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MOVING FORWARD: APPROACHES FOR STATE-FEDERAL COOPERATION IN A DECARBONIZING ELECTRICITY SECTOR

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Introduction

A bonanza of well-researched studies released in the past year depict trajectories by which the United States can decarbonize over the next two to three decades. Taken together, these studies conclude that the feat is a huge undertaking, but that the energy supplied from low- or no-emissions resources could achieve reliable outcomes at a price that is not as bewildering as previously supposed.

There are big "ifs" and "buts" in these studies. Their hopefulness depends upon a construction boom of new power plants, built in the right places—sometimes far away from where customers have a demand for electricity. In addition to powering current demand, a transformed electricity sector will have to absorb the demand of transportation and industrial sectors as they electrify and avoid direct fuel use and the emissions that entails. Electricity demand has held steady for about a decade. So decarbonization constitutes a "double boom": swapping out the old with the new, and building even more new on top of that to meet additional demand.

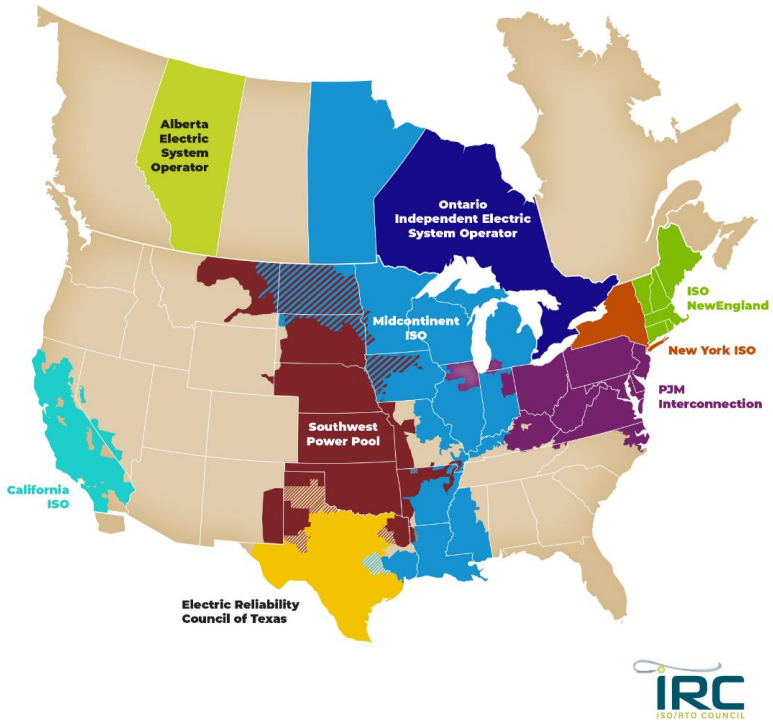
Coordination between these power plants becomes more essential for the grid's reliable operation, so that intermittent power plants can trade-off periods when they are available against those times they are not. Regional electricity markets that span time zones, climates, and geologies make possible a more diversified supply of low- and zero-emissions resources. If a given wind farm is highly intermittent, then the fleet of wind, solar, hydro, nuclear, and carbon-capture resources possible across a large area help balance each other—and the same can be said about the diversification of consumer demand across a wide area. There is consequently little question that the larger decarbonization effort will depend on amplifying this dynamic of regionalizing the business of electricity. A common if sometimes understated assumption of the studies referred to above, which are linked to in the appendix of this paper, is that regional electricity markets will be the indispensable proving grounds of the decarbonization of the electric-power sector.

Put another way: Decarbonization happens best (and sometimes only) when the scale of achievement is at least regional. And, of course, climate-policy ambitions have been national in scale—witness the Paris Agreement that reflects national governments making national pledges. So it is a paradox of American political science that the governmental activity to mandate decarbonization in the U.S. power sector has happened most prominently in the states—not at the national or regional level.[1] It is also a happy accident that the regional markets have sometimes been adaptive to these state ambitions, and that certain other factors—the falling cost of cleaner sources of energy and the expressed preference of consumers to use cleaner electricity— where regulation allows—have driven outcomes toward decarbonization.

[1] There is no mandatory standard at the federal level, although tax incentives have boosted deployment of renewable wind and solar technologies. Meanwhile, 30 states and the District of Columbia have a renewable portfolio standard or clean electricity standard, and some of the same states also impose a price on carbon emissions of certain power generators. Database of State Incentives for Renewables and Efficiency, *RPS & CES Summary Map* (updated September 2020), available at: http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2020/09/RPS-CES-Sept2020.pdf

Hoping to come closer to matching the scale of the problem, some have called for a national power grid, like there is an interstate highway system and a national postal service. This is unlikely to happen. The United States faces a situation where it seems certain that decarbonization policy in the pivotal electric-power sector will continue to occur in the absence of a clear, comprehensive, and national policy. Thus, the question is: Can these regional electricity markets, which the states neither govern nor regulate, be compatible in the long term with state decarbonization polices, which to be achieved typically must be implemented at a larger scale than the state level?

Regional electricity markets



Source: http://isortotest.org/wp-content/uploads/2018/05/ISO-RTO-Map-2018.jpg

An era of bad feelings: the current state of the state-federal relationship

It is not surprising many believe that the answer to that question is "no." Recent years have marked an era of tension between the regulation of certain regional electricity markets and state policy ambitions.

Beginning in 2016, several eastern states moved to enact massive nuclear subsidies that benefitted four large power companies with assets in New Jersey, Ohio, Connecticut, Illinois, and New York. Traditionally, these are some of the largest and most politically influential utilities in the region.

In economic terms, providing subsidies to particular power plants distorts the market for everyone else. These subsidies risk turning a heads-up competition in the regional markets between power producers

into a competition at state capitols for special favors. An adage first offered by the Independent Market Monitor for the PJM market, "subsidies are contagious," has sadly held up to the test of time.[2]

Only recently has it become clear that some of these state enactments were essentially corrupt. In July 2020, Commonwealth Edison, Exelon's utility subsidiary in Chicago, entered into a deferred prosecution agreement, paid a $200 million fine, and admitted in a sworn statement to facilitating kickbacks and even appointing a member to its corporate board at the behest of the political machine associated with the Illinois House Speaker.[3] In return, the utility secured passage of critical pieces of legislation, including the one that contained the nuclear subsidies. A criminal investigation is ongoing, with a utility executive pleading guilty to corruption last fall in federal court,[4] and four others, including the utility's former CEO, pleading not guilty in December and awaiting trial.[5]

Just a week after the Exelon news broke in July, the Ohio Speaker of the House was arrested in a similar racket where federal prosecutors allege that he used the utility holding company FirstEnergy as a "bank," channeling a total of $60 million to the speaker's political machine – again, in exchange for the passage of legislation whose centerpiece was a massive nuclear subsidy.[6] Remarkably, both the Ohio and Illinois laws remain in effect, despite clear evidence that corrupt means were deployed to obtain their passage.

The Federal Energy Regulatory Commission (FERC) has responsibility for ensuring the rates charged in the regional markets are just, reasonable, and not unduly discriminatory. In 2018, the federal regulator found the state nuclear subsidies eroded all of these principles "because investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies."[7] At that time, FERC required a rewrite of the market rules of PJM, the largest regional market in the eastern United States. In late 2019, FERC concluded what those rules should finally look like: a competition free of state subsidies, achieved by broadly applying a "Minimum Offer Price" in the auctions the regional market holds to ensure enough power resources will be

To states, FERC's actions have looked like an effort to box out the low-carbon resources that are the sum and substance of their decarbonization policies from participating in an important aspect of the regional electricity markets.

[2] Statement of Joseph Bowring, Independent Market Monitor for PJM, Before the New Jersey Environment and Energy Committee (Dec. 4, 2017), available at: http://www.monitoringanalytics.com/filings/2017/IMM_Testimony_NJSEEC_20171204.pdf

[3] U.S. Department of Justice, *Commonwealth Edison Agrees to Pay $200 Million to Resolve Federal Criminal Investigation into Bribery Scheme*, (July 17, 2020), available at: https://www.justice.gov/usao-ndil/pr/commonwealth-edison-agrees-pay-200-million-resolve-federal-criminal-investigation

[4] Jon Seidel, "Former ComEd exec pleads guilty, gives feds first conviction in ongoing bribery probe," (Sep. 29, 2020), *Chicago Sun Times*, available at: https://chicago.suntimes.com/politics/2020/9/29/21494030/former-comed-exec-pleads-guilty-corruption-federal-investigation-bribery-madigan-fidel-marquez

[5] Dave McKinney & Tony Arnold, "Four Former ComEd Executives and Lobbyists Plead Not Guilty in Bribery Scheme," (Dec. 2, 2020), *WBEZ*, available at: https://www.wbez.org/stories/four-former-comed-executives-and-lobbyists-plead-not-guilty-in-bribery-scheme/6149a893-7431-463f-acc4-59e2413efdba

[6] Doug Livingston, "Feds: FirstEnergy bankrolled alleged corruption scheme," (July 21, 2020), *Akron Beacon Journal*, available at: https://www.beaconjournal.com/story/news/politics/state/2020/07/21/feds-firstenergy-bankrolled-alleged-corruption-scheme/42337351/

[7] Calpine Corp. et al. v. PJM Interconn., 163 FERC ¶ 61,236 at P 150 (2018).

available to maintain reliability.[8] The Minimum Offer Price Rule, or MOPR, would ensure that the financial effects of any "state subsidy" would be excluded for purposes of setting the price that power plants receive—and consumers pay.

One may view FERC's action as intended to safeguard the free and fair competition within the regional market. To states, FERC's actions have looked like an effort to box out the low-carbon resources that are the sum and substance of their decarbonization policies from participating in an important aspect of the regional electricity markets. The reaction from states to FERC's ruling was fast and harsh. The chairman of Maryland's public service commission said his state would take "a serious look" at exiting the regional market.[9] His counterpart in New Jersey cast it in even starker terms, saying "taking control of our own resource mix may be the only way to stop the Trump Administration's attempts to prop up fossil fuels to the detriment of our clean energy program."[10] Although this battle began due to nuclear subsidies, FERC's definition of "state subsidy" encompasses virtually any state support for any resource. As states ramp up their renewable mandates, FERC's MOPR policy impacts them, too.

PJM is not the only place where state/federal tensions have been apparent. The New England and New York markets have similar issues involving state subsidies. For the New England market, FERC approved an attempt at accommodating state-subsidized resources through a substitution auction, which allows existing resources to bid out their obligations and be substituted for by new clean energy resources.[11] While in some ways an elegant solution, New England's substitution auction has failed to produce many results: Recent prices in the New England market are so low that the revenues possible from the substitution auction are not especially attractive, either for the clean energy resource or the existing resource whose obligations the clean resource would be buying out. Whatever its practical successes or failures, however, the New England example does stand for the proposition that creative solutions are possible in the complex interrelationship between FERC, the states, and the regional markets. Meanwhile, in New York, FERC also has taken a dim view of state subsidies, rejecting proposals to exempt state-subsidized resources from that market's MOPR policy.[12] A complaint to apply an even more expansive PJM-like MOPR policy remains pending at the agency.

However, FERC itself seems to be seeking to pivot. At FERC's January 2021 meeting, Commissioner Neil Chatterjee, a supporter of the PJM MOPR policy, indicated he did not favor imposing the PJM-like MOPR in New York.[13] In addition, FERC's newest commissioners, Allison Clements and Mark Christie, took their seats only recently. Each of them has indicated their desire to see a coming-together between states and the regional electricity markets. In Commissioner Clements words, "I believe the Commission must look forward, past the false dichotomy presented in this proceeding that implies that

[8] Id., 169 FERC ¶ 61,239 (2019).
[9] Catherine Morehouse, "Maryland taking a 'serious look' at exiting PJM capacity market through FRR, says PSC Chair," (Apr. 29, 2020), Utility Dive, available at: https://www.utilitydive.com/news/maryland-taking-a-serious-look-at-exiting-pjm-through-frr-says-psc-chair/576957/
[10] New Jersey Board of Public Utilities, "NJBPU Launches Investigation to Ensure State's Clean Energy Future Despite Federal Regulation that Favors Fossil Fuels," (March 27, 2020), available at: https://www.bpu.state.nj.us/bpu/pdf/MOPR%20Press%20Release%20327_FINAL.pdf
[11] ISO New England, 162 FERC ¶ 61,205 (2018).
[12] New York ISO, 172 FERC ¶ 61,206 (2020).
[13] Catherine Morehouse, "Gas generators ask FERC to apply PJM MOPR logic to NYISO," (Oct. 16, 2020), Utility Dive, available at: https://www.utilitydive.com/news/gas-generators-ask-ferc-to-apply-pjm-mopr-logic-to-nyiso/587138/

we must choose to either 'protect' the markets the within the Commission's jurisdiction or to accommodate state public policy goals."[14]

Back to monopoly: states threaten a retreat to an old style of regulation

While the battleground of state/federal policy has often been the eastern electricity markets, this is primarily an unintended consequence of something which at its core is highly positive: After de-monopolizing the generation and sale of electricity, eastern states set up markets where many market participants vie against one another for retail sales and through the competitive auctions of the regional markets. Competition is messy, and the mess is public. Attempts to reconfigure the playing field to the advantage of a single participant spur litigation to protect the market's competitive features, and what constitutes an "advantage" is sometimes an open question that regulatory litigation must resolve.

Compare this to places dominated by local utility monopolies, where all business must be routed through the monopoly, which inevitably takes a toll on whatever economic activity might exist within its footprint. Certainly, this process seems less messy, but that is because the monopoly is in the lead, and would-be competitors are often cowed into silence. At a time of great transition, when policymakers and regulators should be encouraging technology innovation and competitive investment, a monopoly gatekeeper hardly seems like an appropriate vehicle to achieve that change. Indeed, one thing the competitive regional markets have succeeded in is attracting new investments and pushing out old investments. In New England, 12,000 megawatts (MWs) of new generation, demand response, and energy efficiency have entered the market while nearly 7,000 MWs of older and less efficient resources have exited the market.[15] On a larger scale, PJM has seen over 65,000 MWs of generation, demand response, and energy efficiency—more than one-third of the region's electricity demand—enter the market, displacing over 41,000 MWs that exited the market.[16] This stands in sharp contrast to places such as the American southeast, where no competitive regional market structure exists and where local regulation protects monopolies, resulting in a situation where uneconomic coal resources persist and new, cleaner resources fail to enter the market.[17]

At a time of great transition, when policymakers and regulators should be encouraging technology innovation and competitive investment, a monopoly gatekeeper hardly seems like an appropriate vehicle to achieve that change.

[14] Concurring Statement of Comm. Clements, Calpine Corp. et. al. v. PJM Interconn., 174 FERC ¶ 61,036 (2021).
[15] ISO-New England, "Key Grid and Market Stats," (accessed Dec. 29, 2020), available at: https://www.iso-ne.com/about/key-stats/markets
[16] PJM, "2021/2022 RPM Base Residual Auction Results," (May 23, 2018), available at: https://pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx
[17] Gimon, O'Boyle, Clack, & McKee. *The Coal Cost Crossover: Economic Viability of Existing Coal Compared to New Local Wind and Solar Resources*, (2019), a joint report by Energy Innovation and Vibrant Clean Energy, p. 3. Available at: https://vibrantcleanenergy.com/wp-content/uploads/2019/03/LCOE-Mapping/Coal-Cost-Crossover_Energy-Innovation_VCE_FINAL2.pdf

There are a number of potentially tragic outcomes to the current state-federal relationship. The worst would be a return to local monopolies in places that, two decades ago, consciously rejected this model. This would not only be a loss for the innovation that is a hallmark of competition, but of the regional scale on which decarbonization depends. But re-monopolization likely is what will happen if the FERC-regulated regional markets cannot be aligned with, or at least accommodative of, state carbon policy, which in most eastern states enjoys widespread political support and is regarded as an imperative.

The biggest supporters of a return to monopoly are, of course, the companies that would have the privileges of being a monopoly returned to them in the process. In Illinois, New Jersey, and Maryland, these companies are the same parties that lobbied for the nuclear subsidies described above. They have pushed a concept that would allow states to peel out of the regional auction that has been used to promote capital investment in PJM, and instead return to localized procurements that they would either run or in which they would exercise more significant market power.[18]

In one hotbed of this push to re-monopolize, policymakers have shown courage and resisted. The State of Illinois is litigating against FERC over its MOPR policy in PJM. But Governor J.B. Pritzker still sees the value in regional approaches, laying this out as a core principle in one of the most detailed policy plans any U.S. governor has released on energy policy in recent years, and calling on his state to "implement a market-based solution that supports clean power and clean air."[19] In the same vein, the six New England States have criticized "a wholesale market not aligned with a rapidly transitioning resource mix and consumer investments in clean energy and decarbonization."[20] But the New England States also "are committed to pursuing a new, regionally-based market framework" that does achieve the goals of decarbonization, reliability, and economic efficiency.[21]

FERC has also signaled that it is coming around to the view that there must be some consideration of state climate policies in the agency's regulation of regional markets. After holding a technical conference on carbon pricing, FERC released a proposed policy statement that would encourage regional market operators to explicitly incorporate state-set carbon prices.[22] FERC still has substantial work to do to ensure that it is not talking past states, however. Usually, states have expressed their decarbonization policies as mandates to buy clean energy through renewable-portfolio or clean-electricity standards, rather than prices on carbon emissions. Other states have chosen to express their decarbonization ambitions through programs like the Regional Greenhouse Gas Initiative (RGGI), an emissions trading market that covers the power sector in certain eastern states.[23] To develop a

[18] Known as the "Fixed Resource Requirement Alternative," or FRR, under PJM's market rules, a utility is permitted to effectively island itself and procure a sufficient amount of capacity outside the competitive auction to meet its PJM-forecast reliability needs. To date, the only utilities in PJM that use FRR are vertically integrated monopolies that never opened their local marketplace to competition.

[19] Office of Gov. J.B. Pritzker, *Putting Consumers & Climate First: Governor Pritzker's Eight Principles for a Clean & Renewable Illinois Economy* (Aug. 21, 2020), p. 7. https://www2.illinois.gov/IISNews/21974-Putting_Consumers_Climate_First-Governor_Pritzkers_Eight_Principles_for_a_Clean_Renewable_Illinois_Economy.pdf

[20] New England States Council on Electricity, *New England States Vision Statement*, (Oct. 16, 2020). http://nescoe.com/resource-center/vision-stmt-oct2020/

[21] Id.

[22] Notice of Proposed Policy Statement, *Carbon Pricing in Organized Wholesale Electricity Markets*, 173 FERC ¶ 61,062 (2020), available at: https://www.ferc.gov/media/ad20-14-000-0

[23] Problematically, RGGI leads to substantial "leakage" because it does not impose emissions restrictions on each power plant within the regional electricity market footprint. It also does not have especially stringent prices for carbon emissions. Thus, ironically, in some ways, RGGI stands as an example of a seemingly "regional" approach that has in key respects failed because it is not genuinely region-wide. One of the studies described above found that RGGI *increases* emissions in one

policy whereby regional markets and these state standards more easily co-exist is perhaps the most significant work that FERC will have to achieve this decade.

New (and refurbished) approaches to state-federal cooperation

After an era of bad feelings, both federal and state policymakers are gradually returning to a consensus that state climate policies and competitive regional markets are compatible, or even indispensable to one another. As described above, this should be a core understanding of policymakers working in the energy and policy space, since the only studies that realistically depict a decarbonization pathway depend upon regionalism. But it is also a return to a core value of government: cooperative federalism.

Both federal and state policymakers are gradually returning to a consensus that state climate policies and competitive regional markets are compatible, or even indispensable to one another.

Congress first regulated electricity only to fill the gap where courts found that states had no jurisdiction because of transactions that occurred between state lines.[24] Since that time, more and more of the sector has been characterized by fundamentally interstate transactions, and that trend should increase if cost-effective decarbonization strategies are pursued. Such commerce occurs through the federally regulated regional markets, though Congress also expressly reserved certain authority to the states, including around power generation and retail sales that are allowed to occur in any given state.[25] As one FERC commissioner has recently explained, "the existence of cross-jurisdictional effects is not necessarily a 'problem' for the purposes of the Federal Power Act," and noting that these effects are "the natural result of a system in which regulatory authority over a single industry is divided between federal and state government."[26]

Cooperative federalism goes farther than simply drawing lines between the state-federal jurisdiction. Instead, it necessitates at least consultation and possibly joint decision-making. There are at least four pathways to move forward and give effect to a more structured approach for the federal and state governments to consider the interdependencies of their policymaking and regulation.

First, beginning with the Federal Power Act itself, an important but frequently overlooked section of the law makes clear that Congress intended FERC to establish regulation that accommodated state priorities, albeit to do so in a way that was consistent with the federal legal requirement that rates be just, reasonable, and not unduly discriminatory. Second, the FERC-approved decision-making processes of certain regional markets provide a useful guide on how questions closely associated with state policy decisions can include state actors. Third, another federal law, the Federal Advisory Committee Act, provides a separate channel for FERC to scope the questions that the federal regulator would like formally answered by states and stakeholders, promoting consensus on their import to federal regulation in the process. Fourth and finally, FERC has often cooperated in the past with the

large, regional electricity market. Energy & Environmental Economics (E3), *Least Cost Carbon Reduction Policies in PJM*, (Oct. 28, 2020), pp. 9-10.

[24] New York v. FERC, 535 U.S. 1 (2002), citing to the "Attleboro Gap."

[25] 16 U.S.C. §824(a)-(b).

[26] Statement of Commissioner Richard Glick, ISO New England, 173 FERC ¶ 61,161, available at: https://www.ferc.gov/news-events/news/item-e-20-commissioner-richard-glick-dissent-regarding-iso-new-england-inc#_ftn7

state regulatory association, the National Association of Regulatory Utility Commissioners ("NARUC"), in a more informal vetting of issues of mutual concern. Nothing prevents it from resuming that dialogue.

Options for state-federal cooperation

State-federal boards that establish federal regulations that incorporate state viewpoints and policies, in a way that is consistent with the Federal Power Act's requirement that rates be just, reasonable, and not unduly discriminatory.

Delegated authority in regional electricity markets that carve out parts of a regional electricity market's rules to be written by state policymakers, or to have important variables of those markets' auctions be calculated by them.

Federal advisory committees that serve as formal conduits for federal regulators to promote consensus and take input among a diverse assortment of stakeholders, including states, and which are extensively used throughout the federal bureaucracy (but not at FERC).

FERC-NARUC collaboratives that allow open and routine conversation around predefined topics of mutual importance between federal regulators and their state counterparts.

Each of these four pathways is explored in some detail below. They share a common purpose: Regional markets can be used as a vehicle to achieve state policy purposes, such as a growing trade in the clean energy credits used to comply with state Renewable Portfolio Standards and Clean Electricity Standards. FERC has an avenue to align multiple states' efforts to its existing wholesale markets, adapting those markets to accomplish regional objectives, without intruding on the prerogatives of states that choose to adopt policies of varying stringency.

In this kind of cooperative federalism, state participation in that part of the FERC regional market structure pertaining to their state policies is crucial. It would be an obvious non-starter for FERC to assume within its jurisdictional markets the means of achieving state policies without including states in the governance or decision-making processes on these issues in a significant way. In order to rebuild the federal-state relationship, a clear, formal action to channel states' viewpoints into regional markets seems necessary.

State-federal boards

Section 209 of the Federal Power Act contemplates the periodic creation of panels that include state regulators for the purpose of deciding matters that come before the FERC or promoting alignment between state and federal policy.[27] FERC has only seldom relied on this procedure, and did so most recently between 2005 and 2006 only at the explicit direction of Congress.[28] The result of this

[27] 16 U.S.C. §824h(a)-(b).

[28] Congress in adopting the Energy Policy Act of 2005 added 16 U.S.C. §824w directing the establishment of regional joint boards of economic dispatch in regional markets and a report to Congress.

consultation was a report about further regional market integration, directed toward Congress.[29] But Congress contemplated that Section 209 would be used for more than just compiling reports. It lays out procedures both to use state regulators as decisionmakers under federal law, and to promote routine coordination between federal and state regulators to create a consistent body of regulation.[30] The Commission's implementing regulations of this statute are more restrictive and have often been cited by FERC in limiting the effect of Section 209.[31] Notably, several commenters suggested FERC adopt a Section 209 state-federal board within the agency's recent docket to consider state-set carbon pricing.[32]

Congress intended that Section 209 of the Federal Power Act would be used for more than just compiling reports.

FERC's sister agency, the Federal Communications Commission ("FCC"), has a similar history of interacting with state regulatory agencies that possess state regulatory authority over certain telecommunication carriers that are subject to both state and federal regulation. The FCC operates three joint boards. All of them are designed either to align federal and state regulation, or to ensure that one form of regulation does not stand as a barrier to the accomplishment of identified policy priorities. Two of these are established at the explicit direction of Congress.[33] The FCC has another "joint conference" that Congress did not require, the Federal-State Joint Conference on Advanced Telecommunications Services, but which the FCC created using its generic authorities to seat joint boards, noting that its statute "provides a flexible vehicle for state-federal cooperation."[34] The FCC issued the order forming this board shortly after NARUC endorsed the concept by resolution.[35] Notably, the statutory authority the FCC relied on to seat this joint board at its own discretion is virtually identical to FERC's statutory authority in the Federal Power Act.[36]

The ongoing tensions between the state-federal jurisdictions in electricity policy revolve around a set of conceptual issues—rather than a single, particular matter in controversy. In that vein, the process spelled out in Section 209(a) of the Federal Power Act might seem inappropriate, because it appears to contemplate a decision on a particular matter in controversy. The less adjudicatory, although still formalized, cooperation envisioned by Section 209(b) could be appropriate both in scoping issues of state-federal cooperation and ultimately in bringing them to resolution. FERC could consider asking NARUC, or another representative of states, whether it would support such a joint board through a resolution, as occurred when the FCC took the step of forming the joint board referred to above.

Delegated authority in regional electricity market governance

A growing trend in regional electricity market governance is a split or delegated authority over an important authority a market operator possesses: the right embodied under Section 205 of the Federal

[29] https://cms.ferc.gov/sites/default/files/2020-04/final-cong-rpt_1.pdf
[30] 16 U.S.C. §824h(a)-(b).
[31] Frank P. Darr, *A Critical Analysis of Joint Board Policy at the Federal Energy Regulatory Commission*, (Aug. 1993), *San Diego Law Review* (Vol. 30, Issue 3), available at: https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1250&context=sdlr
[32] See the comments of the Ohio Public Utility Commission's Office of Federal Energy Advocate, NRG Energy Inc., and the Energy Trading Institute, FERC Dkt. No. AD20-14-000.
[33] Respectively, these are established pursuant to 47 U.S.C. §410(c) and 47 U.S.C. §254(a)(1).
[34] Citing to 47 U.S.C. §410(b). *In the Matter of Federal-State Joint Conference on Advanced Telecommunications Services*, CC Docket No. 99-294 (Oct. 8, 1999) at 5. Available at: https://docs.fcc.gov/public/attachments/FCC-99-293A1.pdf
[35] *Id.*, at 3.
[36] *Compare* 16 U.S.C. §824h(a)-(b) with 47 U.S.C. §410(a)-(b).

Power Act to file a proposal, or tariff, for how the market should be structured at FERC. Such a proposal is ultimately approved or not by FERC, but a largely deferential standard applies to these proposals, with FERC determining whether it is "just and reasonable" and "not unduly discriminatory."[37] The most explicit example of this style of delegated governance within a regional market is the Southwest Power Pool's Regional State Committee ("RSC"). The RSC exercises that the regional market's right to determine what the regional market will file as a tariff at FERC with respect to certain topics that traditionally implicate states' regulatory prerogatives.[38] In FERC's docket on carbon pricing, Vistra suggested a similar tack might give states comfort in a carbon-pricing and revenue-allocation mechanism housed within an independent system operator/regional transmission organization ("ISO"/"RTO").[39]

Other examples of this shared authority over a regional market's tariff exist, in addition to the example of the RSC. The California Independent System Operator ("CAISO") vests the "primary authority to approve or reject a proposed change to a market rule" caused by the existence of the regional Western Energy Imbalance Market ("EIM") to the EIM Governing Body, a five-member independent board nominated by stakeholders and ultimately approved by the EIM Governing Body itself.[40]

It is easy to see how the interplay between states and regional markets might extend to state-determined carbon prices or the scale of demand for clean energy credits

Meanwhile, other governance structures require the regional market to use inputs established by external state-government procedures for certain market processes established by tariff. FERC has accepted resource adequacy rules filed by the Midcontinent Independent System Operator ("MISO") providing that a state may override the Planning Reserve Margin established by MISO.[41] FERC has similarly recognized that the Installed Capacity Requirement ("ICR") for the New York Control Area is calculated pursuant to rules established by the New York Public Service Commission ("NYPSC"), and that the proposed ICR is subject to review by both FERC and the NYPSC.[42] Additionally within this arrangement the proposed ICR is determined through an extensive stakeholder process facilitated by the New York State Reliability Council, whose executive committee is made up of represents across the range of NYISO market participants and several members not affiliated with any market participant.[43] It is easy to see how the interplay between states and regional markets in these examples might extend to state-determined inputs like the price of carbon or the scale of demand for RPS/CES credits.

One caution FERC and states should keep in mind is that an approach that relies on governance within a regional market and an approach that relies on regulatory oversight of a regional market may be incompatible. For example, it may well be the case that states, rather than acting jointly with FERC on a

[37] 16 U.S.C. §824(d).
[38] *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 at P 220.
[39] Comments of Vistra Corp., FERC Dkt. No. AD20-14-000.
[40] CAISO, *Charter for Energy Imbalance Market Governance* (adopted Dec. 18, 2015, rev'd March 27, 2019), at 3-4. Available at: https://www.westerneim.com/Documents/CharterforEnergyImbalanceMarketGovernance.pdf
[41] *See, e.g., Indianapolis Power & Light Co. v. Midcontinent Independent System Operator, Inc.*, 155 FERC ¶ 61,034 at P 14 (2016) (explaining that "[i]f a state regulatory body establishes a [Planning Reserve Margin] for its regulated entities that is higher or lower than the MISO [Planning Reserve Margin], MISO will apply that state-established [Planning Reserve Margin] to those entities").
[42] See New York State Reliability Council, 122 FERC ¶ 61,153 at P 32 (2008).
[43] http://www.nysrc.org/default.html

decision-making body operating pursuant to federal law, would instead prefer to be seated in a capacity where they exercise the delegated tariff filing rights. Were that the case, it would seem inappropriate to have a state act both as a decisionmaker within a regional market's decision-making process for the purpose of crafting a filing to FERC, and then subsequently sit on a FERC panel that is tasked to review and decide on that filing.

Federal advisory committees

One of the most frequently used tools in federal administrative law to collect the input of state and local governments, industry stakeholders, and unaffiliated technical experts is an advisory committee that operates consistent with the Federal Advisory Committee Act ("FACA").[44] The General Services Administration publishes a brochure to help agencies understand the procedures for such a committee.[45] Under FACA, advisory committees have a specific charter, tenure, and membership, and hold open meetings with specifically noticed agendas with the help and oversight of a designated federal officer. The work of advisory committees often "form the basis for government decisions."[46]

Many regulatory commissions make use of advisory committees. Perhaps most notably of late, the Centers for Disease Control and Prevention and the Food and Drug Administration have relied extensively on advisory committees during the course of the COVID-19 pandemic. Of particular note is the FDA's Vaccines and Related Biological Products Advisory Committee, which has played a central role in the regulatory approval process of vaccines.[47] That advisory committee's work has served to provide external analysis of the submissions of regulated parties to the FDA, and also to promote confidence and acceptance of the agency's work at a politically charged moment in history. Closer to the work of FERC, the Commodity Futures Trading Commission sponsors five advisory committees, and in a similar vein, they have been relied upon for consensus-building, professional works including last year's landmark report on Managing Climate Risk in the U.S. Financial System.[48]

The FCC extensively uses the reports of one of its advisory committees, the North American Numbering Council ("NANC"),[49] as the basis for its decision-making, including in proceedings where the rights of regulated carriers are affected.[50] The NANC may be a particularly relevant example for FERC because it deals with an important set of conceptual issues that intersect state and federal regulatory interests of a highly networked industry whose future success depends on interoperability and scale.[51] The FCC has used the NANC as a forum to refer specific matters that would benefit from consensus-based resolution and/or the application of technical expertise within that set of conceptual issues.

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[44] 5a U.S.C. §§1-16.

[45] https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance/the-federal-advisory-committee-act-faca-brochure

[46] Id.

[47] https://www.fda.gov/advisory-committees/vaccines-and-related-biological-products-advisory-committee/2020-meeting-materials-vaccines-and-related-biological-products-advisory-committee

[48] https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf

[49] https://www.fcc.gov/about-fcc/advisory-committees/north-american-numbering-council/general/nanc-background

[50] Usually, the FCC incorporates the NANC's reports into the record of a proceeding, and parties are given the opportunity to reply to them before the FCC issues an order.

[51] Numbering in a technologically evolving world, the portability of phone numbers, and interoperability may seem decidedly less important than climate change. But these topics result directly in the outgrowth of important public policy problems like robocalling, the ease with which customers may shop between competing carriers, and public-safety hotlines, on which the NANC has frequently provided reports to help resolve.

Traditionally, the chair of the NANC is a state utility commissioner, and its representation draws from all different industry segments of the telecommunications landscape as well as consumers and consumer advocates. The NANC's working-group structure is designed to promote consensus in the production of its final work product (typically, written reports), but separate concurring and dissenting opinions are sometimes issued.

FERC-NARUC collaboratives

NARUC, representing state public utility commissions, and FERC have a long history of interacting with one another. FERC commissioners frequently have been invited speakers at NARUC's meetings, and likewise, state regulators often have presented at FERC's technical conferences and in other forums. However, the standing forums that NARUC and FERC once used have not recently been in use. As former Minnesota commissioner and MISO executive David Boyd recently recalled, "the opportunity to share perspectives did not always lead to consensus but allowed for open exchange of ideas that preserved a respectful culture enabling regulation in the best interest of impacted parties."[52] FERC regulations encourage the use of informal conferences to avoid "the imposition of inconsistent or conflicting regulations upon companies subject to both Federal and State control."[53] If FERC's leadership believed it was premature to articulate a scope of work on these issues, which might be essential to the efficient operation of a joint board or advisory committee, it could be best for FERC begin anew with a structured engagement with states through NARUC conferences.

Conclusion

Most states in their climate policymaking must rely on regional market structures regulated by the federal government to achieve them. The only exceptions are very large or insular states and territories that either do not require regional cooperation because of their size or cannot obtain it because of their location. In each plausible study of decarbonization, regional markets are essential, and a growing number of market designs have emerged that, likewise, require states leveraging one another and regional markets to produce capital investments in clean energy resources.

At a time when distrust has been sadly commonplace between the federal and state governments on energy policy issues, an approach marked by cooperative federalism will be difficult, and it must commence with an appropriate procedural structure to facilitate it. However, there is no need to invent something wholly new. The issue is not intractable, and there are a handful of concrete approaches that would allow FERC to re-establish its relationship with the states.

As states look to turn the ambition of their climate policies into results at a regional scale, and as FERC works to improve the efficiency of regional markets with those state actions as a backdrop, a first step must be coordination in a spirit of cooperative federalism. Any of the approaches outlined above would be a significant step in that direction.

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[52] David Boyd, Ph.D., *Can FERC's Markets and State Clean Energy Policies Work Together*, prepared for Northwestern University Electricity Dialogue, at 5. https://www.law.northwestern.edu/research-faculty/clbe/events/electricity/documents/can_ferc_markets_and-state_clean_energy_policies_work_together.pdf

[53] 18 C.F.R. §385.1303.

Appendix

Select 2019-2020 Studies of U.S. Decarbonization Trajectories and Regional Market Design Proposals

Model-Based Studies of Decarbonization Trajectories

E. Larson, C. Greig, J. Jenkins, et. al. Princeton University, Andlinger Center for Energy & the Environment, *Net-Zero America: Potential Pathways, Infrastructure, and Impacts*, December 2020.

S. Hull, A. Olson, C. Duff, M. Yuan, P. O'Neill, J. Hooker. Energy & Environmental Economics (E3), *Least Cost Carbon Reduction Policies in PJM*, October 2020.

E. Gimon, M. O'Boyle, T. McNair, C. Clack, A. Choukulkar, B. Cote, S. McKee. Vibrant Clean Energy & Energy Innovation, *Economic and Clean Energy Benefits of Establishing a Southeast U.S. Competitive Wholesale Electricity Market*. August 2020.

E. Mettetal, S. Bharadwaj, A. Breckel, A. Kizer, et. al. E3 & Energy Futures Initiative, *Net-Zero New England: Ensuring Electric Reliability in a Low-Carbon Future*. November 2020.

Market Design Proposals reliant on Regional Electricity Markets

K. Spees, S. Newell, W. Graf, E. Shorin. Brattle Group, *A Forward Market for Clean Energy Attributes*, September 2019.

Susan F. Tierney, Analysis Group, *Wholesale Power Market Design in a Future Low-Carbon Electric System*, November 2020.

Brendan Pierpont, *A Market Mechanism for Long-Term Energy Contracts to Support Electricity System Decarbonization*, December 2020.

Eric Gimon, Energy Innovation, *Let's Get Organized: Long-Term Market Design for a High Penetration Grid*, December 2020.

Steven Corneli, *A PRISM-Based Configuration Market for Rapid, Low Cost and Reliable Electric Sector Decarbonization*, December 2020.

About the Author

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