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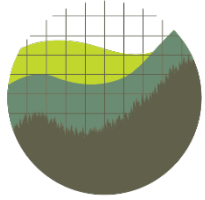
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Legal Principles Primer

Carbon Pricing in Wholesale Energy Markets

March 3, 2020

Bethany Davis Noll

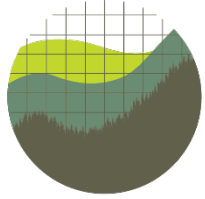


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Statutory Authority

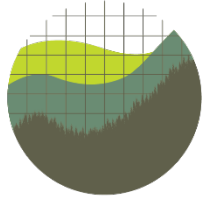
“As a creature of statute, FERC has only those powers endowed upon it by statute.” *Maine v. Fed. Energy Regulatory Comm’n*, 854 F.3d 9, 24 (D.C. Cir. 2017)



Federal Power Act

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

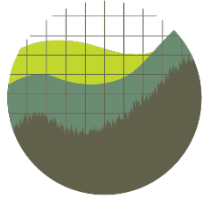
All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges **shall be just and reasonable**, 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. § 824(b)(1)

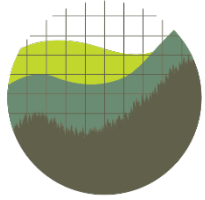
(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at **wholesale in interstate commerce**, but except as provided in paragraph (2) **shall not apply to any other sale of electric energy** or deprive a State 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.



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).

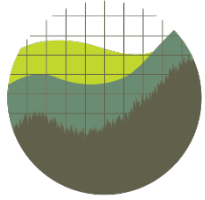


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Preemption Questions

Does state action stand as an obstacle “to the accomplishment and execution of the full purposes and objective” of a federal law or regulation?
Oneok, Inc. v. Learjet, Inc., 135 S.Ct. 1591, 1595 (2015).

Has Congress occupied the whole field leaving no room for state action?



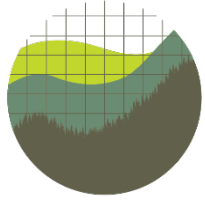
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Area of Traditional State Control

These preemption theories “must be applied sensitively ... so as to prevent the diminution of the role Congress reserved to the states while at the same time preserving the federal role.” *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493 (1989) .

“Absent a clear statement of that purpose, we will not presume Congress to have authorized such a stark intrusion into traditional state authority.” *Bond v. U.S.*, 572 U.S. 844, 866 (2014).

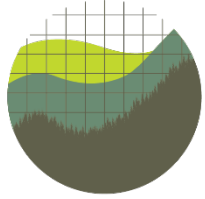


Direct Effects

“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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Federal Power Act

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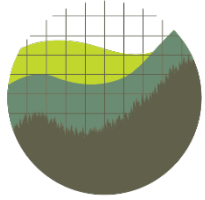


Public Goods



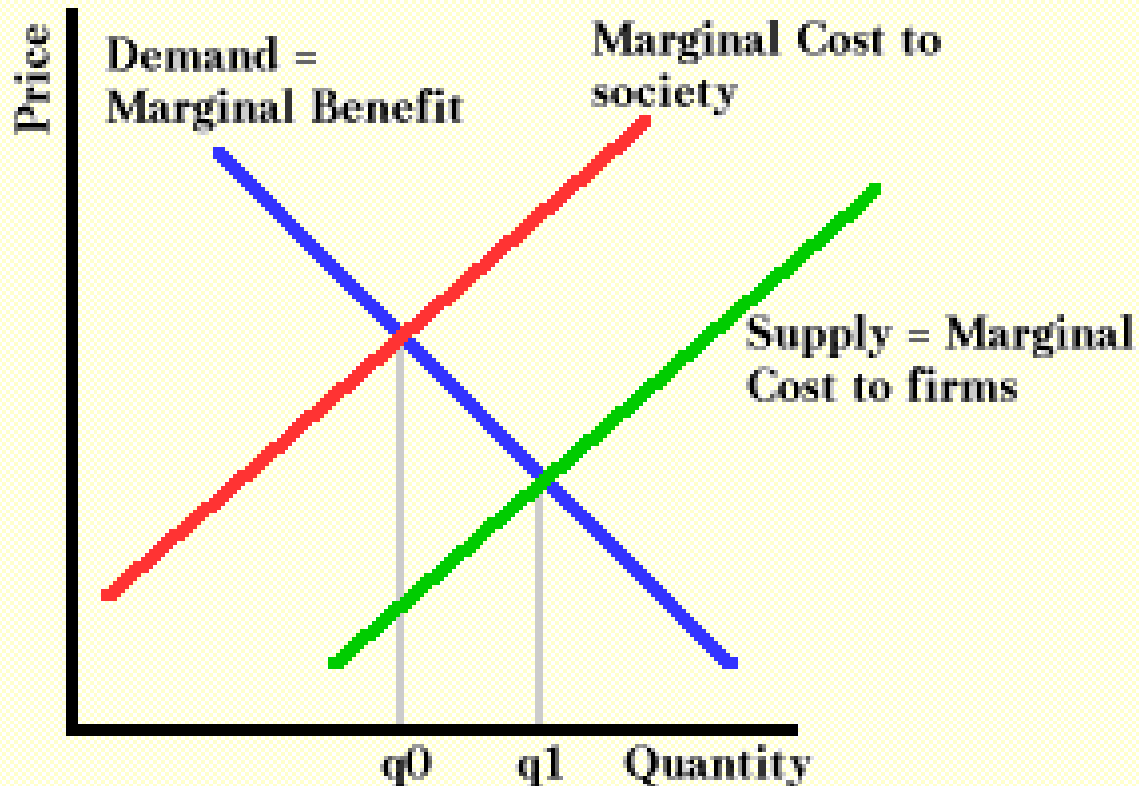
Asymmetric Information

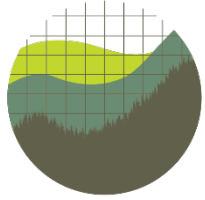




Externalities

With externalities, some effects of decisions are ignored by those making decisions, so results are not optimal.



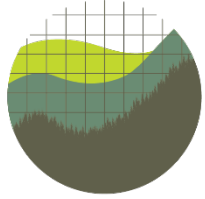


Theories of Jurisdiction

CO2 emissions directly affect the marginal social cost of each unit of wholesale electricity.

State policies intended to reduce CO2 emissions can be harmonized with the federal wholesale rules.

If a state imposes carbon pricing, those costs can be reflected in the generator bids.



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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.