Guarini Center
Environmental, Energy, and Land Use Law

NYU | LAW

Issue Brief

October 2017

Political Cross Currents in the Electricity Sector

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Introduction

The Federal Energy Regulatory Commission ("FERC" or "Commission") faces increasing and conflicting pressures from both States and the Department of Energy ("DOE") to intervene in the federal wholesale electricity markets that FERC administers. This primer provides a brief overview of those political forces and the legal framework in which they operate. These cross currents, some of which are quite recent, have the potential to fundamentally alter the federal electricity markets, or even precipitate their collapse.

Under the Federal Power Act ("FPA"), States and the federal government share authority over our nation's electricity sector. Generally speaking, FERC governs interstate sales of wholesale electricity whereas States control the retail distribution of electricity to consumers. For certain parts of the country, FERC allows the price of wholesale electricity to be set through competitive markets. Because the wholesale and retail sides of the grid are not "hermetically sealed,"[1] State efforts to decarbonize the grid, or otherwise promote preferred generation resources, can have significant consequences on wholesale market prices. When this occurs, aggrieved parties may petition FERC to account for these price effects in setting wholesale electricity rates. FERC may choose to mitigate these effects, accommodate them, or maintain the status quo.[2]

The FPA sets limits on what FERC and the States can do. Injured parties have sought relief in federal court on grounds that the States or FERC have acted beyond their respective jurisdiction, impermissibly encroaching on the other's sphere of control. The Supreme Court has adjudicated recent jurisdictional disputes with a relatively light touch. With respect to the FPA's preemptive effect, it has eschewed a bright line rule in favor of a more fact-specific inquiry.[3] This pragmatic approach has allowed FERC, the States, and private stakeholders leeway to pursue policies such as State renewable portfolio standards and federal demand response regulation.

Several weeks ago, the Trump administration injected itself into this dynamic, asserting that FERC has failed to fairly compensate coal and nuclear power plants for the "resilience" and "reliability" that these resources provide to the grid. On September 29, 2017, the DOE issued a notice of proposed rulemaking urging FERC to adopt a tariff that provides cost recovery and a fair return on equity to resources in organized markets that, *inter alia*, have a "90-day fuel supply on site."[4] The proposal would force utilities, and ultimately consumers, to pay eligible coal-fired and nuclear power plants for all their costs. In so doing, it would allow those generators to submit artificially lower bids into the wholesale markets, dramatically lowering market prices, and possibly leading to the total collapse of the wholesale markets.[5] DOE directed FERC to take final action on the proposal within 60 days.[6]

Although nuclear and coal generators praised DOE's action, the proposal ignited protest from a cavalcade of energy experts, including several former-FERC officials,[7] as well as groups representing competing power producers and environmental interests.[8] FERC is an independent agency and need not implement DOE's proposal. But even if FERC declines to follow DOE's directive, the coal-friendly message from the Trump administration is clear, and could incline FERC to take a harder line towards State environmental policies that influence wholesale market prices. Carbon pricing initiatives led by regional transmission organizations ("RTOs"),[9] which are overseen by FERC, also may be viewed through a more skeptical lens.

The Federal Power Act and Jurisdictional Limits

As previously mentioned, the FPA divides authority over the nation's electricity sector between States and the federal government. The statute gives FERC exclusive authority over the transmission and sale of wholesale electricity in interstate commerce.[10] However, the FPA reserves to the States jurisdiction over "any other sale of electric energy,"[11] including retail sales (*i.e.*, sales to end-use customers) and wholesale electricity sales that occur entirely within the state.[12] States also retain control over "facilities used for the generation of electric energy."[13]

In recent years, this statutory division of authority has "generate[d] a steady flow of jurisdictional disputes because—in point of fact if not of law—the wholesale and retail markets in electricity are inextricably linked."[14] Changes on the state-administered retail side of the electricity sector can affect prices in the federally-regulated wholesale markets, and vice versa. As a result, demarcating jurisdictional boundaries is difficult. It requires not just ascertaining whether a given State policy influences wholesale market rates, but whether the policy is so tied to the wholesale rates that it usurps FERC's authority.

In *Hughes v. Talen Energy Mktg., LLC*,[15] the Supreme Court provided some guidance as to when State policies impermissibly intrude on FERC's turf. *Hughes* held that the FPA preempted a Maryland order directing utilities to enter into a contract for differences with a new gas-fired power generation plant in order to incentivize the plant's construction. The *Hughes* holding was expressly limited; it invalidated the Maryland order solely because the contract conditioned payment of funds on capacity[16] clearing the wholesale auction. “Nothing in this opinion,” the Court admonished, “should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator’s wholesale market participation.”[17]

Ongoing challenges to state nuclear subsidies – the latest wave in the steady flow of jurisdictional disputes – may clarify what distinguishes a “tethered” from an “untethered” State policy. Following *Hughes*, New York and Illinois implemented zero-emission credit (ZEC) programs to prop up their aging nuclear fleets, which provided both local employment and gigawatts of carbon-free electricity. Competing electricity generators sued, claiming that the States, through these programs, were substituting their preferred rates for those approved by FERC. The Southern District of New York and Northern District of Illinois both dismissed the complaints, although appeals are pending before the Second and Seventh Circuits, respectively.[18]

Notably, in both cases, the district courts held that the FPA does not allow private parties to bring suit in federal court on the basis that a state law violates the FPA, and even if it did, the ZEC programs at issue were not preempted and did not violate the dormant commerce clause.[19] This legal precedent, if upheld, would be consequential.[20] The elimination of a private right to preempt would preclude power generators, utilities, and groups representing ratepayers and environmental interests from suing in federal court to enjoin State actions that the FPA allegedly preempts. These parties would have to first present their claims to FERC. The Commission would consider these jurisdiction-based claims along with other FPA claims, including allegations that the wholesale rates affected by these State actions are not just and reasonable.

The upshot of this holding is that FERC would have a greater ability to define the limits of its own jurisdiction. Proceedings before the Commission would rise in importance as FERC would hear all disputes in the first instance. No longer would the same claim proceed along parallel tracks before both FERC and the federal courts. Furthermore, under the current *Chevron* framework, Commission determinations, including those concerning preemption, likely would receive deference from a reviewing court.[21] That is, where statutory ambiguities exist, a federal judge would weigh FERC’s own conclusion as to the FPA’s allocation of State and federal power in deciding that issue. Funneling disputes through FERC’s administrative procedures would strengthen FERC’s hand as it seeks to ensure that competitive markets produce just and reasonable rates in the face of State and DOE policy.

FERC’s Mitigation and/or Accommodation of State Public Policy

It is unclear what action, if any, FERC will take to mitigate the effect of State policies on wholesale electricity prices in capacity markets, particularly out-of-market payments to nuclear generators.[22] In parallel to federal litigation, power producers have filed complaints before FERC urging the Commission to take such countermeasures.[23] Proposed remedies include enhancing buyer-side mitigation measures, *i.e.* “offer floors . . . to deter large net buyers and local governments from subsidizing new entry and artificially depressing capacity market prices.”[24] Such price floors, sometimes called minimum offer price rules ("MOPRs"),[25] could require "all new and existing resources that receive out-of-market revenue to bid at least at the level they would have bid if they were being supported solely by the competitive marketplace."[26] RTOs also have considered "two-tiered pricing" to mitigate the influence of uncompetitive bids along with other measures.[27]

On the other hand, FERC could move to accommodate, rather than mitigate, State policy, allowing RTOs to file tariffs that integrate states' environmental goals into the wholesale market. This could take the form of centralized procurement of environmental attributes identified by the states (like the RECs and ZECs programs), or the inclusion of a carbon or pollution adder in wholesale energy bids. RTOs could also craft a combination of these two main approaches, integrating state environmental goals in part, while leaving states free to pursue different or more stringent environmental goals.[28]

Whatever course FERC pursues, RTOs likely will continue to play a key role in this policy landscape. Born out of FERC Order No. 2000 (which, in turn, built on Order Nos. 888/889), RTOs are quasi-legislative, non-profit entities that manage the transmission grid on a regional basis. They vary not only in their internal governance structures, but also in their service areas, which cover different States with different policy priorities. This can sometimes lead to RTOs adopting different market rules and litigation positions.[29] Under Section 205 of the FPA and FERC's regulations, RTOs must file their proposed rate schemes with FERC, who then determines whether the rates are "just and reasonable."[30]

Some RTOs have made noted efforts to accommodate State public policy. NYISO, for instance, has initiated a stakeholder process to examine "the potential for using carbon pricing within wholesale markets to further New York's energy goals."[31] The New England Power Pool's Integrating Markets and Public Policy stakeholder process has considered reforms such as implementing a carbon tax or changing capacity market design.[32]

Two key questions arising from RTOs' treatment of State policy are (i) what authority do RTOs have under the FPA to premise their tariffs on state environmental goals, and (ii) to what extent will FERC defer to RTO decision-making going forward. Promotion of clean energy generation typically resides in the province of the States. Though FERC has rather broad authority to approve RTO-filed tariffs as just and reasonable, RTOs could be overstepping their jurisdictional limits by incorporating carbon pricing into the wholesale market prices.[33] Even if FERC could approve an RTO-filed tariff that incorporates State public policy goals, it likely would not be required to do so, and it is unclear what deference, if any, FERC would accord to such proposals.[34]

DOE's Recently Proposed Coal and Nuclear Subsidy

FERC also could fundamentally reform the markets in the name of "resilience" and "reliability." On September 29, 2017, the Department of Energy (DOE) issued a notice of proposed rulemaking directing FERC, through the Commission-approved wholesale markets, to "accurately price generation resources necessary to maintain the reliability and resiliency of our Nation's electricity grid."[35] Under the proposed rule, eligible reliability and resiliency resources must, *inter alia*, have “a 90-day fuel supply on site.”[36] This would appear to encompass coal, nuclear, and certain hydroelectric facilities.

Given the vagueness of DOE’s proposed rule, it is unclear how FERC would “accurately price” these resources. For instance, DOE proposes that the FERC-approved rate

> shall include pricing to ensure that each eligible resource is fully compensated for the benefits and services it provides to grid operations, including reliability, resiliency, and on-site fuel assurance, and that each eligible resource recovers its fully allocated costs and a fair return on equity.[37]

Compensating “benefits and services” and ensuring recovery of costs plus a return on equity are two different goals that could lead to radically different rules. FERC staff provided commenters with an extensive list of questions that would help the agency understand the implications of DOE’s proposed rule, underscoring both the breadth of the proposed reform and lack of basic policy details provided.[38]

Backlash to the DOE’s proposal resonated from almost all quarters of the electricity sector.[39] Renewable energy and natural gas representatives filed an unprecedented joint motion before FERC arguing that no reliability emergency existed that would justify an interim final rule or DOE’s aggressive timetable, and cited DOE and North American Electric Reliability Corporation’s own reports for support.[40] Two of the three acting FERC commissioners assured stakeholders that FERC would not “destroy the marketplace” in order to implement DOE’s proposal.[41] One Montana public utility commissioner claimed it would “dynamite” the competitive wholesale markets.[42] Days later, DOE Secretary Rick Perry sought to downplay the radical scope of DOE’s proposal stating it “wasn’t a directive” and aimed to merely start a conversation on the need to address resiliency.[43]

As noted above, FERC possesses ultimate authority over wholesale rates.[44] It must consider DOE’s proposal, but need not adopt it.[45] At this time it is difficult to predict what action FERC ultimately will take. Prior to the DOE proposal, interim FERC Chairman Neil Chatterjee stated that the existing coal and nuclear fleet “need to be properly compensated for the value they provide to the system.”[46] A majority of the Commission may be hesitant to “blow the market up”[47] solely to prop up uncompetitive incumbent energy resources, but it may be more receptive to market proposals that incorporate the value of reliability in a resource-neutral way.

In the meantime, the political winds buffeting FERC’s competitive markets show no signs of diminishing. As cheap natural gas and renewables continue to outcompete coal and nuclear power in the marketplace, incumbent generators have increased their efforts to obtain subsidies from Washington. States, for their part, are expanding their efforts to fight climate change and promote clean energy, taking actions that at times bring them into conflict with federal priorities. Indeed, the pressure on States to green the power sector is arguably stronger now in the wake of recent federal environmental regulation rollbacks. Both forces in different ways test FERC’s longstanding commitment to competitive wholesale electricity markets. The

Commission has the flexibility under to FPA to successfully manage these challenges, but whether and in what form the markets will survive is as yet unknown.

Acknowledgments

I am grateful for the helpful contributions and review by Danielle Spiegel-Feld, Katrina Wyman, Matthew R. Christiansen, Richard Miller, and Miles Farmer. All views and errors are my own

[1] *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 766 (2016).

[2] *See, e.g.*, *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 103 (2d Cir. 1985) (FERC may "take into account activities it cannot regulate in setting rates for activities that it may regulate" and "consider[] nonjurisdictional activity in setting jurisdictional rates").

[3] *See Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

[4] Dep't of Energy, *Grid Resiliency Pricing Rule*, Notice of Proposed Rulemaking, Dkt No. RM17-3-000 (Sept. 29, 2017), available at https://energy.gov/sites/prod/files/2017/09/f37/Notice%20of%20Proposed%20Rulemaking%20.pdf. Secretary Perry's letter to FERC accompanying the proposed rule was dated September 28, 2017. *See* Letter from Secretary Rick Perry to FERC Chairman and Commissioners re: Secretary of Energy's Direction that the Federal Energy Regulatory Commission Issue Grid Resiliency Rules Pursuant to the Secretary's Authority Under Section 403 of the Department of Energy Organization Act (Sept. 28, 2017).

[5] According to Former FERC Chairman Jon Wellinghoff, the DOE proposal "would blow the market up," and former Commissioner Tony Clark stated that enacting the rule would be "very challenging for the markets." *See* Gavin Bade, *Powelson: FERC 'will not destroy the marketplace' in DOE cost recovery rulemaking*, UTILITY DIVE (Oct. 5, 2017), http://www.utilitydive.com/news/powelson-ferc-will-not-destroy-the-marketplace-in-doe-cost-recovery-rule/506577/. Former FERC Commissioner Nora Mead Brownell, a Republican, said she was "shocked and frankly disappointed" by DOE's proposal and that it is "going to destroy the markets [and] drive away investment in new more efficient technologies . . . at a cost to business and ratepayers that is astronomical." Rich Heidorn Jr., *FERC's Independence to be Tested by DOE NOPR*, RTO INSIDER (Oct. 2, 2017), https://www.rtoinsider.com/ferc-doe-cybersecurity-rick-perry-76484/.

[6] *Id.*

[7] *Id.*

[8] *See* Ed Crooks, *US delivers electric shock with coal and nuclear subsidy plan*, FINANCIAL TIMES (Oct. 1, 2017) https://www.ft.com/content/a5c7c658-a6bb-11e7-ab55-27219df83c97; Timothy Gardner, *U.S. energy head seeks help for coal, nuclear power plants*, REUTERS (Sept. 29, 2017); http://www.reuters.com/article/us-usa-powergrid-perry/u-s-energy-head-seeks-help-for-coal-nuclear-power-plants-idUSKCN1C42G0.

[9] Unless otherwise noted, "RTOs" will refer collectively to both regional transmission organizations and independent system operators subject to FERC jurisdiction.

[10] 16 U.S.C. § 824(b); *see also* § 824(d).

[11] 16 U.S.C. § 824(b)(1).

[12] *Elec. Power Supply Ass'n*, 136 S. Ct. at 767.

[13] 16 U.S.C. § 824(b)(1).

[14] *Elec. Power Supply Ass'n*, 136 S. Ct. at 766. That is because "the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other. To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level. And so too, of necessity, will FERC's regulation of those wholesale matters." *Id.*

[15] *Hughes*, 136 S. Ct. 1288 (2016).

[16] Capacity markets have several different objectives: ensuring that generators will be able to provide energy over a specified period of time, providing "missing money" to generators to the extent that revenues from energy and ancillary services do not cover their fixed and variable costs, and to incentivize new entrants into the market. *See* Richard B. Miller, Neil H. Butterklee, Margaret Comes, *"Buyer-Side" Mitigation in Organized Capacity Markets: Time for A Change?*, 33 Energy L.J. 449, 450 (2012) (discussing the purpose of capacity markets and proposing reforms).

[17] *Hughes*, 136 S. Ct. at 1299 (internal quotations omitted).

[18] *See Vill. of Old Mill Creek v. Star*, No. 17 CV 1163, 2017 WL 3008289 (N.D. Ill. July 14, 2017); *Coal. for Competitive Elec. v. Zibelman*, No. 16-CV-8164 (VEC), 2017 WL 3172866 (S.D.N.Y. July 25, 2017). Interestingly, both sides of the ZEC litigation agreed that state renewable energy credits (RECs) in New York, Illinois, and elsewhere do not intrude on federal jurisdiction. ZECs were modeled on RECs (hence the name), but power producers assert that they are distinct because, *inter alia*, ZEC payments are more directly tied to the wholesale energy prices. Under both states' programs, the value of ZECs decrease proportionally as wholesale prices rise within certain ranges. *See* New York Public Service Commission, *Order*

Adopting a Clean Energy Standard, at 129-30, 138, & App. E at 12 (Aug. 1, 2016); 20 Ill. Comp. Stat. 3855/1-75(d-5)(1)(B).

[19] *Id.* The Northern District of Illinois also dismissed claims by consumer groups that the Illinois ZEC program violated the Equal Protection Clause of the Fourteenth Amendment. *See Vill. of Old Mill Creek*, 2017 WL 3008289, at *17-18. The court concluded that the Illinois statute had a plausible rational basis and that treating Illinoisans different from citizens of other States does not run afoul of the Equal Protection Clause. *Id.*

[20] With respect to the ZEC litigation, the Second and Seventh Circuits could very well agree with the district courts and conclude that the FPA forecloses a private right of action. Energy law is dense, technical, and complex. *Hughes'* narrow holding arguably reflects a judicial desire to tread lightly in this highly-regulated area where deciding jurisdiction necessarily entails wading into the nitty-gritty details of federal ratemaking. To be sure, putting FERC in charge of determining the limits of its own jurisdiction, even with judicial review, may raise some fears of agency overreach. But the FPA already gives FERC broad authority to determine whether a given practice that influences wholesale markets is just and reasonable, and as a result, "there will be few, if any, cases in which FERC could find a rate or practice preempted where it could not also block or invalidate that rate or practice by determining that it is not just and reasonable." Matthew R. Christiansen, *The FPA and the Private Right to Preempt*, 84 Geo. Wash. L. Rev. Arguendo 129, 146 (2016) (assessing whether the FPA forecloses equitable relief).

[21] *See City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1868–69 (2013) (holding *Chevron* analysis applicable to agency's determination of its own statutory jurisdiction); *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 54 (D.C. Cir. 2014) ("[T]he court will defer to the Commission's reasonable interpretation of statutory ambiguities concerning both the scope of its statutory authority and the application of that authority" (citing *City of Arlington*)). Alternatively, the doctrine of primary jurisdiction could offer courts another way to refer preemption cases to FERC. *See, e.g.*, *City of Osceola, Ark. v. Entergy Arkansas, Inc.*, 791 F.3d 904, 909 (8th Cir. 2015) (FERC had primary jurisdiction over wholesale electricity contract dispute between city and energy provider that centered on interpretation of contract's FERC-approved rate formula); *but see Entergy Nuclear Fitzpatrick, LLC v. Zibelman*, No. 5:15-CV-230, 2016 WL 958605, at *9 (N.D.N.Y. Mar. 7, 2016) (holding primary jurisdiction inappropriate where plaintiff challenged NYPSC order approving subsidy-like agreement between utility and nuclear generating facility on preemption grounds).

[22] *See* Miller, *supra* note 16, at 450.

[23] *See* Independent Power Producers of New York v. NYISO, FERC Docket Nos. EL 13-62-001 and EL 13-62-002. FERC identified at least 23 then-pending matters as relevant to its technical conference on the relative roles of wholesale markets in the Eastern RTOs and State policies. *See* FERC Supplemental Notice of Technical Conference, Docket No. AD17-11-000 (Apr. 13, 2017) at 2.

[24] Miller, *supra* note 16, at 450. FERC originally defined "a net buyer of a capacity" as "a market participant whose capacity purchase obligation as an LSE [load serving entity] outweighs the amount of capacity supply it owns or controls." *New York Indep. Sys. Operator, Inc.*, 122 F.E.R.C. ¶ 61,211 at n.5 (Mar. 7, 2008); *see also* Miller, *supra* note 16, at 473 n.2.

[25] MOPRs currently only apply to new capacity resources. *See, e.g.*, PJM Manual 18: PJM Capacity Market, Revision: 38 (July 27, 2017) at 118-119, *available at* http://www.pjm.com//media/documents/manuals/m18.ashx; NYISO Market Administration and Control Area Services Tariff, Section 23 Attachment H, Market Power Mitigation Measures.

[26] Robert C. Flexon, President & CEO, Dynegy, Inc., Pre-Technical Conference Comments, Dkt. No. AD17-11-00, at 4, available at https://www.ferc.gov/CalendarFiles/20170426151233-Flexon,%20Dynegy.pdf.

[27] At one point, ISO-NE proposed implementing "two-tiered pricing." Under this proposal,

> whenever new capacity offered at prices deemed uncompetitive cleared the market, two prices would result. New resources would have received a capacity clearing price based on all sellers' actual offers, while existing resources would have received a higher price based on the capacity clearing price that would have resulted if all new resources had offered their capacity at competitive levels (based on a benchmark estimate of their actual costs).

FERC Staff Report, *Centralized Capacity Market Design Elements*, AD13-7-000 (Aug. 23, 2013) at 28. In 2011, FERC rejected this proposal. *See ISO New England Inc.*, 135 FERC ¶ 61029, 61145–46 (Apr. 13, 2011). FERC acknowledged that two-tiered pricing ensures that uncompetitive prices are mitigated while accommodating state energy policies, but also results in purchasing capacity in excess of that needed to meet the planning reserve margin whenever two-tiered pricing is invoked. *Id.* Instead, the Commission directed ISO-NE to develop a design incorporating price floors. *Id.*

[28] These regulatory options, and their attendant jurisdictional tensions, have not gone unnoticed at FERC. In May of this year, the Commission held a two-day

technical conference to address the interplay between State policies and wholesale markets operated by the ISO New England Inc., New York (ISO-NE) Independent System Operator, Inc. (NYISO), and PJM Interconnection, L.L.C. (PJM).

[29] PJM and MISO, for instance, were on opposite sides of the Illinois ZEC litigation, with the former advocating that the state program unlawfully interfered with federal wholesale markets, and the latter arguing for dismissal since a federal ruling could cut short the promising RTO stakeholder processes addressing this issue. *Compare* PJM Interconnection, L.L.C. as Amicus Curiae in Opposition to Motion to Dismiss, *EPSA v. Star*, No. 17-cv-1164, Dkt. No. 88 (Apr. 24, 2017) *with* Midcontinent Independent System Operator, Inc.'s Brief as Amicus Curiae in Support of Defendants' Motion to Dismiss, *EPSA v. Star*, No. 17-cv-1164, Dkt. No. 85-1 (Apr. 24, 2017).

[30] *See* 16 U.S.C. § 824d(c); 18 C.F.R. § 35.34(j)(1)(iii).

[31] Brad Jones & John Rhodes, Cover letter to the Brattle Group's *Pricing Carbon into NYISO's Wholesale Energy Market to Support New York's Decarbonization Goals* (Aug. 10, 2017), available at http://www.nyiso.com/public/webdocs/markets_operations/documents/Studies_and_Reports/Studies/Market_Studies/Pricing_Carbon_into_NYISOs_Wholesale_Energy_Market.pdf.

[32] *See generally*, NEPOOL, Integrating Markets and Public Policy, http://www.nepool.com/IMAPP.php; *see also* Ari Peskoe, *Easing Jurisdictional Tensions by Integrating Public Policy in Wholesale Electricity Markets*, 38 Energy L.J. 1 (2017) (discussing various IMAPP proposals and their jurisdictional ramifications).

[33] For an in-depth assessment of statutory and judicial support for finding a carbon adder just and reasonable, see generally Peskoe, *supra* note 32, at 30-37; Justin Gundlach and Romany Webb, *Carbon Pricing in New York ISO Markets: Federal and State Issues*, Columbia Law School: Sabin Center for Climate Change Law (Feb. 2017).

[34] Under Section 205 of the FPA, FERC need not determine that the RTO's proposal is the *only* just and reasonable tariff, but just that it meets a baseline standard. Moreover, FERC can categorically approve or disapprove a given tariff, or approve it with "minor modifications," but it cannot make modifications that "transform the proposal into an entirely new rate of FERC's own making." *NRG Power Mktg., LLC v. Fed. Energy Regulatory Comm'n*, 862 F.3d 108, 110 (D.C. Cir. 2017).

[35] *Grid Resiliency Pricing Rule*, *supra* note 4.

[36] *Id.* at 18 (proposed amendment at 18 C.F.R. § 35.28 (g)(12)(i)(C)).

[37] *Id.* at 19 (proposed amendment at 18 C.F.R. § 35.28 (g)(12)(iii)).

[38] FERC Office of Energy Policy and Innovation, *Grid Reliability and Resilience Pricing*, Dkt. No. RM18-1-000 (Oct. 4, 2017); available at https://www.ferc.gov/media/headlines/2017/2017-3/10-04-17.pdf.

[39] "Almost everyone outside the coal and nuclear industries wants FERC to turn down DOE's grid market rule." Jeff St. John, *Behind the Backlash to Energy Secretary Rick Perry's Demand for Coal-Nuclear Market Intervention*, GREENTECH MEDIA (Oct. 5, 2017) (collecting critiques from various stakeholders).

[40] The energy trade groups stated, among other things, that the proposed timeframes were "wholly unreasonable and insufficient to allow for an informed consideration of the significant issues proposed [in the DOE's letter]." *Joint Motion of the Energy Industry Associations in Response to the Secretary of Energy's Requests for an Interim Final Rule and an Expedited Time Frame for Comment and Consideration, and Motion for a Technical Conference*, FERC Dk. No. RM18-1-000 (filed Oct. 3, 2017).

[41] *See* Gavin Bade, *Powelson: FERC 'will not destroy the marketplace' in DOE cost recovery rulemaking*, UTILITY DIVE (Oct. 5, 2017), http://www.utilitydive.com/news/powelson-ferc-will-not-destroy-the-marketplace-in-doe-cost-recovery-rule/506577/.

[42] Montana Public Service Commissioner Travis Kavulla, a Republican and the former president of the National Association of Regulatory Utility Commissioners told *Utility Dive*, "This takes [the issue of integrating state policies into the wholesale power markets] and says, 'OK, I guess it's time to dynamite [the markets] then. Grandma has a cold, let's smother her with a pillow now." Gavin Bade, *How DOE's baseload power rule 'would blow the market up'*, UTILITY DIVE (Oct. 2, 2017), http://www.utilitydive.com/news/how-does-baseload-power-rule-would-blow-the-market-up/506269/.

[43] Washington Examiner Daily on Energy, *Coal and Nuclear Should be Part of the Future, Perry Says* (Oct. 6, 2017); http://doe.structure.email/newsletter/daily-on-energy-oct-6.

[44] "The Commission shall have exclusive jurisdiction with respect to any proposal . . . and shall consider and take final action on any proposal made by the Secretary . . . in an expeditious manner in accordance with such reasonable time limits as may be set by the Secretary for the completion of action by the Commission on any such proposal." 42 U.S.C. § 7173(b).

[45] *Id.* The Secretary of Energy invoked a little-used procedure under Section 403 of the Department of Energy Organization Act that allows him to propose rules with respect to matters under FERC's jurisdiction. *See* 42 U.S.C. § 7173(a).

[46] Interview with Chairman Chatterjee, *Open Access, FERC Podcast* (Aug. 14, 2017), transcript available at https://www.ferc.gov/media/podcast/2017/08-14-transcript.pdf.

[47] *See* comments by former FERC officials, *supra* note 6.