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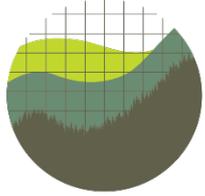
***Markets, Externalities, and the Federal Power Act:
The Federal Energy Regulatory Commission's
Authority to Price Carbon Dioxide Emissions***

Bethany Davis Noll & Burcin Unel

Environmental Law & Policy Annual Review

Environmental Law Institute

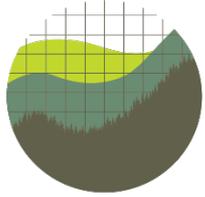
April 3, 2020



Federal Power Act

16 U.S.C. § 824d(a) Just and reasonable rates

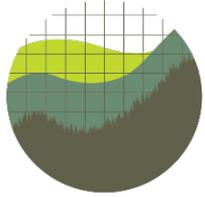
All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges **shall be just and reasonable**, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.



Federal Power Act

16 U.S.C. § 824d (Section 205)

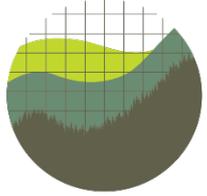
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Federal Power Act

16 U.S.C. § 824e (Section 206)

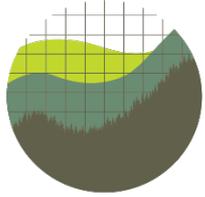
Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is **unjust, unreasonable, unduly discriminatory or preferential**, the Commission **shall determine the just and reasonable rate**, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.



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Market Failures

- Market power
- Asymmetric information
- Public goods
- Externalities

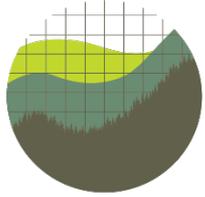


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Statutory Authority

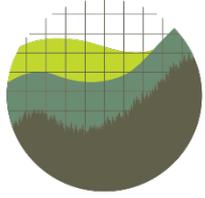
“As a creature of statute, FERC has only those powers endowed upon it by statute.” *Maine v. Fed. Energy Regulatory Comm’n*, 854 F.3d 9, 24 (D.C. Cir. 2017)



Federal Power Act

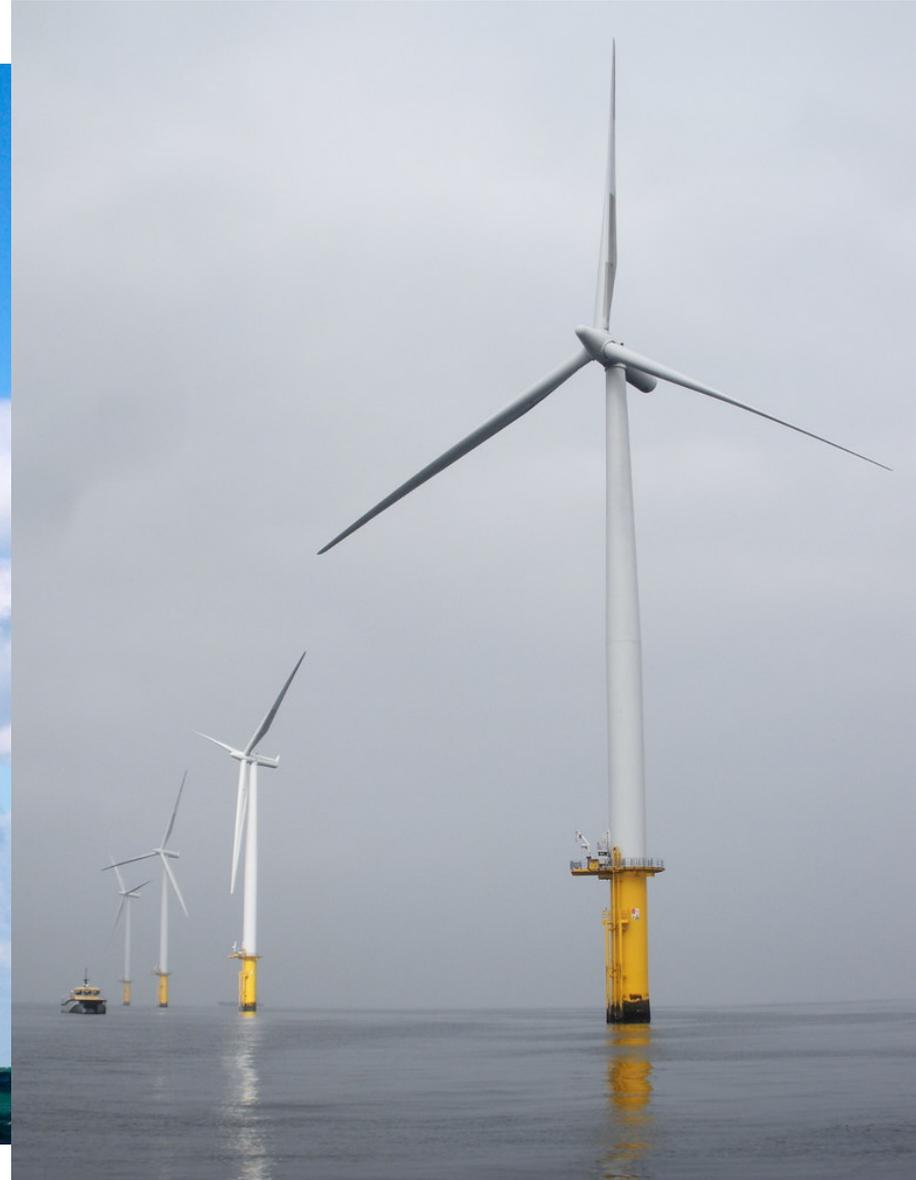
16 U.S.C. § 824(b)(1)

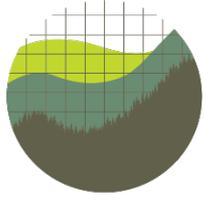
(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at **wholesale in interstate commerce**, but except as provided in paragraph (2) **shall not apply to any other sale of electric energy** or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. **The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy**, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over **facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce**, or over facilities for the transmission of electric energy consumed wholly by the transmitter.



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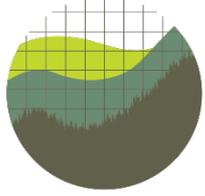




State-Federal Divide

Federal - “When FERC regulates what takes place on the wholesale market, as part of carrying out its charge to improve how that market runs, then no matter the effect on retail rates, § 824(b) imposes no bar.” *F.E.R.C. v. Electric Power Supply Ass’n*, 136 S.Ct. 760, 776 (2016).

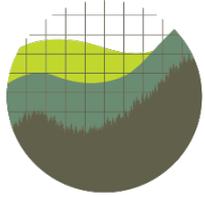
State - The courts have generally explained “that incidental effects of state regulation on matters of federal concern do not rise to the level of preempting those state laws—what matters, in terms of the constitutional preemption concern, is whether the challenged state laws *target* those areas reserved by Congress for federal regulation.” Br. for the U.S. and FERC as *Amici Curiae*, *Village of Old Mill Creek v. Star*, 2018 WL 2746229 (7th Cir. 2018).



Direct Effects

“FERC has the authority—and, indeed, the duty—to ensure that rules or practices ‘affecting’ wholesale rates are just and reasonable.”
F.E.R.C. v. Electric Power Supply Ass’n, 136 S.Ct. 760, 774 (2016).

“ ‘[W]e now approve, a common-sense construction of the FPA's language, limiting FERC's ‘affecting’ jurisdiction to rules or practices that ‘*directly* affect the [wholesale] rate.’” *Id.*



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Questions?

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* This presentation does not purport to represent the views, if any, of New York University School of Law.