A Tale of Two Cases: Shifting Sands of Federal and State Jurisdiction over Electricity

In a recent decision revisiting the separate spheres of state and federal jurisdiction over electricity, the U.S. Court of Appeals for the District of Columbia Circuit adopted a narrow statutory interpretation of federal authority that ignores the broad view of the wholesale electricity market as a single enterprise cutting across state boundaries. If correct, what effect will precluding a federal role in demand response have on the wholesale electricity markets and the prices consumers pay? Further, can the apparently shifting sands of federal and state jurisdiction over electricity be reconciled, or has the D.C. Circuit identified another regulatory gap that may only be resolved by the intervention of Congress?

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I. Background: Federal Regulation of the Transmission of Electricity Across State Lines

Eighty-seven years ago, when interstate commerce in electricity was in its infancy and sales of energy generated in one state for use in another state were the exception and hardly the norm, the United States Supreme Court was faced with a dispute in which a corporation had generated electricity in Rhode

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Island for sale across the state line into Massachusetts. In that case – *Attleboro Steam vs. Public Utility Commission*[1] – the Supreme Court held that the generation and transmission of electricity across state lines was an interstate business and not subject to regulation by either state. The Court explained that, ''if such regulation is required it can only be attained by the exercise of the power vested in Congress.'' This created a regulatory gap as at the time, as no federal agency was authorized to regulate the interstate sale and transmission of electricity.

In 1935, after due deliberation, Congress passed Part II of the Federal Power Act (FPA). It plugged the regulatory gap – the inability of state commissions to regulate interstate commerce in electricity affecting their own states – by adopting a limited remedy for federal regulation of only those electricity transactions affecting interstate commerce. Section 201 of the FPA grants a federal regulatory commission, now the Federal Energy Regulatory Commission, jurisdiction ''only to those matters which are not subject to regulation by the States,'' preserving for state regulatory commissions their existing role in the regulation of generating facilities, local distribution and retail sales of electric energy.

Under this rubric, federal jurisdiction over wholesale electricity markets had come to be considered exclusive and plenary. In 1945, the Supreme Court observed that the statute conferring jurisdiction on the federal agency was couched largely in technical language following the flow of electric energy – an engineering and scientific, rather than a legalistic or governmental test, because ''state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise.''[2]

Has the D.C. Circuit's latest decision correctly divined the line dividing federal and state jurisdiction?

Since then, the nascent wholesale electricity market has evolved considerably. Regional transmission organizations now administer multistate trading platforms and interconnected grids for the economic dispatch of electric generation resources that did not exist in 1927 or 1945. However, in a recent decision revisiting the separate spheres of state and federal jurisdiction over electricity – *Electric Power Supply Association v. FERC* (*EPSA*[3]) – the U.S. Court of Appeals for the District of Columbia Circuit adopted a narrow statutory interpretation of federal authority that ignores the broad view of the wholesale electricity market as a single enterprise cutting across state boundaries. The court vacated FERC Order No. 745, thereby negating a federal effort to promulgate a uniform rule for demand response compensation in wholesale electricity markets. The court found that the federal regulatory commission lacked the authority to regulate demand response, a practice with clear effects on the wholesale electricity market, because ''the statutory text [of the FPA] forecloses the agency's assertion of authority'' over retail customers and their decision whether to purchase electricity at retail.

Has the D.C. Circuit's latest decision correctly divined the line dividing federal and state jurisdiction? If correct, what effect will precluding a federal role in demand response have on the wholesale electricity markets and the prices consumers pay? Further, can the apparently shifting sands of federal and state jurisdiction over electricity be reconciled, or has the D.C. Circuit identified another regulatory gap that may only be resolved by the intervention of Congress?

II. Demand Response

Demand response is the intentional reduction of electricity usage by end-use customers from their expected consumption in response to incentive payments