Energy Jurisdiction in the Twenty-First Century

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The U.S. electrical grid is a modern marvel, consisting of nearly 3500 utility organizations, 450,000 miles of transmission lines, and six million miles of distribution cable that span across and crisscross the country to serve over 334 million people (and growing) whose total electricity demand exceeds 830 gigawatts. But the grid is evolving, as it has since its inception. From a relatively simple beginning with fewer power suppliers and unsophisticated technology, the grid today is characterized by robust competition, greater innovation, and a blurring distinction between the wholesale sale and retail sale of electricity.

In the midst of the evolution of the grid is the Federal Power Act. At its core, the Act grants the Federal Energy Regulatory Commission jurisdiction to regulate the wholesale sale of electricity, but reserves to the states their traditional jurisdiction over generation, intrastate transmission and distribution, and retail sales. This bright-line jurisdiction between the Commission and the states has remained relatively unchanged since the Federal Power Act's enactment in spite of the evolution of the grid.

A bright-line jurisdiction, however, is antiquated in the modern grid where there are no bright lines, as activities in the wholesale market naturally affect the retail market, and vice versa. By drawing on three of the Supreme Court's most recent energy law cases, this Note offers a comprehensive look at energy jurisdiction, and illuminates the problems of a bright-line analysis and expansive federal jurisdiction in the modern grid. First, this Note considers Hughes v. Talen Energy Marketing, LLC *to highlight the resulting jurisdictional tensions between the Federal Energy Regulatory Commission and the states in the modern grid. As this Part illustrates, courts have*

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developed and applied a bright-line analysis that favors expansive federal jurisdiction. Second, this Note uses Federal Energy Regulatory Commission v. Electric Power Supply Association *to illustrate the practical results of an expansive federal jurisdiction in energy regulation. Third, this Note discusses the resulting policy implications to state energy goals. Finally, this Note concludes by drawing on* Oneok, Inc. v. Learject, Inc. *to propose a framework that balances the mandates of the Federal Power Act, and federal and state jurisdiction in the twenty-first century grid. This Note, ultimately, hopes to help bring energy regulation to the twenty-first century.*

INTRODUCTION

The U.S. electrical grid is a modern marvel, consisting of an interconnected and intricate network of generation facilities, transmission lines, and distribution lines. The grid is composed of nearly 3500 utility organizations, 450,000 miles of transmission lines, and six million miles of distribution cable that span across and crisscross the country to serve over 334 million people (and growing) whose total electricity demand exceeds 830 gigawatts.[1] It is no wonder then that the National Academy of Engineering has dubbed the grid as the "supreme engineering achievement of the 20th century."[2]

But the grid is evolving, as it has since its inception. Throughout the twentieth and twenty-first centuries, demand for electricity has increased, as society grows ever more dependent on reliable electricity for nearly all aspects of modern life.[3] The composition of the electricity supply mix has also changed. Though fossil fuels still remain the most prevalent source of electricity (making up over 67 percent of the electricity portfolio), this is rapidly changing.[4] From 2013 to 2040, natural gas and hydrocarbon gas liquids consumption is expected to grow by more than 50 percent,[5] and the share of renewable energy in the electricity mix is expected to rise by as much as 72 percent.[6]

1. FERC, RELIABILITY PRIMER: AN OVERVIEW OF THE FEDERAL ENERGY REGULATORY COMMISSION'S ROLE IN OVERSEEING THE RELIABLE OPERATION OF THE NATION'S BULK POWER SYSTEM 9 (2016) [hereinafter FERC RELIABILITY PRIMER]; HARRIS WILLIAMS & CO., TRANSMISSION & DISTRIBUTION INFRASTRUCTURE 2 (2014), http://www.harriswilliams.com/sites/default/files/industry_reports/ep_td_white_paper_06_10_14_final.pdf.

2. John Fialka, *Modernizing the Grid: A Tugboat 'Trying to Turn a Big Ocean Liner'*, CLIMATEWIRE (July 6, 2016), http://www.eenews.net/stories/1060039806.

3. FERC RELIABILITY PRIMER, *supra* note 1, at 9.

4. *Frequently Asked Questions: What is U.S. Electricity Generation by Energy Source?*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/tools/faqs/faq.cfm?id=427&t=3 (last updated Apr. 18, 2017).

5. U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2015 WITH PROJECTIONS TO 2040, at ES-6 (2015).

6. *Id.* This growth in total energy share will likely not come to fruition, though, as it depends in part on the availability of federal tax credits for renewable electricity generation. *Id.* The Trump administration has expressed hostility towards renewable energy and has embraced the coal industry. *See* Coral Davenport & Alissa J. Rubin, *Trump Signs Executive Order Unwinding Obama Climate Policies*, N.Y. TIMES (Mar. 28, 2017), https://www.nytimes.com/2017/03/28/climate/trump-executive-order-climate-change.html.

But while the grid has transformed, the Federal Power Act (FPA) has remained relatively unchanged.[7] A New Deal statute, the FPA was enacted in 1935 and charged the Federal Energy Regulatory Commission (FERC) to regulate the wholesale sale of electricity, along with both the wholesale and retail aspects of transmission, but left to the states their traditional jurisdiction over generation, intrastate transmission and distribution, and retail sales.[8] The FPA thus established a "bright line" jurisdiction to regulate electricity: It granted the wholesale sale of electricity to the federal government, but reserved the retail sale of electricity to the states.

A bright-line jurisdiction, however, is antiquated. In the modern grid, there are no bright lines, as activities in the wholesale market naturally affect the retail market.[9] By drawing on the Supreme Court's recent energy law cases, this Note offers a comprehensive look at energy jurisdiction, and illuminates the problems of a bright-line analysis and expansive federal jurisdiction in the modern grid. This Note proceeds in four Parts. Part I provides a historical background of the FPA and the evolution of the grid. Part II discusses the resulting jurisdictional tensions between FERC and the states in light of the reality of the modern grid, and how courts have resolved those tensions. As this Part illustrates, courts have developed and applied standards of review that favor expansive FERC jurisdiction. Part III then discusses the consequences of expansive FERC jurisdiction, and the policy implications to state energy goals. Finally, Part IV concludes by drawing on a recent Supreme Court decision to propose a framework that balances the mandates of the FPA, and FERC and state jurisdiction in the twenty-first century grid.

I. BACKGROUND

The genesis of the grid is a rather complex and long story, and this Part provides a snippet of that story. This Part discusses the FPA and then details the transformation of the grid over a relatively short period of time from a regulated monopoly structure to competitive markets. This Part concludes by examining how the advent of more sophisticated technology has facilitated greater interconnectivity in the modern grid.

A. A Bright Jurisdictional Line

Initially, public utilities were subject only to state regulation. It was not until 1920 when Congress enacted the Federal Water Power Act that public

7. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 44 (2014) (highlighting how "[f]or approximately sixty years . . . FERC [has] discharged [its] responsibility" in a relatively unchanged manner).

8. 16 U.S.C. § 824 (2012).

9. *See* FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 766 (2016); Oneok, Inc. v. Learjet, Inc., 135 S. Ct 1591, 1601 (2015).

utilities were subject to both state and federal regulation.[10] The Act mainly focused on water power projects.[11] It also established the Federal Power Commission (FPC) and charged it to regulate hydroelectric projects under federal control.[12]

In 1935, Congress expanded the FPC's jurisdiction in response to the Supreme Court's decision in the seminal energy law case, *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.* In *Attleboro*, the Court determined that the states cannot regulate wholesale rates because wholesale electricity "is not local but national" in character.[13] State regulation of wholesale rates would therefore "place[] a direct burden upon interstate commerce" in violation of the Dormant Commerce Clause.[14] Further, only Congress can regulate a matter that is "essentially national in character," as the Commerce Clause vests in Congress the power to regulate commerce among the states.[15]

The *Attleboro* holding left a regulatory gap: State regulators were stripped of their authority over wholesale rates, but no federal regulatory authority existed to fill the void. To "close the '*Attleboro* gap,'" Congress enacted the FPA to charge the FPC to regulate wholesale electricity in interstate commerce— "the precise subject matter beyond the jurisdiction of the States in *Attleboro*."[16] In 1977, most of the powers and responsibilities of the FPC were then transferred to FERC.[17]

The FPA granted FERC authority over wholesale electricity, which is the "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce."[18] This authority includes the determination of "just and reasonable" wholesale rates.[19] FERC's jurisdiction also extends over certain aspects of the retail sale of electricity, as FERC has authority over both the wholesale and retail aspects of transmission and any retail "regulation, practice, or contract affecting such [wholesale] rate[s]."[20]

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10. *See* Charles K. McFarland, *The Federal Government and Water Power, 1901–1913: A Legislative Study in the Nascence of Regulation*, 42 LAND ECON. 441, 441 (1966).
11. *See id.*
12. JAMES H. MCGREW, FERC: FEDERAL ENERGY REGULATORY COMMISSION 5 (2d ed. 2009).
13. Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89–90 (1927).
14. *Id.* at 88–89.
15. *Id.* at 90.
16. New York v. FERC, 535 U.S. 1, 20 (2002).
17. MCGREW, *supra* note 12, at 5.
18. 16 U.S.C. § 824(a) (2012).
19. § 824d.

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

§ 824d(b). A wholesale sale is defined as a "sale of electric energy to any person for resale." § 824(d).
20. §§ 824(b); 824d(a); 824e(a).

Congress, however, did not grant authority over the entire regulatory field to the federal government. The FPA reserved to the states jurisdiction over the retail sale of electricity, which is the sale of electricity directly to an end user.[21] The FPA also preserved state jurisdiction over "facilities used for the generation of electric energy [and] facilities used in local distribution [of electricity]."[22] Finally, the FPA instructed that FERC jurisdiction shall "extend only to those matters which are not subject to regulation by the States."[23]

Courts have understood these mandates of the FPA as creating two neatly divided regulatory spheres: Wholesale electricity is reserved for FERC, while retail electricity is reserved for the states.[24] Courts have thus fashioned a bright-line rule for energy jurisdiction.[25] And, although the FPA has been amended many times and the grid has evolved, the overall statutory structure of the FPA has remained relatively unchanged.[26] This bright-line rule has therefore persisted in the modern grid.

B. Smudging the FPA's Jurisdictional Line: A Changing Electrical Grid

A bright-line rule has arguably always been a poor fit, considering that there has always been "a direct relationship between consumption and the volume of sales made to retail customers in the retail markets . . . and the volume of energy purchased in the wholesale markets for resale."[27] But back when the FPA was enacted in the 1930s, a bright-line jurisdiction probably made more practical sense, as the grid was relatively simple, with fewer power suppliers and unsophisticated technology compared to the modern grid.[28]

Back then, energy was believed to be "the quintessential natural monopoly," meaning that the energy market was characterized by long-run decreasing costs and that a single provider could supply the product or service

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21. The FPA expressed that FERC jurisdiction "shall not apply to [the] sale of electric energy" other than wholesale. § 824(b)(1); *see* Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89–90 (1927) (holding only that states cannot regulate wholesale rates, but left retail rates within the jurisdiction of the states).

22. § 824(b)(1); *see* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983).

23. § 824(a). The savings clause however is only a "policy declaration." Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964) (quoting Conn. Light & Power Co. v. Fed. Power Comm'n, 324 U.S. 515, 527 (1945)) (a "policy declaration . . . cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose"). Nonetheless, it explicitly signaled that Congress intended to preserve state jurisdiction over the retail sale of electricity.

24. *See* New York v. FERC., 535 U.S. 1, 16 (2002).

25. *See infra* Part II.A.1.

26. *See* James J. Hoecker & Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?*, 35 ENERGY L.J. 71, 73 (2014).

27. Opposition to Petitions for Writ of Certiorari at 6, FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016) (Nos. 14-840, 14-841).

28. For instance, FERC notes that the first electricity systems were independent of each other, serving local communities or regions. It was only after World War II when the systems interconnected as a resulted of increased demand for electricity. FERC RELIABILITY PRIMER, *supra* note 1, at 10.

at a lower cost than competitors could offer.[29] The prevailing belief at the time was that it was most efficient to regulate natural monopolies as true monopolies.[30] Therefore, prior to the enactment of the FPA, most state energy markets were regulated as vertically integrated monopolies where electricity was mainly controlled by privately owned utilities, also known as investor-owned utilities (IOUs).[31]

Starting in the late 1960s, rising generation costs and slower growth helped clear the way for a restructuring of the grid. The passage of new environmental regulations, such as the Clean Air Act of 1970, raised operating costs by requiring utilities to reduce their emission of pollutants, and in many cases, install expensive pollution-control technologies.[32] Additionally, the Organization of Petroleum Exporting Countries imposed an embargo on oil exports to the United States in 1973.[33] Although the oil embargo only lasted until March 1974, it nonetheless resulted in higher energy prices.[34] Meanwhile, the accident at Three Mile Island in 1979 resulted in higher costs for nuclear generation.[35] There were also reliability concerns as parts of the grid experienced major blackouts.[36]

These events prompted government officials and experts to question the existing regulatory structure of the grid.[37] Congress enacted legislation to reduce national dependence on foreign oil, diversify the energy supply mix with renewable and alternative energy sources, and improve the efficiency of

29. David Schraub, *Renewing Electricity Competition*, 42 FLA. ST. U. L. REV. 937, 938, 950 n.48 (2015).

30. U.S. ENERGY INFO. ADMIN., THE CHANGING STRUCTURE OF THE ELECTRIC POWER INDUSTRY 2000: AN UPDATE 1 (2000) ("The long-standing traditional structure of the industry was based, in part, on the economic theory that electric power production and delivery were natural monopolies, and that large centralized power plants were the most efficient and inexpensive means for producing electric power and delivering it to customers. Large power generating plants, integrated with transmission and distribution systems, achieved economies of scale and consequently lower operating costs than relatively smaller plants could realize. Because of the monopoly structure, Federal and State government regulations were developed to control operating procedures, prices, and entry to the industry in order to protect consumers from potential monopolistic abuses.").

31. *Id.* at 5.

32. *Id.* at 8; *see* Clean Air Act, 42 U.S.C. §§ 7470–7479 (2012).

33. U.S. ENERGY INFO. ADMIN., *supra* note 30, at 31.

34. *Id.*

35. *Id.* at 8. For background on the Three Mile Island accident, see *Backgrounder on the Three Mile Island Accident*, U.S. NRC, http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html (last updated Dec. 12, 2014).

36. In 1965, for example, the "Great Northeast Blackout" affected about thirty million people in eight states and parts of Canada. *The Great Northeast Blackout*, HISTORY, http://www.history.com/this-day-in-history/the-great-northeast-blackout (last visited Nov. 11, 2016). The New York City blackout in 1977, meanwhile, affected about nine million people. Jennifer Latson, *Why the 1977 Blackout Was One of New York's Darkest Hours*, TIME (July 13, 2015), http://time.com/3949986/1977-blackout-new-york-history/.

37. U.S. ENERGY INFO. ADMIN., *supra* note 30, at 1; Freeman & Spence, *supra* note 7, at 44. Recent studies show that the inefficiencies in the grid at this time amounted to billions of dollars lost in the national economy each year. Richard J. Pierce, Jr., *Completing the Process of Restructuring the Electricity Market*, 40 WAKE FOREST L. REV. 451, 453–54 (2005).

the grid.[38] One such measure was the Public Utilities Regulatory Policies Act (PURPA). Enacted in 1978 as part of President Jimmy Carter's national energy plan, PURPA represented "the first explicit endorsement by Congress of competition policies for the electric power industry."[39] Congress, in particular, intended to remove barriers to market entry that new generators faced under the traditional, vertically integrated model of electricity regulation.[40] To achieve this goal, Congress authorized FERC to prescribe rules "it determines necessary to encourage cogeneration and small power production."[41]

FERC promulgated Orders Nos. 69 and 70 to fulfill PURPA's mandate to spur competition.[42] The rules encouraged the entry of non-utility generators[43] to the wholesale market by compelling electric utilities to buy electricity generated by qualified independent power producers (qualified facilities or QFs)[44] at the avoided-cost rate, which approximates what it would cost the utility to generate the same amount of electricity.[45] Before the order, small power producers were generally excluded from the wholesale market because they did not enjoy the same economies of scale in electricity generation as the entrenched IOUs.[46]

In 1992, Congress enacted the Energy Policy Act of 1992 to further encourage competition in the grid.[47] The Act created a new category of power producers, exempt wholesale generators (EWGs), and thereby expanded non-utility markets.[48] EWGs are similar to QFs in that they are wholesale producers that do not sell electricity in the retail market or own transmission facilities.[49] But unlike QFs under PURPA, EWGs are not price regulated and may charge market-based rates.[50]

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38. U.S. ENERGY INFO. ADMIN., *supra* note 30, at 8.

39. JOEL B. EISEN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS 630–31 (4th ed. 2015).

40. *Id.* at 631.

41. 16 U.S.C. § 824a-3(a) (2012).

42. 18 C.F.R. § 292 (2017).

43. A non-utility generator is "[a] corporation, person, agency, authority, or other legal entity or instrumentality that owns or operates facilities for electric generation and is not an electric utility. Nonutility power producers include qualifying cogenerators, qualifying small power producers, and other nonutility generators (including independent power producers). Non-utility power producers are without a designated franchised service area and do not file forms listed in the Code of Federal Regulations, Title 18, Part 141." *Glossary*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/tools/glossary/index.cfm?id=N (last visited Nov. 11, 2016).

44. To be considered as a QF, an independent power producer must meet certain ownership, operating, and energy efficiency criteria established by FERC. 16 U.S.C. § 796 (17)–(18).

45. 18 C.F.R. § 292.304(b)(2).

46. Beth Dunlop, *Qualifying Facilities Under PURPA: What Qualifies?*, 15 ENVIRONS 7, 7 (1991).

47. MCGREW, *supra* note 12, at 146.

48. U.S. ENERGY INFO ADMIN, *supra* note 30, at 8.

49. *Id.*

50. *Id.* In addition, "EWGs are independent power facilities generating electricity for sale in wholesale power markets that do not meet the size, efficiency, or ownership requirements for QF status.

In addition, the Act expanded FERC's authority to approve applications for transmission service.[51] Under this authority, FERC issued Orders Nos. 888 and 889, thereby ordering IOUs to make their transmission lines available to third parties.[52] Order No. 888 also ordered the "functional unbundling of wholesale electricity sales from transmission services, required owners of transmission lines to provide open-access transmission services on non-discriminatory terms[,] and opened wholesale electricity markets to competition."[53]

In 1999, FERC then promulgated Order 2000 to remedy lingering structural and economic inefficiencies in the national transmission grid.[54] The order encouraged the formation of regional transmission organizations (RTOs)—independent entities that control and operate transmission networks, improve reliability through regional planning, and ensure that the operation of the grid is free from discriminatory practices.[55] The order also allowed independent system operators (ISOs)—independent nonprofit entities—to serve as RTOs.[56] There are currently seven RTOs and ISOs: ISO New England; New York ISO; PJM Interconnection (Mid-Atlantic, including Maryland, and a portion of the Midwest); Midwest ISO; Southwest Power Pool; Energy Reliability Council of Texas (most of Texas); and California ISO (California).[57] It is estimated that about two-thirds of the electric power in the grid is now delivered through RTOs and ISOs.[58]

FERC determines EWG status." *What Is an EWG?*, ELECTRIC POWER SUPPLY ASS'N, (last visited Feb. 8, 2016).

51. MCGREW, *supra* note 12, at 146; *see* Energy Policy Act of 1992, Pub. L. No. 102-486, §711, 106 Stat. 2776, 2905–10 (1992).

52. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (FERC May 10, 1996) (to be codified at 18 C.F.R. pts. 35, 385); Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, 61 Fed. Reg. 21,737 (FERC May 10, 1996) (to be codified at 18 C.F.R. pt. 37).

53. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,550–60 (May 10, 1996) (to be codified at 18 C.F.R. pts. 35, 385); Freeman & Spence, *supra* note 7, at 46 (footnote omitted).

54. MCGREW, *supra* note 12, at 156.

55. Regional Transmission Organizations, 18 C.F.R. § 35.34(a) (2017). An RTO has to meet five requirements: (1) independence from market participants, (2) no financial interest in market participants, (3) regional scope of operations, (4) planning and expansion authority, and (5) an "open architecture" policy allowing the RTO to modify its structure as experience may require. § 35.34(j), (l).

56. *Regional Transmission Organizations (RTO)/Independent System Operators (ISO)*, FERC, https://www.ferc.gov/industries/electric/indus-act/rto.asp (last updated May 11, 2017).

57. *What Are RTOs and Organized Markets?*, ELECTRIC POWER SUPPLY ASS'N, https://www.epsa.org/industry/primer/?fa=rto (last visited Dec. 15, 2016).

58. *See* Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 209 (2015).

Reliability and environmental concerns nonetheless persisted.[59] National security interests in energy also increased in the 2000s.[60] Congress enacted the Energy Policy Act of 2005 (EPAct2005) to address these concerns.[61] At his signing of EPAct2005, President George W. Bush remarked that EPAct2005 "promotes dependable, affordable, and environmentally sound production and distribution of energy for America's future."[62] In general, EPAct2005 reaffirmed a commitment to restructuring the grid to increase competition. It also strengthened FERC's regulatory tools to develop energy infrastructure and address inefficiencies in the grid, such as market manipulation and reliability concerns.[63]

Thus, throughout the last century, Congress has charged FERC with increasingly ambitious national energy policies to address reliability and other concerns in the grid. FERC, in response, has exercised its authority under the FPA—sometimes "creative[ly]"[64]—to spur competition. Scholars have noted that FERC even went "beyond what Congress had anticipated":

> For example, FERC moved incrementally to promote competition by authorizing individual [NUG] firms to charge market-based rates and by requiring individual firms to provide open access to transmission lines as a "voluntary" concession in a series of adjudicative cases in which utilities sought merger approval or approval of market-based rates.[65]

FERC was so effective in encouraging competition that, according to energy scholar Professor Richard Hirsh, "[t]hrough its mostly unintended consequences, PURPA inaugurated the process by which the traditional structure of the utility system disintegrated."[66]

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59. *See* Brad Sherman, *A Time to Act Anew: A Historical Perspective on the Energy Policy Act of 2005 and the Changing Electrical Energy Market*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 211, 211–12 (noting that the Energy Policy Act of 2005 was enacted in part to address these reliability and environmental concerns). In 2003, the grid also experienced "the largest blackout in American history," affecting millions in eight states and Canada. James Barron, *The Blackout of 2003: The Overview; Power Surge Blacks Out Northeast, Hitting Cities in 8 States and Canada; Midday Shutdowns Disrupt Millions*, N.Y. TIMES (Aug. 15, 2003), http://www.nytimes.com/2003/08/15/nyregion/blackout-2003-overview-power-surge-blacks-northeast-hitting-cities-8-states.html.

60. In 2001, the United States experienced possibly the worst attack on American soil in history. *See 9/11 Attacks*, HISTORY, http://www.history.com/topics/9-11-attacks (last visited Dec. 15, 2016). There was accordingly a greater interest in energy in the context of national security at this time. *See* Sherman, *supra* note 59.

61. *See* Sidney A. Shapiro & Joseph P. Tomain, *Rethinking Reform of Electricity Markets*, 40 WAKE FOREST L. REV. 497, 516 (2005) ("[E]nergy policy today must address energy, the environment, and security.").

62. President George W. Bush, Statement on Signing the Energy Policy Act of 2005 (Aug. 8, 2005), http://www.presidency.ucsb.edu/ws/?pid=64861.

63. *See Fact Sheet: Energy Policy Act of 2005*, FERC, https://www.ferc.gov/legal/fed-sta/epact-fact-sheet.pdf (last visited May 14, 2017).

64. *See infra* Part 0.

65. Freeman & Spence, *supra* note 7, at 45 (footnotes omitted).

66. Schraub, *supra* note 29, at 955 n.71 (quoting RICHARD F. HIRSCH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 119 (1999)).

C. A Blurred Jurisdictional Line: The Modern Electrical Grid

In addition to its more comprehensive regulatory framework, the modern grid is far more technically complex than the historical grid. The vestiges of the historical vertically integrated monopolies are being replaced by deregulation, resulting in greater competition. The grid is also undergoing even more changes with the advent of increasingly sophisticated technology, further blurring the bright-line jurisdiction between FERC and the states.

Recently, for instance, a number of states have adopted or are moving towards adopting smart-grid-related laws and regulations.[67] A smart grid applies technologies to monitor the consumption of electricity.[68] This allows utilities to monitor how effectively electricity is distributed to customers or change the flow of electricity from one area to another to adapt to real-time demand.[69] A smart grid also enables newer technologies to be integrated into the grid, such as solar or wind energy production, and even plug-in electric vehicles.[70] Thus, a smart grid improves the reliability and efficiency of electricity distribution, and provides utilities with more information about, and control of, energy consumption.

One program that benefits from smart-grid developments is net metering, which allows electricity consumers to participate in the operation of the grid. Consumers can sell back to their utility service provider excess electricity generated by the consumers' distributed-generation systems, such as rooftop solar panels and other small-scale, on-site power sources. By adding electricity from a variety of distributed sources into the grid, net metering has the potential to lower both wholesale and retail rates.[71] Currently, over forty states and the District of Columbia have mandatory net-metering rules.[72]

Another program that utilizes smart-grid technologies is demand response, which seeks to encourage consumers to reduce their energy consumption during peak periods; that energy is then diverted to critical areas.[73] There are two major types of demand response programs: (1) rate-based programs, which allow the retail price of electricity to fluctuate based on its actual cost, and (2)

67. Cassarah Brown, *States Get Smart: Encouraging and Regulating Smart Grid Technologies*, NAT'L CONF. OF ST. LEGISLATURES (July 2013), http://www.ncsl.org/research/energy/regulating-and-encouraging-smart-grid-technologies.aspx.

68. *Id.*; *What Is the Smart Grid?*, SMARTGRID.GOV, https://www.smartgrid.gov/the_smart_grid/smart_grid.html (last visited Nov. 12, 2016).

69. *What Is the Smart Grid?*, *supra* note 68.

70. *Id.*; *see* Martin LaMonica, *Electric Cars Seen as Killer App for Smart Grid*, CNET (June 21, 2009, 7:49 AM), https://www.cnet.com/news/electric-cars-seen-as-killer-app-for-smart-grid/.

71. EDISON ELEC. INST., SOLAR ENERGY AND NET METERING 1–2 (2016), http://www.eei.org/issuesandpolicy/generation/NetMetering/Documents/Straight%20Talk%20About%20Net%20Metering.pdf.

72. Mark Muro & Davashree Saha, *Rooftop Solar: Net Metering Is a Net Benefit*, BROOKINGS INSTITUTION (May 23, 2016), https://www.brookings.edu/research/rooftop-solar-net-metering-is-a-net-benefit/.

73. *Demand Response*, OFF. OF ELECTRICITY DELIVERY & ENERGY RELIABILITY, energy.gov/oe/services/technology-development/smart-grid/demand-response (last visited Nov. 16, 2016).

incentive-based programs, which allow customers to receive additional compensation in exchange for energy reductions when the grid is under particular strain and costs are high.[74] Demand response can accordingly be used to improve reliability by balancing supply and demand in the grid. This improved reliability can then benefit consumers by lowering wholesale rates and, in turn, retail rates.[75]

This trend towards increasing connectivity in the grid is blurring the distinction between wholesale and retail rates, as state laws and policies may now influence wholesale rates, and FERC rules and regulations may influence retail rates. Yet, despite these innovations and the restructuring of the grid, Congress has left relatively intact the bright jurisdictional lines it drew in 1935 when it enacted the FPA.[76] FERC, in turn, has resorted to creative strategies to bypass the statutory limits of the FPA to achieve national energy goals.[77] Tensions in jurisdictional questions have accordingly arisen.

II. DETERMINING ENERGY JURISDICTION

This Part discusses the analysis courts apply to answer those jurisdictional questions. This Part proceeds in three subparts. Subpart A explains how courts turn to preemption to determine whether a state law is preempted by the FPA. If a state law is not preempted, FERC can still assert jurisdiction over the activity through rule making. Subpart B details how courts review FERC claims to jurisdiction through rule making. Finally, through a discussion of demand response, subpart C illustrates how the fear of FERC aggrandizing on traditional state jurisdiction is no longer merely a hypothetical, but a reality.

A. A Broad Preemptive Analysis

There are two primary theories of preemption: express and implied preemption. In express preemption, Congress has made its intent to preempt state laws explicit.[78] Absent express intent, state laws can nonetheless be preempted through implied preemptive intent. There are two types of implied preemption: field and conflict preemption. In field preemption, state jurisdiction is trumped where "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to

74. Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 885, 897 (2015).

75. *Demand Response*, *supra* note 73. For a technical explanation of how improved reliability can result in lower wholesale rates, see FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 770 (2016) (explaining how demand response can affect the bidding process for electricity and, ultimately, wholesale rates).

76. *See* Hoecker & Smith, *supra* note 26.

77. *See infra* Part II.A.1.

78. *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 76–77 (2008); English v. G.E. Co., 496 U.S. 72, 78–79 (1990).

supplement federal law."[79] If Congress has not occupied the field, state jurisdiction can still be conflict preempted if it interferes with federal jurisdiction. State jurisdiction can be conflict preempted in two ways: (1) if it makes it impossible for a private party to comply with both state and federal law,[80] or (2) where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[81]

This subpart discusses the preemption doctrine that courts have fashioned in the context of determining FERC jurisdiction. First, this subpart examines the broad reach of that preemption doctrine, where federal regulators enjoy exclusive jurisdiction over wholesale rates and any state encroachment into this field is preempted. This subpart also covers the Natural Gas Act (NGA), another federal energy statute that shares many structural and historical similarities with the FPA.[82] Like the FPA, the NGA was enacted in response to a regulatory gap created when the Supreme Court found that the Commerce Clause precludes states from regulating rates of gas moving in interstate commerce.[83] The NGA closed this gap by charging FERC to regulate the wholesale sale of gas.[84] An understanding of the scope of the NGA is therefore important to understanding the scope of the FPA, as courts "routinely rel[y] on NGA cases in determining the scope of the FPA, and vice versa."[85]

Second, this subpart discusses the Court's latest energy law case, *Hughes v. Talen Energy Marketing, LLC*. Because the *Hughes* Court applied a traditional bright-line analysis in the context of the modern grid, *Hughes* presents an ideal case to analyze the shifting dynamics in energy jurisdiction. Thus, this subpart provides a rich account of *Hughes* to highlight the problems inherent in the continued application of a bright-line rule in the modern grid.

1. An Exclusive Jurisdiction

The Supreme Court has developed a broad preemptive analysis for FERC jurisdiction over wholesale rates. In *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, the Court embraced a broad scope of FERC jurisdiction over the wholesale sale of gas under the NGA.[86] There, the Court determined

79. Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 509 (1989).

80. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–143 (1963).

81. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

82. Stephen J. Humes, *Supreme Court Walks Energy Policy Tightrope as It Addresses Federalism and States' Rights*, TRENDS, Mar./Apr. 2016, at 8; Scott B. Grover, *The Supreme Court's Platonic Energy Policy*, NAT. RES. & ENV'T, Fall 2016, at 52 (2016); Alexander D. Torres, Oneok, Inc. v. Learjet, Inc.*: The Supreme Court Narrows the Preemptive Scope of the Natural Gas Act and Extracts a Win for State Courts*, 27 VILL. ENVTL. L.J. 361, 384 (2015).

83. Phillips Petrol. Co. v. Wisconsin, 347 U.S. 672, 683 (1954).

84. *Id.*

85. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1298 n.10 (2016).

86. 314 U.S. 498, 510 (1942).

that the NGA gives FERC "plenary" authority over the wholesale sale of gas.[87] This jurisdiction extends to activities in the retail sale of gas if those activities reasonably "materially affect interstate commerce."[88]

The Court noted that prior to the NGA, courts had applied a more flexible approach in determining state jurisdiction under the Commerce Clause by "look[ing] to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce."[89] The Court reasoned that Congress abandoned this flexible approach in enacting the NGA, and instead adopted a bright-line jurisdiction "developed in the *Attleboro* line which denied state power to regulate a sale 'at wholesale to local distributing companies.'"[90] Any state activity, even those in the retail market, that encroaches on wholesale rates is thus preempted; this determination does not require a detailed examination because, simply, FERC has "plenary" jurisdiction over wholesale rates.[91]

Subsequent cases affirmed this exclusion of state jurisdiction in the wholesale sale of both electricity and gas. In *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, the Court determined that FERC's jurisdiction over the wholesale sale of gas was "clear and complete" with "[n]o exceptions . . . in either category for particular uses, quantities or otherwise."[92] In the context of the FPA, the Court in *United States v. Public Utilities Commission of California* found that "Congress interpreted [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power."[93] In *Federal Power Commission v. Southern Cal. Edison Co.*, the Court determined that Congress "left no power" to the states to regulate in the wholesale market, but instead extended "plenary" and "exclusive" jurisdiction over the wholesale sale of electricity to FERC.[94]

The Court thus determined that FERC comprehensively occupies the field of wholesale electricity and gas sales. States cannot interfere with FERC's exclusive authority.[95] Any attempts by states, whether direct or indirect, such as through a contract that affects wholesale rates,[96] to set wholesale rates at a rate or on terms different than those determined to be "just and reasonable" by

87. *Id.* at 509–10.

88. *Id.*

89. *Id.* at 505.

90. Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 214 (1964) (quoting *Ill. Nat. Gas Co.*, 314 U.S. at 504).

91. *Ill. Nat. Gas Co.*, 314 U.S. at 509–10.

92. 332 U.S. 507, 516–17 (1947).

93. 345 U.S. 295, 308 (1954).

94. 376 U.S. 205, 214–16 (1964) (citing *Ill. Nat. Gas Co*, 314 U.S. at 504).

95. 16 U.S.C. § 824(b)(1) (2012); *see* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 373 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966, 968–70 (1986).

96. *See* Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash., 554 U.S. 527, 545 ("There is only one statutory standard for assessing wholesale-electricity rates, whether set by contract or tariff—the just-and-reasonable standard.").

FERC are preempted.[97] In addition, any state efforts, even in the retail markets, that "materially" affect wholesale rates are preempted, regardless of their purpose or other confounding factors.[98] The Court has therefore traditionally applied field preemption to trump state laws that encroach on FERC's exclusive jurisdiction over the wholesale sale of electricity or gas.[99]

2. Hughes v. Talen Energy Marketing, LLC

The Court has continued to apply its historical bright-line rule even in the modern grid where there are no bright lines. The Court, for instance, applied a bright-line analysis in its most recent energy law case, *Hughes*, where the issue before the Court was whether the FPA preempted an order promulgated by the Maryland Public Service Commission (MPSC).

a. Background

The disputed order in *Hughes* required three state load-serving entities (LSEs)—the organizations that deliver electricity to retail consumers in deregulated markets—to enter into a twenty-year pricing contract with CPV Maryland, LLC (CPV) to construct a new natural gas power plant.[100] State regulators promulgated the order to address reliability concerns over a perceived capacity shortfall in the state.[101]

Maryland is a member of PJM Interconnection (PJM), an RTO that oversees the grid in parts of thirteen mid-Atlantic states, midwestern states, and the District of Columbia.[102] PJM operates a capacity market, called the Reliability Pricing Model.[103] In this market, "[e]ach PJM member that provides electricity to consumers must acquire enough power supply resources to meet demand not only for today and tomorrow but for [three years in the] future. Members secure these resources for the future through the PJM capacity market."[104]

The capacity market operates a competitive auction to procure capacity.[105] In this auction,

97. *Nantahala Power & Light Co*., 476 U.S. at 968–69.

98. *See Ill. Natural Gas Co.*, 314 U.S. at 509–10.

99. *See, e.g.*, U.S. v. Pub. Util. Comm'n of Cal., 345 U.S. 295, 306–11 (1953) (holding that the FPA prohibited state control of wholesale rates in interstate commerce); Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind., 332 U.S. 507, 519–20 (1945) (holding that Congress "occupied the field" in the wholesale sale of natural gas).

100. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1294–95 (2016).

101. *Id.* at 1294.

102. *Id.*

103. *Capacity Market (RPM)*, PJM, http://learn.pjm.com/three-priorities/buying-and-selling-energy/capacity-markets.aspx (last visited Nov. 15, 2016).

104. *Id.*

105. *Id.* Capacity represents a commitment of resources to deliver when needed, particularly in case of a grid emergency. *Id.*

> [o]wners of capacity to produce electricity in three years' time . . . bid that capacity into the auction for sale to PJM at rates the sellers set in their bids. PJM accepts bids until it has purchased enough capacity to satisfy anticipated demand. All accepted capacity sellers receive the highest accepted rate, called the "clearing price." LSEs then must purchase, from PJM, enough electricity to satisfy their assigned share of overall projected demand.[106]

This auction is extensively regulated by FERC.[107] As a result, the clearing price serves as the FERC determination of the just and reasonable rate.[108]

Maryland state legislators grew concerned over the efficacy of the PJM capacity auction to encourage development of sufficient, new, in-state generation. In May 2007, the Maryland General Assembly enacted Senate Bill 400, calling for MPSC to study the adequacy of generation and transmission assets in the state.[109] In its findings, the MPSC reported that "Maryland faces a critical shortage of electricity capacity . . . because Maryland sits in a highly congested portion of the regional electric transmission system (which makes it difficult to bring more power in) and because we use more electricity than is generated here."[110]

Consequently, in 2009, Maryland regulators urged FERC to extend to ten years the New Entry Price Adjustment, which guarantees new generators a certain entry price for three years under certain conditions.[111] FERC rejected the proposal, reasoning that the proposal was unjust and unreasonable because it would "result in further price discrimination between existing resources" by favoring new suppliers.[112] FERC also reasoned that "[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability and both should receive the same price so that the price signals are not skewed in favor of new entry."[113]

In response to FERC's decision, the MPSC promulgated the Generation Order at issue in *Hughes* to encourage in-state generation and address the perceived shortfall in energy supply. The order solicited proposals to construct a new natural gas power plant. To incentivize bids, Maryland required three state LSEs to enter into a twenty-year pricing contract (called a "contract for differences" (CfD)).[114] Unlike a traditional bilateral contract for capacity, the CfD does not transfer ownership of capacity to the LSEs, but instead requires

106. *Hughes*, 136 S. Ct. at 1290.
107. *Id.*
108. *Id.*
109. S. 400, 2007 Leg., 423d Sess. (Md. 2007).
110. MD. PUB. SERV. COMM'N, INTERIM REPORT OF THE PUBLIC SERVICE COMMISSION OF MARYLAND TO THE MARYLAND GENERAL ASSEMBLY, PART I: OPTIONS FOR RE-REGULATION AND NEW GENERATION 1 (2007).
111. *PJM Interconnection, L.L.C.*, 128 F.E.R.C. ¶ 61,157, at ¶ 93 (2009).
112. *Id.* at ¶ 94.
113. *Id.* at ¶ 102.
114. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1294–95 (2016).

the capacity owner to sell its capacity in the PJM market.[115] If the capacity clears the capacity auction, the CfD compensation scheme requires one of two scenarios to guarantee that the capacity owner receives the contract price stipulated in the CfD. If the capacity owner clears the capacity auction at a price below the contract price, the CfD requires LSEs to make up the difference between the market price and the contract price of the agreement. Alternatively, if the capacity owner clears the capacity auction at a price above the contract price, the CfD requires the capacity owner to pay the LSEs the difference between the market price and the contract price. The theory behind the pricing mechanism is that any loss or gain would be passed by the LSEs to Maryland ratepayers.[116]

In late 2011, the state accepted the proposal of petitioner CPV.[117] On April 12, 2012, the MPSC ordered three of the state's LSEs to enter into the CfD agreement with CPV.[118] In response to the order, Talen Energy Marketing, LLC, and other competing energy firms (collectively, Talen) filed suit in the District Court for the District of Maryland against the MPSC, alleging that Maryland's program violated the Supremacy Clause, the Dormant Commerce Clause, and 42 U.S.C. § 1983.[119]

b. Procedural History

The district court found Maryland's program to be field preempted because it did more than encourage the development of a power plant (an authority reserved to the states by the FPA).[120] The court highlighted that the program undermined the exclusive authority of FERC to regulate the wholesale sale of electricity by requiring CPV to participate in the wholesale market at a price different than the price deemed as just and reasonable by FERC's approved regulatory framework (the capacity auction in this instance).[121] Because the court found the program to be field preempted, it did not pursue the "academic exercise" of determining whether the program was also conflict preempted because the issue was moot at that point.[122]

The Fourth Circuit affirmed the finding of the district court, but also found the program to be conflict preempted. The Fourth Circuit reasoned that the program was field preempted because it distorted the capacity auction's pricing

115. *Id.* at 1295.

116. PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d. 790, 831–32 (2013).

117. Brief for Petitioner CPV Maryland, LLC at 20–21, Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016) (Nos. 14-614, 14-623).

118. Complaint for Declaratory and Injunctive Relief at ¶¶ 6–7, PPL EnergyPlus, LLC v. Nazarian, 974 F. Supp. 2d 790 (D. Md. 2013) (No. 1:12-cv-01286-MJG). The Complaint refers to LSEs as electric distribution companies (EDCs).

119. *Id.* at ¶¶ 79–106.

120. *Nazarian*, 974 F. Supp. 2d at 840–41.

121. *Id.* at 837.

122. *Id.* at 841. For the other claims, the court determined that the program did not violate the Dormant Commerce Clause and that the plaintiff's section 1983 claim was meritless. *Id.* at 853, 855.

signals to set just and reasonable rates.[123] Further, the program was conflict preempted because it served as an effort to override the explicit policy choice of FERC to not extend the timeframe of a guaranteed price to new generators.[124] The Fourth Circuit, however, limited its holding to the facts of this case and "the specific program."[125]

The Supreme Court agreed with the Fourth Circuit's finding that the Maryland program was both field and conflict preempted.[126] The Court articulated that FERC extensively regulates the structure of the PJM capacity auction to ensure that the clearing price is "just and reasonable."[127] The Court went on to note that Congress "vest[ed] in [FERC] exclusive jurisdiction over wholesale sales of electricity in the interstate market,"[128] including "plenary" and "exclusive" jurisdiction over the determination of "just and reasonable" wholesale rates.[129] The Court then determined that the program was preempted because it set an interstate wholesale rate different than the "just and reasonable" rate set by the auction mechanism and, therefore, ran contrary to FERC's "plenary" and "exclusive" jurisdiction over wholesale rates.[130] And like the Fourth Circuit, the Court limited its holding to the facts of the case and held only that the condition that CPV enter the capacity market and clear the capacity auction was preempted.[131]

3. Analysis: Hughes *and the Modern Grid*

In *Hughes*, the Court applied a bright-line jurisdiction analysis where any state activity that encroaches on the "exclusive" and "plenary" federal jurisdiction over wholesale rates is preempted. But this reasoning ignores the reality of the modern grid—a grid where "a 'Platonic ideal' of strict separation between federal and state realms [does not] exist."[132] A bright-line jurisdiction in a connected grid is problematic because it undercuts the intent of Congress

123. PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467, 478–79 (2014).

124. *Id.* at 478–79; *see PJM Interconnection, L.L.C.*, *supra* note 111, at ¶¶ 93–94 (FERC denying CPV and the State of Maryland's proposal to extend the New Entry Price Adjustment period to ten years).

125. *Nazarian*, 753 F.3d at 478.

126. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297–99 (2016). Although the Court was not explicit whether the program was field or conflict preempted, it used the field preemption language and reasoning applied by the Fourth Circuit. And because field conflict encompasses a broader range of preemption, it is thus reasonable to infer that the Court decided to not go into the "academic exercise" of determining whether the program was likewise conflict preempted. *See Nazarian*, 974 F. Supp. 2d. at 841.

127. *Hughes*, 136 S. Ct. at 1294.

128. *Id.* at 1291.

129. *Id.* at 1297–98.

130. *Id.* at 1291–92, 1297; *see* 16 U.S.C. § 824(b)(1) (2012); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966, 969–70 (1986); Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 373 (1988).

131. *Hughes*, 136 S. Ct. at 1299.

132. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 776 (2016) (citing Oneok, Inc. v. Learjet Inc., 135 S. Ct. 1591, 1601 (2015)).

to extend federal jurisdiction only to areas the *Attleboro* decision proscribed from state regulation.

Congress intended to craft a regulatory structure of concurrent jurisdiction in energy regulation between FERC and the states. As evidenced by the language of the FPA, Congress charged FERC to regulate wholesale rates, but reserved to the states "significant control over local matters."[133] The history surrounding the FPA also suggests a congressional intent to preserve historical state jurisdiction. The Senate Committee Report accompanying the bill states that "[s]ubsection (a) . . . declares 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."[134] Moreover, the House Committee Report accompanying the bill states that "[t]he bill . . . contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges."[135] That report also highlights that "[t]he new parts [of federal regulation over electricity] are so drawn as to be a complement to, and in no sense a usurpation of, State regulatory authority."[136]

In addition, the Court has recognized that the FPA (1) took no authority from state commissions; (2) complements and does not usurp state regulatory authority; and (3) throughout, directs FERC to receive and consider the views of state commissions.[137] The Court has also noted that "FERC itself has recognized that under the FPA[,] the states retain" significant authority, including jurisdiction "over local service issues, including reliability of local service . . . [and] authority over utility generation and resource portfolios."[138] The Court and FERC have thus both recognized that Congress intended to establish a regulatory field with concurrent jurisdiction between the states and FERC.

A persisting broad application of preemption to protect the "exclusive" and "plenary" jurisdiction of FERC over wholesale rates in an interconnected grid, however, undermines this congressional design of concurrent jurisdiction. In an interconnected grid, a state activity in the retail market invariably affects the wholesale market, maybe "even substantially."[139] A broad preemption doctrine in an interconnected grid instructs a court to find a state's regulatory activity preempted when it encroaches on the exclusive field of federal jurisdiction, regardless of whether the activity was an exercise of traditional

133. New York v. FERC, 535 U.S. 1, 24 (2002).

134. S. REP. NO. 74-621, at 48 (1935).

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

136. *Id.*

137. Petition of the States of Conn. et al. as Amici Curiae in Support of Petitioners at 6, Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016) (Nos. 14-614, 14-623) (citing Conn. Light & Power Co. v. Fed. Power Comm'n, 324 U.S. 515, 526 (1945)).

138. *Id.* (citing *New York*, 535 U.S. at 24).

139. *See* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 776 (2016) (noting how an activity in one market will likewise affect the other market).

state authority. Therefore, an application of field preemption in an interconnected grid is problematic because it extends the field of federal jurisdiction to areas of long-standing state jurisdiction that now overlap with the wholesale market.

In *Hughes*, for example, the Court's application of a broad preemption analysis meant that Maryland's exercise of its historical authority to encourage generation was preempted in part because the activity touched an area of federal jurisdiction.[140] The *Hughes* decision itself is not particularly worrisome, as the Court limited the scope of its holding to the facts of the case and similar programs that set different rates than the just and reasonable rates determined by FERC through the capacity marketing mechanisms.[141] The Court's application of a bright-line jurisdiction, however, is problematic from a policy perspective and in regard to the congressional design for energy regulation.[142] A broad preemption analysis places the burden on states to show that state energy policies do not encroach on FERC's exclusive field of wholesale rates, or else risk being preempted. At the very least, this burden signals a shift away from concurrent jurisdiction to expansive FERC jurisdiction.

B. A Deference Standard of Review

If a state activity is not preempted under the FPA, FERC can nonetheless preempt the activity by asserting jurisdiction over the contested activity. Through a survey of relevant legal doctrines, this subpart provides an overview of the developing standard of review courts apply to determine the legality of an agency's interpretation of its jurisdiction. Although the Court has yet to address whether the *Chevron* doctrine extends to FERC's interpretation of its jurisdiction, this subpart posits that courts will likely defer to FERC's reasonable interpretation of its jurisdiction in the event of an ambiguity in the FPA.[143] Finally, this subpart highlights the dangers of applying a deference standard of review to FERC jurisdictional questions.

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140. *Hughes*, 136 S. Ct. at 1299; *see New York*, 535 U.S. at 24; Nordhaus, *supra* note 58, at 206–07.

141. *Hughes,* 136 S. Ct. at 1299.

142. *See infra* Part III.

143. The *Chevron* doctrine is a two-step process for judicial review of an agency's construction of an ambiguous statutory mandate it is charged with administering. The Court instructed that the reviewing court must first look to the intent of Congress. If the statute is not ambiguous, then that is the end of inquiry as both the courts and agencies must give way to "the unambiguously expressed intent of Congress." Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). If, however, the intent of Congress is not "clear," then a reviewing court must defer to an agency's reasonable interpretation of a statute that the agency administers, even if the court would have interpreted the statute differently. *Id.* In sum, *Chevron* commands courts to defer to an agency's reasonable interpretation of an ambiguous statute it is charged with administering.

1. A Divided Court

In *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, the Court had to determine the scope of the FPA and whether it preempted an order of the Mississippi Public Service Commission.[144] The order granted the Mississippi Power and Light Company the authority to purchase a portion of electricity from Grand Gulf at higher retail rates than the rates determined by FERC as just and reasonable to cover costs associated with the construction and operation of the Grand Gulf 1 power plant.[145] Without reference to *Chevron*, the Court determined that the state commission's order was preempted because it conflicted with federal jurisdiction over wholesale rates.[146]

Although the majority opinion did not analyze the case under *Chevron*, Justice Scalia and Justice Brennan wrote separately to focus the Court's analysis on whether FERC's assertion of jurisdiction over Mississippi Power & Light Company's agreement to participate in the construction of a power plant and to purchase power from that facility was reasonable under *Chevron*.[147] In a concurring opinion, Justice Scalia argued that it was appropriate to accord *Chevron* deference to an agency's interpretation of its statutory jurisdiction:

> What the case comes down to . . . is whether FERC's asserted jurisdiction to examine the prudence of a particular utility's joining a pooling arrangement with affiliated companies is supported by the provisions of the Federal Power Act. If so, there is no regulatory gap for the States to fill, and they are pre-empted from examining that question of prudence in calculating the rates chargeable to retail customers. In considering the Federal Power Act question we will defer, of course, to FERC's construction if it does not violate plain meaning and is a reasonable interpretation of silence or ambiguity.[148]

Justice Scalia reasoned that deference is "necessary because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority."[149] Further, Justice Scalia argued that "deference is appropriate because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction [because] Congress would neither anticipate nor desire that every ambiguity in statutory authority would be addressed, de novo, by the courts."[150]

144. Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 356 (1988).
145. *Id.* at 360–64.
146. *Id.* at 377.
147. *Id.* at 377–84 (Scalia, J., concurring); *id.* at 384–91 (Brennan, J., dissenting).
148. *Id.* at 380 (Scalia, J., concurring) (citing *Chevron U.S.A. Inc.*, 467 U.S. at 842–44).
149. *Id.* at 381(emphasis omitted).
150. *Id.* at 381–82 (emphasis omitted) (citing *Chevron U.S.A. Inc.*, 467 U.S. at 843–44).

On the other hand, Justine Brennan, in dissent, noted that the *Chevron* doctrine is limited to statutes the agency was "entrusted to administer."[151] Justice Brennan went on to argue that "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies."[152] Further, Justice Brennan rejected the assumption that Congress "intended an agency to fill 'gaps' in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power."[153] Justice Brennan then examined the jurisdictional issue without "any special deference."[154]

2. Determining an Agency's Jurisdiction: City of Arlington v. FCC

Like in the Supreme Court, there was a split in the circuit courts regarding whether *Chevron* deference extended to an agency's determination of its jurisdiction. In 2013, the Supreme Court granted certiorari in *City of Arlington v. FCC* to resolve the circuit split.[155] In a majority opinion authored by Justice Scalia and joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, the Court rejected any distinction between jurisdictional and other interpretive questions for the purposes of *Chevron* deference.[156] In its reasoning, the Court noted that:

> judges should not waste their time . . . decid[ing] whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'nonjurisdictional.' Once those labels are sheared away, it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not.[157]

In his concurrence, Justice Breyer highlighted that "the distinction between 'jurisdictional' and 'non-jurisdictional' interpretations is a mirage."[158]

Chief Justice Roberts, joined by Justices Kennedy and Alito, however, "fundamental[ly]" disagreed with the majority opinion.[159] The dissenters, along

151. *Id* at 386 (Brennan, J., dissenting) (citing *Chevron U.S.A. Inc.*, 467 U.S. at 44).
152. *Id.* at 386–87.
153. *Id.* at 387 (citation omitted) (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 843–44).
154. *Id.* at 389. In his examination, Justice Brennan determined that:

> regardless of FERC's jurisdiction to allocate incurred costs among member utilities and regardless of its jurisdiction to review the prudency of an interstate pool's projects in order to set wholesale rates for intrapool transactions, *state utility commissions retain jurisdiction* to determine whether incurring those costs involved prudent purchase decisions that can be passed on to retail customers.

Id. at 391 (emphasis added).
155. *See* City of Arlington v. FCC, 668 F.3d 229, 248 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013) (noting that there was a circuit split on the issue).
156. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013).
157. *Id.* at 1870–71.
158. *Id.* at 1875 (Breyer, J., concurring in part and concurring in the judgment).
159. *Id.* at 1877 (Roberts, C.J., dissenting).

with Justice Breyer, stressed that *Chevron* deference does not automatically extend to an agency's interpretation of its jurisdiction. For Justice Breyer and the dissenters, a court must first ask whether Congress intended to delegate to the agency the authority to interpret the particular statutory provision.[160] This question is a judicial one where no deference is appropriate.[161] Only after a court determines that Congress "has in fact delegated to the agency lawmaking power over the ambiguity at issue" must a court defer to an agency's interpretation of a statutory ambiguity concerning its jurisdiction.[162]

The majority, however, squared the dissent's argument with the Court's instructions in *United States v. Mead*. In *Mead*, the Court clarified that the basis of the *Chevron* doctrine is ultimately congressional intent.[163] The *Mead* Court determined that an "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the *force of law*, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[164] Thus, the majority in *City of Arlington* noted the dissent was correct that *Chevron* deference does not automatically extend to an agency's interpretation of its jurisdiction, because *Mead* required that a court must first determine that an agency acted in a manner intended by Congress to carry the force of law.[165] The majority then distinguished *Arlington* from *Mead* by stressing that, unlike in *Mead* where the Court "denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking,"[166] the agency in *Arlington* had rulemaking authority and exercised that authority.[167]

But in some instances, a court may hesitate to automatically accord *Chevron* deference to an agency's interpretation of its jurisdiction, like the dissent in *Arlington*. In a case decided before *Arlington*, the Court in *FDA v. Brown & Williamson Tobacco Corp.* rejected applying *Chevron* deference automatically to instances when an agency's interpretation significantly expands the agency's authority to regulate matters of great economic and social

160. The dissenters stressed that, "before a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue." *Id.* at 1880. Meanwhile, Justice Breyer noted that "[t]he question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently." *Id.* at 1876 (Breyer, J., concurring in part and concurring in the judgment).

161. "[A] court should not defer to an agency on whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue." *Id.* at 1879–80 (Roberts, C.J., dissenting).

162. *Id.* at 1880.

163. United States v. Mead, 533 U.S. 218, 226–27 (2001).

164. *Id.* (emphasis added).

165. *City of Arlington*, 133 S. Ct. at 1874 (citing *Mead*, 533 U.S. 218 (2001)). This threshold inquiry is commonly referred to as "Chevron Step Zero." *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 193 (2006).

166. *City of Arlington*, 133 S. Ct. at 1874.

167. *Id.* at 1869–70.

importance.[168] In such instances, the Court instructed that courts must take a harder look to determine whether Chevron applies:

> Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.[169]

Applying the reasoning in *Brown & Williamson*, the Court in *King v. Burwell*, a case decided after *Arlington*, determined that an agency's jurisdictional determination is a judicial question where no deference is appropriate in instances when an agency's interpretation significantly expands the agency's authority to regulate matters of great economic and social importance.[170] The Court highlighted that courts must pause before applying the *Chevron* doctrine automatically in certain circumstances, such as where the agency reasonably does not have the appropriate expertise to regulate the field.[171]

But even if an agency has the appropriate expertise, courts must still exercise caution before applying *Chevron* automatically in instances that greatly expand the agency's jurisdiction. In *Utility Air Regulatory Group v. EPA*, for example, the Court rejected EPA's assertion that the Clean Air Act requires the agency to include greenhouse gas emissions every time the Act uses the term "air pollutant."[172] The agency's construction of the Act expanded the agency's authority over "tens of thousands, and the operation of millions, of small sources nationwide."[173] The Court noted that EPA's interpretation "falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text."[174] When *Arlington* is thus read in conjunction with *Brown & Williamson*, *King*, and *Utility Air Regulatory Group*, it is clear that there may be some extraordinary circumstances when *Chevron* does not apply in regard to an agency's interpretation of its regulatory scope.[175]

3. Determining FERC Jurisdiction after City of Arlington v. FCC

After *Arlington*, the Supreme Court's split regarding whether to afford *Chevron* deference to FERC's interpretation of its jurisdiction has likely been

168. 529 U.S. 120, 147 (2000).
169. *Id.* at 159 (citation omitted).
170. 135 S. Ct. 2480, 2489 (2015).
171. *Id.*
172. 134 S. Ct. 2427, 2446, 2448 (2014).
173. *Id.* at 2444.
174. *Id.*
175. *See* Samuel L. Feder et al., City of Arlington v. FCC*: The Death of* Chevron *Step Zero?*, 66 FED. COMM. L.J. 47, 49 (2013).

decided in the affirmative, even though the Court has yet to explicitly determine whether *Chevron* indeed applies in such a scenario.[176] First, FERC proceedings regarding a determination of its jurisdiction will likely carry the force of law under the *Arlington* majority's reasoning, as Congress has charged FERC with expansive authority to regulate interstate electricity, including "any rule, regulation, practice, or contract affecting such rate"[177] or "directly affect[ing]" the wholesale market.[178] And even in dissent in *Mississippi Power*, Justice Brennan did not suggest that FERC lacked the force of law to determine jurisdiction in such instances.[179] The Court in dicta has also suggested that FERC has the force of law to determine jurisdiction in FERC proceedings.[180]

Second, FERC is likely the appropriate agency to handle issues over wholesale rates. FERC has the appropriate expertise over wholesale rates, unlike the Internal Revenue Service in *King*, which the Court determined has no expertise in crafting healthcare reforms and so declined to apply *Chevron* to the agency's determination of jurisdiction over tax reforms for healthcare.[181] FERC, after all, is charged by the FPA to regulate wholesale electricity in interstate commerce.[182] Therefore, barring an interpretation that expands FERC's jurisdiction over a swath of new entities amounting to great economic and social importance, FERC's interpretation of a statutory ambiguity concerning its jurisdiction over wholesale rates will likely not give courts reasons to pause and apply a harder look.[183]

Finally, Justice Scalia's concurring opinion in *Mississippi Power* carried the court in *Arlington*. In both *Mississippi Power* and *Arlington*, Justice Scalia talked about how *Chevron* deference applies to an agency's interpretation of an ambiguous statutory provision because the distinction between jurisdictional

176. In the most recent FERC cases that have dealt with such circumstances, for instance, the Court sidestepped the issue. In *New York v. FERC*, a case decided before *Arlington*, the D.C. Circuit said in dicta that *Chevron* deference applies to FERC's interpretation of its jurisdiction in light of an ambiguity in the statute. 535 U.S. 1, 38 (2002). The Court, however, determined that *Chevron* was inapplicable in *New York* because "FERC did not purport to resolve an ambiguity" in a statute. *Id.* Similarly, the Court in *FERC v. Electric Power Supply Ass'n*, a case decided after *Arlington*, sidestepped the applicability of *Chevron* in FERC's interpretation of jurisdictional ambiguities by determining that the provision of the statute at issue in the case was clear. 136 S. Ct. 760, 773 n.5 (2016).

177. 16 U.S.C. § 824e(a) (2012).

178. *EPSA*, 136 S. Ct. at 774 (emphasis omitted) (quoting Cal. Independent System Operator Corp. v. FERC, 372 F.2d 395, 403 (2004)).

179. *See* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 383–91 (1988) (Brennan, J., dissenting).

180. The Court has noted that FERC would have the authority to resolve an ambiguity in jurisdiction within the ambit of the doctrine had it done so. *New York*, 535 U.S. at 38.

181. *See* King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

182. MCGREW, *supra* note 12, at 5.

183. *Cf.* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014) (rejecting EPA's interpretation of a statute where it would have given the agency authority "to regulate millions of small sources" it did not previously have).

and non-jurisdictional questions is illusory.[184] Justice Scalia reasoned that to not extend *Chevron* to an agency's interpretation of its jurisdiction and review each decision de novo would run contrary to the "general rationale for deference": "Thirteen [c]ourts of [a]ppeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*. The excessive agency power that the dissent fears would be replaced by chaos."[185]

But the law may still be unsettled. *Arlington* was a five-to-four decision written by Justice Scalia.[186] With the appointment of the Honorable Neil Gorsuch to replace Justice Scalia, the scope of *Chevron* may change, possibly even into a "world without *Chevron*."[187] In a recent case, Justice Gorsuch critically questioned the constitutionality of *Chevron*:

> [C]ourts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them. A duty expressly assigned to them by the [Administrative Procedure Act] and one often likely compelled by the Constitution itself. That's a problem for the judiciary.[188]

A Court with Justice Gorsuch on the bench may therefore shift the course of *Chevron*. As *Brown & Williamson*, *King*, and *Utility Air Regulatory Group* illustrated, the Court is willing to remove certain cases from the *Chevron* framework. In a "world without *Chevron*," the Court may be more willing to apply exemptions and exceptions to not defer to agency interpretations.

4. Analysis: Arlington *and FERC Jurisdiction*

In the modern interconnected grid, applying *Chevron* deference to FERC's jurisdictional interpretation is problematic because it may expand FERC jurisdiction at the expense of state jurisdiction. Because of this risk of losing historical state jurisdiction, the National Governors Association (NGA), a collective voice of the nation's governors,[189] opposed extending *Chevron* deference to an agency's jurisdictional determination. The NGA emphasized that states have "a vital interest in the scope of federal regulatory authority," as they are often regulated by federal agencies that frequently operate in the same subject matters as the state.[190] The NGA stressed that "allowing federal agencies to determine the scope of their own jurisdiction, with only deferential

184. City of Arlington v. FCC, 133 S. Ct. 1863, 1870–71 (2013); *Miss. Power & Light Co*., 487 U.S. at 381 (Scalia, J., concurring).

185. *City of Arlington*, 133 S. Ct. at 1874; *Miss. Power & Light Co.*, 487 U.S. at 381–82.

186. *City of Arlington*, 133 S. Ct. at 1866.

187. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

188. *Id.* at 1153 (emphasis omitted).

189. NGA's members are the governors of the fifty States, three Territories, and two Commonwealths. Amici Curiae Brief of the Nat'l Govenors Ass'n et al. in Support of Petitioners at 1, City of Arlington v. FCC, 133 S. Ct. 1863 (2013) (Nos. 11-1545, 11-1547).

190. *Id.* at 3, 11.

review by courts, would effectively allow federal agencies to trench upon the authority of state and local governments, with little constraint or check."[191] To illustrate this risk, the NGA highlighted the savings clause of the Federal Communications Act that preserves historical state jurisdiction.[192] However, affording *Chevron* deference to an agency's determination of its jurisdiction disregards such a clause because courts must defer to the agency's interpretation.[193]

This same risk of agency aggrandizement of state jurisdiction is present in the context of FERC. As FERC forays into the modern grid, it can encroach on traditional state jurisdiction, even though the FPA meticulously created a concurrent regulatory framework that preserves historical state jurisdiction in energy regulation.[194] First, FERC can easily argue that the statute is ambiguous with respect to jurisdiction; after all, Congress in drafting the FPA in the 1930s reasonably did not conceptualize such an idea as a smart grid where the retail and wholesale markets would be so closely intertwined.[195] The scope of FERC's jurisdiction is also ambiguous, as evidenced by the Court's recent attempt to clarify FERC's "affecting" jurisdiction.[196] If a court agrees that the statute is ambiguous, then the court must defer to FERC's determination of jurisdiction. And under *Chevron*, FERC's claim to jurisdiction will likely be affirmed.[197] Therefore, according *Chevron* deference to jurisdictional questions cuts against traditional state jurisdiction and favor expansive FERC jurisdiction.

C. A Case Study of Demand Response: FERC Encroaching on State Jurisdiction

Demand response presents an ideal case study through which to understand the shifting dynamics in energy law. The idea of reducing energy consumption ("negawatts") as a way to improve the grid was first introduced in the late 1980s.[198] Since then, state public utility commissions have had almost exclusive responsibility over demand response.[199] It has only been recently that FERC started to regulate demand response.[200] Through an analysis of this

191. *Id.* at 11–12.
192. *Id.* at 12.
193. *Id.* at 12–13.
194. *See supra* Part I.A.
195. *See* 16 U.S.C. § 824 (2012); New York v. FERC, 535 U.S. 1, 20–24 (2002).
196. *See* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 774 (2016).
197. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1030 (1990) (finding that courts were more likely to find in favor of agencies after *Chevron*).
198. Jeremy Stahl, *Welcome the Negawatt Revolution*, SLATE (Nov. 28, 2012, 5:15 AM), http://www.slate.com/articles/technology/the_efficient_planet/2012/11/amory_lovins_negawatt_revolution_u_s_is_finally_taking_energy_efficiency.html.
199. Jacobs, *supra* note 74, at 904.
200. *Id.*

changing regulatory relationship between FERC and the states in demand response, this subpart illustrates how the fear of FERC encroaching on state jurisdiction is no longer a hypothetical, but a reality.

1. Background

Until recently, state public utility commissions have had close to exclusive authority over demand response. The commissions adopt rules that govern utilities within their jurisdictions, and the utilities then create rules ("tariffs") for participation in their own demand response programs.[201] These tariffs set compensation, describe program parameters, explain any testing and eligibility requirements, describe the notice the utility will provide of demand response "events," and explain how a customer's load drop will be calculated.[202]

This decentralized approach to demand response resulted in uneven deployment of the program through the states and the various public utilities within the states, with some states more active than others.[203] California, in particular, has been a leader in adopting demand response initiatives.[204] But California is not the norm, as many states have done little.[205] In fact, even California's advancements are relatively new, as the state had until recently missed a goal that demand response meet 5 percent of the state's peak demand.[206] Conversely, some states have made negative progress by prohibiting aggregators from bidding retail-customer demand response into wholesale markets.[207]

Demand response, however, represents an important tool for balancing the supply and demand in the grid. For instance, it has been estimated that the top 10 percent of all energy "load" consumed each year is consumed in the top 1 percent of energy-intensive hours during that year.[208] A complete enumeration of the benefits of demand response is outside the scope of this Note, but scholars and energy experts have lauded demand response as a mechanism for addressing reliability and the cost of supplying electricity to U.S. consumers.[209] Congress has likewise praised demand response as a valuable tool to address

201. *Id.*
202. *Id.*
203. *Id.* at 905.
204. *Id.* at 905–06.
205. *Id.*
206. *Id.*; Robert Walton, *Why Isn't California Leading on Demand Response?,* UTILITY DIVE (Oct. 15, 2014), http://www.utilitydive.com/news/why-isnt-california-leading-on-demand-response/318821/.
207. Jacobs, *supra* note 74, at 905–06.
208. *Id.* at 895.
209. *See, e.g.*, Justin M. Gundlach, EPSA v. FERC—*The End of Wholesale Demand Response?*, 42 ECOLOGY L.Q. 699, 728 (2015); Erich D. Priebe, *Demand Response and Order 745: Market-Based Reforms in Energy Regulation*, 39 J. CORP. L. 617, 622 (2014); Hon. Jon Wellinghoff & David L. Moreonff, *Recognizing the Importance of Demand Response: The Second Half of the Wholesale Electric Market Equation*, 28 ENERGY L.J. 389, 393 (2007).

shortcomings in the grid. Through EPAct2005, Congress charged FERC with broad statutory goals regarding demand response.[210]

2. Federal Regulation over Demand Response

Congress's hortatory language for FERC to develop demand response programs, however, was not backed with new authority.[211] Consequently, FERC has had to work within the limitations of the FPA to achieve ambitious national goals. As Professor Sharon Jacobs explains,

> FERC has taken a creative approach to this problem. Rejecting both the option of leaving demand response in the hands of state and local regulators and the option of challenging jurisdictional boundaries directly or seeking new statutory authority, FERC has instead charted a middle course. This approach . . . involves the use of FERC's authority over sales of electricity for resale to create and develop demand response programs at the wholesale level.[212]

Jacobs refers to FERC's "creative approach" of exploiting its jurisdiction over wholesale electricity to indirectly regulate retail electricity as a way to "bypass[] federalism" and the statutory limits of the FPA.[213]

Relying on its authority under the FPA, FERC promulgated a number of rules to regulate demand response.[214] First, FERC issued Order No. 719 to require RTOs and ISOs to accept bids from aggregators of retail-customer demand response "on a basis comparable to other resources,"[215] unless "the laws and regulations of the relevant retail regulatory authority do not permit a retail customer to participate."[216] Second, FERC issued Order No. 745 in an effort to increase participation in the demand response programs in wholesale by removing barriers to participation.[217] Order No. 745 required that demand response resources in wholesale markets be paid the market price for energy.[218]

Through Order Nos. 719 and 745, FERC entered into the historical jurisdictional sphere of states by giving retail customers access to the demand response programs in wholesale. Critically, FERC in Order No. 745 sought to make demand response in wholesale more lucrative for retail customers through the ordered equal compensation scheme. Not surprisingly, FERC has encountered legal challenges in its regulation of demand response.

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210. *See* 16 U.S.C. §§ 2641–2645 (2012).
211. § 2642(d).
212. Jacobs, *supra* note 74, at 905.
213. *Id.*
214. This Note will only cover Order Nos. 719 and 745.
215. Order No. 719, *Wholesale Competition in Regions with Organized Electricity Markets*, 125 F.E.R.C. ¶ 61,071, at ¶ 3 (2008).
216. *Id.* at ¶ 158(e).
217. Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 F.E.R.C. ¶ 61,187, at ¶ 1 (2011).
218. *Id.* at 16,658–59.

3. FERC v. Electric Power Supply Association

Electric Power Supply Association and four other energy industry associations challenged Order No. 745 in the D.C. Circuit, arguing that FERC exceeded its jurisdiction under the FPA.[219] In addition, petitioners asserted that FERC acted arbitrarily and capriciously under the Administrative Procedure Act when it adopted the compensation scheme.[220] Petitioners argued that the compensation scheme overcompensated demand response participants because consumers not only the saved retail cost of energy they chose not to consume, but also received a payment equal to the market price for that energy.[221]

The D.C. Circuit agreed with petitioners, finding that the rule was both an "ultra vires agency action," and an arbitrary and capricious exercise of discretion under the APA.[222] The D.C. Circuit emphasized that there are "specific limits" to FERC's jurisdiction under the FPA.[223] In particular, the FPA limited FERC's jurisdiction to areas that were not within the historical jurisdiction of the states.[224] The court then concluded that the rule exceeded the FPA's limits by "'luring' . . . retail customers" into the wholesale market, and causing them to decrease "levels of retail electricity consumption."[225] Therefore, the Rule engaged in "direct regulation of the retail market" and so was ultra vires.[226]

The Supreme Court disagreed. In *Federal Energy Regulatory Commission v. Electric Power Supply Ass'n* (*EPSA*), the Court conceded that the rule at issue in the case affected retail sale of electricity—maybe "even substantially."[227] The Court nonetheless determined that FERC has jurisdiction to regulate the demand response transactions because the transactions "directly affect" wholesale rates and thereby fall within FERC's "affecting" jurisdiction under section 206.[228] In its rationale, the Court stressed that the resulting effect on retail rates "is of no legal consequence" so long as FERC operates in the

219. Brief for the Respondents at 1–4, FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016) (Nos. 14-840, 14-841).

220. *Id.* at 3–4.

221. *Id.* at 21.

222. Elec. Power Supply Ass'n v. FERC, 753 F.3d 216, 225 (D.C. Cir. 2014), *rev'd* 136 S. Ct. 760 (2016). The court determined that the rule was arbitrary and capricious because FERC failed to "adequately explain" how the compensation scheme "results in just compensation." *Id.* In its reasoning, the court argued that FERC did not "properly consider" the view that such a payment would give those providers a windfall by leaving them with "the full LMP plus . . . the savings associated with" reduced consumption. *Id.* (emphasis omitted) (quoting Order No. 745-A, *Demand Response Compensation in Organized Wholesale Energy Markets*, 137 F.E.R.C. ¶ 61,215 (2011)).

223. *Id.* at 222.

224. *Id.*

225. *Id.* at 223 (emphasis omitted).

226. *Id.*

227. 136 S. Ct. 760, 776 (2016).

228. *Id.* at 774–76.

wholesale sphere,[229] because in the modern grid "[i]t is a fact of economic life that the wholesale and retail markets in electricity . . . are not hermetically sealed from each other."[230]

The Court's reasoning comports with the historical bright-line analysis by suggesting that when FERC is acting within its regulatory sphere, then that activity is within FERC's jurisdiction, regardless of its effect on areas historically and explicitly reserved to the states. A broad analysis like that applied by the *EPSA* Court and a bright-line rule find that FERC comprehensively occupies the field of wholesale electricity and gas sales. States cannot interfere with FERC's exclusive authority.[231] Therefore, courts apply a broad analysis to preserve FERC's exclusive jurisdiction over wholesale rates.[232] In the modern grid, this reasoning allows FERC to claim jurisdiction over an activity in the wholesale sphere—even though that activity may "substantially" affect retail rates[233]—so long as the activity operates in both the wholesale and retail regulatory sphere, which it invariably does in the modern grid.[234]

A continued application of a bright-line analysis is problematic, as the Court's recent decisions illustrate just how far FERC can entrench upon historical state jurisdiction through a continued application of a bright-line analysis. In *Hughes*, the Court applied a bright-line analysis even in the context of an interconnected grid and so preempted Maryland's exercise of its historical authority to encourage generation because the activity touched an area of federal jurisdiction Meanwhile, the Court in *Arlington* determined that *Chevron* deference applies to an agency's determination of its jurisdiction. Finally, the Court in *EPSA* held that FERC has jurisdiction over demand response because the activity "directly affect[s]" wholesale rates, even though it may "substantially" affect retail rates.[235]

III. POLICY DISCUSSION: CONSTRAINING STATE ENERGY GOALS

The Court's recent decisions bring clarity to energy law. However, this clarity in favor of expansive FERC jurisdiction comes at a price to state jurisdiction. This Part considers how the Court's decisions strip states of policy tools necessary to achieving their energy goals.

229. *Id.* at 776 (citing Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354 (1988)).

230. *Id.* (citing Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594 (2015)).

231. *See supra* Part II.A.1.

232. *See id.*

233. *See EPSA*, 136 S. Ct. at 776. *But see* Elec. Power Supply Ass'n v. FERC, 753 F.3d 216, 223–24 (2014), *rev'd* 136 S. Ct. 760 (reasoning that Order No. 745 was ultra vires because it invaded on traditional state jurisdiction by "'luring' . . . *retail* customers" into the wholesale market).

234. *See supra* Part I.C.

235. *EPSA*, 136 S. Ct. at 773, 776.

A. The Timeframe of Capacity Markets Is Too Short to Induce New Generation

Perhaps the greatest concern stemming from the Court's application of a bright-line analysis is how it cripples state policy tools to achieve energy goals like reliability. In an amicus curiae brief in *Hughes* supporting the Maryland program, ten states and eight state utility commissions stressed that, "[b]ecause electricity is and has been an essential service . . . , each state acts through its police powers to ensure an adequate, diverse supply of electricity to its citizens."[236] The states went on to emphasize that "States unequivocally depend upon their reserved authority in the FPA to ensure reliable, diverse electricity for their residents."[237] Even the District Court for the District of Maryland agreed with this statement, noting in its decision for the *Hughes* case that Maryland has "a legitimate interest and federally permissible role in securing an adequate supply of electric energy."[238]

Reliability is an especially pertinent concern, given the string of reliability issues the grid has experienced. In the summer of 2012, the PJM network experienced a crippling blackout that affected more than three million residents in the District of Columbia and neighboring states.[239] To make matters worse, more than two million residents and businesses remained in the dark for several days after the blackout.[240] PJM suffered further reliability challenges in the winter of 2014 as generation units experienced forced outages as a consequence of equipment failure, cold-temperature operations, and fuel-supply issues.[241]

The federal response to these reliability concerns has consistently been to spur competition in the wholesale markets.[242] At the regional level, FERC encouraged the formation of RTOs and the operation of a capacity market to improve reliability.[243] The capacity market is designed to serve two purposes. First, it is supposed to "ensure[] long-term grid reliability by procuring the appropriate amount of power supply resources needed to meet predicted energy

236. Petition of the States of Conn. et al. as Amici Curiae in Support of Petitioners, *supra* note 137, at 3.

237. *Id.* at 10–11.

238. PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790, 829 (D. Md. 2013) (citing 16 U.S.C. § 824o(i) (2012)).

239. *Washington's Power Cuts: Taken by Trees*, THE ECONOMIST (July 7, 2012), http://www.economist.com/node/21558302.

240. Michael Schwirtz, *Many Still Without Electricity in Mid-Atlantic States*, N.Y. TIMES (July 1, 2012), http://www.nytimes.com/2012/07/02/us/mid-atlantic-braces-for-more-storms-and-heat.html?_r=1&ref=washingtondc.

241. PJM INTERCONNECTION, ANALYSIS OF OPERATIONAL EVENTS AND MARKET IMPACTS DURING THE JANUARY 2014 COLD WEATHER EVENTS 4, 9, 19, 36 (2014), http://www.pjm.com/~/media/library/reports-notices/weather-related/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx; Julia E. Sullivan, *The Intersection of Federally Regulated Power Markets and State Energy and Environmental Goals*, 26 FORDHAM ENVTL. L. REV. 474, 501–04 (2015).

242. The federal response to reliability concerns from all parts of the federal government (the President, Congress, and FERC) has consistently been to encourage competition. *See supra* Part 0.

243. *See id.*

demand three years in the future."[244] Second, it is believed to "create[] long-term price signals to attract needed investments in generation infrastructure to assure adequate power supplies in the [local] region."[245] Specifically, "[a] high clearing price in the capacity auction encourages new generators to enter the market, increasing supply and thereby lowering the clearing price in same-day and next-day auctions three years' hence" and vice versa.[246] These price signals are based on location "to reflect limitations on the transmission system and to account for the differing needs for capacity in various areas of PJM."[247] Two-thirds of the country, including Maryland, is currently subject to this regional planning system.[248]

Some experts praise the design and structure of RTOs as a worthy mechanism for improving regional reliability. For example, Dr. David Patton, the market monitor for Midwest ISO and New York ISO, underscored that:

> [T]he operation of RTO spot markets . . . significantly reduces the potential for [a blackout], because the market software is instantaneously redispatching generation, so that when you approach a limit, there's a constant monitoring and a constant redispatch to manage the loads on the key facilities. . . . So, my answer would be that deregulation . . . [has] a reliability benefit.[249]

In addition, scholars argue that "RTOs are better at ensuring reliability because they have no financial interest in the marketplace, and because they cover wider geographical areas."[250]

The benefits of capacity markets, however, may be overstated. Empirical evidence suggests that capacity markets have failed to induce new generation. In fact, only an infinitesimal percentage (0.1 percent) was built solely in response to the market mechanisms of the capacity markets.[251] Instead, LSEs or programs in connection with long-term power-purchase agreements with LSEs (similar to the Maryland program) have spurred the majority of new generation.[252] A small minority (2.4 percent) was built as a result of some form of incentive outside of the capacity market, such as a grant.[253]

Experts argue that the capacity market's market mechanism to signal the current demand and the predicted demand three years in the future[254] is too

244. *Capacity Market (RPM)*, *supra* note 103.
245. *Id.*
246. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1293 (2016).
247. *Capacity Market (RPM)*, *supra* note 103.
248. Nordhaus, *supra* note 58, at 209.
249. William L. Massey et al., *Reliability-based Competition in Wholesale Electricity: Legal and Policy Perspectives*, 25 ENERGY L.J. 319, 347 n.153 (2004) (quoting Dr. David Patton, Testimony at the 858th Commission Meeting of the Federal Energy Regulatory Commission (May 5, 2004)).
250. *Id.* at 335.
251. Jay Morrison, *Capacity Markets: A Path Back to Resource Adequacy*, 37 ENERGY L.J. 1, 45 (2016).
252. *Id.*
253. *Id.*
254. *Capacity Market (RPM)*, *supra* note 103.

short to take into account the uncertainties and risks in the market. For instance, CPV has emphasized that the capacity market is "simply insufficient" to encourage new generation: "As currently configured, the RPM is too short-term, too volatile, and too fraught with continued regulatory uncertainty to provide lenders with anything close to the certainty of a fixed revenue stream required for financing."[255] Other energy suppliers have also expressed a hesitancy to produce new generation regardless of the clearing price as a consequence of the timeframe of the capacity market being too short.[256]

This empirical evidence indicating that capacity markets have failed to induce new generation is supported by the experiences of states. Maryland regulators promulgated the order at issue in *Hughes* specifically because the PJM capacity market had failed to encourage sufficient new generation in the state. In a study on the state's energy profile, MPSC emphasized that the capacity market has failed to address the reliability concerns of the state:

> [O]f critical importance, we cannot rely on PJM's Reliability Pricing Model to deliver new generation to Maryland. . . . Since its inception in 2007, *RPM has brought no new generation to Maryland*, in spite of the fact that clearing prices for capacity in [PJM's] SWMAAC [zone] have averaged almost double those of the non-constrained portions of PJM. . . . Despite these exorbitant capacity charges, which have increased energy costs to Maryland ratepayers by hundreds of millions of dollars, no new base load generation was bid into the [PJM base residual auction] during the 2012-2014 delivery period. Zero.[257]

Thus, MPSC concluded that the State "cannot expect market forces to give rise to new generation that will appear in time to solve [the State's] reliability problems."[258]

The State of Maryland is not alone in its experience with the inefficacy of capacity markets to encourage new generation for generation adequacy. New Jersey, another state in the PJM network, has experienced similar reliability concerns. The New Jersey Legislature stressed that the PJM's capacity market "has not resulted in large additions of peaking facilities or any additions of intermediate or base load resources available to the region and the State."[259] The state legislature, therefore, "instructed New Jersey's Board of Public

255. Motion of CPV Maryland, LLC for an Order Requiring Investor-Owned Utilities to Enter into Long-Term Contracts for the Sale of Power and Request for Expedited Treatment at 24, The Commission's Investigation of Investor-Owned Electric Companies' Standard Offer Service for Residential and Small Commercial Customers in Maryland, No. 9117 (Md. P.S.C. July 6, 2009), http://www.cpv.com/pdf/Maillog%20Version%20CPV_Maryland_Motion.pdf.

256. *Id.* at 2 n.2.

257. Order No. 84815, *In re Whether New Generating Facilities are Needed to Meet Long-Term Demand for Standard Offer Service*, Md. P.S.C., No. 9214, at 22-23 (Apr. 12, 2012) (emphasis added).

258. Motion of CPV Maryland, LLC for an Order Requiring Investor-Owned Utilities to Enter into Long-Term Contracts for the Sale of Power and Request for Expedited Treatment, *supra* note 255 at 2 n.2.

259. N.J. STAT. ANN. § 48:3-98.2(b) (West 2011), *invalidated by* PPL Energyplus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014).

Utilities to promote the construction of new power-generating facilities in the state."[260] In response, "the Board of Public Utilities crafted a set of contracts . . . that assured new electric energy generators fifteen years of revenue from local utilities and, ultimately, New Jersey ratepayers."[261] Like the Court in *Hughes*, however, the Third Circuit found the agreement to be field preempted because it interfered with FERC's exclusive authority to set just and reasonable wholesale rates.[262]

B. Capacity Markets Do Not Value State Policy Objectives

Experts also criticize the capacity markets' inability to take into account the nuances of the market or state policy objectives. Capacity markets are bid-based systems that treat all capacity as fungible; in other words, all capacity that enters the market is treated equally regardless of its policy or social value.[263] Because the markets treat all capacity as fungible, the clearing price signals only the demand in general; it does not signal the demand for a particular energy or state policy goals.[264] This market design, coupled with FERC's "fuel neutral" policy,[265] has failed to encourage fuel diversification.[266] Consequently, a significant amount of the new generation continues to be gas-fired due to practical constraints (for example, lower initial investment and faster payback for gas-fired generation).[267]

The lack of energy diversification is problematic because diversity in the energy portfolio is critical to improving reliability. As scholars have noted, in order "to provide safe, reliable, and reasonably priced electric service in an environmentally responsible manner, it is important to have a diverse portfolio of generation assets."[268] Likewise, experts have posited that "fuel diversity is extremely important" to help the grid manage unforeseen contingencies.[269] Current reliability concerns in parts of the grid have also been attributed to the lack of diversity in the energy supply.[270]

In response to the deficiencies of capacity markets, states have exercised their long-standing authority to stimulate new local generation and diversify

260. PPL Energyplus, LLC v. Solomon, 766 F.3d 241, 246 (3d Cir. 2014).
261. *Id.*
262. *Id.* at 252.
263. Morrison, *supra* note 251, at 46–47.
264. *Id.*
265. FERC's "fuel neutral" policy means that FERC does not prioritize certain fuels or technologies so that the facility that offers the lowest price will clear the market. Sullivan, *supra* note 241, at 489.
266. *Id.*
267. *Id.* at 489–90.
268. *Id.* at 480.
269. Comments Submitted on Behalf of the Public Utilities Commission of Ohio at 7–8, Technical Conference on Winter 2013-2014 Operations & Mkt. Performance in Reg'l Transmission Orgs. & Indep. Sys. Operators (May 15, 2014) (F.E.R.C. Docket No. AD14-8-000), http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13546266.
270. Sullivan, *supra* note 241, at 491–92.

their energy portfolios.[271] The Court's continued application of a broad preemption analysis, however, jeopardizes these types of state policy tools. In *Hughes*, for example, the Court determined that programs that seek to encourage local generation are preempted if they enter FERC's exclusive jurisdiction over wholesale rates.[272] Although the *Hughes* decision itself is not particularly problematic as the Court limited its findings to the specific program at issue in *Hughes*,[273] the decision is nonetheless problematic as a legal precedent and from a policy perspective. The Court essentially instructed that a state activity to encourage new generation is preempted if it enters the wholesale realm, even though that state activity is an exercise of a state's traditional authority and regardless of the fact that any state activity invariably enters the wholesale market in an interconnected grid.[274] State policy tools are consequently imperiled as a result of the Court's application of a broad preemption doctrine in the context of the modern grid.[275]

IV. THE GRID DEMANDS A DYNAMIC ENERGY REGULATORY FIELD

The grid thus demands a new approach to determining jurisdiction for effective energy regulation. Through a survey of the Court's recent energy law cases, this Part proposes a possible standard of review to mitigate the concerns germane to a continued application of a bright-line analysis in an interconnected grid. First, this Part highlights how the Court in *Oneok, Inc. v. Learjet, Inc.* expressed an attentiveness to the reality of energy jurisdiction today, and applied a narrow preemption analysis. This Part then contrasts that attentiveness to the reality of the grid with the Court's reasoning and holding in *Hughes*, where it pivoted back to a bright-line analysis. Next, this Part discusses why the Court's decision in *Hughes* was misguided and, instead, should have applied the same reasoning the *Oneok* Court applied. This Part concludes by proposing a standard of review to determining energy jurisdiction that still works within the bounds of existing precedent, but that is also appropriate for the twenty-first century grid.

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271. N.J. STAT. ANN. § 48:3-98.2(b) (West 2011), *invalidated by* PPL Energyplus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014) (the purpose being to diversify the State's energy portfolio); Order No. 84815, *In re Whether New Generating Facilities are Needed to Meet Long-Term Demand for Standard Offer Service*, Md. P.S.C., No. 9214, at 22-23 (Apr. 12, 2012) (emphasis added).

272. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1291–92, 1297 (2016).

273. *Id.* at 1299.

274. *See* Opposition to Petitions for Writ of Certiorari, *supra* note 27 (noting that there is "a direct relationship between" retail and wholesale demand in a connected grid thereby an activity in one regulatory realm affects the other).

275. The *Hughes* Court did limit its finding of preemption to programs that are conditioned to enter the capacity market. 136 S. Ct. at 1299. This limitation, however, is superfluous because all state activities that aim to encourage new generation at the very least implicitly require the new generator to enter the capacity market, or else the new generation serves no purpose in increasing energy supply in the state.

A. Oneok, Inc. v. Learjet, Inc.*: A Narrow Preemption Inquiry*

Unlike in *Hughes*, the Court in *Oneok* rejected a bright-line analysis. In *Oneok*, a group of institutions that buy natural gas directly from interstate pipelines sued the pipelines. The institutions alleged that the pipelines had violated state antitrust laws.[276] Importantly, however, "[t]he pipelines' behavior affected both federally regulated wholesale natural-gas prices and [state-]regulated retail natural-gas prices."[277] The Court therefore had to consider the preemptive scope of the NGA—specifically, whether the NGA preempted state antitrust laws.[278]

Breaking from its historic application of a bright-line analysis, the Court applied a narrow and flexible preemption analysis.[279] First, the Court instructed that preemption must be treated as a matter of degree, as state laws may legally enter the otherwise exclusive realm of FERC. In instances "where . . . a state law can be applied to nonjurisdictional as well as jurisdictional sales, [courts] must proceed cautiously, finding pre-emption *only* where detailed examination convinces [courts] that a matter falls within the pre-empted field."[280] The Court commanded that only laws "*aimed directly*" at federal jurisdiction are preempted.[281]

Second, the Court emphasized the importance of the "continued exercise of state power."[282] The Court instructed that preemption analysis must be narrow so as to "not . . . handicap or dilute" this power.[283] The Court reasoned that this narrow framework is necessary because "a clear division between areas of state and federal authority in natural-gas regulation" simply does not exist in the modern grid.[284] Instead, the Court highlighted that this concept of a bright line is a "[p]latonic ideal [that] does not describe the natural gas regulatory world."[285]

In its analysis, the Court carefully examined the NGA. Scrutinizing the express grant of jurisdiction by the NGA, the Court noted that the NGA extends FERC's jurisdiction over the transportation and sale of natural gas in interstate commerce, but limits FERC's jurisdiction to (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural-gas companies engaged in such transportation or

276. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594 (2015).

277. *Id.* (emphasis omitted).

278. *Id.* Although *Oneok* involved the NGA rather than the FPA, analyzing the case in the context of FPA is nonetheless relevant as the NGA and FPA share many historical and structural similarities. *See* sources cited *supra* note 82.

279. *Oneok, Inc.*, 135 S. Ct. at 1603.

280. *Id.* at 1599 (emphasis added).

281. *Id.* at 1600 (quoting N. Nat. Gas Co. v. State Corp. Comm'n of Kan., 372 U.S. 84, 94 (1963)).

282. *Id.* at 1599 (quoting Panhandle E. Pipe Line Co v. Pub. Serv. Comm'n of Ind., 332 U.S. 507, 517–18 (1947)).

283. *Id.*

284. *Id.* at 1601.

285. *Id.*

sale."[286] The NGA, however, reserves to the states regulation of the other portions of the industry, such as retail rates and other matters traditionally subject to state authority and not otherwise charged to the federal government.[287] The Court then scrutinized the legislative history of the NGA, which was "replete with assurances that the [NGA] 'takes nothing from the State [regulatory] commissions.'"[288] In sum, the NGA fashioned a concurrent jurisdiction between the states and FERC in the regulation of natural gas.

Ultimately, the Court held that "other considerations . . . weigh[ed] against a finding of pre-emption in this context."[289] The Court reasoned that the state antitrust laws were not "aimed directly" at federal jurisdiction, but rather retail rates—an area "firmly on the States' side of that dividing [jurisdictional] line" under the NGA.[290] The Court also found that the antitrust laws were not "aimed directly" at federal jurisdiction, but were more "like blue sky laws" aimed at "all businesses in the marketplace."[291] The Court, nonetheless, left open the possibility that the antitrust laws were conflict preempted.[292]

In his dissent, Justice Scalia lambasted the majority's holding as "smudg[ing] [the bright] line" between wholesale and retail markets.[293] Scalia highlighted that "'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction' over the gas trade."[294] Because of this bright-line jurisdiction, Scalia argued that the Court has "'squarely rejected' . . . 'a case-by-case analysis of the impact of state regulation upon the national interest'"[295]—essentially, the majority's command for a "detailed examination" of whether the challenged state activity conflicts with federal jurisdiction.[296] Scalia goes on to stress that the majority's case-by-case examination is "unworkable,"[297] and only "makes a snarl of [the Court's] precedents" that

286. 15 U.S.C. § 717(b) (2012).

287. §§ 717(b), 717d(a); *Oneok, Inc.*, 135 S. Ct. at 1596, 1600–01.

288. *Oneok, Inc.*, 135 S. Ct. at 1599 (quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 511 (1989)); *see* Phillips Petrol. Co. v. Wisconsin, 347 U.S. 672, 682–83 (1954) ("There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business. A significant part of this gap was created by cases holding that 'the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States.'" (quoting Interstate Nat. Gas Co. v. Fed. Power Comm'n, 331 U.S. 682, 689 (1947) (footnotes omitted))).

289. *Oneok, Inc.*, 135 S. Ct. at 1603.

290. *Id.* at 1600–01 (quoting *Nw. Cent. Pipeline Corp.*, 489 U.S. at 514); *see* §§ 717(b), 717d(a).

291. *Oneok, Inc.*, 135 S. Ct. at 1600–01.

292. *Id.* at 1602. The Court, however, did not go into the merits because the issue before the court was whether state antitrust laws were field preempted. *Id.*

293. *Id.* at 1603 (Scalia, J., dissenting).

294. *Id.* at 1607 (quoting Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986)).

295. *Id.*

296. *Id.* at 1599 (majority opinion).

297. *Id.* at 1603 (Scalia, J., dissenting).

have determined that FERC jurisdiction over wholesale rates as "exclusive" and "plenary."[298]

B. The Hughes *Court Should Have Applied a Narrow Preemption Analysis*

This subpart examines the Court's decision in *Hughes* in the context of the modern grid. First, this subpart explains why the Court's decision was misguided. Second, this subpart provides a solution to cure the flawed reasoning the Court applied in *Hughes*. This subpart proposes that the *Hughes* Court should have applied the *Oneok* Court's reasoning to not only better align the *Hughes* decision with legal precedents, but also attune it to the reality of the modern grid.

1. The Court's Field Preemption Reasoning Is Flawed

In *Hughes*, the Court did not apply a narrow preemption analysis like in *Oneok*. However, the *Hughes* Court's application of field preemption was misguided. The Court in *Hughes* conceded that the Maryland program did not actually set wholesale rates,[299] or even "tamper with the actual terms of an interstate transaction."[300] The Court nonetheless reasoned that the program was preempted because it "interfere[d]" with FERC's exclusive jurisdiction over wholesale electricity.[301] But this language of interference is a classic example of an "obstacle" preemption, a type of conflict preemption where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[302]

In its reasoning, the *Hughes* Court cited to *Mississippi Power & Light Co. v. Mississippi* and *Nantahala Power & Light Co. v. Thornburg* to highlight that interference with FERC jurisdiction is enough to find state activities field preempted.[303] In *Nantahala*, the Utilities Commission of North Carolina devised its own method to calculate the rates Nantahala Power & Light Company could charge its retail customers.[304] In *Mississippi Power*, meanwhile, the Mississippi Public Service Commission granted an order to allow Mississippi Power & Light Company to charge higher retail rates than

298. *Id.* at 1606.

299. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1298–99 (2016) ("True, Maryland's program does not prevent a utility from recovering through retail sales a cost FERC mandated it incur.").

300. PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467, 476 (4th Cir. 2014).

301. *Hughes*, 136 S. Ct. at 1298 (quoting Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 373 (1988)).

302. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *accord* Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995); English v. General Elec. Co., 496 U.S. 72, 79 (1990); Hillsborough Cty. v. Auto. Med. Labs., 471 U.S. 707, 713 (1985); *see* Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1259–60 (2010).

303. *Hughes*, 136 S. Ct. at 1298–99.

304. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 955 (1986).

those approved by FERC.[305] The Court determined that the respective state orders were preempted in both instances because they interfered with FERC's jurisdiction to set just and reasonable rates.[306]

Mississippi Power and *Nantahala*, however, are "best read as . . . conflict pre-emption case[s]," as the Court's finding of preemption in both cases was quite narrow.[307] In *Nantahala*, the Court determined that the North Carolina commission's method "conflict[ed]" with FERC's authority to set just and reasonable rates.[308] The Court struck down the state effort as preempted because "state efforts to regulate commerce must fall when they *conflict* with or *interfere* with federal authority over the same activity."[309] Relying on this conflict preemption reasoning, the *Mississippi Power* Court likewise found the Mississippi commission's order preempted because it conflicted with federal jurisdiction over wholesale rates.[310] Thus, the Court in both cases determined that the respective state orders were preempted on the basis of a "conflict" or "interfere[nce]" posed by the respective state activities and FERC's jurisdiction.[311] Critically, neither the *Mississippi Power* nor *Nantahala* Court suggested that a state order that conflicts with FERC jurisdiction is enough to find *field* preemption or that Congress had so comprehensively legislated in the field so as to preclude any state intrusion into the field.[312]

2. A Narrow Preemption Doctrine Would Cure the Errors in the Court's Reasoning

The *Oneok* Court recognized the risks inherent in applying a broad preemption doctrine in the modern grid. Therefore, the Court accordingly applied a limited preemption analysis to account for the reality of the grid and preserve historical state jurisdiction where it overlaps with FERC jurisdiction. In light of the interconnectedness of the modern grid, the *Oneok* Court called for a case-by-case analysis to determine whether state efforts are preempted. There, the Court determined that a state effort is preempted "only where detailed examination convinces [the Court] that a matter falls within the pre-empted field" and that only if a state effort "aim[s] directly" at federal jurisdiction is that activity field preempted.[313] This detailed examination

305. *Miss. Power & Light Co.*, 487 U.S. at 356.

306. *Nantahala Power & Light Co.*, 476 U.S. at 972–73; *Miss. Power & Light Co.*, 487 U.S. at 375.

307. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1601 (2015).

308. *Nantahala Power and Light Co.*, 476 U.S. at 973.

309. *Id.* at 964 (emphasis added) (quoting Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 (1981)).

310. *Miss. Power & Light Co.*, 487 U.S. at 375 (finding that state efforts cannot "collaterally attack[]" FERC jurisdiction).

311. *Id.* at 377 (quoting *Chicago & N.W. Transp. Co.*, 450 U.S. at 318–19).

312. *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 76–77 (2008); English v. G.E. Co, 496 U.S. 72, 78–79 (1990).

313. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599–1600 (2015).

includes a scrutiny of the express grant of jurisdiction by the enabling statute and its legislative history.

The *Hughes* Court did not apply a "detailed examination," with the majority opinion spanning a paltry ten pages.[314] But if the Court had applied a detailed examination, then it would have noted that the legislative history is "replete" with congressional intent to meticulously reserve state and federal jurisdictional lines in crafting the FPA.[315] In so doing, Congress granted FERC jurisdiction over the wholesale market[316] and "any rule, regulation, practice, or contract affecting [wholesale] rate[s],"[317] but reserved the retail sale of electricity and other long-standing jurisdiction to the states, such as facility siting and generation adequacy.[318] Similar to the legislative history of the NGA, the legislative history of the FPA is "replete with assurances that the [FPA] 'takes nothing from the State [regulatory] commissions.'"[319]

The *Oneok* Court instructed that a state activity is field preempted only in instances when that activity "aim[s] directly" at FERC jurisdiction.[320] In *Hughes*, the CfD at issue did not aim directly at setting wholesale rates;[321] in fact, the Court conceded that the program did not set wholesale rates[322] or even tamper with the rates.[323] The purpose of the CfD was "to encourage construction of new in-state generation,"[324] a matter "firmly [reserved] on the States' side of [the] dividing line" under the FPA, both in terms of the FPA's express grant of jurisdiction and its legislative history.[325] The program also did not directly target wholesale rates, but instead the market in general, as the program aimed to increase the general supply of energy in the market.[326] Thus, under a narrow preemption framework, the CfD would not have been field preempted because it did not "aim[] directly" to undermine FERC's jurisdiction.[327]

The *Hughes* Court's broad application of preemption is also inconsistent with the *EPSA* Court's holding that limited the scope of FERC jurisdiction.[328]

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314. *Id.* at 1599; Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

315. *See* New York v. FERC, 535 U.S. 1, 20–23 (2002); *see also supra* Part I.A.

316. 16 U.S.C. § 824(a) (2012).

317. §§ 824(b), 824d(a), 824e(a).

318. § 824(b)(1); Nordhaus, *supra* note 58, at 206; *see New York*, 535 U.S. at 20–24.

319. *Oneok, Inc.*, 135 S. Ct. at 1599 (quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 511 (1989)); *see New York*, 535 U.S. at 20–24.

320. *Oneok, Inc.*, 135 S. Ct. at 1600.

321. *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1294–96 (2016).

322. *Id.* at 1298.

323. PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467, 476 (4th Cir. 2014).

324. *Hughes*, 136 S. Ct. at 1298.

325. *Oneok, Inc.*, 135 S. Ct. at 1600 (quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 514 (1989)); *see* 16 U.S.C. § 824(a), (b)(1) (2012); *see also New York*, 535 U.S. at 20–24.

326. *Oneok, Inc.*, 135 S. Ct. at 1600–01. Generation adequacy also falls within the historical jurisdiction reserved to the states by the FPA. Nordhaus, *supra* note 58, at 206.

327. *Oneok, Inc.* at 1600.

328. *See* Part II.C.3.

The *Hughes* Court reasoned that the CfD interfered with wholesale rates—even though it did not set rates—because FERC's jurisdiction over wholesale rates is not limited to wholesale rates, but rather extends to all decisions and activities that "directly affect[]" the rates.[329] This "affecting" jurisdiction, however, was the very jurisdiction that the *EPSA* Court limited in its holding.[330] In *EPSA*, the Court noted that since the "affecting" jurisdiction language of section 206 is capacious, it was necessary to apply a "common-sense" limitation to FERC's "affecting" jurisdiction, finding that FERC's jurisdiction is limited to rules or practices that "directly affect the [wholesale] rate."[331] The *EPSA* Court's limitation of FERC's "affecting" jurisdiction over wholesale rates suggests that FERC's jurisdiction over wholesale rates does not comprehensively occupy the field so as to exclude any state interference.[332]

The Court's holding in *Oneok* did leave open the possibility of finding the program in *Hughes* to be conflict preempted.[333] Under conflict preemption, a state activity is preempted if, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[334] In *Hughes*, the Court emphasized that the program "interfere[d]" with FERC's exclusive jurisdiction over wholesale electricity.[335] Therefore, under conflict preemption, Maryland's "effort[] to regulate commerce must fall" because it "interfere[d] with federal authority over the same activity."[336]

The *Hughes* Court should have applied a narrow preemption analysis as applied in *Oneok*. First, a narrow preemption analysis would have allowed the Court to value the congressional design of concurrent jurisdiction in energy regulation, even in the context of an interconnected modern grid. Second, this approach would have corrected the Court's misguided application of its conflict preemption precedent to support its finding of field preemption. Finally, a narrow preemption approach would not have precluded a conflict preemption analysis. And under a conflict preemption analysis, the Court would have likely found the state program to be conflict preempted and thus, achieve the same outcome as the Court's decision. In *Hughes*, the Court limited its holding to the

329. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 774 (2016) (quoting Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658, 16,676 (FERC Mar. 24, 2011)); *Hughes*, 136 S. Ct. at 1298–99; *see* § 824e(a).

330. *EPSA*, 136 S. Ct. at 774.

331. *Id.* (emphasis omitted) (quoting Cal. Indep. System Operator Corp. v. FERC, 372 F.3d 395, 403 (2004)).

332. *See* Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 509 (1989).

333. *See Oneok, Inc.*, 135 S. Ct. at 1602 ("To the extent any conflicts arise between [state laws] and the federal rate-setting process, the doctrine of conflict pre-emption should prove sufficient to address them.").

334. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

335. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1298 (2016).

336. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 964 (1986) (quoting Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318–19 (1981)); *see* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 377 (1988).

specifics of the program; finding the program to be conflict preempted invariably achieves the same results, because it would likewise only find similar programs that interfere with FERC jurisdiction to be preempted.

In her concurrence, Justice Sotomayor tried to clarify the Court's preemption analysis by emphasizing her understanding of the Court's decision as one of conflict preemption. Justice Sotomayor stressed that, in her opinion, Congress did not intend to legislate comprehensively in the field so as to field preempt relevant state authority.[337] She added that Congress "rightly recognizes the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price-effective energy."[338] This is the proper reading of Congress's intent in drafting the FPA.[339] It is clear, then, that in the modern grid with no bright lines, a narrow analysis of the preemptive scope of federal jurisdiction is necessary to protect the congressionally designed concurrent jurisdiction in energy regulation.

CONCLUSION

A bright-line analysis is a relic of the historical grid. In today's grid, the continued application of a bright-line rule and the accordance of *Chevron* deference to FERC's interpretation of an ambiguity in the FPA result in the continued expansion of FERC jurisdiction and an assault on state jurisdiction.

In *Hughes*, the Court applied a bright-line analysis to answer a jurisdictional question that involves no bright lines. In theory, the Court's reasoning was sound (notwithstanding its misguided application of the conflict preemption cases to support its reasoning); after all, a bright-line jurisdiction—where FERC enjoys "exclusive" and "plenary" jurisdiction over wholesale rates—demands that any state activity that intrudes on this sphere be preempted, as the regulatory field is already occupied by FERC. In practice, however, the Court's holding is unworkable. There are no longer bright lines in the grid: A bright-line jurisdiction is simply a "Platonic ideal" that does not describe the energy regulatory world.[340]

In his dissent in *Oneok*, Justice Scalia feared that the Court was "smudg[ing]" historically bright jurisdictional lines in energy jurisdiction by applying a detailed, case-by-case analysis to determining jurisdiction in energy regulation.[341] Justice Scalia admonished the Court's decision as a "make-it-up-as-you-go-along approach to preemption [that] has no basis in the [NGA], contradicts our cases, and will prove unworkable in practice."[342] But, as this

337. *Hughes*, 136 S. Ct. at 1299–1300 (Sotomayor, J., concurring).
338. *Id.* at 1300.
339. *See supra* Part II.A.3.
340. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 776 (2016) (citing Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1601 (2015)).
341. *See Oneok, Inc.*, 135 S. Ct. at 1603 (Scalia, J., dissenting).
342. *Id.*

Note has argued, maybe "smudg[ing]" historically (but now antiquated) bright jurisdictional lines and applying a "make-it-up-as-you-go-along approach" is the appropriate framework to determining FERC jurisdiction and bringing energy law to the twenty-first century.[343] After all, there are no bright lines in the grid today—only blurred lines.

343. *Id.*