

WHO MAKES THE RULES? FEDERAL AND STATE JURISDICTION OVER ELECTRIC TRANSMISSION ACCESS

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I. INTRODUCTION

A great deal of ink has been spilled during the past few years attempting to define the boundary between the jurisdictions of federal and state governments over energy transactions, particularly those involving the sale and transmission of electricity. The United States Supreme Court has on several recent occasions addressed this subject.¹ The Court's efforts, however, have done little to resolve the difficult questions that arise when both federal and state authorities claim jurisdiction over energy transactions that are of vital concern to the citizens of the state in which they arise and also have substantial implications for the nation as a whole. The "bright line" tests that the Court had once enunciated and upon which we relied for guidance were discarded as "anachronistic" less than twenty years later.²

The jurisdictional debate implicates very serious issues of social and economic policy. There is, for example, the question whether an electric utility that owns a transmission network should, when the demand for transmission service exceeds the capacity of service that can be safely provided, give special preference to transmission service for its "native load" customers.³ The regulatory tide seems to be flowing in favor of the native load customers interests despite efforts by other potential users to outbid the native load customers for transmission capacity access.⁴

There are other equally weighty issues at play as we begin to grapple with

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1. See, e.g., *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

2. Compare *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964) with *Arkansas Elec. Coop. v. Arkansas Public Ser. Comm.*, 461 U.S. 375, 391 (1983).

3. In its *Northeast Utilities* merger case, the Federal Energy Regulatory Commission defined the term "native load customers" to encompass "those customers on whose behalf [the utility] by statute, franchise or contract, has undertaken the obligation to plan, construct, and operate its system to provide reliable service." *Northeast Utils. Serv. Co.*, 50 F.E.R.C. ¶ 61,269, at 62,014 n.259 (1991). Used as a benchmark for regulatory purposes, the definition is somewhat circular, of course, because the utility has a legal obligation to serve the customers whom the regulatory agency determines it must serve.

4. In its rehearing order in the *Northeast Utilities* merger case, the FERC declared "that under no circumstances will [the utility] be required to provide firm wheeling service out of existing transmission capacity where doing so would impair or degrade reliability of service to native load customers." *Northeast Utils. Serv. Co.*, 58 F.E.R.C. ¶ 61,070, at 61,199 (1992). The Commission's chairman has, however, pointed out in his public speeches that "everybody is somebody's native-load customer," *quoted in* Thomas F. Berg,

the changing structure and technological potential of the utility industry. Should large retail customers have the right to reduce their energy costs by purchasing from distant suppliers, using the local utility's system to transmit those supplies to their loads? Should non-utility generators of electricity, particularly those that have been given preferential, qualifying facility, status under the Public Utility Regulatory Policies Act of 1978 (PURPA)⁵ be allowed access to the transmission network so that they can sell their output to distant utilities and users?

These are important issues. The way in which they are resolved will say a great deal about how our energy-dependent economy functions for decades to come. An equally important question is whether the definitive resolution of these questions will be developed by state regulatory authorities, exercising sole or coordinate jurisdiction, or solely by an agency of the federal government. In this area, as in so many others, the choice of regulatory forum often seems to determine the outcome of the controversy. That may explain why Americans have traditionally shed so much metaphorical and genuine blood deciding what are essentially jurisdictional disputes between governmental institutions.

Uncertainty and controversy over the question whether the federal government has exclusive jurisdiction to decide questions of mandatory electric transmission access or shares its authority with the states is a relatively recent development. For decades, it had been an article of faith among utility lawyers that, as a general principle, neither the federal government nor the states had authority to require investor-owned utilities to perform "wheeling" if they did not voluntarily wish to do so. A utility might have found it necessary to offer transmission service as a condition of its license to construct and operate a nuclear plant or in order to forestall possible liability under the antitrust laws, but these were exceptional circumstances. In the norm, intelligent and diligent counsel would have had no reservations about advising that, as a general rule, the law left the decision as to whether to provide wheeling services to the discretion of the owners of the transmission network, free of regulatory interference.

About ten years ago, this comfortable and predictable world began to change. Both the Federal Energy Regulatory Commission (FERC or Commission) and the state commissions began the process of requiring utilities subject to their jurisdiction to provide transmission service. Although the change was provoked by many influences, the primary factor was that in this area, as so frequently happens, the regulators found themselves caught up in changing fashions of economic theory. Popular legend credits John Maynard Keynes with having observed that the deeds of today's politicians are usually based on the theorems of long-dead economists.⁶ The behavior of the FERC and its

State Commissioners Grapple with National Issues, 128 Pub. Utils. Fortnightly 25 (Dec, 15, 1991)), a statement that has caused much agitation but has also placed the debate in a useful perspective.

5. 16 U.S.C. § 824a-3 (1988).

6. What Keynes actually wrote was "Practical men who believe themselves to be exempt from any intellectual influences, are usually the slaves of some defunct economist." J.M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY*, 383 (1835).

brother agencies in the states demonstrate that Keynes' theorem holds true for regulators as well as politicians.

We are all familiar with the movement, begun in the Carter Administration, to remove regulatory constraints from private businesses. That movement reached an apotheosis of sorts during the Reagan Administration. When its adherents came to consider the so-called "natural monopolies," they argued that constraints on access to transportation or transmission systems should be eliminated. The rationale was that buyers and sellers of the basic commodity, be it natural gas or electric energy or some other commodity or service, could come together and bargain in an open marketplace where rates would be set by the law of supply and demand rather than by governmental fiat or the pull-and-haul of competing pressure groups. Regulators caught the fever. In its regulation of the natural gas transmission industry, the FERC boldly moved towards transmuting the interstate pipelines from merchants to "open access" carriers.⁷ In the name of encouraging competitive forces, the FERC also allowed end-users who had traditionally been served by local distributors to secure their gas supplies directly from interstate pipelines, thereby bypassing their customary suppliers.⁸

The cause of "open access" in FERC's scheme of regulation of the electric utility industry found itself impeded by a number of factors. First, there was the prevailing legal theory, noted previously, which held that wheeling was a matter to be dealt with through private ordering rather than by regulatory agencies. In addition, in the electric utility field, the FERC encountered an absence of the sort of pervasive regulatory jurisdiction that the Commission held over the natural gas pipeline industry. It took time for legal theory to provide the tools for the Commission to use in order implement the imperatives of prevailing economic theory.

The initial departure sprang from the notion that the agency can, and will, provide for access to utility transmission systems by way of conditions upon its approval of mergers and acquisitions between utilities under section 203 of the Federal Power Act (FPA).⁹ The Commission first imposed such conditions in the *Utah Power and Light Co.-PacificCorp* merger case.¹⁰ Since then, the Commission has imposed a rather elaborate regime of open-access conditions on other utility mergers.¹¹ The Commission's justification for man-

7. See Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, [1982-1985 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,655, 50 Fed. Reg. 42,408 (1985), *vacated and remanded*, *Associated Gas Distrib. v. F.E.R.C.*, 824 F.2d 981 (D.C. Cir. 1987), *readopted on an interim basis*, Order No. 500 [1986-1990 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,761, 52 Fed. Reg. 30,344 (1987), *remanded*, *American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, [1986-1990 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,867, 54 Fed. Reg. 52,344 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, [1986-1990 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,880, 55 Fed. Reg. 6,605 (1990), *aff'd in part and remanded in part*, *American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990).

8. See *Kansas Power & Light Co. v. Williams Natural Gas Co.*, 45 F.E.R.C. ¶ 61,272 (1988), *reh'g denied*, 46 F.E.R.C. ¶ 61,216, *aff'd*, *Kansas Power & Light Co. v. FERC*, 891 F.2d 939 (D.C. Cir. 1989).

9. Federal Power Act, 16 U.S.C. § 824b (1988).

10. *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095 (1988), *remanded sub nom.*, *Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991).

11. See, e.g., *Northeast Utils. Serv. Co.*, *supra*, n.4.

dating transmission access by indirection was its well-established responsibility to exercise its authority in a manner that furthers the objectives of the antitrust statutes.¹² Open access to the transmission grid, the Commission has consistently stated, will prevent the merged utility from exercising undue market power. Can we expect the Commission to employ this same reasoning outside the context of a merger case? Probably so.

It is the activities of the state public utility regulatory commissions with which we are primarily concerned in this article. A substantial group of state commissions was unwilling to wait for the FERC to develop a set of legal theories that might enable it to overcome the putative constraints upon federally mandated wheeling. They were motivated for the most part by concerns about efficient planning of bulk power supply, a matter with which the FERC deals only sporadically and indirectly. As we shall see, these state commissions have taken steps to require jurisdictional utilities to provide transmission service to third parties. The legal basis for these requirements is questionable. Utilities, however, have found themselves in a rather difficult position as they have had to decide whether to challenge the legality of major regulatory initiatives by the agencies whose actions control the overwhelming preponderance of their revenues and from which their franchises derive. This is not simply a matter of appearing to be less than good corporate citizens. Equally significant is the fact that the remedies theoretically available to utilities have not proven entirely satisfactory. Although the transmission-access issue probably lies within the primary jurisdiction of the FERC, the Commission has not boldly stepped into the controversy to protect its turf. As of this writing, the FERC has for more than two years deferred action on a petition from a group of Wisconsin utilities challenging a wheeling order issued by the Wisconsin Public Service Commission. I will examine that proceeding in more detail later in this article.

The Congress, too, has been concerned with transmission access issues as part of its ongoing deliberations on legislative proposals to reform the Public Utility Holding Company Act of 1935 (PUHCA).¹³ Although the President's National Energy Strategy declared that FERC policies and programs "will be reviewed to ensure that transmission services and facilities are adequate" for future needs and called for "[e]xpansion of transmission access,"¹⁴ the Administration did not recommend the enactment of legislation on this subject. It appears, therefore, that legislative action dealing with jurisdiction over transmission access issues may be some years away and its outcome is uncertain.

This situation places utilities in a dilemma. They must continue to do business under the regulatory aegis of the state commissions. These agencies have vast discretion over retail rates and utility decisions to construct generation, transmission, and distribution facilities. Faced with the uncertainty of vindicating their possible legal defenses and the certainty of an important and powerful agency hell-bent on implementing a transmission access scheme, utilities may be excused if they decline the honor of inscribing their names in the

12. See *Gulf States Utils. Co. v. FPC*, 411 U.S. 747 (1973).

13. 15 U.S.C. §§ 79-79z-6 (1988).

14. *National Energy Strategy, Executive Summary* at 10 (1st ed. 1991-92).

lawbooks in the titles of test cases. The result is that state regulatory agencies exercise real influence over transmission access matters, an influence that far exceeds the theoretical scope of their limited jurisdictional reach. Utilities rightly believe that it is perilous to ignore the state commissions' desires with respect to interstate transmission matters.¹⁵

As a result, the state commissions are accumulating pervasive influence in the area of transmission access even though, as we shall see, the legal basis for the exercise of their jurisdiction is doubtful. A regulatory *tour de force* is taking place before our eyes.

II. LEGAL FRAMEWORK

Under section 201(a) of the FPA, federal jurisdiction extends to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce."¹⁶ In addition, under section 205 of the Act, the FERC's jurisdiction extends to rates and charges for interstate transmission of electric energy and to the terms and conditions of transmission service.¹⁷ Section 205 also requires public utilities to file with the Commission their current transmission tariffs, including "the classification, practice, and regulations affecting" transmission service.¹⁸ Other provisions of the FPA authorize the FERC to suspend, investigate, and adjudicate disputes involving transmission service tariffs, and to determine "the lawfulness of [any] rate, charge, classification, or service" respecting, among other things, transmission of electric energy in interstate commerce.¹⁹

All things considered, Congress has given the FERC a rather broad and unequivocal charter to regulate the business of performing transmission service.²⁰ What, if anything, has been left under the cognizance of the states?

15. The peril extends beyond utilities in their role as owners and operators of the transmission network in their control areas. It also applies to the utilities as potential *customers* of transmission service. A capacity-constrained utility unwilling to take advantage of state commission wheeling programs to import power can anticipate pointed questions about its prudence in constructing new capacity when cheaper capacity could have been purchased from a non-contiguous utility and wheeled into its service territory.

16. 16 U.S.C. § 824(a) (1988).

17. 16 U.S.C. § 824d (1988).

18. *Id.*

19. Federal Power Act §§ 205, 206, 16 U.S.C. §§ 824c, 824d (1988).

20. The charter is not as unequivocal as it might have been. In the Public Utility Regulatory Policies Act, Congress added a new section 211 to the Act (16 U.S.C. 824j), authorizing the Commission to require utilities to perform transmission service. Section 211(c)(1) prohibits exercise of the Commission's authority unless the Commission also determines that a mandatory wheeling order "would reasonably preserve existing competitive relationships." The Commission has construed section 211(c)(1) in a manner that sharply restricts the reach of its authority under section 211 to order wheeling. The section 211 authority, the Commission has ruled, is limited to cases in which a utility must perform wheeling service to another utility in order to cope with a shortage of fuel supplies or to promote coordination among utilities. *Southeastern Power Admin. v. Kentucky Utils. Co.*, 25 F.E.R.C. ¶ 61,204 (1983). This restrictive construction of section 211 has been criticized. See Pierce, *A Proposal to Deregulate the Market for Bulk Power*, 72 VA. L. REV. 1183, 1189 n.38 (1986); F. Norton and M. Early, *Limitations On the Obligations to Provide Access to Electric Transmission and Distribution Lines*, 5 ENERGY L.J. 47 (1984). Nevertheless, The Commission has declined to use section 211, as some critics claim it should have, to institute a federally chartered regime of untrammelled transmission access.

Some proponents of state regulatory jurisdiction over transmission access have noted that section 201 of the FPA specifically restricts the scope of federal regulation "to extend only to those matters which are not subject to regulation by the States,"²¹ and have focussed on the Act's declaration that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof . . ."²² Based upon this language, they argue that state commissions may regulate "intrastate" transmission which is said to consist of transmission of electricity produced by a generating facility within the state to loads located in the same state. Precedent, as well as physics, demonstrates that this argument is unlikely to be successful.²³

It has been many years since the courts first held that the transmission of electricity is in interstate commerce if the electricity has the potential to cross state lines. In *FPC v. Florida Power & Light Co.*,²⁴ the United States Supreme Court held that if a utility is connected to an interstate grid, even though it transmits no energy beyond the borders of its home state, the power flows along its lines are subject to federal regulation because they are in interstate commerce. The Federal Power Act's reservation of exclusive regulatory authority to the states in section 201(b) of the statute was given a very narrow reading in *New England Power Co. v. New Hampshire*.²⁵ It seems to follow that the FERC has regulatory jurisdiction over transmission service performed by a utility connected to the interstate network. This description fits virtually all utilities, except those in Hawaii and Alaska, as well as some in Texas.

To say that a federal agency has regulatory authority over a subject does not, however, entirely settle the question whether the states may also regulate it. There are two constitutional hurdles that the states must overcome before they can establish concurrent jurisdiction to require and regulate the provision of wheeling services by their native utilities. The first hurdle has its source in the negative pregnant of the Commerce Clause of the Constitution. This is the notion that certain aspects of interstate commerce are immune from state regulatory authority even though the federal government has chosen not to regulate them. It is a doctrine which traces its origins back to the days of Chief Justice Marshall.²⁶ This doctrine is familiar to students of public utility regulation as it was the basis for the Supreme Court's holding that states could not regulate wholesale sales of electricity between utilities in different states.²⁷ It

21. 16 U.S.C. § 824(a) (1988).

22. 16 U.S.C. § 824(c) (1988).

23. In the analogous domain of jurisdiction over the transportation of natural gas, the Supreme Court had no difficulty rejecting the argument that intrastate transmission of gas that had moved in interstate commerce was subject to the exclusive regulatory authority of the states. *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950). It took enactment of the Hinshaw Amendment to the Natural Gas Act, P.L. 323, 83d Cong., 2d Sess., 68 Stat. 36 (1954), 15 U.S.C. § 717(b), to confer on the states jurisdiction over those movements.

24. 404 U.S. 453 (1972).

25. 455 U.S. 331 (1982).

26. *Gibbons v. Ogden*, 33 U.S. (9 Wheat.) 1 (1824).

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

was also the basis for the Court's later holding that the federal government had exclusive power to regulate wholesale sales of electricity between utilities in the same state.²⁸

The second problem that advocates of state action must overcome is the doctrine of preemption—and the allied principle, “occupation of the field”—that has its origins in the Supremacy Clause of the Constitution.²⁹ In substance, those barriers to state action exist when there is a conflict, actual or potential, between a provision of federal law (or an entire federal statutory scheme) and the regulatory regime of the states.³⁰ The courts will examine with care the question whether the exercise of state power will interfere with an existing federal regulatory program or with the exercise of federal regulatory authority in the future. A number of states have endeavored to justify their assertion of regulatory jurisdiction over transmission service by their local utilities on the ground that their position is supported by the Supreme Court's rationale in *Arkansas Electric Coop. v. Arkansas PSC*.³¹ In *Arkansas Electric*, the Court upheld the state's assertion of regulatory jurisdiction over a rural electrical cooperative because no federal regulatory scheme applied to the cooperative's rates and services.³² In view of the universality of utility rate regulation, the Court could not find that the Commerce Clause precluded the state from filling the lacuna left by the absence of FERC jurisdiction over the cooperative's wholesale rates.

Because the FERC lacks jurisdiction to direct utilities to perform transmission service,³³ so the argument runs, there is a regulatory “gap” that the states are free to fill. This analysis is flawed in some very fundamental ways. One cannot simply identify a nook or cranny of regulatory authority that Congress has denied to the FERC and conclude that the states are empowered to fill it. Before that conclusion follows, one must determine that Congress did not intend to occupy that field to the exclusion of the states. As the Supreme Court has said: “[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision *to regulate*.”³⁴ The classic formulation of the occupation-of-the-field doctrine calls for an examination of the pervasiveness of the federal regulatory program, the need for national uniformity, and the danger of conflict between state requirements and the administration of a federal program.³⁵ When one

28. *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964).

29. U.S. CONST. art. VI, cl. 2.

30. See *California v. FERC*, 495 U.S. 490 (1990) (preemption); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (occupation of the field).

31. 461 U.S. 375 (1983).

32. The Federal Power Commission had held that the economic regulatory authority conferred by the Federal Power Act did not extend to rural electric cooperatives. *Dairyland Power Coop.*, 37 F.P.C. 12 (1967).

33. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). Congress' effort in the Public Utility Regulatory Policies Act of 1978 to increase FERC's authority to mandate wheeling service appears to have foundered upon the Commission's holding that the authority could not be exercised in a manner hostile to the wheeling utility's perceived economic interests. See n.20, *supra*.

34. *Arkansas Elec.*, 461 U.S. at 384.

35. See *Pennsylvania v. Nelson*, 350 U.S. 497, 502-05 (1956).

performs the requisite analysis, the conclusion that Congress has left no room for states to regulate transmission access seems inevitable. For one thing, it is difficult to imagine what steps a state commission might take in this area without invading the FERC's indisputable jurisdiction over the rates for, and the terms and conditions of, transmission service. Second, a structure of individual state wheeling requirements conflicts with the strong federal policy, embodied in both the FPA and the PURPA, favoring national and regional coordination. Third, the FERC itself has declared unlawful an attempt by one state regulatory commission to regulate the rates charged for transmission service by a jurisdictional utility.³⁶ The FERC's interpretation of its organic statute is entitled to great weight under well-established doctrines of statutory construction.³⁷

For these reasons, it appears that the strongest legal position argues against state commission jurisdiction to require, or otherwise regulate, wheeling on the part of native public utilities. Nevertheless, the states have been quite active in this field as we now shall see.

III. ACTIONS BY THE STATE COMMISSIONS

A. *In general*

A number of states have claimed the authority to mandate transmission access. These assertions of jurisdiction have rested on a number of grounds, the most frequently mentioned being the following:

1. The state has jurisdiction over the planning and operation of the transmission system. A necessary adjunct to this authority is the power to require a utility to act in ways designed to reduce costs, increase reliability, or otherwise optimize the performance of the statewide transmission system.
2. FERC's authority to mandate wheeling is severely limited. Therefore, the states can fill the "regulatory gap." (We have considered this meretricious argument above and have noted its flaws.)
3. State action to require transmission access will enhance competition.
4. State action to require transmission access will carry out the purposes of the Public Utility Regulatory Policies Act, the Federal Power Act, or both.

Interestingly enough, a survey of state commission activities in this field performed during the preparation of this paper—though admittedly not exhaustive—failed to turn up a single instance of a commission that has acted in a manner calculated to *preclude* utilities from voluntarily providing access to their transmission networks.³⁸ Therefore, this article reviews a selection of approaches taken by some state commissions that have gone far down the road in providing mandatory transmission access. Some states have ordered their native utilities to provide wheeling service. Other states have merely contem-

36. Florida Power & Light Co., 29 F.E.R.C. ¶ 61,140 (1984). The Commission found that it had jurisdiction over the utility's rates for transmission service, then reasoned that preemption of the state agency followed automatically under *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964).

37. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); *Udall v. Tallman*, 380 U.S. 1 (1965).

38. It is arguable, however, that paying lip service to the notion of open access while delaying its implementation until there is in place a fail-safe method of "protecting native load," until the utility has developed rates for transmission service that reflect its cost with surgical precision, or until some other chimeral objective has been attained would amount to the same thing.

plated making such orders. Both groups are of interest.³⁹

B. Wisconsin

In 1989, the Public Service Commission of Wisconsin (PSCW) ordered all the major Wisconsin investor-owned utilities to develop joint use and cost-sharing agreements with their neighboring utilities and to file those agreements with both the PSCW and the FERC within one year.⁴⁰ The Wisconsin Commission also required jurisdictional investor-owned utilities to file wheeling rates with the FERC within one year. The PSCW announced that it would later review the agreements and the transmission tariffs to test their conformity with twenty specified general principles for transmission service.

The Wisconsin Commission's decision to mandate transmission service evolved from its supervision of the least-cost resource planning process within that state. The PSCW had earlier required the utilities to engage in joint planning of the Wisconsin transmission system. In the Commission's view, mandatory transmission access was only an adjunct to statewide planning efforts, and a necessary one at that. The PSCW saw it as the only means by which the benefits of system-wide planning could be equitably distributed among the state's utilities.⁴¹

In addition to the least-cost planning rationale, the Wisconsin Commission also attempted to construct a jurisdictional foundation for its wheeling mandate by drawing upon several traditional areas of state regulatory authority over electric utilities. In language that was obviously designed to address the issue of federal preemption, the PSCW wrote in its order:

The transmission system is a monopoly affected with a public interest and it is to be used for the general public good. The transmission system is made possible by the state's grant of its sovereign power of eminent domain, which is a recognition of the public's interest in the universal provision of reliable electric service. The basis of a utility's right to own and/or use the transmission system of the state is the utility's obligation to serve load within its service territory.⁴²

The Wisconsin Commission made several additional general findings to support its assertion of jurisdiction to mandate transmission access:

1. It is in the public interest to avoid the duplication of transmission facilities.⁴³
2. The owners of a transmission monopoly should not be "unduly enrich[ed]" by their good fortune.⁴⁴

39. The following states have adopted regulations mandating wheeling: Indiana (for qualifying facilities (QFs)), Maine (not restricted to QF-generated power), Minnesota (for QFs), Pennsylvania (for QFs), and Texas (for QFs). See EDISON ELECTRIC INST., TRANSMISSION ACCESS AND WHEELING: A SUMMARY OF STATE LAWS AND REGULATIONS (1989).

40. Advance Plans for Construction of Facilities, 102 PUR4th 245, 290-91 (1989).

41. *Id.* at 284.

42. *Id.* at 275. This argument is an excellent example of loud trumpeting about a non-issue as a means of deflecting attention from an issue on which one's position is untenable. The question before the Wisconsin Commission was whether the locus of regulatory power over the use of transmission network lay with the state commission or with the federal government.

43. *Id.* at 284.

44. *Id.* at 298. Regarding a company that has constructed a transmission grid by dint of its investment and exertions as the beneficiary of a benevolent providence presents an interesting view of property rights in this last decade of the 20th Century.

3. It is in the public interest for the commission to ensure that there are no institutional impediments to equitable allocation of the benefits of the integrated transmission system among all utilities and cooperatives.⁴⁵

Finally, in support of its decision to require only bilateral—as opposed to multilateral—joint use and cost-sharing arrangements among utilities, the Wisconsin Commission found that:

4. It is reasonable to approach the goal of equitable allocation of the costs and benefits of the transmission system incrementally in view of the uncertainties involved.⁴⁶

How did the Wisconsin investor-owned utilities (IOUs) react to this outpouring of social planning? In the understated words of two PSCW staff members, “the IOUs did not greet [the Commission’s] order with enthusiasm.”⁴⁷ The utilities challenged the validity of the wheeling provisions of the Commission’s order in state court, and they challenged the joint use and cost-sharing provisions of the order in both the state courts and before the FERC.⁴⁸ The court stayed the requirement to file joint use and cost-sharing agreements. But the FERC has yet to act on the utilities’ petition, although it is more than two years old.

Perhaps the most significant aspect of the Wisconsin experience is that all of the affected utilities have in fact filed wheeling tariffs with the FERC.⁴⁹ So, on the subject of mandatory wheeling, the Wisconsin Commission has pragmatically won the day, even though its authority to order wheeling is under challenge and appears questionable. On the other hand, only a few of the utilities have developed partial joint use and cost-sharing arrangements. Shielded by the state court’s stay, most of them have not complied with the Wisconsin Commission’s order.

C. Florida

Under Florida law, the Florida Public Service Commission (FPSC) has authority to require utilities to transmit electricity over their transmission lines from one utility to another when such transmission is deemed necessary to ensure the efficient and reliable operation of the state energy grid.⁵⁰ Acting under this provision, the FPSC in 1983 issued rules requiring Florida utilities

45. *Id.* at 285.

46. *Id.* at 284.

47. Michael Arny & Barbara James, *New Attitudes Towards Transmission—Wisconsin Style*, Pub. Utils. Fortnightly, (Sept. 15, 1991) at 13.

48. See *Northern States Power Co. (Wis.) v. Pub. Serv. Comm’n*, F.E.R.C. No. EL89-40-000 (Petition filed July 13, 1989) (noticed 54 Fed. Reg. 31,229, 31,231 (July 27, 1989)). On February 27, 1992, a Wisconsin trial court issued a bench order holding that the public service commission had exceeded its authority by ordering utilities to enter into joint-use agreements. The court did not, however, set aside the public service commission’s order requiring utilities to file open-access tariffs at the FERC. The trial court’s order has been appealed. *Elec. Util. Week 1* (Mar. 9, 1992).

49. *Id.* Three of the four tariffs provide that transmission service is available to utilities, qualifying facilities, and independent power producers—but not to retail customers. The rates in the tariffs are based on the embedded costs of the filing utilities. The fourth filing, that of Northern States Power Company of Wisconsin, is currently the subject of a rate proceeding at the FERC.

50. FLA. STAT. ch. XXVII 366.055(3) (1990).

to wheel power for all qualifying facilities wishing to transmit power across their systems. One year later, the Florida Commission established an interim wheeling rate.

To obtain a determination whether the Florida Commission has the wheeling authority it purported to assert, both the Florida Commission and several Florida utilities petitioned the FERC for a declaratory order on the jurisdictional issue. They requested the FERC to determine whether: (1) the rates for wheeling of QF power by one Florida electric utility to another are subject to the FERC's regulatory jurisdiction; (2) the FERC's authority, if it exists, is exclusive; and (3) the FERC may waive or delegate this authority. The FERC answered these questions by holding: (1) that the rates for transmission service by Florida utilities are subject to its exclusive authority; (2) the FERC's authority is non-waivable and non-delegable; and (3) Florida is, therefore, without authority to regulate wheeling rates charged by its native utilities.⁵¹

Undeterred by FERC's decision, the FPSC asserted in 1987 that wheeling of power by Florida utilities solely within the state constituted intrastate commerce. Therefore, it held, the FERC's exclusive jurisdiction extended only to the rates charged for the service, and the FPSC, not the FERC, possessed the authority to regulate the terms and conditions of transmission service. The state's largest investor-owned utility responded by filing a second petition with the FERC for a declaratory order, asking the FERC to rule that the state commission had absolutely no authority to regulate wheeling by Florida utilities. The FERC agreed with the utility's position, holding that it had plenary authority over all aspects of interstate transmission of electricity, including the terms and conditions of the service, and was not restricted to regulating only the rates.⁵²

The Florida Commission has recently decided to defer to the FERC's view of the state commission's jurisdiction over transmission access. In 1990, two cooperatives and the Florida Municipal Power Agency intervened in a proceeding before the Florida Commission, requesting that the Commission adopt a set of "Transmission Principles." According to the intervenors, the Transmission Principles would require: "[A]ll electric utilities in the state should be, or have the opportunity to be, involved in statewide transmission system planning and operation . . . [and] that access to a jointly planned, owned, and operated transmission grid should be made available to all electric utilities without discrimination."⁵³ The reasoning behind the intervenors' position closely parallels the logic that the WPSC used to justify its assertion of jurisdiction over transmission service by native utilities.

The Florida Commission noted that in order to implement the transmission principles it "may need to seek approval from the FERC" because the FERC "may have exclusive jurisdiction over transmission access and alloca-

51. Florida Power & Light Co., 29 F.E.R.C. ¶ 61,140 (1984).

52. Florida Power & Light Co., 40 F.E.R.C. ¶ 61,045 (1987).

53. Investigation into the Adequacy of the Electrical Transmission Grid in North Florida, 199 PUR4th 269, 270 (1990).

tion."⁵⁴ The Florida Commission backed off from direct conflict with the federal agency which had twice determined that Florida lacked jurisdiction to impose transmission requirements on Florida utilities. It found that there was no need for it to interject its authority into the area because it knew of no unresolved controversy over "utility-to-utility" wheeling service that a Florida utility had declined to provide.⁵⁵ For this reason, the FPSC declined to impose the Transmission Principles on the three investor-owned utilities subject to its jurisdiction. Instead, it invited the utilities "to file an engineering study quantifying . . . the benefits" likely to flow from the transmission principles.⁵⁶ Only if the results of the study "show that *all* affected utilities are likely to benefit" would the Florida Commission initiate proceedings to adopt the proposal.⁵⁷

In the midst of all of this jurisdictional pulling and hauling, several Florida Qualifying Facilities (QFs) and Florida IOUs have quietly worked out wheeling arrangements.

D. California

The California Public Utilities Commission (CPUC) instituted a proceeding in September 1990 to investigate access to transmission by independent power producers and QFs and to determine how best to foster increased wheeling for those entities.⁵⁸ The CPUC had previously adopted an "economic harm" standard under which a utility was required to wheel for QFs located outside its service area, unless the utility could demonstrate that the QF's production would displace economy energy transactions or otherwise cause economic harm to the ratepayers.⁵⁹ In its September 1990 notice of inquiry, the California Commission stated that California utilities had provided very little wheeling for QFs and other independent power producers. The CPUC's notice also set five goals for its transmission policy:

1. Nondiscrimination and the promotion of competition in electrical generation;
2. Services priced at cost;
3. Adherence to least-cost resource planning;
4. Sensitivity to environmental concerns; and
5. Feasibility and simplicity.⁶⁰

The California Commission noted that it would utilize the investigation to examine the question whether transmission costs should be considered in the competitive bidding process. The specific issue here is whether transmission costs should be factored into the price of QF- or IPP-generated power

54. *Id.* at 276-277. In the face of two FERC declaratory orders unambiguously claiming exclusive jurisdiction over transmission service, the Florida Commission's grudging concession that the FERC "*may* have exclusive jurisdiction" has an interesting and atavistic ring to it.

55. *Id.* at 275.

56. *Id.* at 276.

57. *Id.* (emphasis added).

58. Nondiscriminatory Access to Electricity Transmission Services for Nonutility Power Producers, 116 PUR4th 353 (1990).

59. *Id.* at 356.

60. *Id.* at 356-57.

when evaluating it as an alternative for a utility engaged in a solicitation process. If, for example, two QFs competing with one another make identical bids, should the fact that one producer's power must be wheeled to a remote utility purchaser while the other producer's will be generated within that purchaser's service area be considered in selecting the winner? The CPUC also set for investigation the related question of who—the QF, the utility's ratepayers, or both—should pay for any utility system upgrades necessary to provide wheeling service.⁶¹

The CPUC notice specifically indicated that it did not intend to order utilities to perform retail wheeling.⁶² In this respect, its program was consistent with that of the Wisconsin Commission.

E. Connecticut

Connecticut law permits the Department of Public Utility Control (DPUC) to require wheeling of electricity produced by a "private power producer" to another "utility or to another facility operated by the private power producer" if the DPUC first determines that the wheeling order will not: (1) adversely impact the customers of the utility; (2) result in an uncompensated loss or unduly burden the utility or private power producer; (3) impair the reliability of service of the utility; or (4) impair the ability of the utility to provide adequate service to its customers.⁶³

As of this date, the Connecticut DPUC has not exercised its authority to require wheeling of power.⁶⁴ There is, however, substantial evidence that the DPUC would not hesitate to exercise its statutory powers owing to qualms about the validity of such powers under federal preemption law.

In 1987, the DPUC issued a report in response to a state legislative directive to investigate wheeling and QF interconnection on the transmission systems of Connecticut utilities and the restrictions that such uses of transmission and distribution cause or could cause.⁶⁵ Among the issues to be investigated was the question of the division between state and federal authority.

The DPUC's report argued that the FPA does not pre-empt the states from ordering utilities to perform wheeling service:

Firstly, the Act does not expressly prohibit state ordered wheeling transactions Secondly, FERC has not exercised its own limited authority to order wheeling, and therefore, there can be no implicit preemption. . . . [Moreover, state-mandated wheeling would] further the purpose of PURPA, which is to encourage the utilization of cogeneration and small power production. Thus, state wheeling orders are not preempted by the FPA.⁶⁶

The DPUC's report also argued that the proviso in section 201(b)(1) of the FPA—precluding the exercise of federal regulatory jurisdiction over

61. *Id.* at 361.

62. *Id.* at 361.

63. CONN. GEN. STAT. § 16-243a(b) (Supp. 1991).

64. One of the two Connecticut investor-owned utilities currently wheels power produced by a qualifying facility on a voluntary basis.

65. 1986 Conn. Acts 86-289 (Reg. Sess.).

66. Electric Transmission Serv., 82 PUR4th 473, 519 (1987).

"facilities [used] for the transmission of electric energy consumed wholly by the transmitter"—may allow the state commissions to order wheeling. According to the DPUC, this constraint had never been interpreted by the FERC or the courts. As we have seen, the Department's organic statute authorized the agency to require wheeling of electricity produced by a "private power producer" if certain showings were made. Accordingly, the DPUC reasoned, if the term "transmitter" found in section 201(b)(1) of the FPA were defined to mean the same thing as the term "private power producer" found in the Connecticut statute, then the Department would be authorized to order wheeling.⁶⁷

The DPUC declined to endorse retail wheeling. While it found wheeling for retail customers to be "technically feasible," the DPUC held that retail wheeling "would pose significant short term economic risk to Connecticut electric utilities and their customers, and raise serious questions of equity and regulatory responsibility."⁶⁸

F. Ohio

The Ohio Public Utilities Commission (OPUC) has announced plans to order wheeling for winning bidders in capacity solicitation competitions held by Ohio utilities. The announcement was part of a March 1991 order by which the OPUC directed its staff to initiate a rulemaking proceeding to establish a bidding system under which utilities would procure new capacity.⁶⁹ In its order, the Ohio Commission determined "utilities should provide open access to the intrastate transmission grid for winning bidders, for the amount of capacity offered by the winning bidders in a host utility's bid solicitation."⁷⁰

The OPUC based this requirement on the desirability of increasing competition. It reasoned that restricting bidders to sites within the service area of the utility soliciting the bids would unduly limit competition and, thereby, "erode the cost-effectiveness goals of the [integrated resource planning] process."⁷¹

It is intriguing to consider the implications of the Ohio Commission's order. The order questioned whether the OPUC had jurisdiction to order wheeling.⁷² But the Commission harbored no illusions about its *power* to achieve the same result by other means. Citing a staff analysis, the Ohio Commission said:

The Staff . . . understands the point made by the commentators who claimed that current regulatory treatment of transmission provides little incentive for transmission-owning utilities to increase their use of their systems for bulk power transfers. . . . In addition, the Staff recognizes [that] . . . this Commission has exclusive jurisdictional authority over retail ratemaking, including the setting of

67. *Id.* at 523-24.

68. *Id.* at 476.

69. Competitive Bidding for the Acquisition of New Electricity Capacity, 121 PUR4th 499 (1991).

70. *Id.* at 506.

71. *Id.* at 505.

72. The order made explicit reference to the "intrastate transmission grid." It also acknowledged that the FERC has exclusive jurisdiction over the setting of rates, terms, and conditions for *wholesale* transmission access and wheeling. These statements cannot be reconciled.

rates for the utilities' recovery of investment in the state's transmission system.⁷³

These statements strongly imply that the OPUC might use its authority over retail rates to disallow investment in transmission plant—unless the utility can “increase the use of” its transmission system. The surest route to such increased use would be for the utility to offer open-access transmission service. That, at the least, is a hypothesis that the OPUC's analysis would encourage.

IV. CONCLUSION

Encouraging competition in the wholesale generation market and more efficient uses of capital-intensive utility transmission systems: these are laudable goals. State commissions—charged with producing fair and equitable rates for retail customers, committed to fostering the development of the nascent independent power industry, and convinced that a rational regulatory system must be posited upon credible least-cost resource planning—are justifiably impatient with the federal government's failure to come to grips with and promulgate a viable policy to deal with the issue of transmission access. Thus, they have moved forward, brushing aside jurisdictional uncertainties and relying on some rather dubious legal reasoning about the constitutional and statutory limitations on their powers. Taking a lesson from the recent actions of the FERC, more than one state commission has sought to impose rules that may be beyond its jurisdiction by drafting them as conditions to routine actions within its jurisdiction.

Utility executives, faced with the question whether to accede to these initiatives of dubious validity, tend to choose to go along with the state commissions' programs. They know, or at least sense, that greater and freer transmission access lies in their immediate futures. They understand that federal regulators who covet a nationwide open-access transmission system will reach out for their industry as soon as their attention can be diverted from producing unlimited open access and “unbundling” in the gas pipeline industry. The temperate, statesmanlike course of action may appear to be to acquiesce in the programs of their state regulatory agencies and, indeed, an attempt to trump them by proposing transmission-access programs devised by the utilities themselves. One suspects that they are motivated to do so in order to avoid the ultimate nightmare of the investor-owned utility: unlimited retail wheeling.

These phenomena are occurring at an accelerated pace in many states. State commissions are in fact writing the rules under which investor-owned utilities provide wheeling service to non-utility generators and others who are seeking to sell electric power in distant markets. The rules are being obeyed. The objections to the jurisdictional authority of state agencies to promulgate such rules are being dismissed as mere lawyers' quibbles.

It is worth asking, however, whether there is more at stake than a lawyers' game. Does it really matter whether the rules for transmission access are made at the state or federal level if the result is the same, the result being

73. *Id.* at 506.

substantially more wheeling service performed by investor-owned utility systems?

Under our great constitutional scheme, the power to regulate interstate commerce is also the power to restrict it.⁷⁴ A state that can require its native utilities to wheel power to serve load centers in the state when electric power is relatively cheap and abundant, can, with equal validity and vigor, restrict and embargo electric service when the electric power industry finds itself faced with rising prices and a supply shortage. History teaches us that this is exactly what will occur.⁷⁵

The vision of Chief Justice John Marshall remains valid in our time. He stressed that the regulation of matters vital to a national economy cannot be left to the parochial supervision of the several states. It requires a national perspective to choose wisely among the competing interests of investor-owned utilities, QFs, other IPPs, wholesale customers, and retail customers all of whom have a stake in our policy towards transmission access. The FERC is the administrative agency vested with responsibility for exercising that national perspective. It, not the state commissions, should be the institution making the rules for transmission access.

The time has come for the FERC to get on with that task. Renewed concern over the thorny subject of transmission access should be a top priority matter for the Commission. Until the FERC takes on this difficult work, however, it appears that state programs will be the major influence shaping our national policy towards transmission access.

Finally, utilities themselves must be aware that pressures to implement "open access" transmission policies will be forthcoming from both state and federal regulatory agencies. They should have in place clearly thought-out strategies for dealing with these pressures. The potential strategies can include a preemptive strike, under which the utility voluntarily files federal and state transmission tariffs—containing the terms and conditions that the utility believes are essential to preserve the integrity of its system. On the other side of the range might be adherence to a "Just Say No" policy, under which the utilities unleash their powerful legal arsenal of authority for the proposition that the agencies lack jurisdiction to mandate wheeling. Regardless of whether either of these approaches or some more moderate strategy is chosen, it is important for the utilities involved to recognize that the issue of transmission access is one that will be fought out at both the state and federal levels. For it is clear that both levels of government have something important to say on the subject.

74. See *Champion v. Ames*, 188 U.S. 321 (1903) (lottery case).

75. See *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).