ENERGY LAW JOURNAL

Volume 20, No. 2 1999

A JURISDICTIONAL CLASH OVER ELECTRICITY TRANSMISSION: NORTHERN STATES POWER v. FERC

*William H. Penniman**
*Paul B. Turner***

I. INTRODUCTION

Conflicts between the federal government and the states are likely, if not inevitable, when Congress creates a scheme of dual regulation—as it has in the case of interstate natural gas pipelines or electric utilities. Congress empowers a federal agency to exercise regulatory control over activities *in interstate commerce*, while leaving *intrastate* activities of the same companies to be regulated by state agencies. Over the years, jurisdictional disputes among federal and state entities have arisen repeatedly.

The potential for federal-state conflict was realized, once again, in a recent decision of the United States Court of Appeals for the Eighth Circuit. In *Northern States Power Company v. FERC*,[1] a unanimous panel of the Eighth Circuit dealt a potentially serious blow to the Federal Energy Regulatory Commission's (FERC) regulation of the interstate transmission of electricity. The court ruled that the FERC lacks authority to require a transmission-owning electric utility to curtail firm transmission underlying such utility's retail service on an equal basis (*i.e.*, pro rata) with firm transmission performed for shippers of electricity in the interstate wholesale market. The case arrived on the heels of the FERC's issuance of Orders No. 888 and 889,[2] which marked the most sweeping revision of

* *Of Counsel*, Sutherland Asbill & Brennan LLP, Washington, D.C.; A.B., Allegheny College, 1970; J.D., Georgetown University Law Center, 1974.

** *Associate*, Sutherland Asbill & Brennan LLP, Washington, D.C.; A.B., University of Chicago, 1990; J.D., University of Virginia, 1996.

1. Northern States Power Co. v. FERC, 176 F.3d 1090 (8th Cir. 1999). Requests for rehearing en banc of the case were denied on September 1, 1999.

2. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,036, 61 Fed. Reg. 21,540 (1996) (codified at 18 C.F.R. pts. 35, 385) [hereinafter Order No. 888], *order on reh'g*; Order No. 888-A, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, III F.E.R.C. STATS. & REGS. ¶ 31,048, 62 Fed. Reg. 12,274 (1997) (codified at 18 C.F.R. pt. 35) [hereinafter Order No. 888-A], *order on reh'g*; Order No. 888-B, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 81 F.E.R.C. ¶ 61,248, 62 Fed. Reg.

the FERC's regulation of electric utilities' transmission services since the enactment of Part 2 of the Federal Power Act (FPA) in the 1930s.[3]

In Orders No. 888 and 889, the FERC promulgated new, industry-wide regulations designed to open wholesale electricity markets to increased competition. The FERC did this by requiring utilities within its jurisdiction to perform non-discriminatory transmission of wholesale electric power regardless of the identity of the buyer or seller. Utilities subject to the FERC's order were required to schedule and curtail all firm transmission of electricity on an equivalent basis, including the transmission underlying their own retail sales.

Finding that the petitioner, Northern States Power Company (NSP), would be "placed between the proverbial rock and hard place . . . in violation of either a state tariff or Order No. 888,"[4] the Eighth Circuit held that the FERC had "transgressed its Congressional authority which limits its jurisdiction to interstate transactions" such that the FERC's "attempt to regulate curtailment of electrical power to NSP's native/retail consumers" is unlawful.[5] The court reversed the FERC's orders and remanded the case to the FERC "to allow amendment to its curtailment orders, as now interpreted under Order No. 888, so as to not encroach upon the authority of the regulatory commissions of the states."[6]

After briefly describing the proceedings, including key aspects of Order Nos. 888 and 889, and the changes underway in the electric utility industry, this article will address the scope of the FERC's jurisdiction over interstate transmission of electricity under the FPA, and whether the Eighth Circuit properly resolved the curtailment jurisdiction conflicts between the FERC and state regulators. It is concluded that the *Northern States* decision squarely presents the jurisdictional question, but the Eighth Circuit panel's answer to the question is exactly backwards. Moreover, if it survives, the Eighth Circuit's decision poses a serious threat of state interference with interstate transmission of electricity. The resulting balkanization of electric markets would be a major setback both to existing electricity markets and to evolving electric power markets, ultimately undermining, not enhancing, service reliability both for retail and wholesale customers.

64,688 (1997), *order on reh'g*, Order No. 888-C, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 82 F.E.R.C. ¶ 61,046, (1998).; Order No. 889, *Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct*, F.E.R.C. STATS. & REGS. ¶ 31,035 (1996) [hereinafter Order No. 889], *order on reh'g*, Order No. 889-A, *Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct*, III F.E.R.C. STATS. & REGS. ¶ 31,049, *reh'g denied*, Order No. 889-B, *Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct*, 81 F.E.R.C. ¶ 61,253 (1997). Due to the functional unbundling of generation from transmission and open access to transmission, Order No. 888, was a major pro-competitive step in the evolution of the electric power industry.

3. Federal Power Act, 16 U.S.C. §§ 824-824j (1999).
4. *Northern States Power*, 176 F.3d at 1095.
5. *Northern States Power*, 176 F.3d at 1096.
6. *Id.*

II. BACKGROUND

A. *Order No. 888*

Over the past fifteen years, the FERC's regulation of natural gas pipelines under the Natural Gas Act (NGA)[7] and of electric utilities under the FPA has evolved from a traditional utility-regulatory model to a pro-competitive model in which consumers' interests are protected through promotion of customer choices among competing sellers of natural gas or electricity.[8] At the heart of the new approach is the FERC's now broadly implemented policy of requiring (or, where necessary, encouraging) open access, nondiscriminatory transmission of natural gas and electricity by the entities that control the pipes and wires which connect the sources of production to potential buyers and ultimately to consumers.

The FERC developed its open access transportation policies initially in its regulation of interstate natural gas pipelines. After meeting judicial resistance to experiments with selective transportation of natural gas, the FERC prohibited interstate pipelines from restricting access to transportation in ways that were designed to protect their own sales in 1985.[9] In 1992, the FERC mandated open access, non-discriminatory transportation of natural gas by interstate pipelines and guaranteed that pipelines' wholesale and retail sales were not given a preference over transportation of gas sold by others.[10] The results have been stupendous: lower natural gas prices; increased choices of suppliers; a greater ability to negotiate tailored supply contracts; price risk management options; more customer-responsive sellers (including a new class of unregulated gas marketers); and, as a result of more sophisticated contracts and supply diversity, greater service reliability than had existed prior to Order No. 636.[11]

Pleased with its success in restructuring the natural gas pipeline industry, the FERC turned to the electric power industry in the mid-1990s. In doing so,

7. Natural Gas Act, 15 U.S.C. §§ 717-717w (1999).

8. Donald F. Santa, Jr. & Clifford S. Sikora, *Open Access and Transition Costs: Will the Electric Industry Transition Track the Natural Gas Industry Restructuring?*, 15 ENERGY L.J. 273, 273-76 (1994); Richard J. Pierce, Jr., *The State of Transition to Competitive Markets in Natural Gas and Electricity*, 15 ENERGY L.J. 323, 323-329 (1994); Richard J. Pierce, Jr. , *Antitrust Policy in the New Electric Industry*, 17 ENERGY L.J. 29, 29-41 (1996).

9. Maryland People's Counsel v. FERC, 768 F.2d 450 (D.C. Cir. 1985); Maryland People's Counsel v. FERC, 761 F.2d 780 (1985); Order No. 436, 50 Fed. Reg. 42,408 (1985), *aff'd in part and vacated in part*, Associated Gas Distribs. v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). Order No. 500, 52 Fed. Reg. 30,334 (1987), which did not survive judicial scrutiny in its entirety in Associated Gas Distribs. v. FERC, 893 F.2d 349 (D.C. Cir. 1989) (*AGD I*), attempted to address, as an interim rule, several aspects of Order No. 436 that the U.S. Court of Appeals for the District of Columbia Circuit found objectionable in *AGD I* (inadequate treatment of take-or-pay liability and LDC throughput reduction).

10. Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, F.E.R.C. STATS. & REGS. ¶ 30,939, *order on reh'g*, Order No. 636-A, F.E.R.C. STATS. & REGS. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 F.E.R.C. ¶ 61,272 (1992), *aff'd in part and remanded in part*, United Distribution Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224 (1997), *order on remand*, Order No. 636-C, 78 F.E.R.C. ¶ 61,186 (1997).

11. Energy Information Agency, *Natural Gas 1998: Issues and Trends*, at 1 (1999); Vicky A. Bailey, *Reassessing the Role of Regulators of Competitive Energy Markets, or: Walking the Walk of Competition*, 20 ENERGY L.J. 1, 15-16 (1999).

the FERC had both its extensive experience under the NGA, and it had directional support from Congress. In 1992, Congress passed the Energy Policy Act (EPAct),[12] which broadly authorized the FERC to order "transmitting utilities"—including both utilities that are and those that are not otherwise subject to the FERC's jurisdiction under the FPA—to wheel (transmit) electric power for others, so long as the electricity is to be resold by the recipient (i.e., so-called wholesale wheeling). On the other hand, the FERC was barred from using its EPAct authority to order retail wheeling (i.e., to compel a utility to transmit energy sold by a third-party to the utility's retail customers).[13]

At their core, Orders No. 888 and 889 required electric utilities, subject to the FERC's jurisdiction, to provide transmission service on an open-access, non-discriminatory basis; unbundle their transmission, generation, and sales functions; broadly share information about transmission capacity availability; offer standardized transmission and related services; adhere to standard protocols; and adhere to a code of conduct governing the interaction of its transmission-related and generation-related employees.[14] Fundamental to Order No. 888 is the requirement that utilities must treat transmission of their own power in the same way they treat transmission of power owned or sold by others.[15] In order to implement these non-discriminatory access policies (and to prevent a proliferation of unstandardized tariff terms from impeding interstate electricity markets), the Commission's rule required all FPA jurisdictional electric utilities to file and implement tariff provisions that largely track a *pro forma* tariff attached to Order No. 888 (or, alternatively, to justify any requested waivers from specific *pro forma* tariff provisions). They were also required to implement an electronic communication system and certain protections against self-favoritism (the OASIS requirements) that were spelled out in Order No. 889.[16] The FERC stated in Order No. 888 that it would grant a waiver to a utility's filing of a tariff matching the *pro forma* tariff only where, for example, the utility's tariff is consistent with, or superior to, the FERC *pro forma* tariff.[17]

Order No. 888's *pro forma* tariff provides, *inter alia*, that jurisdictional utilities must offer their customers two types of firm services—network integration service and point-to-point service as well as non-firm point-to-point serv-

12. The Energy Policy Act of 1992, Pub. L. No. 102-486, Title VII, §§ 721-722 (1992) (adding §§ 210-211 to the FPA).

13. *Id.* After a lengthy rulemaking process, the FERC issued broad wholesale electric wheeling rules in Orders No. 888 and 889, and in successor orders. Although EPAct's new wheeling powers were available for utility-specific orders, the FERC issued Orders No. 888 and 889 based on its general FPA jurisdiction over interstate transmission and wholesales of electricity by traditionally-regulated utilities, including the power under FPA sections 205 and 206 to set rates and remedy unduly discriminatory conduct.

14. For a more detailed discussion of Order No. 888, *see Report of the Committee on Electric Utility Regulation*, 18 ENERGY L.J. 197, 199-207 (1997) [hereinafter *Report on Utility Regulation*].

15. Order No. 888 stated: "An essential element of non-discriminatory transmission access is the right of transmission customers to reserve and purchase transmission service that is of the same quality as that used by the transmission provider in serving its wholesale requirements customers and *retail load*." Order No. 888, *supra* note 2, F.E.R.C. STATS. & REGS. ¶ 31,036, at 31,746 (emphasis added).

16. Order No. 889, *supra* note 2.

17. Order No. 888, *supra* note 2, F.E.R.C. STATS. & REGS. ¶ 31,036, at 31,770.

ice.[18] Although a number of the details of network and point-to-point service differ, Order No. 888 requires that curtailments[19] of firm point-to-point service must be comparable to curtailments of firm network transmission service and of transmission underlying the transmitting utility's own retail sales—i.e., in the event of transmission constraints, curtailment of firm network and firm point-to-point service must be implemented on a *pro rata* basis.[20] Order No. 888 also required utilities to offer specified "ancillary services," such as scheduling, balancing, and back-up energy.[21] In addition, Order No. 888 provided a list of criteria for its evaluation of independent system operator proposals, as well as of stranded cost requests. Finally, the FERC conditioned shipper access so that a non-jurisdictional utility could be denied transmission service under Order No. 888, unless the shipper was willing to provide equivalent "reciprocal" transmission services.

Order Nos. 888 and 889 have significantly expanded the number and variety of wholesale transactions, and have facilitated the emergence of independent marketers of electricity whose business consists of buying and selling power in wholesale markets.[22] The distance over which transactions occur has also grown, with many transactions requiring transmission across multiple states and several utilities.[23] With the encouragement of the FERC and some states, a number of utilities have come together to form independent system operators (ISOs), whose job is to manage the operation of the integrated utility grids of participating companies to maximize reliable flows of electricity across multiple utility systems. The idea of even broader "regional transmission organizations" (RTOs) is also being actively pursued by the FERC.[24]

---

18. Network service allows the network customer to call on all of the utility's transmission network to transmit its power, essentially mirroring the type of service the transmitting utility provides itself. *See pro forma* tariff § 1.21. Point-to-point service, on the other hand, allows the customer to schedule and transmit its power between two distinct points, a delivery point and a receipt point. *See id.* §§ 1.13, 1.27.

19. The *pro forma* tariff defines "curtailment" as a "reduction in firm or non-firm *transmission* service in response to a transmission capacity shortage as a result of system reliability conditions." *Id.* § 1.7 (emphasis added).

20. Order No. 888, *supra* note 2, F.E.R.C. STATS. & REGS. ¶ 31,036, at 31,749; *pro forma* tariff § 13.6. To the extent firm network and firm point-to-point customers utilize secondary points for receipts and deliveries, their service becomes "non-firm" and their curtailment priority is reduced below that of firm customers that are using their primary or reserved points. Only when firm customers use secondary points are network customers given a higher priority than point-to-point customers.

21. *Report on Utility Regulation,* supra note 14, at 201.

22. *See, e.g.*, James J. Hoecker, *Plain Talk About Electric Competition*, at 4 (Remarks of FERC Chairman Before the American Public Power Ass'n) (June 21, 1999); Douglas F. John & Ronald S. Oppenheimer, *The Commodozation of Energy*, 12 NAT. RES. & ENV'T 251 (1998) (stating that, as of 1998, the FERC had granted authorization to 360 power marketers).

23. "The move toward competition, especially the issuance of Order No. 888, brought major change to the [electric] industry. In addition, the enlargement in the scope of economic markets and technological improvements increased the distance over which buyers and sellers transacted." Curt L. Hebert, *The Quest for an Incentive Utility Regulatory Agenda*, 19 ENERGY L.J. 1,4 (1998).

24. Notice of Proposed Rulemaking, *Regional Transmission Organizations*, 87 F.E.R.C. ¶ 61,173 (1999).

B. *FERC Orders*

The *Northern States* case involved NSP's petition for review of three FERC orders related to NSP's implementation of Order No. 888.[25] On October 11, 1996, NSP filed its open access transmission tariff to comply with Order No. 888 and the *pro forma* tariff provisions. Thereafter, NSP filed amendments to its tariffs and sought FERC approval.[26] One of these proposed amendments sought to change the transmission curtailment priorities from those set forth in the Commission's *pro forma* tariff. In its filing, NSP proposed that curtailments be made in accordance with the Mid-Continent Area Power Pool (MAPP) Line Loading Relief Procedure rather than implement *pro rata* curtailments of transmission capacity among all firm transmission customers. According to NSP, MAPP's procedure curtails customers based on the fourteen MAPP priority groups into which the customer falls. Within each priority group, curtailments are *pro rata*, but overall there are many more priorities than are prescribed by Order No. 888.[27] The FERC rejected this change and concluded, *inter alia*, that NSP had failed to demonstrate that the proposed curtailment priorities were consistent with, or superior to, the *pro forma* tariff curtailment priorities (under which firm network and firm point-to-point customers have the same curtailment priority).[28]

NSP sought clarification of the order, stating that the *pro forma* curtailment provisions would subject NSP to conflicting obligations under the MAPP procedures and the *pro forma* tariff priorities.[29] NSP sought clarification on whether it would be required under the tariff provision to shed network or native load to provide service to firm point-to-point customers, even after it had exhausted its re-dispatch options, and it still faced a capacity shortage.[30] The Commission denied the clarification that NSP sought because it would not comport with the *pro forma* tariff provision and would undermine the Commission's goal of comparability of service.[31]

Thereafter, NSP filed an emergency request for clarification or rehearing and a conditional motion for a stay.[32] In that motion, NSP argued that because the Commission does not have jurisdiction over NSP's bundled retail sales, the Commission's orders do not apply the curtailment procedures to the network service NSP uses to make bundled retail sales.[33] The Commission rejected NSP's motion, stating:

> The Commission's June 29 order was clear that NSP cannot give preferential treat-

25. *Northern States Power Co. (Minn.) & Northern States Power Co. (Wis.)*, 83 F.E.R.C. ¶ 61,098 (1998), *order on clarification*, 83 F.E.R.C. ¶ 61,338 (1998), *order denying request for clarification, reh'g, and stay*, 84 F.E.R.C. ¶ 61,128 (1998).
26. 83 F.E.R.C. ¶ 61,338, at 61,465.
27. 83 F.E.R.C. ¶ 61,338, at 61,469.
28. *Id.*
29. 83 F.E.R.C. ¶ 61,338.
30. *Id.* at 62,369. NSP argued that the procedure it proposed was fair because it had sold capacity based on the assumption that it could curtail point-to-point customers before network or native-load customers. *Id.*
31. 83 F.E.R.C. ¶ 61,338, at 62,369-70.
32. 84 F.E.R.C. ¶ 61,128.
33. *Id.* at 61,671.

> ment to its native load when curtailing transmission. The Commission does not regulate bundled retail sales, but the pro forma open access tariff . . . does require that wholesale transmission users be treated comparably to the transmission provider's native load customers, including retail customers.[34]

NSP appealed these FERC orders to the Eighth Circuit.

C. *Eighth Circuit Proceedings*

In its appeal of the FERC's orders, NSP argued that under the guise of exercising its jurisdiction over interstate transmission, the FERC exceeded its jurisdiction and encroached upon state jurisdiction reserved by the FPA.[35] NSP submitted that because the FERC's orders potentially could result in NSP having to "black out" its retail customers to provide service to its point-to-point wholesale customers, the orders directly regulate retail distribution.[36] Moreover, NSP argued that if the orders do not directly regulate retail distribution, the FERC nonetheless exceeded its jurisdiction because its arguably indirect regulation has such a significant effect on matters within the state's jurisdiction.[37]

The FERC, in defending its orders, offered three basic arguments. On the jurisdictional issue, the FERC argued that its orders did not regulate retail distribution, but only regulated interstate transmission which is within its jurisdictional scope. The FERC contended that its actions did not prescribe retail curtailment. The FERC's orders only ensured that a utility would not discriminate against a third-party transmission customer with respect to the interstate transmission curtailment, in favor of transmission supporting its own sales, retail or otherwise. In doing so, according to the FERC, it was simply regulating the terms and conditions of service of interstate transmission.[38] Apart from the jurisdictional arguments, the FERC argued that (1) NSP's arguments amounted to a collateral attack on Order No. 888[39] and (2) there was substantial record evidence supporting the Commission's decisions.[40]

On May 14, 1999, the Eighth Circuit issued its decision in the case. The court ruled that: (1) NSP's appeal did not constitute a collateral attack on Order No. 888, and (2) the FERC had exceeded its jurisdiction under the FPA. The court, in a relatively short opinion, agreed with NSP that the FERC's orders potentially presented NSP with the choice of complying with the FERC's orders or state regulatory law.[41] The court also asserted that retail service required a

34. 84 F.E.R.C. ¶ 61,128, at 61,671.

35. NSP also argued that the FERC's orders were not supported by substantial evidence in the administrative record. Finally, NSP argued that, in evaluating NSP's proposed tariff change, the FERC had applied the wrong legal standard—using a "consistent with or superior to the *pro forma* tariff" standard rather than the FPA's "just and reasonable" standard.

36. Petitioner's Brief, at 18-20, Northern States Power Co. v. FERC, No. 98-3000 (8th Cir.).

37. *Id.* at 21-22.

38. Respondent's Brief, at 31-33, Northern States Power Co. v. FERC, No. 98-3000 (8th Cir.).

39. *Id.* at 23-25.

40. Respondent's Brief, at 25-31.

41. *Northern States Power*, 176 F.3d at 1095. The court asserted that under Minnesota law, "NSP may not shed its retail load absent an emergency or when electric supply is limited or unavailable." *Id.* Review of the retail tariffs appended to NSP's Petitioner's Brief, however, draws into question whether, in fact, NSP faced any regulatory conflict in its obligations to state and federal authorities. First, if NSP were required by

higher priority because "when the circumstances require curtailment in the transmission of electricity, most wholesale customers may use alternative supplies from other utilities or generate power themselves, and can avoid power outages through such practice. The native/retail consumer, however, is unable to turn to alternative sources of supply."[42]

Although the court acknowledged that Congress had drawn a bright line between state and federal regulatory schemes, it did not apprehend any conflict; the court thought that "it [was] obvious that the indirect effect of Order No. 888, as interpreted by the Commission, is an attempt to regulate curtailment of electrical power to NSP's native/retail customers."[43] Consequently, the court concluded the FERC had transgressed its Congressionally-prescribed jurisdictional bounds. The court, therefore, remanded the case to the FERC to allow NSP to revise its tariffs.

III. THE FERC'S JURISDICTION

Federal regulation of electric utilities' transmission, wholesale rates, and services had its genesis in the Supreme Court's decision in *Attleboro*,[44] in which the Court restricted the ability of states to regulate interstate transmission and wholesales of electricity.[45] Similarly, in *Kansas Natural Gas*,[46] the Court restricted state regulation of interstate transmission and wholesales of natural gas. The effect of these decisions was to create a "regulatory gap," by which states could regulate intrastate, but not interstate, activities of electric and natural gas utilities. Against this background, Congress enacted Part II of the FPA (regulating investor-owned utilities with respect to interstate transmission and wholesales of electricity) and the NGA (regulating interstate natural gas transmission and sales for resale, as well as the natural gas companies owning or operating facilities used for such transmission or sales). Each of these statutes was designed to fill their respective "Attleboro Gaps" that otherwise would exist in the regulation of interstate activities of commerce.[47]

the FERC to curtail transmission so that electric supply is "limited or unavailable," then a retail sales curtailment would be in accordance with state law even as state law was characterized by the Eighth Circuit. Second, the curtailment sections in its filed retail tariffs in Minnesota, North Dakota and South Dakota, authorize NSP to "curtail electric service" for a variety of reasons, including when necessary to comply with any order or request of any governmental authority having jurisdiction. Thus, if we are correct that the FERC has jurisdiction over transmission curtailments, then retail curtailments resulting from FERC-approved tariffs would be consistent with NSP's retail tariffs.

42. *Id.*

43. *Northern States Power,* 176 F.3d at 1096.

44. Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927).

45. United States v. Public Utils. Comm'n of Cal., 345 U.S. 295, 311 (1953) ("Part II [of the FPA] is a direct result of *Attleboro*."); Connecticut Light & Power Co. v. FPC, 324 U.S. 515 (1945). In *Attleboro*, the Supreme Court held that states were constitutionally prohibited from regulating interstate commerce involving electricity. Prior to passage of Part II of the FPA, because of *Attleboro*, interstate transactions of electricity went unregulated.

46. Missouri ex. rel. Barrett v. Kansas Natural Gas Co., 265 U.S. 298 (1924)

47. In Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983), the Supreme Court backed away from its assessment in *Attleboro* of the states' constitutional ability to regulate wholesales of electricity, absent an issue of preemption. The case involved the assertion of jurisdiction over the wholesale rates of an electric cooperative by the Arkansas Public Service Commission (Arkansas PSC).

Both the FPA and the NGA empower the FERC to regulate rates and services for interstate transmission and wholesales by entities that are not specifically exempted,[48] while leaving local distribution and purely intrastate transportation to state regulators. For example, the FPA provides, in relevant part:

> (a) It is declared that . . . Federal regulation . . . of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.
>
> (b)(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . . The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.[49]

The FERC's jurisdiction under the Natural Gas Act is similarly drawn:

> It is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale of natural gas but shall not apply to any other transportation or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of

The cooperative was not regulated by the FERC because the FERC previously had held that, under the FPA, cooperatives that borrow money from the Rural Electrification Administration (REA), now the Rural Utilities Service (RUS), are not subject to the FERC's FPA jurisdiction. The Court explicitly stated that if the mechanical *Attleboro* test were applied, the Arkansas PSC could not regulate the Arkansas cooperative's wholesales to Arkansas retail cooperatives. *Id.* at 1915. Nonetheless, the Court noted the general trend in its Commerce Clause jurisprudence was to look at the state regulation involved and its effects, and uphold the state's assertion of jurisdiction. *Id.* at 1916. The case did not present the preemption issues raised by *Northern States*, however, because the FERC did not regulate the cooperative at all—in effect, under a revised interpretation of the potential scope of state regulation of utilities, the Court allowed the state of Arkansas to fill the "gap" created by the FERC's decision not to regulate RUS-financed cooperatives. For a discussion of some of the preemptive questions involving the state PUCs and the R.U.S., see Clinton A. Vince & John S. Moot, *Federal Preemption Versus State Utility Regulation in a Post-Mississippi Era*, 10 ENERGY L.J. 1 (1989); Lori Burkhart, *The REA vs. the State PUCs*, 128 No. 12 PUB. UTIL. FORT. 31 (1991). However, it is clear that the Supreme Court's changed thinking about *Attleboro* does not retroactively alter the scope of FERC jurisdiction under the Federal Power Act. The Supreme Court made clear in *Arkansas Electric Cooperative* that the case should not be read as cutting back on the scope of the FERC's regulatory authority under the Federal Power Act. *Arkansas Elec. Cooperative*, 461 U.S. at 390-92; *cf.* Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 371-72 (1988).

48. Municipal utilities and, in the case of electricity, state- or federally-created utilities, are exempt from general rate regulation under the FPA. FPA § 201(f), 16 U.S.C. § 824f. However, even here, Congress recently expanded the FERC's authority over the transmission roles of these entities in EPAct's amendments to the FPA. The FERC took a further step through its "reciprocity" requirement in Order No. 888.

49. 16 U.S.C. § 824.

natural gas.[50]

Comparison of these two jurisdictional grants highlights the similarities between these Acts with respect their jurisdictional reach.[51] Although these two statutes have some distinctive differences[52] and the industries have somewhat different structures and histories, the courts often have stated that the statutes are to be interpreted *in pari materi*, i.e., precedents from one are at least presumptively relevant to the other.[53]

IV. ANALYSIS OF ISSUES BEFORE THE EIGHTH CIRCUIT

The Eight Circuit's opinion focused on (1) the potential for conflict between the FERC's orders and NSP's retail service obligations in light of the FPA's exclusion from the FERC's jurisdiction of retail sales and local distribution, and (2) the court's perception of the potentially significant effects of the FERC's orders on service to retail customers. The court concluded that the FERC had overstepped its bounds and impermissibly intruded on state regulation of retail electric services.

It is concluded here that the court's analysis was superficial, ignored appli-

---

50. 15 U.S.C. § 717(b).

51. There are also striking similarities under the FPA and the NGA with regard to the scope of the FERC's authority over the rates and terms of service. The FPA provides:

> (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

16 U.S.C. § 824d.

This language closely parallels that of the Natural Gas Act:

> (a) All rates and charges made, demanded, or received by any natural gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

15 U.S.C. § 717c.

52. In the NGA, for example, the FERC is granted significant certificate and abandonment authority over interstate pipelines and their services. 15 U.S.C. § 717f. With regard to the FPA, Congress gave the FERC authority over electric utilities that it did not confer on the Commission with respect to pipelines, such as express authority to order wholesale wheeling and interconnections. 16 U.S.C. §§ 824i, 824j. Moreover, under the FPA, electric utilities face FERC regulation of the issuance of their securities, sales of jurisdictional facilities, and mergers, as well as restrictions on certain activities of officers and directors. 16 U.S.C. §§ 824b, 824c, 825d.

53. *See, e.g.*, Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578 n.7 (1981); FPC v. Conway Corp., 426 U.S. 271, 281 (1976).

cable precedent, and substituted the court's views concerning the relative consequences of retail and wholesale curtailments for the FERC's judgment concerning the public interest in non-discriminatory transmission access. In support of this conclusion, it is necessary to evaluate four fundamental issues: (1) What is meant by transmission in interstate commerce under the FPA? (2) Are curtailments of transmission service a subject of federal rather than state regulation? (3) Is there an actual or potential conflict between the state's regulation of retail curtailments and federal regulation of transmission service? and (4) If both state and federal regulators attempted to regulate transmission allocations, how should the conflict be resolved?

A. *What is Transmission in Interstate Commerce?*

In *Northern States*, NSP did not explicitly contest that it was engaged in performing interstate transmission either under Order No. 888 or in connection with its own sales of electricity at retail. Nevertheless, NSP set up a dichotomy between federal and state jurisdictions; on the one hand, the FERC's jurisdiction over NSP's "wholesale electric supply and transmission in interstate commerce" and, while on the other hand, state jurisdiction over NSP's "bundled service" (including the generation, transmission and distribution of electricity) to the retail customer in each of the five states in which NSP provides retail services.[54] Inasmuch as the FPA reserves retail sales and "local distribution" to state regulation, and transmission curtailments could interfere with the utility's performance of retail service, NSP argued that the FERC had improperly intruded on regulatory authority reserved by Congress to the states through the FERC's insistence that firm point-to-point service be afforded the same transmission curtailment priority as service to "native load" customers. The court adopted NSP's arguments and then concluded that the FPA bars the FERC from regulating transmission in a way that would impinge, directly or indirectly, on the authority reserved by the FPA with respect to state regulation of retail sales and local distribution. The court failed, however, adequately to examine the relevant case law or the impact its decision would have on interstate movements of electricity.[55]

The FPA provides the FERC with jurisdiction over "the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce."[56] Each grant of jurisdiction is distinct and independent.[57] The FERC's jurisdiction, however, does *not* extend to "any other *sale* of electric energy" or to "facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric

54. *Compare* Petitioner's Brief, at 4, *with* Petitioner's Brief, at 2.

55. The simplistic dichotomy also ignores the fact that all electricity (except, perhaps, line losses) is eventually delivered to some utility's retail load. Thus, the court's purporting to permit states to afford a transmission curtailment preference to the transmitting utility's "native/retail" load is likely to come at the expense of another utility's "native/retail" load.

56. FPA §§ 201(a), (b)(1), 16 U.S.C. §§ 824(a), (b)(1).

57. FPC v. Louisiana Power & Light Co., 406 U.S. 621, 636 (1972); Panhandle E. Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U.S. 507, 517 (1947).

energy in intrastate commerce . . . ."[58] Section 201(c) defines "electric energy in interstate commerce" as electricity that is "transmitted from a State and consumed at any point outside thereof."[59]

The FERC and the courts have taken an expansive view of the Commission's jurisdiction over interstate transmission of electricity. In *Florida Power & Light*,[60] the Supreme Court upheld the Commission's assertion of jurisdiction over Florida Power & Light Company (FP&L) even though FP&L's transmission facilities and wholesales were located entirely within Florida and its transmission facilities were only interconnected with, and its wholesales only made to, other Florida utilities. Despite FP&L's protests that it operated wholly intrastate, and despite its studies purporting to show that the electricity generated and transmitted by FP&L could not reach other states,[61] the Court held that FP&L was subject to the Commission's FPA jurisdiction. The Court relied on findings that the electricity FP&L sold and/or transmitted to interconnected Florida utilities was commingled in the others' systems with electricity that was bound out of state, making all such commingled electricity interstate in character.[62] This commingling of electricity flowing in interstate commerce resulted in FP&L's engagement in interstate transmission and wholesales subject to the Commission's broad jurisdiction, notwithstanding FP&L's pleas about its facilities' intrastate locations, power flows, and the markets for its sales.[63]

---

58. FPA § 201(b)(1), 16 U.S.C. §§ 824(b)(1).

59. *Id.* § 201(c), 16 U.S.C. § 824(c).

60. FPC v. Florida Power & Light Co., 404 U.S. 453 (1972)

61. This purported showing that FP&L's electricity would not leave the state of Florida distinguished this case from Jersey Central Power & Light Co. v. FPC, 319 U.S. 61 (1943), in which the evidence showed that electricity generated and transmitted in New Jersey could travel to New York via an interconnection between Jersey Central and another New Jersey utility whose facilities were interconnected with a New York utility. *See also PUC of Cal.*, 345 U.S. 295. The Court in *Florida Power & Light* noted that "Jersey Central type tracing studies become less feasible as interconnections grow more complicated." *Florida Power & Light*, 404 U.S. at 468. Moreover, a utility that transmits, at high voltage, power received and retransmitted at high voltage as part of a continuous flow of transmission in interstate commerce also should be subject to FERC jurisdiction with respect to such transmission, even if the utility's redeliveries are entirely to consumers located in the same state in which it received the power. FPC v. East Ohio Gas Co., 338 U.S. 464 (1950).

62. *Florida Power & Light*, 404 U.S. at 463-64. The Court was content to decide the issue based on the commingling of electricity with a flow bound out of state. The Court cited without approving or disapproving FERC's alternative jurisdictional argument based on the "electromagnetic unity of response." *Id.* at 460. That jurisdictional theory was based on FERC's apparently uncontested factual findings that FP&L's activities necessarily affected interstate flows of electricity by reason of the physical operation of the grid. As quoted by the Court, the jurisdictional assertion based on the unity of electromagnetic response was summarized by the FERC hearing examiner as follows:

> If a housewife in Atlanta on the Georgia system turns on a light, every generator on [FP&L]'s system almost instantly is caused to produce some quantity of additional electric energy which serves to maintain the balance in the interconnected system between generation and load. . . . The cause and effect relationship in electric energy occurring throughout every generator and point on [the utilities' interconnected] systems constitutes interstate transmission . . . .

Id. at 460-61 (quoting Opinion of the Hearing Examiner, 37 F.P.C. 544, 567-68 (1966)).

63. Interstate commerce subject to the NGA or the FPA would also include a company's retransmission at high pressure or high voltage or its sales for resale within a state of electricity or natural gas received within the boundaries of that state from a transmitter delivering from another state. *See generally* FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964); *East Ohio*, 338 U.S. 464 (continuous flow in interstate commerce subjected an intrastate company to NGA jurisdiction, a holding which was subsequently modified by statute (see

Florida Power & Light reflects a fundamental recognition and acceptance by the FERC and the courts of the FERC's broad jurisdiction over transmission and sales for resale in interstate commerce. The FERC's FPA jurisdiction encompasses investor-owned transmission facilities that are used in interstate commerce, *even if* those transmission facilities are located entirely within the boundaries of a single state.[64] If either transmission or a wholesale in interstate commerce is involved and the utility is not otherwise exempt (e.g., as municipally owned utilities have been exempted), then a bright line is drawn and the FERC has plenary jurisdiction over the public utility and its relevant transactions.[65] While local distribution is an exception to the scope of the FERC's jurisdiction, the Supreme Court has held that the local distribution exception is to be narrowly construed. It is not to be accorded a meaning that interferes with the FERC's ability to exercise its jurisdiction over interstate transmission and wholesales.[66]

This broad view of the FERC's jurisdiction over interstate transmission of electricity is consistent with the broad view taken by the courts with respect to the FERC's jurisdiction over natural gas moving in interstate commerce. Under the NGA, for example, the Supreme Court has held that the FERC has jurisdiction over, *inter alia*: (i) transmission of gas that is ultimately sold at retail;[67] (ii) gas sold for consumptive use but commingled with gas flowing in intestate

---

section 1(c) of the NGA relating to Hinshaw pipelines) if certain conditions are met); Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co., 314 U.S. 498 (1942); *but see* Connecticut Light & Power Co. v. FPC, 324 U.S. 515 (1945). We note that Texas and utilities within Texas occupy a unique place in this jurisdictional analysis. Texas' only interconnection to the interstate grid is by direct current (DC) ties; the FERC has accepted that, for purposes of traditional FPA regulation, transmission within the Electric Reliability Council of Texas (ERCOT) is outside the normal interstate transmission market as a result. For a discussion of the attempt to subject Texas utilities to the FERC's jurisdiction by connecting ERCOT to the interstate grid by DC ties, see Richard D. Cudahy, *The Second Battle of the Alamo: The Midnight Connection*, 10 NAT. RES. & ENV'T 56 (1995). However, in EPAct, Congress even extended the Commission's jurisdiction to order wheeling in Texas.

64. *Florida Power & Light*, 404 U.S. 453. Similar holdings have been made in connection with the transportation of natural gas by interstate pipelines. *See, e.g.*, California v. Lo Vaca Gathering Co., 379 U.S. 366 (1965).

65. *Southern Cal. Edison*, 376 U.S. at 215-16. The "brightness" of the jurisdictional line was tarnished by Order No. 888's adoption of "functional test" for determining that facilities used to transmit power to a third party for resale and a multifactor "functional/technical test" for determining whether facilities used for retail wheeling should be classified as "local distribution" and by announcing the FERC's intent to defer, at least presumptively, to state's identification of local distribution facilities. *See* Order No. 888, *supra* note 2, F.E.R.C. STATS. & REGS. ¶ 31,036, at 31,771, 31,780-81. The FERC's Order No. 888 further muddled the statutory distinctions by asserting that the "service" of local distribution is involved in all deliveries to consumers, even if no local distribution facilities are involved in the transaction. *Id.* at 31,781. However, the FERC has made clear that, at a minimum, facilities transmitting power to others in interstate commerce for resale and some portion of facilities used for retail wheeling in interstate commerce will be deemed to be subject to the FERC's *transmission* jurisdiction. *Id.* at 31,980; *see also New York State Elec. & Gas Corp.*, 78 F.E.R.C. ¶ 61,114 (1997).

66. "[E]xceptions to the primary grant of jurisdiction in the section are to be strictly construed." *PUC of Cal.*, 345 U.S. at 310; Interstate Natural Gas Co. v. FPC, 331 U.S. 682, 690-91 (1947). The distribution exception "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *PUC of Cal.*, 345 U.S. at 311, quoting *Connecticut Power & Light Co.*, 324 U.S. at 527.

67. Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co., 887 F.2d 1295 (6th Cir. 1989).

commerce and partly sold for resale;[68] (iii) a pipeline located wholly in one state but which delivers to an interstate pipeline that takes the gas out of state;[69] and (iv) a pipeline that transports at high pressure, wholly for redelivery and consumption in its state of operation, gas received from an interstate pipeline within the same state.[70]

Although drawing precise lines between transmission and local distribution facilities is fact specific and may be contentious, particularly when one is dealing with radial lines or lines of intermediate voltages,[71] the exercise of labeling facilities is not particularly important for purposes of the issues before the Eighth Circuit. No one disputed that NSP operates interstate transmission facilities or that electricity is transmitted for NSP and others over those transmission facilities. Nor did anyone dispute that the FERC's curtailment orders were directed at allocating among competing transmission users limited capacity in those transmission facilities.

The FPA unambiguously gives the FERC "jurisdiction over all facilities for . . . transmission or sale [for resale] of electric energy" in interstate commerce.[72] The Commission's ability to regulate interstate transmission facilities and services is not diminished by the FPA's reservation to state regulation of retail sales and facilities "used in local distribution or only for the transmission of electric energy in intrastate commerce."[73] Nothing in the FPA suggests any FERC-state sharing of jurisdiction over interstate transmission facilities or serv-

68. *Lo Vaca Gathering Co.*, 379 U.S. 366 (holding that gas is moving in interstate commerce subject to FERC regulation once it is commingled with the stream of natural gas moving in interstate commerce).

69. *Interstate Natural Gas*, 331 U.S. 682; Maryland v. Louisiana, 451 U.S. 725, 755 (1981) ("Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.").

70. *East Ohio*, 338 U.S. 464 (holding that gas received inside a state border and redelivered to markets in that state through transmission facilities located inside a single state nevertheless is moving in interstate commerce so that the pipeline's transportation and sales for resale are subject to FERC regulation). The East Ohio holding was subsequently modified by the NGA section 1(c), the so-called Hinshaw pipeline amendment.

71. In Order No. 888, the FERC announced new approaches to dividing facilities between transmission facilities and local distribution facilities. The FERC found that facilities used to deliver wholesale power are jurisdictional. Otherwise, in determining where the demarcation between interstate transmission and local distribution lies, the FERC adopted a seven-part test, which considers: (1) the proximity of the facilities to retail customers, (2) whether the facilities are radial in character, (3) whether power flows into but not out of the facilities, (4) whether the power that flows into the facilities are transported to another market, (5) whether the power is consumed in a restricted geographical area, (6) whether the facilities include meters to measure flows into the facilities and (7) the voltage of the power flowing through the facilities. Previously, local distribution was associated primarily with stepping down the voltage to distribution levels even if the local distributor implements the step-down promptly after receiving the power, but other factors may also be relevant. *See Connecticut Power & Light*, 324 U.S. at 534. That approach is consistent with the distinction drawn in *East Ohio* between transportation of natural gas in "high pressure" trunk lines and distribution in lower pressure local distribution facilities.

72. FPA § 201(b)(1), 16 U.S.C. § 824(b)(1). As previously noted, Order No. 888 has confused the statutory distinctions by suggesting that, while the FERC will have transmission jurisdiction over, *inter alia*, unbundled retail wheeling, the "service" of local distribution may be provided with respect to deliveries to consumers even if no local distribution facilities can be found. This proposition was not accompanied by any citation, and it is inconsistent with extensive precedent under the Natural Gas Act. *See, e.g.*, Cascade Natural Gas Co. v. FERC, 955 F.2d 1412, 1415 (10th Cir. 1992).

73. FPA § 201(b)(1), 16 U.S.C. § 824(b)(1).

ices.

Contrary to the Eight Circuit opinion, nothing in the FPA suggests that the FERC must withhold regulation of matters within its jurisdiction merely because its actions might indirectly affect retail sales or local distribution of electricity.[74] Nearly everything the FERC does in its regulation of interstate wholesales and transmission can directly or indirectly affect retail sales and the energy available for retail sales and local distribution. For example, the FERC's approval of higher transmission or wholesale rates will affect retail prices, termination of transmission or wholesale rate schedules may reduce power available for reliable retail services, and modifications of the terms of transmission or wholesale services may both raise retail costs and affect retail service reliability.

If the FERC's jurisdiction over interstate transmission were to be limited based on the impacts its regulation might have on retail sales after transmission has been completed, then the retail/local distribution exception potentially would swallow the basic jurisdictional grants to the FERC. This is quite the opposite of the narrow construction of the exception required by the courts.[75] Once facilities are identified as being used to provide interstate transmission of electric energy, the FERC's exclusive jurisdiction applies to those facilities and their utilization.

It should be noted that the FERC, in Order 888 and successor orders, took a somewhat disjointed approach to its transmission jurisdiction. The FERC concluded that "[a]n essential element of non-discriminatory transmission access is the right of transmission customers to reserve and purchase transmission service that is of the same quality as that used by the transmission provider in serving its wholesale requirements customers *and retail load*."[76] Moreover, the *pro forma* tariff requires that *all* long-term firm transmission services be curtailed on a pro rata basis. The FERC also concluded that it had exclusive jurisdiction over the interstate transmission component of *unbundled* retail sales.[77] Indeed, the FERC

74. Obviously, all actions by the FERC must be supported by substantial evidence and must not be arbitrary or capricious. If the FERC were to adopt a policy so harmful to a particular utility's retail customers as to violate those requirements, then its orders would be subject to reversal. However, those are standard issues in judicial review of agency actions, not *jurisdictional* issues.

75. The Eighth Circuit's reliance on Altamont Gas Transmission Co. v. FERC, 92 F.3d 1239 (D.C. Cir. 1996) is misplaced. That case involved an attempt by the FERC to use its rate setting authority over an interstate pipeline to bring about a change in state regulated rates of a non-jurisdictional affiliated pipeline (i.e., to "induc[e] a change to a policy beyond [its] jurisdictional purview"). In *Northern States*, the issue was whether the FERC may regulate transmission curtailments by a jurisdictional company in a way that affected the availability of power for retail sale by the same company. Since any regulation of transmission curtailments will affect deliveries of power, the FERC cannot be said to be taking steps beyond the scope of its jurisdiction. Nothing impinged on the state's ability to regulate the curtailment of retail sales after transmission to local distribution facilities.

76. Order No. 888, *supra* note 2, F.E.R.C. STATS. & REGS. ¶ 31,036, at 31,746 (emphasis added). That principle was later applied in the Commission's curtailment rulings in the orders reviewed by the Eighth Circuit.

77. The D.C. Circuit has stated as to natural gas:

> States have been—and are still—permitted to regulate LDCs' bundled sales of natural gas to end-users because those transactions include transportation over local mains and the retail sale of gas. In contrast, states have *never* regulated the terms and conditions of interstate pipeline transportation. When the gas sales element is severed—*i.e.*, unbundled—from the transaction, FERC retains jurisdiction over the *interstate transportation* component.

went further than simply asserting jurisdiction over unbundled retail interstate transmission. The FERC also asserted jurisdiction over the interstate transmission component of retail "buy-sell" transactions in which a consumer arranges for the transmitting/distributing utility to purchase power from a third-party supplier and then to resell that power to the user following transmission and distribution to the point of use.[78] Although structured as a bundled retail sale to the end user, the FERC deemed this buy-sell structure to be a transmission transaction within its jurisdiction. On the other hand, in Order 888-A, in the context of rejecting arguments that it should require utilities to use the *pro forma* tariff for transmission of power sold in their own retail sales, the FERC declared that it lacked jurisdiction over transmission bundled with retail sales:

> In a situation in which a transmission provider purchases power on behalf of its retail native load customers, the Commission does not have jurisdiction over the transmission of the purchased power to the bundled retail customers insofar as the transmission takes place over such transmission provider's facilities, and therefore the *pro forma* tariff does not have to be used for such transmission."[79]

Given these conflicting expressions of position, one might fairly question whether the FERC has a consistent view of its own jurisdiction. Nevertheless, it is suggested here that these apparent inconsistencies can be harmonized by recognizing that, although the FERC does not have jurisdiction to regulate the rates and terms of retail sales, it does have jurisdiction over interstate transmission facilities, the allocation and curtailment of access to interstate transmission capacity, and undue discrimination related thereto, even with respect to the use of those facilities as part of bundled retail sales. Also, the FERC can (and does) allocate transmission costs away from FERC-regulated services to reflect use of the transmission system to support a utility's retail functions, even though it does not decide how those costs will be incorporated into retail rates. Order 888-A's pronouncement about the FERC's lacking jurisdiction over the transmission embedded in bundled retail sales should be understood merely to refer to its lack of *rate* jurisdiction over such services. As discussed below, this synthesis is well supported by precedent concerning pipeline transportation jurisdiction under the NGA, as well as by practical considerations regarding reliable operation of the interstate transmission network.

B. Are Curtailments of Transmission Service Subject to the FERC's FPA Authority?

Notwithstanding the Eighth Circuit's contrary conclusion, the curtailment of interstate transmission is an essential element of the FERC's regulatory authority over interstate transmission, regardless of whether the resulting transmission capacity allocations affect power available for the transmission provider's own retail sales. As noted, in addition to declaring that "[t]he Commission shall have jurisdiction over all facilities for such transmission [in interstate

United Distribs. Co. v. FERC, 88 F.3d 1105, 1153 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1723 (1997) (emphasis in original).

78. Order No. 888, *supra* note 2, F.E.R.C. STATS. & REGS. ¶ 31,036, at 31,771.

79. Order No. 888-A, *supra* note 2, III F.E.R.C. STATS. & REGS. ¶ 31,048, at 30,217.

commerce]," the FPA grants the FERC authority over the rates and terms of transmission and wholesale services within its jurisdiction.[80] This is comparable to the NGA's grant of jurisdiction over the facilities and rates of "natural gas companies."

Less than a decade after the NGA's enactment, the Supreme Court addressed the comparative jurisdictional responsibilities of the Commission and the states over retail sales by interstate pipelines. Although the Court affirmed *state* authority to regulate *rates* charged by interstate pipelines in *retail sales* directly to large gas users, it put the states and the industry on notice that the Commission was responsible for *curtailments* of natural gas transportation leading to retail sales by the pipeline.[81] In the Court's words, "the matter of interrupting service is one largely related. . .to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states."[82]

Later, the Supreme Court addressed the question of "whether FPC has authority to effect orderly curtailment plans involving *both direct sales and sales for resale*."[83] In *Louisiana Power & Light*, the Supreme Court unequivocally held that the Commission had jurisdiction over the *curtailment* of gas being transported in interstate commerce prior to a retail gas sale, even though the Commission did not have NGA *rate* jurisdiction over those retail sales. In that case, Louisiana Power & Light Company (LP&L) was purchasing natural gas for its generating facilities pursuant to a direct sales contract with United Gas Pipeline Company (United), an interstate pipeline. After United began to encounter the interstate natural gas shortages of the late 1960s and into the 1970s, United filed a gas supply curtailment plan, at the Commission, that reflected priorities based on the end-use of the gas.[84] United's curtailment plan made no distinction between direct sales to large consumers (potentially subject to state regulation) and sales for resale (*i.e.*, wholesales). To clarify, United's federal curtailment plan used the same criteria to curtail supply deliveries to both retail and wholesale customers, even though the NGA expressly withheld authority from the

80. As previously noted, section 205 of the FPA requires a utility to file with the FERC all "rates and charges for any transmission or sale subject to the jurisdiction of the Commission, *and* the *classification, practices, and regulations affecting such rates and charges*, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." These rates and terms of service can be found either in the utility's generally-applicable tariffs or in individual FERC-filed contracts, each of which is subject to FERC review under the "just and reasonable" and "not unduly discriminatory" standards. *See* 16 U.S.C. § 824d(a), (b). All the terms of a service must be set forth in the filed tariff. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951), *cf.* United States Pipeline Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956). However, utilities have not been expected to file the terms of bundled sales subject to state regulation even though transmission subject to the FERC's regulation may be embedded within those sales.

81. *Panhandle (Ind.)*, 332 U.S. at 523. Moreover, in FPC v. Transcontinental Gas Corp., 365 U.S. 1 (1960), the Supreme Court held that, in evaluating an application for a certificate of public convenience and necessity related to *transportation only service* to an electric utility company—an "inferior use from the standpoint of conserving a valuable natural resource"—the FPC could consider the (retail) use to which the gas would be put.

82. *Panhandle (Ind.)*, 332 U.S. at 523.

83. *Louisiana Power & Light*, 406 U.S. at 631.

84. *Louisiana Power & Light*, 406 U.S. at 627.

Commission to regulate retail sales by interstate pipelines.[85] LP&L, a direct sale customer of United's, opposed the plan and argued that the Commission was without jurisdiction to regulate curtailments of deliveries under direct sales (retail) contracts.[86] LP&L relied on the NGA, which reserved the regulation of retail sales for the state.[87] The Supreme Court rejected LP&L's arguments and stated:

> Each of these is an independent grant of jurisdiction and, though the [NGA's] application to 'sales' is limited to sales of interstate gas for resale, the Act applies to interstate 'transportation' *regardless* of whether the gas transported is ultimately sold retail or wholesale. . . .
>
> [T]he prohibition of the proviso of §1(b) withheld from FPC only rate-setting authority with respect to direct sales. Curtailment regulations are not *rate-setting* regulations but regulations of the 'transportation' of natural gas and thus within FPC jurisdiction under. . .§1(b) [of the NGA.][88]

The Supreme Court, reflecting on the congressional intent of the NGA, also held that:

> Congress' grant of sales jurisdiction as to sales for resale and the prohibition as to direct sales were meant to apply *exclusively to rate setting*, and in no wise limited the broad base of 'transportation' jurisdiction granted the FPC. That head of jurisdiction *plainly embraces regulation of the quantities of gas that pipelines may transport. . .*[89]

The FERC has historically regulated unbundled transmission of power sold to retail customers,[90] and it has indirectly regulated the allocation of transmission embedded in wholesale and retail sales. The FERC has approved wholesale contracts that specify the degree of reliability will be equal to that of native load or, in some cases, less than that of native load.[91] The FERC also has historically

85. *Id.*

86. *Louisiana Power & Light*, 406 U.S. at 628.

87. *Id.*

88. *Louisiana Power & Light*, 406 U.S. at 636-37 (emphasis added).

89. *Id.* at 640 (emphasis added). As to electricity, the FERC's use of its transmission jurisdiction to allocate limited supplies of electricity or transmission capacity among a utility's retail and wholesale customers, notwithstanding the FERC's lack of authority over retail rates, appears not to have been directly challenged in the courts, prior to the Eighth Circuit's *Northern States* decision. The precise reason for this gap in the case law is unclear. However, even though the issue of curtailment of electricity transmission embedded in retail sales under the FPA may not have been explicitly addressed in court cases prior to *Northern States*, as set forth above, it is concluded that the FERC has the authority to regulate curtailments of electric transmission to the same degree as it does curtailment of natural gas moving through interstate gas transportation facilities.

90. *Consolidated Edison Co. of N.Y.*, 39 F.E.R.C. ¶ 61,003 (1987); *Consolidated Edison Co. of N.Y.*, 15 F.E.R.C. ¶ 61,174 (1981).

91. *See, e.g., Duquesne Light Co.*, 71 F.E.R.C. ¶ 61,156 (1995) (finding that Duquesne's request for transmission services comparable to the Allegheny Power System native load customers met the standards of sections 211 and 212 of the FPA and ordering the parties to negotiate to attempt to reach agreement as to the terms and conditions of such service); *United Illuminating Co.*, 63 F.E.R.C. ¶ 61, 212 (1993) (accepting transmission tariff which provides firm transmission service the same priority as service to UI's native load and rejecting utility's proposal to recover in wholesale rates stranded generated costs associated with retail service because such matters are subject to state jurisdiction); *Cambridge Electric Light Company*, ER94-1409, *Initial Decision* (Sept. 14, 1995) (finding a transmission agreement that provides for firm transmission equivalent in quality to native load service just and reasonable).

reviewed transmission provider services. It has approved service priorities that give transmission-only service a priority on par with native sales load. This has the effect of treating all covered firm customers equally, notwithstanding the indirect impact on retail services during periods of constrained capacity. Regulation of power pools and ISOs has necessarily entailed explicit control of curtailment priorities by the FERC for transmission and power among utilities, including transmission underlying retail sales.[92]

Although the FPA, like the NGA, distinguishes between interstate transmission and wholesales within the FERC's jurisdiction, and retail sales and local distribution outside the FERC's jurisdiction, there is nothing that prevents the FERC from exercising jurisdiction over the allocation of interstate transmission capacity. The use of interstate transmission precedes and, thus, underlies retail sales and the delivery of energy to local distribution facilities. That is, transmission facilities and operations (possibly involving multiple utilities) are needed to transfer electric energy from widely dispersed generating facilities to local distribution facilities (or, possibly, directly to the user)[93] for retail sale and delivery. Although a local electric utility might send a single bill for its retail sales, this does not alter the fact that *interstate transmission* of electricity from generators to local distribution facilities (or, at least, to the point of retail sale) is a condition precedent to most, if not all, retail sales. In effect, the retail utility's product is *delivered power*, which implicitly includes electric energy bundled with transmission and distribution services to effectuate the delivery. So viewed, retail

92. In a recent Notice of Proposed Rulemaking, the FERC has proposed expanding on its open access policies for interstate transmission to encourage participation by transmission-owning entities, including non-public utility entities in regional transmission organizations (RTOs). Notice of Proposed Rulemaking, *Regional Transmission Organizations*, 87 F.E.R.C. ¶ 61,173 (1999) [hereinafter NOPR]. The Commission notes in its NOPR that:

> the traditional means of grid management is showing signs of strain and may be inadequate to support efficient and reliable operations that is needed for the continued development of competitive electricity markets. In addition, there are indications that continued discrimination in the provision of transmission services by vertically integrated utilities may also be impeding fully competitive electricity markets. . . . If electricity consumers are to realize the full benefits that competition can bring to wholesale markets, the Commission must address the extent of these problems and appropriate ways of mitigating them.

NOPR, *mimeo* at 5-6. The Commission proposal would have transmission-owning entities place their transmission facilities under the control of an RTO. *Id.* at 6.

93. Under the NGA, interstate transportation frequently entails deliveries of natural gas directly to the consumer (typically an electric utility or large industrial consumer) without passage through "local distribution" facilities. *Panhandle (Mich.)*, 887 F.2d 1295; *Cascade*, 955 F.2d 1412; *PUC of Cal.*, 900 F.2d 269. Even in this situation, a retail sale by the pipeline may be subject to state regulation both in connection with the rates charged and initiation of the sale itself. *Panhandle (Ind.)*, 332 U.S. at 521; Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329, 333 (1951). In contrast, in Order No. 888, the FERC took the position that an electric utility's direct delivery of transmission service to an industrial user, even if at transmission voltages without any stepping down by the utility, would generally involve some final stage of local distribution facilities and service. This conclusion was driven by the FERC's apparent desire to reassure utilities and their state commissions that retail wheeling, if it were to develop, would not result in a customer's avoidance of state-approved stranded cost charges. It may also reflect a desire to avoid a regulatory gap in which neither the FERC nor the states could order retail wheeling services to large users that receive power at transmission voltages. This position is not without controversy, since it is directly contrary to the position taken by the Commission and the courts throughout the history of the Natural Gas Act. *See, e.g., Panhandle (Ind.),* 332 U.S. 507; *Michigan Consolidated,* 887 F.2d 1295; *Cascade,* 955 F.2d 1412.

sales (and local distribution) follow transmission, so that if interstate commerce is involved, state jurisdiction over retail sales would follow, in time and place, the FERC's jurisdiction over the underlying transmission of electricity.

The language of the FPA also supports the FERC's exercise of jurisdiction over all transmission curtailments. Although the FPA limits the FERC's sales jurisdiction to wholesale transactions, the FPA's grant to the FERC of jurisdiction over interstate transmission of electricity and facilities used for such transmission is comprehensive (at least as to companies that are not otherwise exempt). The FPA does not distinguish between interstate transmission of power to be sold at retail or wholesale or already owned by the ultimate consumer.[94]

Furthermore, experience and logic support the view that the FERC's jurisdiction over interstate transmission facilities and service must include the authority to regulate curtailments of transmission underlying both retail and wholesale electricity passing through those transmission facilities. Inasmuch as both wholesale and retail power flow through common transmission lines as indistinguishable, commingled electrons, allocation of constrained transmission capacity is a zero sum game. After redispatch has occurred to the maximum extent feasible, allocation of transmission capacity to one set of transactions (e.g., electricity sold at wholesale) necessarily affects transmission capacity available for other sales (e.g., retail sales) and vice versa. The FERC could not effectively regulate either the terms of wholesale services or interstate transmission of power if the Eighth Circuit is correct that states are free to command that electricity sold by the transmitting utility in retail transactions will always be first through the wires in the event of capacity constraints. Such a conclusion would severely undermine the FERC's jurisdiction, leaving the FERC to regulate only the transmission capacity that is left over after a public utility has served its firm and non-firm retail markets. Under that view, the retail sale/local distribution exceptions would swallow the FERC's primary grant of transmission jurisdiction.

It is difficult to see how transmission curtailments by a multi-state utility, such as NSP, could be effectively regulated by the several affected states. The physics of electricity generation and transmission dictates that flows of comingled power will freely cross state lines, and that changes anywhere on the system have an effect elsewhere. As federal courts have recognized, transmission grids operate more as integrated electric machines rather than discretely functioning parts. For example, in an earlier case involving NSP, after noting that NSP operates an electrical transmission system that serves parts of five states and serves both retail and wholesale customers, the D.C. Circuit explained:

> [A] transmission system performs as a whole; the availability of multiple paths for electricity to flow from one point to another contributes to the reliability of the system as a whole. This principle has a strong basis in the physics of electrical

94. 16 U.S.C. § 824. In Order No. 888, and in other contexts, the FERC has held that it has jurisdiction over unbundled transmission of power for retail customers (i.e., retail wheeling that uses interstate transmission facilities), as well as "buy-sells" transactions that are tantamount to transmission arrangements. Order No. 888, *supra* note 2, F.E.R.C. STATS. & REGS. ¶ 31,036, at 31,781, 31,785; *see also Washington Water Power Co.*, 78 F.E.R.C. ¶ 61,178 (1997).

transmission for there is no way to determine what path electricity actually takes between two points or indeed whether the electricity at the point of delivery was ever at the point of origin.[95]

The strong need for system coordination and the uncontrollability of loop flows/parallel flows are facts of life that are central to the operation of the electric system; no one state is capable of effectively regulating the flows. In the short run, the interest of each state in protecting its own consumers is likely to run counter to interests of the other affected states. In such a setting, one could only speculate which, if any, of NSP's five states would prevail in a transmission curtailment dispute over the flow of power from the multiple generators located around NSP's system and the utility systems with which NSP is interconnected. How would NSP attempt to comply with five states' different curtailment rules? Just as states may not prohibit the export of power to other states,[96] states cannot effectively regulate the transmission of electricity among states, a matter that Congress clearly has empowered the FERC to address.[97]

Allowing utilities to tilt their transmission curtailments to favor their own retail customers will inevitably harm the retail customers of other utilities that also rely on those transmission facilities. In this respect, the Eighth Circuit's retail-wholesale dichotomy is misleading and not a viable basis for limiting the FERC's authority over interstate transmission—all electricity is eventually delivered to some retail consumer.

Wholesale markets also require coherent regulation of transmission rates and terms, including curtailments, since deliverability is essential to the viability of wholesale transactions. From the market's standpoint, the degree of firmness of a sale is just as fundamental to the transaction as price, quantity, and term of a relationship.[98] In practice, transmission and wholesale services offered by electric utilities subject to the FERC's jurisdiction range from fully firm (typically, equal to native load in priority) to fully interruptible (e.g., at the seller's discretion whenever capacity is constrained, including for economic reasons), with almost any variation in between.[99] Not surprisingly, prices for transmission and

95. Northern States Power Co. v. FERC, 30 F.3d 177 (D.C. Cir. 1994). In discussing Middle South Utilities, a multi-state electric utility system, the Eighth Circuit had previously noted that "[t]ransmission and generation functions are so coordinated and integrated as to permit an instantaneous transfer of electrical power to any part of Middle South's transmission network." Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n, 772 F.2d 404, 406 (8th Cir. 1985) (quoting Arkansas Power & Light Co. v. FPC, 368 F.2d 376, 378 (8th Cir. 1966)).

96. New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (striking down, on the basis of the Commerce Clause, New Hampshire's attempt to restrict the flow of privately owned and produced electricity in interstate commerce).

97. United States v. Public Utils. Comm'n of Cal., 345 U.S. 295, 300-03 (1953).

98. From the buyer's standpoint, the viability and worth of a utility's transmission or wholesale commitment depends in large measure on the likelihood of service curtailments; from the seller's standpoint, the obligation to deliver and the right to curtail service defines the burden of the service commitment being made; and, from the regulatory standpoint, neither the price nor other terms of a transmission service can be said to be "just and reasonable" and not "unduly discriminatory" without knowing whether a service will be rendered consistently (e.g., last to be curtailed) or erratically (e.g., first to be curtailed).

99. For example, FERC's Order No. 888 creates what amounts to four general curtailment priorities: (1) Network from network resources and Firm point-to-point between primary points; (2) Network from secondary points; (3) Non-firm point-to-point; and (4) Firm point-to-point between secondary points. The higher priority

wholesale services generally will be higher if the service is firm and lower if non-firm.[100] Reliable and competitive wholesale markets cannot be achieved if deliverability of the power—i.e., transmission of purchased power—is subject to interference by state oversight of retail sales by individual transmitting utilities. Moreover, unless each utility is expected to be its own island of power generation and consumption, retail reliability will depend on wholesale reliability, because each sale for resale is also another party's sale at retail.

It is also noteworthy that in recent years Congress has expanded, not shrunk, the FERC's jurisdiction over transmission in interstate commerce. The EPAct clearly empowers the Commission to order wheeling of wholesale power, even where the transmitting utilities would not otherwise be jurisdictional under the FPA—i.e., are not "public utilities" under the FPA.[101] Although the EPAct did not amend the jurisdictional provisions under section 201 of the FPA and Order No. 888 was issued based on the FERC's perceived authority under the FPA section 201, enactment of the EPAct describes a broad congressional policy in favor of federal regulation of interstate transmission of electricity and congressional encouragement for the FERC to lead the electric industry toward more open and competitive markets.[102] However, the FERC's ability to order wheeling post-EPAct (under section 211 of the FPA) or to order interconnections of transmission facilities (under section 210 of the FPA) would be substantially undermined if the utility receiving the order to provide service or an interconnection (or that utility's state regulators) could dictate the applicable degree of transmission firmness and the customer's curtailment ranking. In essence, if states could exercise power over transmission curtailments, the utility (or its state regulator) would be free to undermine the FERC's wheeling and interconnection authority—essentially to say, "Yes, we'll provide the service, but only when we feel like it and only if each affected state consents." In that context, each local utility or its state commission would, in effect, be empowered to block or delay transmission deliveries to other states and the wholesale market in order to protect customers in the intrastate market.

In this case, the panel's readily apparent rationale for giving a higher priority to transmission of power sold at retail by the transmitting utility was that it

afforded to Network customers using secondary points over Firm point-to-point customers using secondary points was justified by the Commission based on relative rate obligations of the two classes of customers. Order No. 888-A, *supra* note 2, III F.E.R.C. STATS. & REGS. ¶ 31, 048, at 30,278-81. In addition to the four basic priorities, price and duration can be a relevant factor in the curtailment priorities of non-firm service. *Id.* at 30,279-80.

100. Firm services are typically subject to reservation charges which must be paid regardless of usage. Florida Power & Light Co. v. FERC, 85 F.3d 684, 686 (D.C. Cir. 1996); Town of Norwood v. FERC, 962 F.2d 20, 21 (D.C. Cir. 1992).

101. Section 211 of the FPA, added by the EPAct, provides: "Any electric utility, Federal Power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order . . . requiring a transmitting utility to provide transmission services . . ." 16 U.S.C. § 824j. A "transmitting utility" is defined as "any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale."—a category broader than electric utility and can include the ERCOT utilities. 16 U.S.C. § 796.

102. One of the purposes of the EPAct was to help promote the development of more competitive and open power markets, particularly in the generation segment.

was persuaded that retail blackouts are less likely to occur if transmission to support the transmitting utility's own retail sales is given a higher priority than transmission of wholesale power that will support another utility's retail sales.[103] Further, even viewing the issue on such a policy level, the *Northern States* decision is unsupported. Indeed, Section 1.19 of the Order No. 888 *pro forma* tariff defines "Native Load Customers" to encompass "wholesale and retail power customers of the Transmission Provider on whose behalf the Transmission Provider, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate the Transmission Provider's system to meet the reliable electric needs of such customers."

Curtailing transmission of power purchased by transmission dependent utilities (TDUs) ahead of transmission for power to be resold to the transmitting utility's own retail customers (possibly including its interruptible retail customers) merely trades curtailment of one utility's retail consumers for curtailment of another. Certainly, nothing in the FPA compels or even encourages such a result.

Moreover, the Eighth Circuit panel misses the point when it asserts that wholesale customers typically have supply alternatives, while NSP's retail customers do not. NSP is a wholesale buyer and a generator for its retail customers. Acting on behalf of its retail customers, NSP can seek the alternative supply sources just like other wholesale buyers. If there is a transmission constraint, NSP can adjust (re-dispatch) generation within its control or, like other buyers, it may be able to purchase power generated downstream of the constraint and "counterflow" the power to its markets in a manner that mitigates the constraint. Such re-dispatching and purchases, however, are more of an economic issue than the physical availability of power. If such alternatives do not exist, then curtailments of affected transmission users may be needed.

The FERC is the appropriate entity to regulate interstate transmission of electricity, and it is charged with making the appropriate policy judgments, which are subject to judicial review. In this regard, there is no reason to doubt the FERC's willingness to protect the reliability of the transmission system for the benefit of retail consumers. The FERC is no more interested in turning out the lights of retail customers than its commissioners are in being berated by congressional critics in hearings before congressional oversight committees.[104] Reliability of service for all transmission users and their customers is a concern of the FERC Commissioners.[105] The FERC currently believes that an open access transmission system with *pro rata* curtailments of firm transmission services will

103. *Northern States*, 176 F.3d at 1095.

104. FERC Chairman James Hoecker recently testified before the House Energy and Power Subcommittee. In his remarks, he indicated that he supports open access as a fair way to protect bulk power markets and ensure reliability. Joseph F. Schuler, Jr., *House Subcommittee Takes on Transmission and Reliability*, PUBL. UTIL. FORT., June 1, 1999, at 38.

105. Vicky A. Bailey, *Reassessing the Role of Regulators of Competitive Energy Markets*, 20 ENERGY L.J. 1, 14 (1998). The Commission has emphasized the importance of reliability and has devoted considerable effort to address such issues. *See, e.g.*, *North Am. Elec. Reliability Council*, 85 F.E.R.C. ¶ 61,353 (1998), *order on reh'g*, 87 F.E.R.C. ¶ 61,160 (1999). It has also made clear the transmitting utilities may reserve transmission capacity to serve future needs reliably as long as they pay for it. *See also* Order No. 888-A, *supra* note 2, III F.E.R.C. STATS. & REGS. ¶ 31, 048, at 30,220.

improve reliability for utilities and their customers. Service reliability will be enhanced by facilitating the development of diverse, reliable supplies for both transmission owning utilities and transmission dependent utilities. The ability to contract for reliable transmission (which is not biased in favor of transmitting utilities' own sales customers) is important to achieving supply reliability from all suppliers, particularly ones located beyond the closest interconnected transmission owner.

In designing the curtailment provisions of transmission tariffs, the FERC is fully capable of considering the retail impacts that could result from its actions. The courts have repeatedly held that, in implementing its curtailment of services policies, the FERC may consider retail service impacts when deciding whether to permit interstate transportation of natural gas.[106] Similarly, when deciding how to regulate transmission facilities and services subject to its jurisdiction, the FERC is not barred from weighing retail impacts, even though it does not have the authority to regulate retail sales.[107] Thus, the Eighth Circuit may not agree with the FERC's policy judgments about the retail impacts of the FERC's curtailment proposals. However, the proposals are still capable of being considered by the same federal agency to which the FPA delegated overall jurisdiction over electric transmission in interstate commerce.

C. Is There a Potential Conflict between the FERC and State Regulation of Curtailments?

Yes and no. It certainly is possible that the FERC's curtailment policies will differ in some respects from the policies of any given state utility commission. This is not surprising since the FERC and state commissioners have different constituencies and face different demands. Each state's primary focus is on consumers and utilities located within its borders, while the FERC must consider the interests of many states and utilities at once when it regulates the interstate transmission of electric energy. Nonetheless, states still have a role to play with respect to curtailment of electricity delivered to local distribution facilities for retail sales.

These jurisdictional issues were successfully navigated during the interstate gas shortages of the 1970s.[108] In a variety of orders and by policy statement, the

106. *See, e.g., Transco*, 365 U.S. 1 (considering end use to which gas will be put in a transportation-only transaction); *Louisiana Power & Light*, 406 U.S. 621 (upholding the FERC's authority over natural gas curtailment in interstate transportation); *Panhandle (Ind.)*, 332 U.S. at 523 & n.23. In contrast to its regulation of interstate pipelines under the NGA, the FERC does not have certificate authority under the FPA. Utilities have provided transmission to themselves using the facilities constructed without prior FERC approval. Consequently, the FERC has not had occasion to review rates or initiation of retail electric transactions in which transmission is embedded in a retail sale of electricity. *Panhandle (Ind.)*, 332 U.S. at 523 & n.23; *Louisiana Power & Light*, 406 U.S. at 636, 640; *see also Transco*, 365 U.S. at 4.

107. *See, e.g., Conway Corp.*, 426 U.S. 271.

108. During the interstate natural gas curtailment era, the FERC required interstate pipelines to allocate available supplies among its wholesale and retail customers based on end-use priorities applied to historical snapshots of each customer's own or resale customer's requirements for natural gas. The highest priorities for pipeline sales were afforded to residential, small commercial and plant protection uses and to process and feedstock uses that could not feasibly be converted to alternate fuels, while the lowest priorities were afforded to boiler fuel and other uses that could readily switch to alternate fuels when gas supplies were short. (Later, the

FERC required interstate pipelines to curtail supplies according to a scheme of curtailment priorities. The priorities were generally based on the retail "end uses" to which the gas was applied during a particular historical slice of time (a "base period"). Even as interstate pipeline *supply* curtailments were implemented based on end-use priorities, *constrained pipeline transportation capacity* was generally curtailed *pro rata* among firm customers and then *pro rata* among interruptible customers.[109] At the same time, states regulated the retail sale priorities applied by local gas distributors to the limited supply of gas made available for sale by interstate pipelines (as well as any intrastate natural gas supply the local distributor could obtain). State-approved priorities for resale of gas purchased by local distribution companies (LDCs) often differed from the priorities that led to interstate pipelines' allocations of gas received by those LDCs. In some states, regulators even asserted that they could order emergency diversion of user-owned gas after it was delivered into a gas utility's local distribution system. The FERC might arguably have conditioned interstate pipeline's supply allocations upon the local utility's redelivery to specific categories of end users (as it did in the case of emergency relief from curtailments). Instead, it generally avoided potential conflicts by taking the position that it was merely allocating supplies or capacity at the interstate pipeline level and leaving retail distributors' allocations to state authorities.

D. If Both State and Federal Regulators were to Attempt to Regulate Transmission Allocations, How Should the Conflict be Resolved?

Without exhaustively reviewing all the cases recognizing the FERC's preemptive authority regarding its jurisdiction under the FPA and the NGA, it is clear that, when Congress occupies an area, contrary state laws are preempted.[110]

Natural Gas Policy Act modified some aspects of pipeline curtailment priorities.) This end-use curtailment procedure fell within the FERC's jurisdiction over transportation of natural gas. *Louisiana Power & Light*, 405 U.S. 621. After the natural gas was delivered to a local distribution company (LDC), the LDC resold the now-limited supplies that it purchased from the pipeline, in accordance with state-approved curtailment priorities that often differed from those established by the FERC. Gas nominally delivered to a local distributor as a result of high priority industrial requirements during an historical base period could be reallocated at the local distribution level to other favored uses, without running afoul of any action by the FERC. Because the FERC did not try to condition interstate allocations upon specific local distribution redeliveries, the courts did not have to decide whether the FERC could have done so, even though it likely could.

109. The FERC preserved the policy of *pro rata* transportation curtailments even after Order No. 636 unbundled all sales from pipeline transportation services, and allowed for pipelines to implement special relief from curtailments to meet documented emergency conditions. The FERC's general policies of *pro rata* curtailments of firm transportation service has been implemented for many years with no documented adverse impacts on service reliability to retail gas consumers.

110. The Supremacy Clause of the Constitution provides:

> [The U.S.] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI. Beyond that, Commerce Clause cases support the conclusion that a state may not regulate interstate transmission of electricity. Certainly, when the FPA was enacted, the Commerce Clause cases indicated they could not. *See, e.g.*, Pennsylvania v. West Virginia, 262 U.S. 553, 596-97 (1923); *Attleboro*, 273 U.S. 83 (1927); *Kansas-Missouri*, 265 U.S. 298 (1924). *See also*, New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). Later cases, such as *Arkansas Elec. Cooperative*, 461 U.S. 375, and General Motors

As the Supreme Court has stated:

> [T]here can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive.' *Missouri Pacific Ry. Co. v. Stroud*, 267 U.S. 404, 408. . .(1925). Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity.' Id., at 318-319.[111]

Case books are full of decisions declaring that the FPA and the NGA "occupy the field" with respect to matters delegated to the FERC, thus preempting state regulation of the same matters.[112] In these areas, the Commission exercises *exclusive* regulatory authority: "[c]ases are legion affirming the exclusive character of FERC jurisdiction where it applies, both under the NGA and under the analogous provisions of the Federal Power Act."[113] When an entity comes within the FERC's jurisdiction, "no state can interfere with federal regulation."[114] There are numerous examples of cases rejecting state actions, undertaken in the name of matters reserved to the states by the FPA or the NGA, which conflicted with the FERC's exercise of authority under the FPA and the NGA.[115]

Corp. v. Tracy, 519 U.S. 278 (1997), do not lead to a different result because each of those cases involved deliveries solely to customers within the state of regulation. Indeed, in *Arkansas Electric*, the Court stated that the "production and transmission of energy is an activity particularly likely to affect more than one state, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests." *Arkansas Elec. Cooperative*, 461 U.S. at 377. Since neither entailed interference with transmission of power or natural gas to other states, neither would appear to lead to a different result from *Attleboro* with respect to curtailments of electric transmission in interstate commerce. As the Supreme Court has stated, "a State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *New England Power*, 455 U.S. at 338.

111. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 964 (1986).

112. *See, e.g., Illinois Natural Gas*, 314 U.S. 498 (because the NGA gave the FERC jurisdiction over extensions of pipeline facilities to local distribution companies, "the state commission was without power to order them").

113. *PUC of Cal.*, 900 F.2d 269; *accord* Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-01 (1988) (it is well settled that "Congress occupied the field of matters relating to . . . transportation of natural gas in interstate commerce."); *Cascade*, 955 F.2d at 1415 (stating that the areas over which the FERC has jurisdiction are "plenary").

114. *East Ohio*, 338 U.S. at 473.

115. Cases such as *Nantahala* and *Mississippi Power & Light* bar states, in their regulation of retail rates, from second guessing FERC-approved rates and charges, including allocations of costs among affiliated utilities. The Supreme Court has struck down, as preempted by the NGA, state efforts to impose ratable take rules on interstate pipelines, even though regulation of gas production was reserved to the states. *Transco*, 365 U.S. 1; Northern Natural Gas Co. v. State Corp. Comm'n of Kan., 372 U.S. 84 (1963). The Supreme Court struck down, as preempted by the NGA, a state's effort to order an interstate pipeline to connect a new distribution company as a customer. *Illinois Natural Gas*, 314 U.S. 498. The Supreme Court has also barred the State of Michigan from regulating securities issuances by interstate pipelines regulated by the FERC, even though the FERC is not authorized by the NGA to regulate pipelines' issuances of securities. *Schneidewind*, 485 U.S. 293.

In addition, in numerous cases, the courts have rejected state efforts to interfere with interstate pipelines' construction or operation of pipeline facilities designed to provide transportation-only services to the direct delivery customers (i.e., transportation of gas owned by the customer without any sale by the pipeline) even where such deliveries bypass a state-regulated local distribution company. *See, e.g., Cascade*, 955 F.2d at 1415; *Pub. Utils. Comm'n of Cal.*, 900 F.2d 269; *Michigan Consolidated*, 887 F.2d 1295. These cases have uniformly recognized that the FERC's jurisdiction over transportation-only transactions is exclusive, and not diminished by the reservation to the states of regulation over retail sales and local distribution facilities.

Even if the FPA and the NGA were not clear that Congress' delegation of interstate transmission responsibility to the FERC had occupied the regulatory field, preemption would be appropriately inferred in the case of interstate transmission curtailments, since utilities could obviously not comply both with conflicting state and federal regulations governing transmission curtailments. As explained in *Schneidewind*,

> Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[116]

Although states may regulate the retail sales services of natural gas pipelines and electric utilities, they cannot interfere with interstate transportation of natural gas or interstate transmission of electricity. As noted by the D.C. Circuit in reviewing the natural gas pipeline industry's equivalent of Order No. 888, states "have never regulated the terms and conditions of interstate pipeline transportation. When the gas element is severed—*i.e.*, unbundled—from the transaction, FERC *retains* jurisdiction over the interstate transportation component."[117] The courts have also rejected attempts by states to wield their authority over local utilities to effectuate potentially protectionist policies at the expense of other states, much as could occur if every state could impose distinct rules for transmission curtailments.[118] In *Middle South Energy*, for example, the Eighth Circuit itself rejected a claim by Arkansas that a state could lawfully reject a utility's contracts to purchase power or to pay for construction of a nuclear plant, stating:

> In *New England Power*, New Hampshire sought to contain within the state the benefits of low-cost power. Arkansas, conversely, seeks to close its borders to high-cost electricity. The effect of both actions is the same: a preference for citizens in the regulating jurisdiction gained at the expense of out-of-state consumers.[119]

In the same vein, contrary to the *Northern States* decision, no state regulating NSP may use retail curtailment rules in order to "close its borders" to retain electricity for the benefit of its local retail customers.

IV. CONCLUSION

In summary, it is clear that the *Northern States* decision is inconsistent with the Federal Power Act and with many cases interpreting the FPA and its sister statute, the NGA. As a practical matter, the Eighth Circuit decision would have the effect of inviting states, in the name of the FPA's "local distribution" reservation, to interfere with interstate *transmission* of electricity even though transmission in interstate commerce was deemed beyond states' competence under

116. *Schneidewind*, 485 U.S. at 300 (citations omitted).

117. *United*, 88 F.3d at 1153 (emphasis added).

118. *See, e.g.*, *New England Power*, 455 U.S. 331; *Middle South Energy*, 772 F.2d 404.

119. *Middle South Energy*, 772 F.2d at 417.

the *Attleboro* and similar cases.[120] Ironically, the potentially inconsistent, state-specific transmission curtailment priorities invited by the Eighth Circuit will undermine the reliability of electric service for many retail customers because conflicting curtailment policies will undercut efforts to enhance coordination of the Nation's electric transmission and generation grid. The de-integration and balkanization of the grid will also tend to reinforce local sales monopolies and encourage unnecessary redundancy of facilities, both of which, will tend to raise retail and wholesale power costs. With the denial of rehearing *en banc*, one can only hope for early review by the Supreme Court, without awaiting the inevitable conflicts among the circuits and the intervening risks to electric suppliers and their customers.

120. If the FERC is barred by *Northern States* from regulating curtailments of interstate transmission because its actions impinge on local distribution reserved for states, and if states are barred by *Attleboro* and similar cases from regulating interstate transmission, then one can legitimately ask whether the effect of *Northern States* is to recreate the regulatory gap that Congress attempted to fill by enacting the FPA.