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## STATE JURISDICTION OVER DISTRIBUTED GENERATORS

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**Synopsis:** The Federal Energy Regulatory Commission (FERC) has defined in an expansive manner its jurisdiction over electricity sales-for-resale, in effect preempting the states from any role, even when such sales occur on distribution circuits for consumption locally. Under the FERC’s approach, all such sales are swept under federal law no matter how small the generator or how local the consuming market. This article challenges the FERC’s approach by providing a review of first principles, illustrating inconsistencies in the FERC’s interpretation, and arguing that the Federal Power Act by its terms leaves to the individual states their own independent jurisdiction over generators that sell their output on distribution circuits to colocated off-takers. This means the states have complete authority, emanating from their organic police powers, to regulate not only the rates and terms of such sales, but also the terms by which the generators interconnect to the distribution grid. Put another way, the individual states have full inherent authority to create and manage what are referred to as “micro-grids,” and to adopt mechanisms such as “feed-in tariffs” for distributed generators.

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The views expressed herein are solely those of the authors and not necessarily those of their respective organizations.

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## I. INTRODUCTION

The United States’ electric grid has been in a state of flux since the first electrons were distributed in San Francisco in 1879.<sup>1</sup> Its form and function have never long remained static and continue to evolve. What began as isolated, radial distribution systems has become the largest interconnected machine on Earth,<sup>2</sup> generating challenging legal and regulatory issues commensurate with its scale.

The contemporary federal vision is of a grid “moving from a monopoly-regulated regime to one in which all sellers can compete on a fair basis and in which electricity is more competitively priced,”<sup>3</sup> though the crafting of such a regime has tested our traditional notions of federal and state jurisdiction. The envisioned unbundled grid traverses all jurisdictional lines—from interstate transmission at 500 kilovolts (kV) to in-home consumption at 120 volts (V)—requiring a partition of authority over the apparatus’s interstate and local aspects. This partition was set forth by Congress in 1935 in Part II of the Federal Power Act (FPA),<sup>4</sup> building on a series of Commerce Clause decisions by the Supreme Court that defined the outer reaches of state jurisdiction over the electric power industry.

The advent of small-scale generating units of various kinds—including photovoltaics, fuel cells, combined heat and power (or cogeneration) units, wind turbines, and some evolving energy storage technologies—has pushed to the

1. RICHARD SHELTON KIRBY ET AL., *ENGINEERING IN HISTORY* 357-58 (Dover Publ’ns 1990) (1956).

2. Igor Paprotny, Professor, Univ. of Cal., Berkeley, Presentation at the 9th Annual MEPTEC MEMS Symposium, slide 2 (May 19, 2011), available at <http://www.meptec.org/Resources/9%20-%20UC%20BERKELEY%20-%20PAPROTTY.pdf>.

3. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Public Utilities*, 75 F.E.R.C. ¶ 61,080, at p. 31,635 (1996).

4. 16 U.S.C. §§ 791-828(c) (2012).

forefront a new question of federal versus state jurisdiction over the activities of such generators. Proponents of “distributed generation,” as it is known, have advocated for the adoption of “feed-in tariffs” to facilitate entry of these new, small-scale, and, in some instances, experimental generating technologies.<sup>5</sup> Others have advocated for development of “micro-grids” on distribution circuits, which could operate as independent energy islands with only minimal, if any, dependence upon the high-voltage grid.<sup>6</sup>

The Federal Energy Regulatory Commission (FERC)<sup>7</sup> has asserted, but we think incorrectly, that all of these aspects of a feed-in tariff are governed exclusively by federal law because, according to the FERC, all wholesales occur in interstate commerce due to the interconnected nature of the North American grid.<sup>8</sup> Under the FERC’s view, there is no role whatsoever for the individual states where the interconnected grid happens to exist, except to the limited extent they act pursuant to a delegation by Congress and FERC regulations under federal law (namely, the Public Utilities Regulatory Policies Act of 1978, PURPA).<sup>9</sup> The FERC takes the view that every generator’s sales of electricity to the local utility company, for resale by the utility to its retail customers, constitute “sales for resale in interstate commerce,” which Congress in the FPA placed exclusively and decisively within the jurisdiction of the Federal Commission in Washington.<sup>10</sup>

This prevailing jurisdictional interpretation imposes on the nation a unitary set of requirements disadvantageous to the distributed generator as against the utility, and inhibits innovation in the states, which ought otherwise serve as laboratories,<sup>11</sup> of creative and forward-looking mechanisms for the cultivation of a sustainable energy economy.<sup>12</sup> It is our view that the Federal Power Act by its terms actually reserves to the individual states their organic, plenary authority to regulate wholesale sales of power by distributed generators for local

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5. See, e.g., *Feed-In Tariff: A Policy Tool Encouraging Deployment of Renewable Electricity Technologies*, U.S. ENERGY INFO. ADMIN. (May 30, 2013), <http://www.eia.gov/todayinenergy/detail.cfm?id=11471>. A feed-in tariff provides in its classic form four key elements that serve to help distributed generators gain entry into what traditionally has been a market dominated by large-scale central generators. First, a feed-in tariff sets the price the generator can charge for its output. Second, a feed-in tariff obligates the interconnected utility to purchase the generator’s output at this price. Third, a feed-in tariff sets clear and simple terms for interconnecting the generating unit to the distribution circuit where it is located. Fourth, a feed-in tariff prescribes the rules for whatever degree of sharing the regulatory authority thinks appropriate for the cost of upgrading the distribution circuit to accommodate the installation of small generators on such circuits.

6. See, e.g., Ken Wells & Mark Chediak, *EBay, Ellison Embrace Microgrids to Peril of Utilities*, BLOOMBERG NEWS (Oct. 20, 2013), <http://www.bloomberg.com/news/2013-10-17/ebay-to-ellison-embrace-microgrids-in-threat-to-utilities.html>.

7. The terms Federal Power Commission, FPC, Federal Energy Regulatory Commission, FERC, and Commission will be used synonymously herein.

8. David Yaffe, *Are State Renewable Feed-In-Tariff Initiatives Truly Throttled by Federal Statutes After the FERC California Decision*, ELECTRICITY J. (Oct. 2010), <http://www.vnf.com/news-articles-52.html>.

9. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.).

10. Yaffe, *supra* note 8.

11. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

12. *Id.*

consumption, and that the FERC has erred in asserting federal jurisdiction, preemptive of the states, over such sales.

## II. ENERGY SALES' LEGAL POSTURE

The reliable and ubiquitous electricity supply enjoyed in the United States is supported by labyrinthine regulations and authorities at the federal, regional, state, utility, and local levels, crafted in response to the demands of a rapidly proliferating and vastly interconnected energy economy. The development of jurisdictional boundaries atop the grid has been a unique challenge for the grid is a unitary apparatus which does not readily express divisions coinciding with our federal system's bifurcation of supervisory powers between the states and federal head.

### A. *The Beginnings of a Regulated Grid*

"Prior to 1935, the States possessed broad authority to regulate public utilities, but this power was limited by [Supreme Court] cases holding that the negative impact of the Commerce Clause prohibits state regulation that directly burdens interstate commerce."<sup>13</sup>

The most famous instance of state regulation burdening interstate commerce, and that which set in motion the jurisdictional evolution at issue herein, occurred when the Public Utilities Commission of Rhode Island proffered to regulate the rate of an electric "current . . . delivered by the Narragansett Company at the state line between Rhode Island and Massachusetts and carried over connecting transmission lines to the station of the Attleboro Company in Massachusetts."<sup>14</sup> The Supreme Court of Rhode Island found the regulation to be in "conflict with the commerce clause of the Constitution"<sup>15</sup> and reversed the PUC's order.<sup>16</sup> On a writ of certiorari to the Rhode Island Supreme Court, the United States Supreme Court concurred, ruling in 1927 that the attempt was "a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, *which places a direct burden upon interstate commerce*"<sup>17</sup> because "the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character."<sup>18</sup> Enunciating what has come to be known as the *Attleboro* Gap,<sup>19</sup> the Court held that "[t]he rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests, but, if such regulation is required it can only be attained by the exercise of the power vested in Congress."<sup>20</sup>

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13. *New York v. FERC*, 535 U.S. 1, 5 (2002).

14. *Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 84 (1927).

15. *Id.* at 86.

16. *Id.*

17. *Id.* at 89 (emphasis added).

18. *Id.* at 90.

19. *New York v. FERC*, 535 U.S. 1, 6 (2002).

20. *Public Utils. Comm'n of R.I.*, 273 U.S. at 90.

Five years later, in *Utah Power & Light Co. v. Pfof*, the Court recognized the generation of electricity as a distinctly local aspect of the grid.<sup>21</sup> That case involved a challenge to a tax on electricity produced in the State of Idaho and transmitted to Utah for distribution to customers there.<sup>22</sup> Recognizing that, “[f]rom the strictly scientific point of view, the subject is highly technical,” the Court cautioned that “we must not lose sight of the fact that . . . what constitutes commerce, manufacture, or production is to be determined upon practical considerations.”<sup>23</sup> After discussing the nature of generation as a distinct and prerequisite step in the transmission and consumption of electrical energy,<sup>24</sup> the Court was “satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing,”<sup>25</sup> such that, “[s]o far as [appellant] produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control.”<sup>26</sup>

In 1935, Congress responded to the call of the *Attleboro* Gap by enacting Part II of the Federal Power Act, wherein it declared:

that Federal regulation of matters relating to generation to the extent provided . . . and of that part of such business which consists of the transmission of 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.<sup>27</sup>

Congress granted the Federal Power Commission jurisdiction over “the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce,”<sup>28</sup> with a sale of electric energy at wholesale defined as “a sale of electric energy to any person for resale.”<sup>29</sup> The FPA also prohibited unreasonable rates or discriminatory practices and empowered the Commission to correct such violations.<sup>30</sup>

Congress limited the Act’s provisions such that they “not apply to any other sale of electric energy.”<sup>31</sup> Pronouncing the scope of the Act’s jurisdictional bounds, Congress provided that “[t]he Commission . . . shall not have jurisdiction . . . 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.”<sup>32</sup>

The Act declares as policy that “such Federal regulation . . . [shall] extend only to those matters which are not subject to regulation by the states.”<sup>33</sup> Commissioner Seavey of the Commission, in support of the legislation, assured

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21. *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 181 (1932).

22. *Id.* at 177.

23. *Id.* at 179.

24. *Id.* at 179-82.

25. *Id.* at 181.

26. *Id.* at 182.

27. 16 U.S.C. § 824(a) (2012).

28. *Id.* § 824(b)(1).

29. *Id.* § 824(d).

30. *Id.* §§ 824d-824e.

31. *Id.* § 824(b).

32. *Id.*

33. *Id.* § 824(a).

the House Committee on Interstate and Foreign Commerce that “[t]he new title II of the act . . . is conceived entirely as a supplement to, and not as a substitution for state regulation.”<sup>34</sup> The Committee was convinced by these assurances, stating in its report that “[t]he new parts are so drawn as to be a complement to and in no sense a usurpation of state regulatory authority.”<sup>35</sup> In assent to this understanding, the Senate Committee on Interstate Commerce found it to be “the policy of Congress to extend that regulation to those matters which cannot be regulated by the states and to assist the states in the exercise of their regulatory powers, but not to impair or diminish the powers of any state commission.”<sup>36</sup> The report continued:

The revised bill would impose Federal regulation only over those matters *which cannot effectively be controlled by the States*. The limitation on the Federal Power Commission’s jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters.<sup>37</sup>

### B. *An Illustrative Return to Attleboro*

To understand the theory we are proposing in this article, it is important to appreciate the legal framework within which the electric power industry in the United States is regulated by the federal and state governments, each in its own sphere.<sup>38</sup> The touchstone here is the Supreme Court’s 1927 decision in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*<sup>39</sup> *Attleboro*, decided by an 8-1 majority, with only Justice Brandeis in dissent, was a seminal case that defined the limits of state jurisdiction under the Commerce Clause of the U.S. Constitution,<sup>40</sup> with respect to the then-rapidly-developing electric power industry as it expanded across state boundaries.<sup>41</sup>

#### 1. *Attleboro*—Facts and Holding

The *Attleboro* case concerned a wholesale power contract between two retail electric utilities, one in Rhode Island and the other in Massachusetts.<sup>42</sup> The seller under the contract was Narragansett Electric Lighting Company, which the Supreme Court described as “a Rhode Island corporation engaged in manufacturing electric current at its generating plant in the city of Providence and selling such current generally for light, heat and power.”<sup>43</sup> In his dissenting opinion, Justice Brandeis noted that Narragansett served some 70,000 customers

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34. *Public Utility Holding Companies: Hearing on H.R. 5423 Before the H. Comm. on Interstate & Foreign Commerce*, 74th Cong. 384 (1935) [hereinafter *Hearings*] (statement of Clyde L. Seavey, Comm’r, Fed. Power Comm’n).

35. H.R. REP. NO. 74-1318, at 8 (1935).

36. S. REP. NO. 74-621, pt. 2, at 48 (1935).

37. *Id.* at 18 (emphasis added).

38. For a more detailed survey of the case law in this area, both before and after enactment of Part 2 of the Federal Power Act, see Frank R. Lindh, *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle*, 10 ENERGY L.J. 277 (1989).

39. *Public Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.* 273 U.S. 83 (1927).

40. U.S. CONST. art. 1, § 8, cl. 3.

41. *Attleboro*, 273 U.S. 83.

42. *Id.*

43. *Id.* at 84.

in Rhode Island.<sup>44</sup> The purchaser under the contract, the Attleboro Steam and Electric Company, had a similar retail electric utility operation across the state line in Massachusetts, providing electric service in and around the city of Attleboro.<sup>45</sup> Although each utility operated its own separate unitary system, the two systems were interconnected at a point on the Rhode Island-Massachusetts border.<sup>46</sup> Narragansett's power sales to Attleboro constituted only a small minority of its business—less than 3%, according to Brandeis.<sup>47</sup>

In 1917, the two companies consummated a “requirements” contract, whereby the Narragansett Company agreed to provide 100% of the electricity the Attleboro Company would need to serve its retail customers in Attleboro over a twenty-year period.<sup>48</sup> The contract set a fixed sales price for the entire twenty-year term of the transaction.<sup>49</sup> On the strength of this requirements contract for its electricity supply, the Attleboro Company then abandoned and dismantled its own power plant in Attleboro, thus becoming completely dependent upon the supply contract with Narragansett to meet all of the electricity demand in and around the city of Attleboro.<sup>50</sup>

By the early 1920s, the Narragansett Company developed a case of seller's remorse, its officers having come to the realization they were selling power to Attleboro at a loss.<sup>51</sup> The contract afforded them no avenue of relief, as it still had fourteen or fifteen years left in its term and the price was fixed.<sup>52</sup> If they continued supplying power to Attleboro under the terms of the contract, the Narragansett Company and its officers had only two choices: They could either raise the rates for power sold to their own retail customers in Providence to make up the loss or else absorb the loss on the Company's books—or perhaps some combination of the two.

With no prospect of relief under the contract itself, the Narragansett Company elected an alternative option, namely, a petition to the Rhode Island Public Utilities Commission, seeking a “tariff amendment” that would give Narragansett a price increase.<sup>53</sup>

The Rhode Island Commission was not a stranger to the transaction, having previously granted an application by the Narragansett Company for approval of the original 1917 contract before it was consummated.<sup>54</sup> This was done in the form of a “tariff” submitted by Narragansett and approved by the Rhode Island Commission, which incorporated the key terms of the contract, including its price and twenty-year duration.<sup>55</sup>

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44. *Id.* at 91 (Brandeis, J., dissenting).

45. *Id.* at 84 (majority opinion).

46. *Id.*

47. *Id.* at 91 (Brandeis, J., dissenting).

48. *Id.* at 84 (majority opinion).

49. *Id.* at 84-85.

50. *Id.* at 84.

51. *Id.* at 85.

52. *Id.* at 84-85.

53. *Id.* at 85.

54. *Id.* at 84-85.

55. *Id.*

In 1921, only four years into the contract, Narragansett took an initial run at a “tariff amendment,” seeking approval from the Rhode Island Commission for a price increase, but the effort was rebuffed based on an objection by the Attleboro Company.<sup>56</sup> In 1924, Narragansett tried again and this time succeeded in obtaining an order of the Rhode Island Commission approving a new, higher rate for the sale of power to Attleboro.<sup>57</sup> The Rhode Island Commission found, after an evidentiary hearing at which both parties were represented, that the contract was indeed forcing Narragansett to sell power at a loss, due to the increased cost of generating the electricity Attleboro was purchasing.<sup>58</sup>

The Attleboro Company sought judicial review of the Rhode Island Commission’s order, and the case found its way to the United States Supreme Court.<sup>59</sup> Attleboro argued that the Rhode Island Commission’s order violated the Commerce Clause of the U.S. Constitution.<sup>60</sup>

By its decision in *Attleboro*, the Supreme Court granted Attleboro’s challenge and affirmed a lower court ruling overturning the Rhode Island Commission’s order based on Commerce Clause principles.<sup>61</sup> Over a dissent by Justice Brandeis, the majority opinion held that the sale of electricity from Narragansett to Attleboro, across the Rhode Island-Massachusetts state line, in a wholesale transaction, was “a transaction in interstate commerce” and hence beyond the authority of either state to regulate.<sup>62</sup> The Court reasoned that the challenged order was “not . . . a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but [was] a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce.”<sup>63</sup>

Narragansett and the Rhode Island Commission argued that the case should be controlled by the Supreme Court’s decision seven years earlier in *Pennsylvania Gas Co. v. New York Public Service Commission* (PSC).<sup>64</sup> In that case, the Court held that the New York Public Service Commission was within its rights in setting the rates for retail deliveries of natural gas to consumers in Jamestown and several other municipalities in western New York State, even though the company supplying and delivering the gas to the consumers imported the gas from Pennsylvania.<sup>65</sup> The Court in *Pennsylvania Gas* resolved the Commerce Clause issue by finding that the retail deliveries constituted a service that was “essentially local” in nature, even though the importation of gas from out-of-state clearly constituted, in the words of the Court, “interstate commerce.”<sup>66</sup> Because of the predominantly local nature of the business in

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56. *Id.* at 85 n.1.

57. *Id.* at 85-86.

58. *Id.*

59. *Attleboro*, 273 U.S. 83.

60. *Id.* at 86.

61. *Id.* at 90.

62. *Id.* at 86.

63. *Id.* at 89.

64. *Id.* at 87 (citing *Pennsylvania Gas Co. v. New York Pub. Serv. Comm’n*, 252 U.S. 23 (1920)).

65. *Pennsylvania Gas Co.*, 252 U.S. 23.

66. *Id.* at 31.



question (namely, delivery of natural gas to retail consumers), the Court found that the impact on interstate commerce, while undeniable, was not enough to overcome the “essential local” nature of the retail gas sales.<sup>67</sup>

In his dissent in *Attleboro*, Justice Brandeis expressed the view that *Pennsylvania Gas v. New York PSC* should control on the facts presented.<sup>68</sup> He noted the Rhode Island Commission’s order was issued “to prevent unjust discrimination and to prevent unjust increase in the price to other customers.”<sup>69</sup> The discrimination here worked against the interests of Narragansett’s customers in Providence and in favor of the interests of Attleboro’s customers in Massachusetts.<sup>70</sup> But Brandeis nevertheless thought the challenged order was a legitimate exercise of Rhode Island’s ordinary police powers, the kind of action regulatory commissions routinely take to prevent rate discrimination and cross-subsidies among customers and customer classes.<sup>71</sup> He thought the order “[did] not obstruct or place a direct burden upon interstate commerce.”<sup>72</sup>

The Supreme Court in *Attleboro*, however, was unmoved by this reliance on *Pennsylvania Gas*, finding the two situations distinguishable.<sup>73</sup> The dispositive case precedent, the majority found, was not *Pennsylvania Gas* but the Court’s 1924 decision in *Missouri v. Kansas Gas Co.*<sup>74</sup> At issue in *Kansas Gas* were wholesale sales of natural gas in Kansas and Missouri by an interstate pipeline originating in Oklahoma.<sup>75</sup> The sales of gas were made to local distribution companies in the consuming states, and they in turn distributed and resold the gas to retail customers in those states.<sup>76</sup> The Court in *Attleboro* explained:

It is clear that the present case is controlled by the *Kansas Gas Co.* [c]ase. The order of the Rhode Island Commission is not, as in the *Pennsylvania Gas Co.* [c]ase, a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce. Being the imposition of a direct burden upon interstate commerce, from which the state is restrained by the force of the commerce clause, it must necessarily fall, regardless of its purpose.<sup>77</sup>

In *Pennsylvania Gas*, the Court declared the delivery of gas to retail customers to be “essentially local” in nature, despite the out-of-state source of gas.<sup>78</sup> In contrast, the Court found in *Attleboro*, the sale of electric power in a wholesale transaction across the state line, from Rhode Island to Massachusetts, was akin to cases “where the transportation, sale, and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end, [such that] the

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67. *Id.*

68. *Attleboro*, 273 U.S. at 92 (Brandeis, J., dissenting).

69. *Id.* at 91.

70. *Id.* at 90 (majority opinion).

71. *Id.* at 91 (Brandeis, J., dissenting).

72. *Id.* at 92.

73. *Id.* at 89.

74. *Id.* at 89 (citing *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924)).

75. *Kansas Natural Gas Co.*, 265 U.S. at 305.

76. *Id.*

77. *Attleboro*, 273 U.S. at 89.

78. *Pennsylvania Gas Co. v. New York Pub. Serv. Comm’n*, 252 U.S. 23, 31 (1920).

paramount interest is not local, but national, admitting of and requiring uniformity of regulation” by the federal government.<sup>79</sup>

## 2. Federal Power Act: “Closing the *Attleboro* Gap”—And Then Some

As the Supreme Court later observed, “*Attleboro* declared state regulation of interstate transmission of power for resale forbidden as a direct burden on commerce.”<sup>80</sup> In the Federal Power Act, in turn, Congress exercised its own power under the Commerce Clause by extending federal jurisdiction over these and other areas. The Court explained:

We have examined the legislative history; its purport is quite clear. Part II was intended to “fill the gap”—the phrase is repeated many times in the hearings, congressional debates and contemporary literature—left by *Attleboro* in utility regulation. Congress interpreted that case as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power.<sup>81</sup>

More recently, in its 2002 decision in *New York v. FERC*, the Supreme Court in the context of a new situation not envisioned at the time of enactment of the 1935 Federal Power Act—namely, “unbundled” transmission and sales services by electric utilities—opined that Congress in this statute did not merely close the “*Attleboro* Gap” by clothing the Federal Commission only with those powers denied to the individual states in the *Attleboro* decision itself.<sup>82</sup> Notwithstanding language in the statute suggesting that it “was no more than a gap-closing statute,” the Court in the *New York* case reasoned, in actuality Congress conferred on the Federal Commission not only the authority denied the states under the *Attleboro* decision and companion cases, but additional authority as well.<sup>83</sup> The *New York* opinion explained:

It is . . . perfectly clear that the original FPA did a great deal more than close the gap in state power identified in *Attleboro*. The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation.<sup>84</sup>

The Court offered as an example the fact, “prior to the enactment of the FPA, that States could regulate aspects of interstate wholesale sales, as long as such regulation did not directly burden interstate commerce.”<sup>85</sup> Thus, under the Supreme Court’s most recent declaration, “even if *Attleboro* catalyzed the enactment of the FPA, *Attleboro* does not define the outer limits of the statute’s coverage.”<sup>86</sup>

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79. *Attleboro*, 273 U.S. at 89 (quoting *Kansas Natural Gas Co.*, 265 U.S. at 309-10).

80. *United States v. Public Utils. Comm’n of Cal.*, 345 U.S. 295, 304 (1953).

81. *Id.* at 307-08.

82. *New York v. FERC*, 535 U.S. 1, 20-21 (2002).

83. *Id.*

84. *Id.* (citing *Attleboro*, 273 U.S. at 85-86) (emphasis added).

85. *Id.* (citing *Attleboro*, 273 U.S. at 85-86).

86. *Id.* at 21.

### 3. A Hypothetical Twist on *Attleboro* Involving a Local Sale-for-Resale

We ask you to consider a different case, involving a hypothetical transaction on the Narragansett Company's local distribution system in Providence. The time period is the mid-1920s, the same era in which the *Attleboro*<sup>87</sup> case arose. In this hypothetical, Narragansett Electric has entered into a long-term, twenty-year power purchase agreement with the owner of an independent power plant located in Providence, an enterprise we will call Providence Power Company. Narragansett plans to use this contract to supply a small portion of the electricity Narragansett needs to serve its 70,000 customers in and around Providence. Narragansett obtains the remainder of the electricity from its own proprietary power plant, also located in Providence. For purposes of this hypothetical, we will assume the power is delivered by Providence Power at a point of interconnection on Narragansett's distribution system, in the City of Providence. The delivery occurs on a distribution circuit, at a lower distribution voltage—not on a high-voltage transmission line. Nevertheless, just to complete our facts, we can assume that Narragansett's system is interconnected with an out-of-state utility (*Attleboro*) at the Rhode Island-Massachusetts state line, and that power from time to time flows freely across the border point on days when Providence Power is delivering electricity into the system.

Just as in *Attleboro*,<sup>88</sup> before consummating this purchase arrangement with Providence Power Company, Narragansett in our hypothetical seeks and obtains permission from the Rhode Island Public Utilities Commission to do so, on the terms specified in the contract. The contract is clearly a sale-for-resale (or wholesale) arrangement: Narragansett as purchaser will include the power in its portfolio of electricity, which Narragansett in turn resells to its 70,000 retail customers. The contract requires Providence Power Company to sell 100% of the output from its Providence plant to Narragansett Electric on a firm basis, 365 days per year (except for planned outages and force majeure events).

Narragansett quickly grows dissatisfied with the terms of its deal. In this hypothetical, however, it is not *seller's remorse* over a price too low to cover its cost, but rather *buyer's remorse* over a price Narragansett now thinks is too high. Not surprisingly, Providence Power Company holds fast and refuses Narragansett's overture to renegotiate the price term or otherwise afford Narragansett some relief from its obligations under the contract. Frustrated by its inability to get relief, Narragansett then petitions the Rhode Island Public Utilities Commission, seeking a "tariff amendment" to lower the price term of the contract. Narragansett presents its case before the Commission, and Providence Power Company is represented and presents a rebuttal. In essence, Narragansett argues that its customers are being burdened with excessively high prices under the contract; Providence Power, in turn, argues that "a deal's a deal" and asks the Rhode Island Commission to leave the contract in force.

The Rhode Island Commission, persuaded by Narragansett's case that the price is too high and the burden on its 70,000 ratepayers unjustified, approves the requested tariff amendment and requires that Providence Power Company accept a lower price for the duration of the contract. In particular, the Rhode

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87. *Attleboro*, 273 U.S. 83.

88. *Id.* at 89.

Island Commission finds that the previously agreed-upon price is “unjust and unreasonable” because of the burden it imposes on Narragansett’s ratepayers and further finds that the new, lower price is “just and reasonable.”

If this order of the Rhode Island Public Utilities Commission, in the year 1927, were challenged by Providence Power under the Commerce Clause, would it have been found to constitute “interstate commerce” beyond the jurisdiction of the Rhode Island authorities, or would the Court have viewed it as local commerce subject to regulation by the state of Rhode Island under its ordinary police powers?<sup>89</sup>

We think it clear the Supreme Court would have found such an order to be within the police powers of the Rhode Island Public Utilities Commission. The Court would have found that the challenged order addressed matters “essentially local” in nature and did not exceed Rhode Island’s powers under the Commerce Clause. There is, to be sure, an indirect effect on interstate commerce in our hypothetical (because of the connection at the Massachusetts border), but it is only minor and not enough to render the order invalid. In particular, the fact that Narragansett Electric has an interconnection with Attleboro Company at the state border means the price Narragansett pays Providence Power could have a ripple effect on the price of power the Attleboro Company procures. Put another way, the Court would have found this case to be governed by the reasoning of *Pennsylvania Gas*<sup>90</sup> and aligned cases, and not by the reasoning of *Kansas Gas*<sup>91</sup> or *Attleboro*.<sup>92</sup>

Thus, when Congress in Part II of the Federal Power Act gave the Federal Power Commission jurisdiction over “sales for resale in interstate commerce,”<sup>93</sup> it did not encompass sales-for-resale by a power producer to an interconnected utility on the utility’s distribution system for ultimate delivery to retail customers by the same utility. This activity—namely, the sale-for-resale by Providence Power Company in our hypothetical—was in the realm of “local” commerce, not “interstate” commerce, under the approach used by the Supreme Court in the early Commerce Clause cases culminating in *Attleboro*.

When Congress in the 1935 Act used the term “interstate commerce” in describing the Commission’s wholesale jurisdiction, it did not intend to sweep in this type of activity, even in the circumstance where the distribution utility is part of a bigger, interconnected, interstate grid. To confirm its intent in this regard, moreover, Congress added the words of section 201 declaring among other things that the Federal Commission “shall not have jurisdiction . . . 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.”<sup>94</sup>

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89. Apart from a Commerce Clause challenge, it is conceivable Providence Power in our hypothetical case also might raise a challenge under the Contracts Clause of the Constitution. U.S. CONST. art. I, § 10, cl. 2 (“No State shall . . . pass any . . . Law impairing the Obligation of Contract . . .”). We express no view on this question. Our focus here is exclusively on the Commerce Clause aspect of the hypothetical.

90. *Pennsylvania Natural Gas Co. v. New York Pub. Serv. Comm’n*, 252 U.S. 23 (1920).

91. *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924).

92. *Attleboro*, 273 U.S. 83.

93. 16 U.S.C. § 824(a) (2012).

94. *Id.* § 824(b)(1).

### C. An Evolving Understanding of an Interstate Grid

In *Jersey Central Power & Light Co. v. Federal Power Commission* (FPC), “[t]he first of the major [Commission] jurisdictional cases,”<sup>95</sup> the Commission asserted jurisdiction to review Jersey Central’s proposed sale of stock to another utility.<sup>96</sup> The Supreme Court in that case held that Commission jurisdiction attached to Jersey Central by way of twelve instances “when all the energy flowing into [a] bus bar at Mechanic Street came from Jersey Central and at the same moments energy flowed from Mechanic Street in New Jersey to the Atlantic substation in New York,” such that “Jersey Central production was instantaneously transmitted to New York.”<sup>97</sup> “This evidence” of coincidence between Jersey Central’s being the sole transmitter to the bus and the simultaneous interstate transmission from the bus, the Court determined, “furnishes substantial basis for the conclusion of the Commission that facilities of Jersey Central are utilized for the transmission of electric energy across state lines.”<sup>98</sup>

The rule of *Jersey Central* was extended in *FPC v. Florida Power & Light Co.*, wherein the court held that Florida Power & Light (FP & L) partook of interstate commerce, conferring Commission jurisdiction, by virtue of its participation in the “Interconnected Systems Group (ISG), a national interlocking of utilities that automatically provides power in case of emergencies.”<sup>99</sup> Specifically, the Court referred to a single instance “when a midwestern utility sustained a 580-megawatt generating loss [and] a regularly scheduled 8-megawatt FP & L contribution to the Florida Pool coincided with an [eight]-megawatt contribution from the pool to the ISG system.”<sup>100</sup> The Court described the circumstances of FP & L’s participation with, and interconnection to, this interstate systems group:

As a member of the Florida Pool, [Florida Power & Light] is interconnected with the Florida Power Corp. (Corp), the Tampa Electric Co., the Orlando Utilities Commission and the City of Jacksonville . . . . If power from FP & L flows in interstate commerce it is because Corp interconnects just short of Florida’s northern border with Georgia Power Co. and regularly exchanges power with it. Georgia’s lines transmit the power out of or into Florida. There are numerous instances in which transfers between Georgia and Corp are recorded as coinciding with transfers between Corp and FP & L.<sup>101</sup>

Attesting to the vast interconnectivity and unity of the grid, the Court quoted the hearing examiner’s explanation that “[i]f a housewife in Atlanta on the Georgia system turns on a light, every generator on Florida’s system almost instantly is caused to produce some quantity of additional electric energy which serves to maintain the balance on the interconnected system between generation and load.”<sup>102</sup> Importantly, the Court “[did] not find it necessary to approve or

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95. *Federal Power Comm’n v. Florida Power & Light Co.*, 404 U.S. 453, 459 (1972).

96. *Jersey Cent. Power & Light Co. v. Federal Power Comm’n*, 319 U.S. 61 (1943).

97. *Id.* at 66.

98. *Id.* at 67.

99. *Florida Power & Light Co.*, 404 U.S. at 457, 462-63.

100. *Id.* at 457.

101. *Id.* at 456-57.

102. *Id.* at 460 (internal quotations omitted).

disapprove the [Commission's] analysis based on unity of electromagnetic response," finding "[i]ts alternative assertion that energy commingles in a bus . . . sufficient to sustain jurisdiction."<sup>103</sup> The bus in question—the point at which FP & L connected to Corp, known as the “Turner bus”—was a “three-strand power line, in this case 225 feet in length.”<sup>104</sup>

Although there was no definitive moment, as in *Jersey Central*, at which FP & L was the sole transmitter to the bus in northern Florida and directly thence to Georgia, the Court found that “[t]he fact that the FPC was exceptionally convincing in [*Jersey Central*] does not raise the standard that it must meet in all future cases.”<sup>105</sup> Rather, the Court concluded that “[p]ower supplied to the bus from a variety of sources is said to merge at a point and to be commingled just as molecules of water from different sources (rains, streams, etc.) would be commingled in a reservoir,” and that “[o]n this basis the FPC need only show (1) FP & L power entering the bus and (2) power leaving the bus for out-of-state destinations at the same moment, in order to establish the fact that some FP & L power goes out of state.”<sup>106</sup>

The Court was content with the Commission's showing, finding that “the conclusion of the FPC that FP & L energy commingled with that of Corp and was transmitted in commerce rested on the testimony of expert witnesses” whose “major points . . . were probed, and in our opinion not undercut, by the hearing examiner's questions, FP & L's cross-examination, and rebuttal testimony of FP & L witnesses.”<sup>107</sup> The Court said that it “must be reluctant to reverse results supported by such a weight of considered and carefully articulated expert opinion,” particularly “when resolution of that question depends on ‘engineering and scientific’ considerations.”<sup>108</sup> Notably, the facts of *Florida Power & Light*, as with *Jersey Central*, are limited to the interconnection of transmission systems.<sup>109</sup>

The Court in *Florida Power & Light* perceived an “‘engineering and scientific test’ that controls this case,”<sup>110</sup> based on its earlier decision in “*Connecticut Light & Power Co. v. FPC* . . . [wherein the Court] noted that . . . the initial jurisdictional determination ‘was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.’”<sup>111</sup>

In *Connecticut Light & Power*, the Commission, as in *Florida Power & Light*, asserted jurisdiction over an electric utility's accounting practices based on its determination that the company's activities rendered it jurisdictional.<sup>112</sup> Of importance here, the facilities upon which the Federal Commission based its

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103. *Id.* at 462-63.

104. *Id.* at 462.

105. *Id.* at 467.

106. *Id.* at 461.

107. *Id.* at 463.

108. *Id.*

109. *Id.* at 468.

110. *Id.* at 467.

111. *Id.* at 455 (citing *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 529 (1945)).

112. *Connecticut Light & Power Co.*, 324 U.S. at 517.

jurisdiction consisted of a substation owned by Connecticut Light & Power that was “used in receipt of interstate power” from another utility.<sup>113</sup> At the substation, Connecticut Light & Power received power at high voltage from the Torrington Company and the similarly named Connecticut Power Company and then reduced the voltage for purposes of local distribution.<sup>114</sup> The Commission determined that these facilities “were ‘for the transmission of electric energy . . . as distinguished from local distribution thereof’” because “the energy received from the Connecticut Power Company and Torrington Company ‘regularly, frequently and for substantial periods of time included electric energy in substantial amounts transmitted from Massachusetts.’”<sup>115</sup>

The Supreme Court overruled both the original assertion of jurisdiction by the Federal Commission and the decision of United States Court of Appeals for the District of Columbia Circuit affirming the Federal Commission’s decision.<sup>116</sup> The Supreme Court grounded its reasoning in the “local distribution” carve-out from federal jurisdiction.<sup>117</sup> Even though a portion of the power delivered to Connecticut Light & Power originated from out-of-state sources, the Court held, the Federal Commission nevertheless had no claim of jurisdiction over “local distribution” of electricity or the “facilities used for local distribution.”<sup>118</sup> The Court observed that there is undoubtedly a unitary electromagnetic aspect of the grid—a test later acknowledged and avoided by the Court in *Florida Power & Light*—saying that the “[t]echnology of the business is such that if any part of a supply of electric energy comes from outside of a state it is, or may be present in every connected distribution facility.”<sup>119</sup> Given this unitary characteristic, “[e]very facility from generator to the appliance for consumption may thus be called one for transmitting such interstate power.”<sup>120</sup> Taking the electromagnetic unity theory to its logical end, the Court posited that “[b]y this test the cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state.”<sup>121</sup> The grid thus being an apparatus unitary to some extent from generator to consumer, the Court mused that “[s]uch a broad and undivided base for jurisdiction of the Power Commission would be quite unobjectionable and perhaps highly salutary if the United States were a unitary government and the only conflicting interests to be considered were those of the regulated company.”<sup>122</sup> Despite the unitary aspect of the grid, the Court observed that “state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single

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113. *Id.* at 519.

114. *Id.* at 520.

115. *Id.*

116. *Id.* at 536.

117. *Id.* at 531.

118. *Id.* at 523.

119. *Id.* at 529.

120. *Id.*

121. *Id.*

122. *Id.* at 530.

enterprise.”<sup>123</sup> Congress, the Court continued, “is acutely aware of the existence and vitality of these state governments.”<sup>124</sup>

The Court surmised several potential reasons why Congress might have chosen to reserve to the states jurisdiction over local distribution facilities: to respect states’ rights and institutions, to avoid clashes between state and federal officials, to avoid overtaxing the Commission, or because Congress might “think it wise to keep the hand of state regulatory bodies in this business, for the ‘insulated chambers of the states’ are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment.”<sup>125</sup> The Court concluded that regardless of motivation, Congress “meant what it said by the words ‘but shall not have jurisdiction, except as specifically provided in this Part or the Part next following over facilities used in local distribution.’”<sup>126</sup> To hold otherwise, such that:

even if local, facilities come under jurisdiction of the Federal Commission because power from out of state, however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control.<sup>127</sup>

In refusing the Commission jurisdiction over facilities used in intrastate commerce or local distribution, “Congress by these terms plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry.”<sup>128</sup> Therefore, although “[t]he expression ‘facilities used in local distribution’ is one of relative generality,”<sup>129</sup> the Court held that:

as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.<sup>130</sup>

Furthermore, the Court observed that “[i]t does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except extra-state energy and still be exempt under the Act. The test is whether they are local distribution facilities.”<sup>131</sup>

The Court in *Connecticut Light & Power* went so far as to place the burden on the Commission to determine that the facilities in question are not used in local distribution, concluding that although

[t]he Commission has found that each of the facilities in question is ‘used for the transmission of electric energy purchased as aforesaid from the Connecticut Power

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 531.

128. *Id.* at 530-31.

129. *Id.* at 531.

130. *Id.*

131. *Id.*



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Company, as distinguished from local distribution thereof . . . [i]t has not . . . made an explicit finding that these facilities are not used in local distribution.<sup>132</sup>

The Court thought such explicit findings necessary because “[n]othing except explicit findings excluding the grounds of state control gives assurance that the bounds of federal jurisdiction have been accurately understood and fully respected, and that state power has been considerably and deliberately overlapped.”<sup>133</sup>

Another important case in this series is *City of Colton*, which concerned a wholesale sale of power by Southern California Edison (a California utility) to the City of Colton (a city in southern California that served retail electric customers within the city limits).<sup>134</sup> In 1958, after the contract had been in effect for several years, the City petitioned the Federal Commission, asking the Commission to assume responsibility for setting the price for the subject sales.<sup>135</sup> Prior to that time, the California Public Utilities Commission (CPUC) had regulated the price without objection.<sup>136</sup> The CPUC and the Edison Company both resisted Colton’s proposal to submit the contract to federal jurisdiction, arguing it should remain under the CPUC’s jurisdiction, but the Federal Commission overruled their objections and began regulating the price.<sup>137</sup> On judicial review, the U.S. Court of Appeals for the Ninth Circuit reversed the Federal Commission’s assertion of jurisdiction, but the Supreme Court ultimately reversed the Ninth Circuit’s decision.<sup>138</sup> Although the Ninth Circuit conceded “that out-of-state energy from Hoover Dam was included in the energy delivered by Edison to Colton,”<sup>139</sup> it nonetheless set aside the FPC’s order, applying a Commerce Clause balancing test and finding a “complete lack of interest on the part of any other state.”<sup>140</sup> The Supreme Court reversed the Ninth Circuit’s ruling, reasoning that:

[our] decisions have squarely rejected the view . . . that the scope of FPC jurisdiction over interstate sales of . . . electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.<sup>141</sup>

*City of Colton* demonstrates that the FPA “incorporated a congressional decision against determining the FPC’s jurisdiction by such a case-by-case analysis, and in favor of employing a more mechanical test which would bring under federal regulation all sales of electric energy in interstate commerce at

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132. *Id.* at 532.

133. *Id.*

134. Federal Power Comm’n v. Southern Cal. Edison Co. (*City of Colton*), 376 U.S. 205, 206 (1964).

135. *Id.* at 206-07.

136. *Id.* at 206.

137. *Id.* at 208 & n.1, 216.

138. *Id.* at 207-08, 210.

139. *Id.* at 208.

140. Southern Cal. Edison Co. v. Federal Power Comm’n, 310 F.2d 784, 789 (9th Cir. 1962).

141. *City of Colton*, 376 U.S. at 215-16.

wholesale except those specifically exempted.”<sup>142</sup> The mechanical test is to determine whether some out-of-state energy is contained in the wholesale, thereby conferring an interstate character and federal jurisdiction.<sup>143</sup> In *City of Colton*, the Court held “that the engineering and scientific evidence received by the Commission on the subject from the Commission’s own experts afforded substantial evidence upon which to rest the findings which trace out-of-state energy to the City of Colton.”<sup>144</sup> This “bright line easily ascertained,” made luminescent by out-of-state energy, surely provides more clarity and utility than could a series of balance-of-interests decisions, but it is nonetheless not yet fully brought to light.<sup>145</sup>

Of importance to our analysis here, the Supreme Court in *City of Colton* expressly confirmed that the sale by Edison to the City did not occur on a “local distribution” line, but rather on a line the Federal Commission found, based on record evidence, to be a “transmission” line.<sup>146</sup> The Court explained that “[section] 201(b) expressly excludes FPC jurisdiction ‘over facilities used in local distribution,’” but that in this instance the Commission found, on the record, the facilities used to render the wholesale to Colton were *not* local distribution facilities.<sup>147</sup> “The findings,” the Court said, “have ample support in the evidence, and the conclusion may properly rest upon the specialized experience of the FPC in determining such questions.”<sup>148</sup>

Thus, *City of Colton* teaches that a wholesale sale of power to a distribution utility, where some portion of the power originates out-of-state, is within Commission jurisdiction when the sale occurs on the transmission grid and *not* on a distribution line. What *City of Colton* expressly did *not* reach, due to the peculiar facts of the case, was a sale-for-resale *on a distribution circuit* for delivery to consumers located on that circuit. “We hold,” said the Supreme Court in *City of Colton*, “that [section] 201(b) grants the FPC jurisdiction over all sales of electric energy at wholesale in interstate commerce *not expressly exempted by the Act itself*.”<sup>149</sup> Of importance to our argument here is that the statutory provision the *City of Colton* Court cited as an example of something “expressly exempted by the Act itself” from federal jurisdiction was the “local distribution” exemption in section 201(b), and the case the Court cited in the companion footnote was *Connecticut Light & Power*.<sup>150</sup>

#### D. Unbundling the Grid

In the bad old days, utilities were vertically integrated monopolies; electricity generation, transmission, and distribution for a particular geographic area were generally provided by and under the control of a single regulated utility. Sales of those services were “bundled,” meaning consumers paid a single price for

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142. *Id.* at 211.

143. *Id.*

144. *Id.* at 208 n.5.

145. *Id.* at 215.

146. *Id.* at 210 n.6.

147. *Id.*

148. *Id.*

149. *Id.* (emphasis added).

150. *Id.* at 205.

generation, transmission, and distribution. As the Supreme Court observed, with blithe understatement, “[c]ompetition among utilities was not prevalent.”<sup>151</sup>

In an effort to introduce greater competition among energy generators, Congress promulgated two major enactments affecting the unbundling of the grid. First, in 1978 Congress passed the Public Utility Regulatory Policies Act (PURPA),<sup>152</sup> which directed the FERC to craft rules requiring utilities to purchase power from certain Qualifying Facilities (QFs).<sup>153</sup> These QFs include cogeneration and certain small power production facilities, such as solar, wind, waste, or geothermal facilities.<sup>154</sup> In its ensuing regulations, the Commission granted the states limited jurisdiction over QF interconnections and rates but capped QFs’ rates at the incremental cost of alternate supply, known as the “avoided cost.”<sup>155</sup> The second major enactment was the Energy Policy Act of 1992 (EPAct), which authorized the FERC to order utilities to interconnect and provide transmission service for unaffiliated generators.<sup>156</sup>

Predicated on its findings “that electric utilities were discriminating in the ‘bulk power markets,’ in violation of [section] 205 of the FPA, by providing either inferior access to their transmission networks or no access at all to third-party wholesalers of power,”<sup>157</sup> the Commission in 1996 issued Order No. 888<sup>158</sup> so as “to remedy [these] unduly discriminatory practices.”<sup>159</sup> The Order No. 888 rulemaking stands on par with the statutory enactments referenced above in terms of its importance in unbundling the grid.

Recognizing that “utilities need to know which regulator has jurisdiction over which facilities and services,”<sup>160</sup> and in deference to the FPA’s reservation to the states of jurisdiction over local distribution facilities, the Commission in Order No. 888 “adopted a seven factor jurisdictional test to identify whether a facility is a local distribution facility subject to state jurisdiction or a facility engaged in interstate transmission subject to FERC jurisdiction.”<sup>161</sup>

[That] seven factor test involves evaluating on a case-by-case basis whether the activities of the facilities in question correspond with seven specific indicators of local distribution:

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151. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (alteration in original) (citing *New York v. FERC*, 535 U.S. 1, 5 (2002)).

152. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.).

153. Public Utility Regulatory Policies Act of 1978 § 210(a), 16 U.S.C. § 824a-3(a) (2012).

154. 16 U.S.C. § 796(17)(A).

155. 18 C.F.R. § 292.306 (2013).

156. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2915-16 (codified as amended at §§ 824j-824k).

157. *New York v. FERC*, 535 U.S. 1, 11 (2002) (citing Order No. 888, *Promoting Wholesale Competition by Public Utilities*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,036, 31,682-684, 61 Fed. Reg. 21,540 (1996)).

158. Order No. 888, *Promoting Wholesale Competition by Public Utilities*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,036, 61 Fed. Reg. 21,540 (1996) (to be codified at 18 C.F.R. pts. 35, 385) [hereinafter Order No. 888].

159. *New York*, 535 U.S. at 10 n.7.

160. Order No. 888, *supra* note 158, at 31,771.

161. *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 695 (D.C. Cir. 2000).

1. Local distribution facilities are normally in close proximity to retail customers.
2. Local distribution facilities are primarily radial in character.
3. Power flows into local distribution systems; it rarely, if ever, flows out.
4. When power enters a local distribution system, it is not reconsigned or transported on to some other market.
5. Power entering a local distribution system is consumed in a comparatively restricted geographical area.
6. Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.
7. Local distribution systems will be of reduced voltage.<sup>162</sup>

On judicial review of Order No. 888, the Supreme Court in *New York v. FERC* found that other than setting forth this seven-part test for ascertaining which facilities constitute “local distribution” facilities, the Commission “ha[d] not attempted to control local distribution facilities,”<sup>163</sup> but on the contrary had refrained from attempting to impose any federal regulation over such facilities—or, in the words of the Court, “merely set forth a seven-factor test for identifying these facilities, without purporting to regulate them.”<sup>164</sup>

#### *E. The Unbundled Generator’s Interconnection*

Generators are impacted in five primary areas by authorities having jurisdiction, including the generator’s interconnection to the grid, grid upgrades required to accommodate the generator, the sales transaction between the generator and its off-takers, the wheeling of the power from generator to off-taker, and any mandatory purchase obligation imposed on the interconnecting utility. Jurisdiction over the interconnection—the terms and standards by which the generator interconnects and supplies power to the grid—has been an especially opaque issue, as it often turns on whether a generator is engaged in inter- or intrastate sales of energy.

In the period directly after issuing Order No. 888, [the] FERC had monitored one element of the process, the interconnection agreements between operators of generators and transmission facilities, on a case-by-case basis. Finding that [case-by-case] approach “inadequate” and “inefficient,” [the] FERC issued Order No. 2003 and three successive rehearing orders. In the interests of achieving transparency and preventing transmission facility owners from favoring affiliated generators over independents in interconnection, the orders require all transmission facilities to adopt a standard agreement for interconnecting with generators larger than 20 megawatts.<sup>165</sup>

Compelled by its “responsibility to remedy the undue discrimination it had found,”<sup>166</sup> the Commission based Order No. 2003 on its grant of authority under the FPA: given that “[t]he Commission has identified interconnection as an

162. *Id.* at 695 n.6 (citing Order No. 888, *supra* note 158, at 31,981).

163. *New York*, 535 U.S. at 22-23.

164. *Id.* at 23 (citing Order No. 888, *supra* note 158, at 31,770-71).

165. *National Ass’n Regulatory Util. Commr’s v. FERC*, 475 F.3d 1277, 1279 (D.C. Cir. 2007) (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 F.E.R.C. ¶ 61,103 (2003) [hereinafter Order No. 2003]).

166. Order No. 2003, *supra* note 165, at P 19.

element of transmission service that is required to be provided under the [open access transmission tariff (OATT)],” the FERC determined that it “may order generic interconnection terms and procedures pursuant to its authority to remedy undue discrimination and preferences under sections 205 and 206 of the Federal Power Act.”<sup>167</sup> Demarcating its jurisdiction, Order No. 2003 reads:

This Final Rule applies to interconnections to the facilities of a public utility’s Transmission System that, at the time the interconnection is requested, may be used either to transmit electric energy in interstate commerce or to sell electric energy at wholesale in interstate commerce pursuant to a Commission-filed OATT. In other words, the standard interconnection procedures and contract terms adopted in this Final Rule apply when an Interconnection Customer that plans to engage in a sale for resale in interstate commerce or to transmit electric energy in interstate commerce requests interconnection to facilities . . . that are used to provide transmission service under an OATT that is on file at the Commission at the time the Interconnection Request is made.<sup>168</sup>

To reiterate, the Commission expressed the extent of its jurisdiction as over “an Interconnection Customer that plans to engage in a sale for resale in interstate commerce or to transmit electric energy in interstate commerce,” supposing the facilities to which the Interconnection Customer will connect “are used to provide transmission service under an OATT that is on file at the Commission at the time the Interconnection Request is made.”<sup>169</sup>

Almost two years after issuing Order No. 2003, the Commission promulgated Order No. 2006, which applies to generators not larger than twenty megawatts (MW).<sup>170</sup> Addressing the jurisdictional scope of Order No. 2006, the Commission assured, “[t]he Commission’s assertion of jurisdiction in this Final Rule is identical to the jurisdiction asserted in Order Nos. 2003 and 888 and upheld by the Supreme Court in *New York v. FERC*.”<sup>171</sup> The Commission later referenced the Order No. 2003 rulemaking, finding that, “[s]ince the jurisdiction asserted in this Final Rule is identical to that asserted in Order No. 2003, we adopt here our discussion from those orders rather than repeat the same information.”<sup>172</sup> As such, the reasoning developed in Order No. 2003 and its clarifying orders apply equally to Order No. 2006.

In Order No. 2003-A, the Commission acknowledged that it “did not state clearly enough its intention with regard to jurisdiction and the applicability of Order No. 2003”<sup>173</sup> and sought to clarify the issue. In the case of *Detroit Edison v. FERC*, decided some eight months prior to Order No. 2003-A’s issuance, the Commission was challenged by Detroit Edison for accepting an OATT from the Midwest Independent Transmission System Operator which allowed unbundled

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167. *Id.* at P 20.

168. *Id.* at P 804.

169. *Id.*

170. Order No. 2006, *Standardization of Small Generator Interconnection Agreements and Procedures*, F.E.R.C. STATS. & REGS. ¶ 31,406 at P 1, 70 Fed. Reg. 34,189 (2005) (to be codified at 18 C.F.R. pt. 35).

171. *Id.* at P 481.

172. *Id.* at P 482.

173. Order No. 2003-A, *Standardization of Generator Interconnection Agreements and Procedure*, F.E.R.C. STATS. & REGS. ¶ 30,965 at P 699, 69 Fed. Reg. 15,932 (2004) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order No. 2003-A].

retail customers to take distribution service under the FERC tariff.<sup>174</sup> The Court of Appeals found that “[s]ection 201(b)(1) of the FPA denies FERC jurisdiction over local distribution facilities and any unbundled retail service occurring over those facilities.”<sup>175</sup> “Moreover,” the court chided, “the orders under review totally ignore Order 888’s carefully formulated seven-factor test for distinguishing between local distribution facilities and ‘FERC-jurisdictional facilities.’”<sup>176</sup>

In arguments during the Order No. 2003 rehearing, one petitioner read *Detroit Edison* as holding that “there are no FERC jurisdictional distribution facilities.”<sup>177</sup> The Commission in Order No. 2003-A disagreed, citing to *Detroit Edison*’s reasoning that “when a local distribution facility is used in a wholesale transaction, [the] FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA section 201(b).”<sup>178</sup> The Commission thus determined that “Order No. 2003 applies when the [distribution] facilities are subject to a Commission-approved OATT and the purpose of the interconnection is to make wholesale sales.”<sup>179</sup>

Also in Order No. 2003-A, the Commission attempted to clarify that “[f]acilities subject to the OATT are: transmission facilities used to transmit electric energy in interstate commerce either at wholesale or for unbundled retail sales; and ‘distribution’ facilities that are used for wholesale sales in interstate commerce.”<sup>180</sup> Furthermore, “if a facility is not already subject to Commission jurisdiction at the time interconnection is requested, the Final Rule will not apply. Thus, only facilities that already are subject to the Transmission Provider’s OATT are covered by this rule.”<sup>181</sup> Aside from this guidance, however, the Commission admitted that “there is no simple method of deciding what facilities are under an OATT” because, “[e]ven if the Interconnection Customer consults the Transmission Provider’s rate filings, it might be unable to determine whether a facility to which it seeks interconnection is subject to the OATT.”<sup>182</sup> The Commission suggested that

the only reasonable method of identifying which facilities are subject to a Transmission Provider’s OATT is to rely on the Transmission Provider, [and] [i]f the Interconnection Customer disagrees with the Transmission Provider’s conclusion that the facility in question lies within or outside the Transmission Provider’s OATT, it should bring the issue to the attention of the Commission.<sup>183</sup>

In the face of such confusion as to which facilities might be subject to an OATT, an incautious Interconnection Customer may be tempted to apply “Order 888’s carefully formulated seven-factor test for distinguishing between local

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174. *Detroit Edison Co. v. FERC*, 334 F.3d 48, 52 (D.C. Cir. 2003).

175. *Id.* at 53 (citing 16 U.S.C. § 824(b)(1) (2000)).

176. *Id.* at 54.

177. Order No. 2003-A, *supra* note 173, at P 702.

178. *Id.* at P 706 (citing *Detroit Edison*, 334 F.3d at 51).

179. *Id.*

180. *Id.* at P 710.

181. *Id.* at P 712.

182. *Id.*

183. *Id.*

distribution facilities and ‘FERC-jurisdictional facilities.’”<sup>184</sup> Indeed, in the Order No. 2003 rulemaking, one petitioner “ask[ed] how one determines whether a particular facility is under the OATT,” and “argue[d] that the Commission should use the seven-factor test set forth in Order No. 888 to determine whether facilities used to deliver electric energy directly to an end user are under its jurisdiction or are ‘local distribution’ facilities under state jurisdiction.”<sup>185</sup> To the contrary, the Commission found the seven-factor test wholly inapplicable: “since we are asserting jurisdiction only over facilities that are already subject to an OATT, the availability of the facilities under a Commission-approved OATT, and not their nominal classification, determines eligibility for Commission-jurisdictional interconnection.”<sup>186</sup>

In sum, the contemporary legal characterization of interconnections, as understood by the Commission and the D.C. Circuit, is that they are relationships, or transactions between parties, akin to sales. An Interconnection Customer will subject its interconnection to FERC jurisdiction in the circumstances described: when the planned interconnection is to a facility already subject to an OATT and made for the purpose of either transmitting in interstate commerce or selling at wholesale in interstate commerce. The sole exception allowed is for retail sales, including PURPA QFs selling their entire output to the interconnected utility.

### III. WHOLESALE ENERGY SALES’ JURISDICTIONAL MISCHARACTERIZATION

The contemporary characterization by the FERC has rendered virtually all sales and interconnections of generators exporting net production to the grid as beholden to federal regulation. The occurrence of a state-jurisdictional sale by an unaffiliated generator is currently allowed in few instances, including third-party generators satisfying on-site demand with no net export, and QFs selling their entire output to the interconnecting utility. Indeed, the Commission has asserted that “the states have no authority outside of PURPA to set the price at which wholesale energy must be purchased.”<sup>187</sup>

Contrary to the FERC’s view, it is the authors’ opinion that the states under the Federal Power Act actually retain full jurisdictional authority over wholesale sales of electric energy in *intrastate* commerce, to the extent such sales and deliveries occur on distribution circuits for local consumption. The failure to acknowledge this potential is prominently manifest in two parallel areas of the law: (1) net metering, and (2) feed-in tariffs. The following review will reveal the potential for such intrastate wholesale sales and, consequently, that such intrastate wholesale sales should fall to state jurisdiction.

#### A. Wholesale Sales and Net Metering

Net billing practices, commonly known as “net metering,” allow generators with on-site consumption to interconnect with a load serving utility, and during

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184. Detroit Edison Co. v. FERC, 334 F.3d 48, 54 (D.C. Cir. 2003).

185. Order No. 2003-A, *supra* note 173, at P 708.

186. *Id.* at P 711.

187. *California Pub. Utils. Comm’n*, 132 F.E.R.C. ¶ 61,047 at P 18 (2010) [hereinafter *2010 Declaratory Order*].

periods of excess on-site energy production export energy to the grid, while during periods of excess on-site demand draw energy from the grid. In the recent decision of *Sun Edison LLC*, the Commission considered whether jurisdictional sales occurred on Sun Edison's retail generation facilities—net-metered roof-top solar arrays, which sold one hundred percent of their electric output to the on-site end-use customer, though some of the energy was exported by the customer to the utility under net metering arrangements.<sup>188</sup> The Commission explained

net metering is a method of measuring sales of electric energy. Where there is no net sale over the billing period, the Commission has not viewed its jurisdiction as being implicated . . . Only if the end-use customer participating in the net metering program produces more energy than it needs over the applicable billing period, and thus is considered to have made a net sale of energy to a utility over the applicable billing period, has the Commission asserted jurisdiction. If the entity making a net sale is a QF that has been exempted from section 205 of the FPA . . . no filing under the FPA is necessary to permit the net sale; however, if the entity is either not a QF or is a QF that is not exempted from section 205 of the FPA . . . a filing under the FPA is necessary to permit the sale.<sup>189</sup>

With respect to Sun Edison's facilities, the Commission concluded that [w]here the net metering participant (i.e., the end-use customer that is the purchaser of the solar-generated electric energy from SunEdison) does not, in turn make a net sale to a utility, the sale of electric energy by SunEdison to the end-use customer is not a sale for resale, and our jurisdiction under the FPA is not implicated.<sup>190</sup>

The Commission's citation of its statutory authority reads:

The Commission has jurisdiction over "the sale of electric energy at wholesale." 16 U.S.C. § 824(b)(1) (2006). The term "sale of electric energy at wholesale," when used in Part II of the FPA, means "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d) (2006).<sup>191</sup>

Notably omitted in the above citation is the modifying clause "in interstate commerce."<sup>192</sup> Clearly, the FERC presumes that all wholesale sales on the interconnected grid in North America (i.e., all wholesale sales except those on the isolated Texas Interconnect or in the non-contiguous states of Alaska and Hawaii) occur in interstate commerce. Accordingly, even a residential photovoltaic system, servicing a retail customer receiving and exporting power solely from and to local distribution facilities, is considered to engage in interstate commerce when it conducts a net sale.

### *B. Wholesale Sales and Feed-In Tariffs*

The same tendency to presume the interstate aspect of wholesale sales is present in the Commission's decisions with respect to feed-in tariffs.

In May 2010, the CPUC submitted to the FERC a petition for declaratory order, asking the FERC to confirm that a "feed-in tariff" promulgated by the CPUC under a state statute (Assembly Bill 1613 (AB 1613)) was lawful and not

188. *Sun Edison LLC*, 129 F.E.R.C. ¶ 61,146 at PP 9-11 (2009).

189. *Id.* at P 18.

190. *Id.* at P 19 (citing 16 U.S.C. § 824(b)(1) (2006)).

191. *Id.* at P 19 n.12.

192. 16 U.S.C. § 824(b)(1).



preempted by federal law.<sup>193</sup> Under the AB 1613 program, as the petition explained, “California utilities [were required] to offer to purchase electricity at a CPUC-set price from CHP generators of 20 MW or less that meet environmental compliance requirements.”<sup>194</sup> The AB 1613 “legislation requires California electrical corporations to file standard ten-year purchase contracts (AB 1613 feed-in tariffs) with the CPUC that require them to offer to purchase at the CPUC-set price for electricity generated by CHP generators.”<sup>195</sup>

A group of California utilities (referred to in the FERC’s declaratory order as the “Joint Utilities”) submitted a competing petition for declaratory order, asserting “that the Commission’s PURPA precedent supports a finding that the states have no authority outside of PURPA to set the price at which wholesale energy must be purchased.”<sup>196</sup> The Commission, in its Order on Petitions for Declaratory Order, (hereinafter 2010 Declaratory Order), found the Joint Utilities persuasive on this point, concluding

[w]hile Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission’s actions or inactions can give States this authority . . . . Rather, we agree with the Joint Utilities that the CPUC’s AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC’s AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA.<sup>197</sup>

The Commission found, however, that AB 1613 would not be unlawful to the extent that the state’s program was administered under the federal PURPA statute, as distinct from the state’s own organic police powers:

[I]nsofar as the CHP generators that can take part in the AB 1613 program obtain QF status pursuant to the Commission’s regulations, the CPUC’s [feed-in tariff] program is *not* preempted by the FPA, PURPA or Commission regulations . . . as long as: (1) the CHP generators from which the CPUC is requiring the Joint Utilities to purchase energy and capacity are QFs pursuant to PURPA; and (2) the rate established by the CPUC does not exceed the avoided cost of the purchasing utility.<sup>198</sup>

In the same proceeding, the Sacramento Municipal Utility District (SMUD) made an alternative argument with respect to the Commission’s jurisdiction over distribution-level feed-in tariffs:

SMUD argues that distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction because FPA section 201(b)(1) explicitly excludes from Commission jurisdiction facilities used in local distribution and any unbundled retail service occurring over those facilities. SMUD also argues that sales of power under distribution-level feed-in tariffs cannot be interstate commerce because the power sold does not enter the bulk transmission system or interstate commerce, but remains on the state-regulated distribution system.

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193. The CPUC was represented in this instance by Mr. Lindh, a co-author of this article. As explained at the outset, however, this article represents Mr. Lindh’s own views, and not the views of the CPUC.

194. *2010 Declaratory Order*, *supra* note 187, at P 5.

195. *Id.* at P 3.

196. *Id.* at P 18 (internal citations omitted).

197. *Id.* at P 64.

198. *Id.* at P 67.

SMUD . . . contends that a broad Commission ruling would call into question the scope of the Commission's distribution exemption under FPA section 201(b)(1).<sup>199</sup>

The Commission responded in somewhat conclusory fashion, as follows:

We deny SMUD's request that the Commission clarify that distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction. The FPA grants the Commission exclusive jurisdiction to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities. The Commission's FPA authority to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities is not dependent on the location of generation or transmission facilities, but rather on the definition of, as particularly relevant here, wholesale sales contained in the FPA.<sup>200</sup>

In support of its contention that sales at the distribution level are sales in interstate commerce, the Commission cited firstly to 16 U.S.C. § 824(d), which defines a wholesale sale absent the interstate modifier of § 824(b)(1), and then to *Transmission Access Policy Study Group v. FERC (TAPS)* and *Detroit Edison Co. v. FERC*.<sup>201</sup> Finally, the Commission invited readers to

[s]ee also *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972) (finding a utility with no direct connections to any out-of-state utility and that sold no power to out-of-state utilities to be subject to the jurisdiction of the Commission due to the fact that power supplied to a bus from a variety of sources was merged and commingled).<sup>202</sup>

The Commission did not respond directly to SMUD's contention that electricity at the distribution level does not, in fact, physically commingle upstream with electricity on the interstate grid.

The argument to be drawn from the Commission's reliance on *Florida Power & Light* is that distribution-level wholesales implicate interstate commerce in the manner described in that case, by virtue of distribution-level energy "commingling" at some point with energy in interstate commerce, no matter how "trifling."<sup>203</sup> It is the authors' opinion that this expansive interpretation violates the FPA's limitation of federal jurisdiction to "the sale of electric energy at wholesale *in interstate commerce*,"<sup>204</sup> and also that it fails to honor the statutory carve-out for transactions occurring on "local distribution facilities."

### C. Intrastate Wholesale Sales on Distribution Circuits

In "light of our history and the structure of our government,"<sup>205</sup> and upon a careful analysis of the FPA and its case law, we submit that certain wholesale sales on distribution circuits are not in "interstate commerce" as that term is used

199. *Id.* at P 56.

200. *Id.* at P 72.

201. *Id.* at P 72 n.100 (citing 16 U.S.C. § 824(d) (2006); *Transmission Access Policy Study Grp. v. FERC (TAPS)*, 225 F.3d 667, 695-96 (D.C. Cir. 2000), *aff'd sub nom.* *New York v. FERC*, 535 U.S. 1 (2002); *Detroit Edison Co. v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003)).

202. *Id.*

203. *Connecticut Light & Power v. Federal Power Comm'n*, 324 U.S. 515, 531 (1945).

204. 16 U.S.C. § 824(b)(1) (2012) (emphasis added).

205. *Connecticut Light & Power*, 324 U.S. at 531.

in the Federal Power Act,<sup>206</sup> and are therefore state jurisdictional. An intrastate wholesale, under prevailing rules, is one that occurs on local distribution facilities to satisfy a buyer's loads colocated on the local distribution facilities. We readily concede that generators interconnecting and selling directly to transmission facilities immediately join in the stream of interstate commerce. Distribution-level wholesales, in contrast, isolated both physically and transactionally from interstate transmission and sale, exemplify Congress's intent in exempting to the states jurisdiction over energy sales not occurring in interstate commerce. The Commission's interpretation of its jurisdiction disregards the potential for such intrastate wholesales. It also impermissibly writes out of the statute the "local distribution" exemption from federal jurisdiction.

### 1. Plain Terms of the FPA

Congress granted the Commission limited wholesale jurisdiction, encompassing only "the sale of electric energy at wholesale *in interstate commerce*,"<sup>207</sup> The FPA's drafters intended to extend the Act "only to those matters which are not subject to regulation by the States."<sup>208</sup> There is an affirmative constraint on the Commission's reach: "[t]he Commission . . . shall not have jurisdiction . . . 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."<sup>209</sup> It follows that intrastate transactions taking place solely upon local distribution facilities are beyond the Commission's reach.

"Can it be said in that state of the statute that whether facilities are local is not relevant to this case?"<sup>210</sup>

### 2. Supreme Court Precedent

In the 2010 Declaratory Order, in support of its assertion that there can be no intrastate wholesale sale outside of PURPA, the Commission cited two Supreme Court cases—*New York v. FERC* and *Florida Power & Light*—both of which are distinguishable and ultimately provide little support for its position.<sup>211</sup>

*New York v. FERC* was the final disposition of the rulemaking Order No. 888. Importantly, the questions before the Court were limited to the transmission component of retail service:

First, if a public utility "unbundles"—i.e., separates—the cost of transmission from the cost of electrical energy when billing its retail customers, may [the] FERC require the utility to transmit competitors' electricity over its lines on the same terms that the utility applies to its own energy transmissions? Second, must [the]

206. 16 U.S.C. §§ 791-828(c).

207. *Id.* § 824(b)(1) (emphasis added).

208. *Id.* § 824(a).

209. *Id.* § 824(b)(1).

210. *Connecticut Light & Power*, 324 U.S. at 523.

211. *2010 Declaratory Order*, *supra* note 187, at P 72 & n.100.

FERC impose that requirement on utilities that continue to offer only “bundled” retail sales?<sup>212</sup>

The case’s focus was interstate transmission in unbundled retail sales.<sup>213</sup> Wholesales are specifically disclaimed: “At the outset, however, we note that no petitioner questions the validity of the order insofar as it applies to wholesale transactions.”<sup>214</sup> With respect to local distribution facilities, the Court observed and condoned the Commission’s renunciation of jurisdiction over such facilities:

Order No. 888 does discuss local distribution facilities, and New York argues that, as a result, [the] FERC has improperly invaded the States’ authority “over facilities used in local distribution,” 16 U.S.C. § 824(b). However, [the] FERC has not attempted to control local distribution facilities through Order No. 888. To the contrary, FERC has made clear that it does not have jurisdiction over such facilities, Order No. 888, at 31,969, and has merely set forth a seven-factor test for identifying these facilities, without purporting to regulate them, *id.* at 31,770-31,771.<sup>215</sup>

Though in the 2010 Declaratory Order the Commission cited *New York v. FERC* as it relates to *TAPS*, the FERC may look for support of its position in the Court’s declaration, “we agree with [the] FERC that transmissions on the interconnected national grids constitute transmissions in interstate commerce.”<sup>216</sup> The *New York v. FERC* Court cited *Florida Power & Light*, as well as amici who explained that “[e]nergy flowing onto a power network or grid energizes the entire grid, and consumers then draw undifferentiated energy from that grid.”<sup>217</sup> Of course, this is no revelation, the *Connecticut Light & Power* Court having observed in 1945 that “if any part of a supply of electric energy comes from outside of a state it is, or may be present in every connected distribution facility.”<sup>218</sup> That fact did not dissuade the *Connecticut Light & Power* Court from giving firm effect to the jurisdictional boundaries of the FPA, in particular the statutory carve-out for “local distribution” facilities,<sup>219</sup> nor should we lose sight of the jurisdictional lines which subdivide the grid.

The *New York v. FERC* Court ultimately determined that the FERC was correct in asserting jurisdiction over the transmission portion of unbundled retail sales and refusing jurisdiction over the transmission portion of bundled retail sales.<sup>220</sup> The Court reasoned that while “[i]t is true that FERC’s jurisdiction over the sale of power has been specifically confined to the wholesale market . . . the FERC’s jurisdiction over electricity *transmissions* contains no such limitation.”<sup>221</sup> Accordingly, the FERC was justified in exerting jurisdiction over the transmission portion of an unbundled retail sale.<sup>222</sup>

212. *New York v. FERC*, 535 U.S. 1, 4-5 (2002).

213. *New York*, 535 U.S. 1.

214. *Id.* at 16.

215. *Id.* at 22-23.

216. *Id.* at 16.

217. *Id.* at 16 n.5.

218. *Connecticut Light & Power v. Federal Power Comm’n*, 324 U.S. 515, 529 (1945).

219. *Id.* at 531.

220. *New York*, 535 U.S. at 26-28.

221. *Id.* at 20.

222. *Id.* at 26.

The New York Public Service Commission and its aligned parties sought to discredit this analysis by asserting that the FPA's drafters "intended to do no more than close the 'Attleboro Gap.'"<sup>223</sup> As discussed above, the Court found it "perfectly clear that the original FPA did a good deal more than close the gap in state power identified in *Attleboro*."<sup>224</sup> Nonetheless, though the FPA conferred FERC jurisdiction over previously state-jurisdictional transactions, it certainly did not go so far as to sweep in non-interstate wholesale sales on specifically exempted facilities.<sup>225</sup> Accordingly, *New York v. FERC* affords the Commission little support in asserting that all wholesales are in interstate commerce.

*Florida Power & Light*, strongly relied upon in the 2010 Declaratory Order,<sup>226</sup> likewise by its terms was limited to the transmission context.<sup>227</sup> The parties over whom jurisdiction was exercised were utilities exchanging transmission-level energy, and the case was decided under transmission-based reasoning.<sup>228</sup> Nowhere implicated were local distribution facilities, nor wholesale sales thereon. In *Florida Power & Light*, energy from Florida Power & Light commingled in a 225-foot bus with energy of the Florida Power Corp., which was in turn transmitted in interstate commerce.<sup>229</sup> The bus interconnected two transmission systems.<sup>230</sup>

As has been discussed, electromagnetic unity of the nation's grid does not override the nation's jurisdictional subdivision between federal and state oversight. To hold

that, even if local, facilities come under jurisdiction of the Federal Commission because power from out of state, however trifling, comes into the system, *would nullify the exemption* and as a practical matter would transfer to federal jurisdiction the regulation of many local companies that [the Court] think[s] Congress intended to leave in state control.<sup>231</sup>

In illustration of the challenges presented by electricity's indeterminate state: the *Florida Power & Light* Court reasoned that "[p]ower supplied to the bus from a variety of sources is said to merge at a point and to be commingled just as molecules of water from different sources (rains, streams, etc.) would be commingled in a reservoir,"<sup>232</sup> in *New York v. FERC*, the Court noted that "[a]mici dispute the States' contentions that electricity functions 'the way water flows through a pipe or blood cells flow through a vein' and 'can be controlled, directed and traced' as these substances can be, calling such metaphors 'inaccurate and highly misleading.'"<sup>233</sup> The opposing aqueous similes employed in these two cases demonstrate the complexity of the subject at hand. Energy,

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223. *Id.* at 20.

224. *Id.* at 21.

225. *Id.* at 22.

226. *2010 Declaratory Order*, *supra* note 187, at P 72 & n.100.

227. *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453 (1972).

228. *Id.*

229. *Id.* at 462.

230. *Id.*

231. *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 531 (1945) (emphasis added).

232. *Florida Power & Light*, 404 U.S. at 461.

233. *New York v. FERC*, 535 U.S. 1, 32 n.5.

bisected by nature's inevitable dualism, exhibits both unitary, electromagnetic qualities, as well as particulate qualities and a measurable direction and quantum of flow. Given these as yet not fully understood complexities of electricity's character, and given the much changed and still evolving grid, the instant when energy crosses from federal to state jurisdiction is understandably elusive. Nonetheless, there irrefutably remains such a line, which, in the case of wholesales, lies between interstate and intrastate transactions.

In *New York v. FERC*, the only attention given to local distribution facilities was in affirmation of the Commission's seven-part test delineated in Order No. 888.<sup>234</sup> *Florida Power & Light* does not address local distribution facilities, nor wholesale sales that occur outside of interstate commerce.<sup>235</sup> The Supreme Court most prominently addressed the local distribution facilities exemption in *Connecticut Light & Power*, wherein the Court was firm in rejecting an unlawful extension of federal jurisdiction given the unitary aspect of the grid.<sup>236</sup> It cautioned that the Commission be mindful of the jurisdictional boundaries that intercut and subdivide the grid. In exempting local distribution facilities, Congress "plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry."<sup>237</sup> Nonetheless, *Connecticut Light & Power* was also decided in the context of facilities used to receive power from interstate transmission and reduce the voltage for subsequent distribution.<sup>238</sup> The case did not reach the issue of intrastate wholesales.

As discussed, the *City of Colton* case addressed wholesales, finding that a wholesale to the city of Colton containing out-of-state energy, and delivered not on a distribution circuit but on a transmission line, qualified as an interstate transaction.<sup>239</sup> The Court also corrected the Ninth Circuit's misapplication of a balancing test, instructing instead that "Congress meant to draw a bright line, easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis."<sup>240</sup> By virtue of the Act's specific restriction of federal jurisdiction to those wholesales occurring "in interstate commerce,"<sup>241</sup> that "bright line, easily ascertained," in the context of wholesales, lies between interstate and intrastate transactions.<sup>242</sup>

Applying the mechanical test espoused in *City of Colton*,<sup>243</sup> an interstate wholesale must contain some out-of-state energy.

In short, the Supreme Court to date has not found opportunity to rule on whether wholesales relegated entirely to local distribution facilities occur in interstate commerce. Nonetheless, much guidance can be gleaned from the

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234. *Id.* at 22-23.

235. *Florida Power & Light*, 404 U.S. 453.

236. *Connecticut Light & Power*, 324 U.S. at 530.

237. *Id.* at 531.

238. *Id.* at 520, 524.

239. *Federal Power Comm'n v. Southern Cal. Edison Co. (City of Colton)*, 376 U.S. 205, 206, 208 (1964).

240. *Id.* at 215-16.

241. 16 U.S.C. § 824(b)(1) (2012).

242. *City of Colton*, 376 U.S. at 215-16.

243. *Id.* at 211.

Court's decisions. In the authors' view, this guidance is not supportive of the Commission's assertion in its 2010 Declaratory Order.

### 3. The Perception of the Courts of Appeals

In addition to the aforementioned Supreme Court cases, the Commission, in the 2010 Declaratory Order, cited two D.C. Circuit cases in support of its distribution-level wholesale theory: *TAPS* and *Detroit Edison*.<sup>244</sup>

*TAPS*, which the Supreme Court affirmed in certain respects in *New York v. FERC*,<sup>245</sup> was a complex case, decided June 30, 2000, wherein “[a]ll key players in the electricity market . . . challenged various provisions of Order 888 and 889.”<sup>246</sup> Although *New York v. FERC* specifically disclaimed any discussion of wholesale jurisdiction,<sup>247</sup> the court below—the D.C. Circuit in *TAPS*—addressed wholesales directly.<sup>248</sup> The *TAPS* court was progenitor of the assumption that all wholesales at any point on the interconnected grid, without exception, are FERC jurisdictional.<sup>249</sup>

The *TAPS* court began its discussion of wholesales by observing that, “[h]istorically, wholesale sales have not for the most part involved local distribution facilities.”<sup>250</sup> Foreseeing the potential for a shift in energy markets as a result of the Order, “FERC claim[ed] that increased unbundling gives resellers the opportunity to reconfigure the wholesale sales so that they might now occur on those facilities which traditionally have been treated as local distribution facilities.”<sup>251</sup>

The *TAPS* court then discussed the dual jurisdictional grants of FPA section 201—that the FERC is charged with regulating both wholesales in interstate commerce and transmissions in interstate commerce while being denied jurisdiction over local distribution facilities except as otherwise provided in the FPA.<sup>252</sup> Certain local distribution facilities, called “dual-use facilities,” are capable of providing both state-jurisdictional retail delivery as well as wholesale service in interstate commerce.<sup>253</sup> Such facilities can invoke either state or federal oversight, depending on the context of the pertinent transaction.<sup>254</sup> With respect to wholesales, the *TAPS* court found that the “FERC’s assertion of jurisdiction over all wholesale transmissions, regardless of the nature of the facility, is clearly within the scope of its statutory authority.”<sup>255</sup>

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244. 2010 Declaratory Order, *supra* note 187, at P 72 & n.100.

245. *New York v. FERC*, 535 U.S. 1 (2002).

246. *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000).

247. *New York*, 535 U.S. at 16.

248. *Transmission Access Policy*, 225 F.3d at 695-96.

249. *Id.* at 691.

250. *Id.* at 695.

251. *Id.*

252. *Id.* at 696.

253. Order No. 2003, *supra* note 165, at P 804.

254. *Id.*

255. *Transmission Access Policy*, 225 F.3d at 696.

In support of this conclusion, the *TAPS* court stated that “FPA [section] 201(a) makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used.”<sup>256</sup> FPA section 201(a) reads in full:

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and 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,<sup>257</sup> to extend only to those matters which are not subject to regulation by the States.

The *TAPS* court delved no deeper into its interpretive assertion, and the interstate character of a wholesale was nowhere assessed. The *TAPS* court continued:

Moreover, various cases support the proposition that [the] FERC regulates all aspects of wholesale transactions. *See, e.g., Duke Power Co. v. FPC*, 401 F.2d 930, 935–36 (D.C.Cir.1968) (noting that the FPC regulates public utility facilities used in wholesale transmissions or sales in interstate commerce); *Arkansas Power & Light Co. v. FPC*, 368 F.2d 376, 383 (8<sup>th</sup> Cir.1966) (stating that the functional use of the transmission lines—wholesale versus retail—controls); *Wisconsin-Michigan Power Co. v. FPC*, 197 F.2d 472, 477 (7<sup>th</sup> Cir.1952) (finding that transmission facilities used at wholesale are not “local distribution facilities”).<sup>258</sup>

The *TAPS* court referred interchangeably to “wholesale sales,” “wholesale transmissions,” and “wholesale transactions.”<sup>259</sup> It would seem that the court did not contemplate the potential for an intrastate sale and thus provided no analysis of a wholesale’s interstate character. A review of the cited cases demonstrates that none justify the failure to consider wholesales’ interstate character.

*Duke Power Co. v. FPC* “present[ed] the question whether the Federal Power Act requires an interstate electric utility to obtain approval by the Federal Power Commission of its acquisition of facilities utilized in the local distribution of electric energy.”<sup>260</sup> Echoing *New York v. FERC*’s determination that the FPA extended beyond the limits of the *Attleboro* Gap, the court held, “[w]hile by no means confined in its coverage to areas legally immune from state control, the Act’s major emphasis is upon federal regulation of those aspects of the industry which – for reasons either legal or practical – are beyond the pale of effective state supervision.”<sup>261</sup> Even so, the court agreed that the Act is one of limited scope, for “Congress did not, . . . in formulating the proscriptive provisions of the Power Act, undertake to exhaust its constitutional prerogatives.”<sup>262</sup>

Beyond this brief discussion, and the court’s acknowledgement that

Congress mandated in Section 201(b) that the provisions of the Act directed toward public electric utilities “shall apply to the transmission of electric energy in

256. *Id.*

257. 16 U.S.C. § 824(a) (2012).

258. *Transmission Access Policy*, 225 F.3d at 696.

259. *Id.*

260. *Duke Power Co. v. Federal Power Comm’n*, 401 F.2d 930, 931 (D.C. Cir. 1968).

261. *Id.* at 935.

262. *Id.*



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interstate commerce and to the sale of electric energy at wholesale in interstate commerce but shall not apply to any other sale of electric energy,”<sup>263</sup>

the court did not address the interstate character of wholesales.

In *Arkansas Power & Light Co. v. FPC*, the second of the cases cited in *TAPS*, Arkansas challenged “orders of the Federal Power Commission determining that Arkansas’ sales of electric energy for resale to its municipal and cooperative customers are sales in interstate commerce.”<sup>264</sup> Addressing the facts of the case, the court in *Arkansas* explained:

The sales to the 23 customers involved in these proceedings are made from short lines extending from substations where the voltage is stepped down in most instances from 115 kW to 13.8 kV for delivery to each customer . . . The sales to the 23 customers are made from energy available in Middle South’s control area which extends over three states and from energy received from other systems outside the control area.<sup>265</sup>

The court in *Arkansas* hearkened to the lessons of *City of Colton*, “that ‘federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental test.’”<sup>266</sup>

“In the *Colton* case, . . . [s]ince no integrated operation was present . . . , the Commission by necessity had to resort to scientific studies to show that out-of-state energy reached the sales to the City of Colton.”<sup>267</sup> Nonetheless, the *Arkansas* court agreed with the Commission that “the teachings of the Supreme Court clearly establish that where, as here, there is an integrated, interstate pool operation, jurisdiction may be proved without resort to tracing studies.”<sup>268</sup> The court looked for guidance to *Pennsylvania Water & Power Co. v. FPC*, in which Pennsylvania Water & Power “contended that some of its sales at wholesale were not in interstate commerce and therefore not subject to federal regulation.”<sup>269</sup>

Contrary to the company’s contention the Commission found:

The central fact disclosed by the record about Penn Water’s sales in Pennsylvania is that they are not sales of the output of Penn Water’s own plant, but sales of output of the integrated and coordinated interstate electric system of which Penn Water’s facilities are an integral part.<sup>270</sup>

Similarly, the *Arkansas* court found the pooled nature of Arkansas’ system to confer federal jurisdiction over wholesales to its municipal and cooperative customers.<sup>271</sup>

Finally, the *TAPS* court looked to *Wisconsin-Michigan Power Co. v. FPC*, for support of its assertion that all wholesales are FERC jurisdictional.<sup>272</sup> In

263. *Id.* at 936.

264. *Arkansas Power & Light Co. v. Federal Power Comm’n*, 368 F.2d 376, 377 (8th Cir. 1966).

265. *Id.* at 379.

266. *Id.* at 379 (citing *Federal Power Comm’n v. Southern Cal. Edison Co. (City of Colton)*, 376 U.S. 205 (1964)).

267. *Id.* at 379-80.

268. *Id.* at 379.

269. *Id.* at 380 (citing *Pennsylvania Water & Power Co. v. Federal Power Comm’n*, 343 U.S. 414 (1952)).

270. *Id.* at 381 (citing *Pennsylvania Water & Power Co.*, 343 U.S. 414).

271. *Id.* at 384.

*Wisconsin-Michigan*, at issue was a “Commission order direct[ing] the power company to cease and desist from charging certain municipalities and other wholesale purchasers of electric energy for resale rates other than those on file with the Commission.”<sup>273</sup> Although *Wisconsin-Michigan* regularly transmitted power between the states of Wisconsin and Michigan, it argued that “commingling, in Wisconsin, of Michigan generated energy with that generated in Wisconsin destroys the interstate character of the resulting mixture, so that all energy, after commingling takes place, is intrastate in character, having become part of the mass of goods within the state.”<sup>274</sup> To the contrary, the court observed that “the reasoning of the courts quite generally is convincing that, even though the interstate component amounts to only a small percentage of the entire volume, the essential interstate character remains and sole jurisdiction is vested in the Commission.”<sup>275</sup> Nevertheless, *TAPS* enjoys little support in *Wisconsin-Michigan* for its assertion that all wholesales are in interstate commerce, for *Wisconsin-Michigan* explicitly required that some out-of-state energy be contained in the wholesale for federal jurisdiction to attach.<sup>276</sup>

The *TAPS* court, in assuming the interstate character of all wholesales, seems to betray a perspective predominated by a central generation paradigm, where energy is produced at a megawatt or gigawatt scale and transmitted to far-flung consumers. Central generators by necessity must make use of the interstate transmission grid to reach consumers, but emergent distributed generation technologies allow for locally sited and competitively priced energy generation. No longer do unaffiliated generators require interstate transmission service; today, generation, sale, and consumption can occur entirely in intrastate commerce on local distribution facilities. Nonetheless, the omission in *TAPS* of any consideration of wholesales’ interstate character would set the stage for the deregulation era’s retention of a defunct approach to wholesale jurisdiction.

In the 2010 Declaratory Order, the Commission also cited for support *Detroit Edison Co. v. FERC*.<sup>277</sup> As discussed above, in *Detroit Edison*, the Commission was challenged by Detroit Edison for accepting an OATT from the Midwest Independent Transmission System Operator which allowed unbundled retail customers to take distribution service under the FERC tariff.<sup>278</sup> Furthering the trend to omit in citation the FPA’s interstate requirement on wholesale sales, the court stated that “when a local distribution facility is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA [section] 201(b)(1).”<sup>279</sup> Not surprisingly, the *Detroit Edison* court cited to the loosely worded passage in *TAPS* discussed immediately above.<sup>280</sup> In turn, the *Detroit Edison* court found, “[the] FERC has jurisdiction

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272. Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667, 696 (D.C. Cir. 2000) (citing *Wisconsin-Michigan Power Co. v. Federal Power Comm’n*, 197 F.2d 472, 474 (7th Cir. 1952)).

273. *Wisconsin-Michigan Power Co.*, 197 F.2d at 474.

274. *Id.* at 478.

275. *Id.*

276. *Id.*

277. 2010 Declaratory Order, *supra* note 187, at P 72 & n.100.

278. *Detroit Edison Co. v. FERC*, 334 F.3d 48, 52 (D.C. Cir. 2003).

279. *Id.* at 51.

280. *Id.* (citing Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667, 695 (D.C. Cir. 2000)).

over all interstate transmission service and over all wholesale service, but [the] FERC has no jurisdiction over unbundled retail distribution service—i.e., unbundled retail service over local distribution facilities.”<sup>281</sup> Once again, nowhere is the interstate aspect of wholesale sales addressed.

In *Detroit Edison* the issue was FERC jurisdiction over the distribution facilities used in unbundled retail service,<sup>282</sup> whereas *New York v. FERC* contemplated Commission jurisdiction over transmission facilities used in unbundled retail service.<sup>283</sup> Though Commission jurisdiction was held to attach to transmission facilities in *New York v. FERC*,<sup>284</sup> in *Detroit Edison* the D.C. Circuit determined that “[s]ection 201(b)(1) of the FPA denies FERC jurisdiction over local distribution facilities and any unbundled retail service occurring over those facilities.”<sup>285</sup>

Although unreferenced, the Commission may also have looked to *National Ass’n of Regulatory Utility Commissioners v. FERC (NARUC)*,<sup>286</sup> for support for its contention that all wholesales occur in interstate commerce. Indeed, *NARUC* cites to the fateful provision in *TAPS*:

Cf. *TAPS*, 225 F.3d at 696 (“FPA [section] 201 makes clear that *all aspects* of wholesale sales are subject to federal regulation, regardless of the facilities used.” (emphasis added)).<sup>287</sup>

In *NARUC*, Order 2003 was challenged on the grounds that the FERC exceeded its jurisdiction in controlling the terms and conditions of generators’ interconnections.<sup>288</sup> The Petitioners argued that *Detroit Edison* controlled.<sup>289</sup> The *NARUC* court explained that in *Detroit Edison*, “[the] FERC’s purported jurisdictional hook was that the power was being shipped over dual-use facilities that provided both retail and wholesale distribution services,”<sup>290</sup> but that the court was “unconvinced by this theory for asserting jurisdiction over non-jurisdictional transactions.”<sup>291</sup> In other words, facilities’ potential to carry FERC-jurisdictional energy does not render them FERC-jurisdictional in all contexts. However, in *NARUC*, “the issue [was] the inverse of *Detroit Edison*; Order No. 2003 applies to jurisdictional transactions only.”<sup>292</sup> Accordingly, because it was assumed that all wholesales and requisite interconnections are FERC jurisdictional, the court upheld Order No. 2003 against the jurisdictional challenge.<sup>293</sup>

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281. *Id.*

282. *Id.* at 52.

283. *New York v. FERC*, 535 U.S. 1, 26 (2002).

284. *Id.* at 26, 28.

285. *Detroit Edison Co.*, 334 F.3d at 53.

286. *National Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

287. *Id.* at 1280.

288. *Id.* at 1279-80.

289. *Id.* at 1280.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 1286.

#### 4. The Commission's Position

In short, upon closer scrutiny, the authorities cited by the Commission in declining to grant the clarification requested by SMUD—namely, whether “the definition of . . . wholesale sales contained in the FPA” does not encompass “distribution-level facilities and distribution-level feed-in tariffs”<sup>294</sup>—are not persuasive. To the contrary, the authorities fail to broach the issue of intrastate sales, often reinforcing the explicit reservation to the states of jurisdiction over local distribution facilities.

In reviewing the Commission's own precedent the difficulty of the topic can be further observed, for the Commission's decisions themselves do not align with its assertion in the 2010 Declaratory Order. As a preliminary matter, however, it should be acknowledged that the Commission's “interpretations of the jurisdictional provisions of the Federal Power Act . . . enjoy *Chevron* deference.”<sup>295</sup> The Commission's interpretation, to be reversed, must be shown “to be ‘plainly erroneous’ or ‘inconsistent with regulations.’”<sup>296</sup> In satisfaction of this standard, the Commission's assertion in the 2010 Declaratory Order is plainly in discord with the explicit dictate of the FPA that federal jurisdiction attaches only to those wholesales occurring in interstate commerce.

The facilities over which intrastate wholesales occur are local distribution facilities, which the Commission addressed specifically in Order No. 2003. The Commission therein described jurisdictional local distribution facilities:

Some lower-voltage facilities are “local distribution” facilities not under our jurisdiction, but some are used for jurisdictional service such as carrying power to a wholesale power customer for resale and are included in a public utility's OATT (although in some instances, there is a separate OATT rate for using them, sometimes called a Wholesale Distribution Rate).<sup>297</sup>

With respect to the Order's application, it instructs:

This Final Rule applies to interconnections to the facilities of a public utility's Transmission System that, at the time the interconnection is requested, may be used either to transmit electric energy in interstate commerce or to sell electric energy at wholesale in interstate commerce pursuant to a Commission-filed OATT. . . . It also applies to a request to interconnect to a public utility's ‘distribution’ facilities used to transmit electric energy in interstate commerce on behalf of a wholesale purchaser pursuant to a Commission-filed OATT. But where the “distribution” facilities have a dual use, i.e., the facilities are used for both wholesale sales and retail sales, the Final Rule applies to interconnections to these facilities only for the purpose of making sales of electric energy for resale in interstate commerce.<sup>298</sup>

The Commission later clarified in Order No. 2003-B that “a facility may be considered dual use *only* if it serves both state- and Commission-jurisdictional

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294. 2010 Declaratory Order, *supra* note 187, at P 72.

295. National Ass'n of Regulatory Util. Comm'rs, 475 F.3d at 1279 (citing *Detroit Edison Co. v. FERC*, 334 F.3d 48, 53 (D.C. Cir. 2003)).

296. *Western Mass. Elec. Co. v. FERC*, 165 F.3d 922, 926 (D.C. Cir. 1999) (citing *Auer v. Robbins*, 519 U.S. 452, 460 (1997)).

297. Order No. 2003, *supra* note 165, at P 803.

298. *Id.* at P 804.

functions at the time the Interconnection Request is submitted. As a result, a dual use facility *must* be subject to an OATT.<sup>299</sup> In sum,

[u]nder Order No. 2003, if such a facility is subject to wholesale open access under an OATT at the time the Interconnection Request is made, and the interconnection will connect a generator to a facility that would be used to facilitate a wholesale sale, Order No. 2003 applies and the interconnection<sup>300</sup> must be subject to Commission-approved terms and conditions.

The Commission has stated that “[t]he definition of Transmission System should include facilities that are controlled or operated by the Transmission Provider or Transmission Owner that are used to provide transmission service or Wholesale Distribution Service under the Tariff.”<sup>301</sup>

The rule of Order No. 2003 was implicated in both a wholesale and a PURPA context in the Commission’s 2006 decision in *PJM Interconnection, L.L.C.*<sup>302</sup> At issue were certain Interconnection Service Agreements “concern[ing] the interconnection of GSG’s wind generating plants to ComEd’s local distribution system.”<sup>303</sup> The Commission found dispositive that “[t]hese distribution facilities have up until now been used by ComEd to deliver electricity to retail customers under a state-jurisdictional tariff and to purchase the total output of QFs, also under state jurisdiction” and had “never been subject to the PJM OATT or its predecessor ComEd OATT.”<sup>304</sup> The distribution line was used to facilitate a PURPA sale between Mendota, “a tax-exempt QF, and ComEd, which buys all of Mendota’s output,”<sup>305</sup> leading the Commission to observe that “when a QF sells its total electric output to the host utility and the host utility takes title to the electric output at the point of interconnection to its local distribution system, as is the case here, there is no Commission-jurisdictional delivery service associated with the QF’s sales.”<sup>306</sup> As such, Mendota’s presence did not render the otherwise retail local distribution facility as subject to Commission jurisdiction.<sup>307</sup> The Commission in turn chose to “interpret the PJM OATT consistent with [its] jurisdiction under Order No. 2003 such that it applies to interconnections to local distribution facilities where there is a preexisting interconnection and a wholesale transaction over the local distribution facilities prior to the new interconnection request being made.”<sup>308</sup> Because these conditions were not met, the Commission refused jurisdiction.<sup>309</sup>

Importantly, the Commission nowhere relied on the fact that GSG’s interconnecting facilities were wind generating plants and potentially QFs

299. Order No. 2003-B, *Standardization of Generator Interconnection Agreements and Procedures*, F.E.R.C. STATS. & REGS. ¶ 31,171 at P 14, 70 Fed. Reg. 265 (2005) (to be codified at 18 C.F.R. pt. 35).

300. Order No. 2003-C, *Standardization of Generator Interconnection Agreements and Procedures*, F.E.R.C. STATS. & REGS. ¶ 31,190 at P 53, 70 Fed. Reg. 37,661 (2005) (to be codified at 18 C.F.R. pt. 35).

301. *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 F.E.R.C. ¶ 61,027 at P 87 (2004).

302. *PJM Interconnection, L.L.C.*, 114 F.E.R.C. ¶ 61,191 (2006).

303. *Id.* at P 1.

304. *Id.* at P 9.

305. *Id.* at P 12.

306. *Id.* at P 15.

307. *Id.*

308. *Id.* at P 17.

309. *Id.*

themselves. GSG's interconnecting facilities in no way impacted the Commission's reasoning; the generator could be a coal-fired plant interconnecting for the purpose of selling at wholesale in interstate commerce and the Commission would disclaim jurisdiction. This is because, the Commission determined, both a preexisting interconnection and a non-PURPA wholesale transaction must be present at the time of the subsequent generator's interconnection request for local distribution facilities to be subject to Commission jurisdiction.<sup>310</sup>

Further illustrating the challenges in applying the Commission's standard, in the Commission's rehearing of Order No. 2006, "Con Edison assert[ed] that Order No. 2006 impermissibly bases jurisdiction on the 'intent' of a generator, rather than its actions," such that "the Parties would not know whether Order No. 2006 applies until after the fact."<sup>311</sup> Con Edison posed an illustrative hypothetical, which illuminates the inconsistencies in the Commission's conception of jurisdictional interconnections:

where a generator intending to sell at wholesale interconnects with a previously state jurisdictional line under state rules. A second generator interconnecting with the same line, but not seeking to sell power at wholesale, would be obliged to interconnect under the Commission's rules. Thus, Con Edison contends, the generator seeking to sell at wholesale interconnects under state law, while the generator seeking to sell at retail would be forced to interconnect under federal law. Similarly, if the first generator decides not to sell at wholesale, the second generator would have to interconnect under state rules, even if it intends to sell at wholesale.<sup>312</sup>

In this hypothetical, we are presented with an instance of a generator interconnecting with a line not already subject to an OATT for the purpose of making a wholesale sale. Ostensibly, because "FPA [section] 201 makes clear that *all aspects* of wholesale sales are subject to federal regulation, regardless of the facilities used,"<sup>313</sup> and because "when a local distribution facility is used in a wholesale transaction, [the] FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA section 201(b),"<sup>314</sup> it should not matter if the line was previously state or federal jurisdictional so long as what transpires is a jurisdictional wholesale sale in interstate commerce. Surprisingly, the Commission came to the opposite conclusion. In response to the hypothetical, the Commission stated:

Con Edison is correct that an Interconnection Customer interconnecting its generator with an electric facility used exclusively to make retail sales, but not currently available for transmission service under an OATT, will do so under state

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310. *Id.*

311. Order No. 2006-A, *Standardization of Small Generator Interconnection Agreements and Procedures*, F.E.R.C. STATS. & REGS. ¶ 31,196 at P 90, 70 Fed. Reg. 71,760 (2005) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order No. 2006-A].

312. *Id.*

313. National Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (emphasis added) (citing Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667, 696 (D.C. Cir. 2000)).

314. Detroit Edison Co. v. FERC, 334 F.3d 48, 51 (D.C. Cir. 2003).

interconnection rules. *It does not matter whether the Interconnection Customer intends to sell power at wholesale or retail.*<sup>315</sup>

These outcomes are inconsistent and contrary to the FPA's call to fill the *Attleboro* Gap. The Commission's standard is untenable, for it requires that jurisdiction turn on distribution facilities' transactional history rather than the nature of the transactions in question, potentially allowing for state jurisdiction over interconnections made to affect wholesale sales in interstate commerce.

#### 5. The Case for Intrastate Wholesale Sales

In its Amended Motion to Intervene referenced in the 2010 Declaratory Order proceeding, SMUD argued,

as a physical matter sales of power over lower voltage distribution wires are unlikely, on account of impedance, to enter the bulk power system. . . . Therefore, sales of power under distribution-level feed-in tariffs cannot be in interstate commerce because the power sold does not enter the bulk transmission system or interstate commerce, but instead remains on the state-regulated distribution system.<sup>316</sup>

Because energy will always follow the path of least resistance, transmission lines' insuperable input impedance effectively repels any upstream commingling by distribution-level energy. Only in a case when the energy production within a distribution circuit exceeds its coincident energy demand would energy be exported to the transmission line. Such unintentional backfeed from the distribution circuit, a rare occurrence in the near term but important potential to anticipate as distributed generation proliferates, would be but incidental to any single generator's otherwise intrastate sales. Therefore, any generator's capacity sold to satisfy loads colocated on the same distribution circuit cannot be said to travel in interstate commerce. Such sales contain no out-of-state energy because the entire transacted capacity is locally generated, and such sales occur entirely on state-jurisdictional local distribution facilities. These intrastate sales include those to the interconnecting utility, or to other off-takers colocated on the distribution circuit.

The Commission would argue that interstate energy is present in local distribution facilities, conferring jurisdiction by commingling. Nonetheless, there is no jurisdictional pooling at issue, for our facts differ from those of *Pennsylvania Water & Power Co.*, wherein "[t]he central fact disclosed by the record about Penn Water's sales in Pennsylvania is that they are not sales of the output of Penn Water's own plant, but sales of output of the integrated and coordinated interstate electric system of which Penn Water's facilities are an integral part."<sup>317</sup> Furthermore, *Detroit Edison* made clear that though the host local distribution facilities may carry other energy originating out-of-state, the dual-use nature of facilities is an insufficient "hook" for conferring federal jurisdiction over otherwise state jurisdictional transactions.<sup>318</sup>

315. Order No. 2006-A, *supra* note 311, at P 99 (emphasis added).

316. Amendment to Motion to Intervene of the Sacramento Municipal Utility District at 4-5, FERC Docket No. EL10-64-000 (June 10, 2010).

317. *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414, 420 (1952).

318. *National Ass'n of Regulatory Util. Comm'rs*, 475 F.3d at 1280.

Our understanding is in accord with the scientific rule that “the initial jurisdictional determination ‘[is] to follow the flow of electric energy.’”<sup>319</sup> Our understanding respects the jurisdictional boundary described in Order No. 888 and affirmed in *New York v. FERC*.<sup>320</sup> Our understanding is in concord with the Commission’s: “[d]istribution’ is an unfortunately vague term, but it is usually used to refer to lower-voltage lines that are not networked and *that carry power in one direction*.”<sup>321</sup> Finally, our understanding abides by the forceful admonition of *Connecticut Light & Power* that the FPA reserves to the states jurisdiction over local distribution facilities not engaged in interstate commerce.<sup>322</sup>

A similar argument was made in the Order No. 2003 proceedings by Edison Electric Institute (EEI), which “note[d] that it is unclear if the Commission has authority over sales of power for resale using ‘distribution’ facilities when the energy neither crosses state lines nor enters the interstate transmission system.”<sup>323</sup> The Commission dismissed the point, saying “this question is moot because the Commission is not here extending its jurisdiction to any facility that is not already under its jurisdiction, pursuant to a Commission-filed OATT at the time the interconnection request is made.”<sup>324</sup> While EEI referred to intrastate *transactions*, the Commission’s reply pertained to *facilities*. The Commission implied that all facilities over which an OATT might apply are always transactionally engaged in interstate commerce, in contravention of *Detroit Edison*.

To illustrate that wholesale distribution service under an OATT may not apply to generators’ sales in intrastate commerce though it applies to other services offered over the same host distribution facilities, the Pacific Gas & Electric Co. (PG&E) Wholesale Distribution Tariff instructs with respect to its applicability:

The Tariff is applicable for the transportation of capacity and energy that is 1) generated or purchased by a Distribution Customer at a generation source and transported to the [Independent System Operator (ISO)] Grid using the Distribution Provider’s Distribution System, or 2) generated or purchased by a Distribution Customer from generation sources and transported from the ISO Grid to the Distribution Customer’s Service Area using the Distribution Provider’s Distribution System. The Tariff is also applicable for delivery to the ISO Grid of any capacity and energy generated or purchased by the Distribution Provider that uses the Distribution Provider’s Distribution System.<sup>325</sup>

Under PG&E’s Tariff, in no instance would a distribution-level sale, physically isolated to the circuit, implicate Commission-jurisdictional service because no energy is delivered *to* nor *from* the ISO grid. A wholesale occurring entirely within the distribution system is therefore isolated from transmission

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319. Federal Power Comm’n v. Florida Power & Light, 404 U.S. 453, 455 (1972) (citing Connecticut Light & Power Co. v. Federal Power Comm’n, 324 U.S. 515, 529 (1945)).

320. New York v. FERC, 535 U.S. 1, 28 (2002); Order No. 888, *supra* note 158, at 31,980-81.

321. Order No. 2003, *supra* note 165, at P 803 (emphasis added).

322. *Connecticut Light & Power Co.*, 324 U.S. at 531.

323. Order No. 2003, *supra* note 165, at P 796.

324. *Id.* at P 808.

325. PAC. GAS & ELEC. CO., WHOLESALE DISTRIBUTION TARIFF at Original Sheet No. 5 (2005).



service and not encompassed by wholesale distribution service. Nonetheless, by applying the boundless theory espoused in the 2010 Declaratory Order,<sup>326</sup> the Commission would surely assert jurisdiction over these otherwise intrastate transactions.

The Commission's extension of the commingling rule of *Florida Power & Light* represents an untenable expansion of its authority under the FPA. As has been demonstrated, the states retain the authority to regulate intrastate wholesale sales of energy, emanating from their organic police powers, such that any intrastate sale, and any interconnection to effect such a sale, should be conducted under state jurisdiction.

#### IV. CONCLUSION

Sales of electric energy occurring solely upon distribution circuits, isolated both physically and transactionally in intrastate commerce, fall to state jurisdiction, not federal jurisdiction. Decisions to the contrary from the FERC and the D.C. Circuit are simply incorrect. The Commission's standard—whereby jurisdiction is predicated on facilities' prior qualifying transactions, and whereby virtually any wholesale is deemed an interstate wholesale—is untenable and not supported by applicable Supreme Court cases.

The appropriate standard by which to determine jurisdiction over wholesales is to follow the flow of energy. When a generator developer plans to interconnect to local distribution facilities so as to partake of ISO Transmission Service and sell to distant buyers, the generator engages in interstate commerce as described in the FPA. However, if the generator developer intends to sell its entire output to buyers collocated on local distribution facilities, cordoned from the stream of interstate commerce, federal jurisdiction is not implicated. Just as there is a bright jurisdictional line between local distribution facilities and facilities used in interstate transmission, so too is there a bright jurisdictional line between interstate and intrastate wholesales. The realization of this standard will bring the law into phase with the explicit intent of the FPA: that “[t]he Commission . . . shall not have jurisdiction . . . over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce,”<sup>327</sup> and that federal jurisdiction will be limited to “the sale of electric energy at wholesale in interstate commerce.”<sup>328</sup>

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326. 2010 Declaratory Order, *supra* note 187, at P 72.

327. 16 U.S.C. § 824(b)(1) (2012).

328. *Id.*