

(MIS)UNDERSTANDING “UNDUE DISCRIMINATION”:  
FERC’S MISGUIDED EFFORT TO EXTEND THE  
BOUNDARIES OF THE FEDERAL POWER ACT

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INTRODUCTION

Imagine you have been approached about a potential investment in a renewable energy project. The company is seeking capital to construct a wind farm in the remote Midwest with the intention of selling electricity for end use in Chicago or other major cities.<sup>1</sup> This seems like a rational investment as the country appears determined to increase its reliance on renewable energy.<sup>2</sup> You realize there is a problem, however. How will the electricity be moved from the wind farm to the wholesale markets where it can be sold?

Electric transmission, however, is not one of the nation’s “hot topics.” Rather, major transmission projects designed to unlock potential sources of renewable generation are in the background, quietly wrangling with complicated state and federal regulations.<sup>3</sup> Unless the process is streamlined, the difficulty in gaining approval for the siting and construction of electric transmission lines will likely curtail the overall expansion of renewable generation for years to come.

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<sup>1</sup> See *The Green Power Express*, ITC HOLDINGS, <http://www.itctransco.com/images/itc-holdings/greenpowerexpress.pdf> (last visited Nov. 10, 2011) [hereinafter *The Green Power Express*] (stating that the transmission project is designed to deliver energy generated in rural areas to major electric load centers like Chicago).

<sup>2</sup> President Obama has sought to promote renewable energy by allocating the Department of Energy \$70 billion in the 2009 stimulus package to provide grants and loans to companies doing various types of renewable energy research or undertaking renewable energy projects. See Steven Mufson, *Will Obama’s Revolution Deliver Energy Independence?*, *WASH. POST*, Apr. 5, 2009, at B2.

<sup>3</sup> See *id.* The Green Power Express is a transmission project proposed by ITC that will cover approximately 3,000 miles in North Dakota, South Dakota, Minnesota, Iowa, Wisconsin, Illinois, and likely Indiana. *The Green Power Express*, *supra* note 1. Based on current transmission authorization procedures in the United States, ITC will have to comply with and receive necessary approval from the relevant regional transmission organization planning processes, the Federal Energy Regulatory Commission, and each state that the transmission lines will traverse. See *The Green Power Express FAQ*, ITC HOLDINGS, <http://www.itctransco.com/itc-holdings/the-green-power-express/faq> (last visited Nov. 10, 2011).

Until recently, the ability of electric utilities to construct new transmission infrastructure within their service territory was uncontroversial. However, the desire of regulators and generators to access renewable energy has resulted in a deficiency in transmission capacity.<sup>4</sup> The Federal Energy Regulatory Commission (“FERC”) has attempted to address the need for additional transmission capacity by encouraging nontraditional investment in transmission infrastructure. Independent transmission companies are seeking to construct new transmission facilities and file tariffs with FERC that will allow them to receive a return on their investment similar to traditional electric utilities.<sup>5</sup> Independent transmission companies are unlike traditional electric utilities because they lack load-serving obligations in the areas where their new transmission facilities will be constructed.<sup>6</sup>

As part of its attempt to encourage additional investment in transmission infrastructure, FERC is requiring public utilities to remove, from FERC-filed tariffs, any provisions that would grant incumbent transmission owners a right of first refusal to construct new regional transmission facilities.<sup>7</sup> A federal right of first refusal would give electric utilities that have traditional customer service territories the first opportunity to construct new transmission projects within their footprint.<sup>8</sup> Unlike in the natural gas indus-

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<sup>4</sup> Transmission line congestion results from a lack of sufficient transmission capacity and prevents customers from purchasing power from their preferred sources because the transactions cannot be consummated due to congestion on transmission lines separating the customer from the power producer. See National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992, 57,003-04 (Oct. 5, 2007). The Department of Energy has recognized a potential catch-22 where renewable generation is not built until there is transmission available to transport the energy, but electric transmission will not be constructed until the generation has been built. See DEP’T OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY 25 (2009), available at [http://congestion09.anl.gov/documents/docs/Congestion\\_Study\\_2009.pdf](http://congestion09.anl.gov/documents/docs/Congestion_Study_2009.pdf). The congestion problem plagues the electric industry.

<sup>5</sup> Cf. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842, 49,880-81 (Aug. 11, 2011) [hereinafter Order No. 1000] (to be codified at 18 C.F.R. pt. 35); see also SHIMON AWERBUCH ET AL., UNLOCKING THE BENEFITS OF RESTRUCTURING: A BLUEPRINT FOR TRANSMISSION 33-35, 61-62 (1999) (assessing the merits of having independent transmission companies and discussing the regulatory hurdles that these companies will have to clear in order to participate).

<sup>6</sup> See Jim Rossi, *Universal Service in Competitive Retail Electric Power Markets: Whither the Duty to Serve?*, 21 ENERGY L.J. 27, 27 (2000) (“[A traditional, vertically-integrated electric utility] submits to price regulation, assumes obligations to extend service to all customers within its geographic service territory, and agrees to continue providing service, once service has commenced.”); see also Order No. 1000, *supra* note 5, at 49,882-85 (reciting comments made by incumbent transmission owners against the possible removal of the federal right of first refusal).

<sup>7</sup> See Order No. 1000, *supra* note 5, at 49,883.

<sup>8</sup> Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 75 Fed. Reg. 37,884, 37,887 n.21 (proposed June 30, 2010) [hereinafter Notice of Proposed Rulemaking] (to be codified at 18 C.F.R. pt. 35) (“A right of first refusal is defined, for the purposes of this proposed rulemaking, as the right of an incumbent transmission owner to construct, own, and propose cost recovery for any new transmission project that is: (1) Located within its service territory; and

try, however, FERC has no statutory authority to regulate the siting or licensing of electric transmission facilities.<sup>9</sup> Siting and licensing of new transmission facilities has traditionally been a state issue.<sup>10</sup>

In Order No. 1000, issued on July 21, 2011, FERC concluded that a right of first refusal is anticompetitive and unduly discriminates against independent transmission developers.<sup>11</sup> FERC had previously suggested in *Primary Power, LLC*<sup>12</sup> that it believed the company proposing the transmission project should have the right to build it unless the regional entity can adequately justify selecting another entity for construction.<sup>13</sup> That decision and the Order No. 1000 reforms will have a significant impact on the way transmission infrastructure is planned and constructed in the United States.

The viability of these reforms is more than a policy controversy. FERC derives its authority from the Federal Power Act (“FPA”), and it cannot take actions inconsistent with or outside the scope of the FPA.<sup>14</sup> FERC’s FPA authority to remedy undue discrimination is limited to actions that protect customers and does not extend to the protection of third-party competitors. FERC is charged with promoting competition, not protecting a particular class of competitors.<sup>15</sup> The FPA’s public interest mandate to take actions does not allow FERC to adopt an extrajurisdictional remedy, although it can consider extrajurisdictional factors in fashioning a jurisdictional remedy.<sup>16</sup>

Transmission construction is generally subject to state, not federal regulation. Order No. 1000 arguably constrains states’ abilities to determine the best procedures for constructing invasive and controversial transmission facilities.<sup>17</sup> Regional transmission organizations and transmission owners must develop and adopt new, federally defined criteria for selecting regional transmission projects, including how the construction entity will be de-

(2) approved for inclusion in a transmission plan developed through the Order No. 890 planning process.”).

<sup>9</sup> See 15 U.S.C. § 717f(c)(1)(A) (2006). *But see* 16 U.S.C. § 824e(a) (2006).

<sup>10</sup> See Donald F. Santa, Jr. & Clifford S. Sikora, *Open Access and Transition Costs: Will the Electric Industry Transition Track the Natural Gas Industry Restructuring?*, 25 ENERGY L.J. 113, 125 (2004).

<sup>11</sup> See Notice of Proposed Rulemaking, *supra* note 8, at 37,896.

<sup>12</sup> 131 FERC ¶ 61,015 (2010).

<sup>13</sup> Primary Power, LLC, 131 FERC ¶ 61,015, at ¶ 65 (2010) (“PJM should administer this tariff provision in a not unduly discriminatory manner . . . and would need to adequately justify its action if it denied the sponsor of the project the right to construct that project and receive the economic benefit of its project.”). This proceeding is pending rehearing, and it is likely that FERC will restate its view on the selection of project construction in line with Order No. 1000.

<sup>14</sup> 16 U.S.C. § 824(a).

<sup>15</sup> Pa. Water & Power Co. v. Fed. Power Comm’n, 343 U.S. 414, 418 (1952) (stating that “[a] major purpose of the whole [a]ct” was to protect customers from excessive prices).

<sup>16</sup> See Fed. Power Comm’n v. Conway Corp., 426 U.S. 271, 276-77 (1976).

<sup>17</sup> Santa & Sikora, *supra* note 10, at 125 (“[T]he siting and authorization of transmission facilities is subject to state, not federal regulation.”).

terminated. As a result, Order No. 1000 risks limiting the traditional power of states to license and site new regional transmission projects.

FERC, however, lacks jurisdiction to specify which entity may construct transmission facilities approved in a regional planning process. The FPA's jurisdictional grant limits FERC's ability to adopt a federally sanctioned selection process requiring equal treatment for all potential transmission developers, regardless of whether or not the developers are similarly situated. Moreover, in Order No. 1000, FERC recognized that it lacks authority under the FPA to preempt states' transmission siting, permitting, and construction decisions.<sup>18</sup> It is well settled law that FERC cannot do indirectly that which it cannot do directly.<sup>19</sup> Even if the new federal regulations are not attempting to exercise preemptive authority and, at the pre-compliance stage, do not directly infringe on the states, the regulations create the potential for conflict between federal and state policy. The potential for conflict indirectly limits state authority by pushing states to conform their regulations to the federal policy and, as a result, implicitly preempts state authority.

Part I of this Comment provides background regarding the reasons for the enactment of the FPA, the development of regional transmission organizations responsible for regionally planning the construction of new transmission infrastructure, and the origins of rights of first refusal. Part II traces the evolution of FERC's undue discrimination standard under the FPA. In light of that evolution, Part II then analyzes whether FERC's mandate to remedy undue discrimination covers the removal of a federal right of first refusal and concludes that the mandate is limited to the protection of customers and is being expanded to protect independent transmission developers. Part III briefly addresses the "public interest" standard, including its interaction with Section 206 of the FPA, and analyzes whether, and the extent to which, the "public interest" standard allows FERC to expand its undue discrimination protection. Part III concludes that the "public interest" standard does not give FERC authority to control who can construct transmission infrastructure by protecting a class of competitors. Part IV states that there is a constitutional bar against the preemption of traditional state regulatory authority and concludes that transmission construction has historically been state-regulated. Part V concludes that Order No. 1000 improperly seeks to extend Section 206 to protection competitors, as opposed to promoting a plentiful supply of electricity through beneficial competition. Part V also contends, however, that FERC would have acted properly by allowing the states to address whether transmission providers should have a right of first refusal in their state-filed tariffs, rather than requiring regional

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<sup>18</sup> Order No. 1000, *supra* note 5, at 49,891.

<sup>19</sup> *See, e.g., S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1091-92 (9th Cir. 2010) (citing *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996)).

planning organizations to treat all project sponsors similarly in the selection process.

## I. BACKGROUND

This Part discusses the purpose of the FPA and the historical scope of federal regulation of electricity. It then addresses the creation of regional entities and the role regional planning plays in the construction of regional transmission facilities. Lastly, this Part explains the concept of a federal right of first refusal in transmission construction and its incorporation into FERC-filed tariffs.

### A. *The Purpose of the Federal Power Act*

Federal regulation of electric transmission developed out of the need to regulate electric utilities involved in interstate commercial transactions.<sup>20</sup> Traditionally, electric utilities served local communities with their intrastate transmission regulated at the state and local levels.<sup>21</sup> In *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*,<sup>22</sup> the Supreme Court, however, first examined whether the state could regulate the interstate transmission of electricity.<sup>23</sup> In *Attleboro*, the Court held that under the Commerce Clause, Rhode Island and Massachusetts’s regulations could not interfere with the interstate transmission of electricity.<sup>24</sup> The decision created the so-called “Attleboro gap” in the regulation of electricity because no federal body had the authority to regulate interstate electric transmission.<sup>25</sup>

As a result, Congress enacted Part II of the FPA to close the “Attleboro gap.”<sup>26</sup> The new FPA provisions provided that FERC’s predecessor, the

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<sup>20</sup> See JAMES H. MCGREW, FERC: FEDERAL ENERGY REGULATORY COMMISSION 139-40 (2d ed. 2009). The Supreme Court’s decision in *Attleboro* necessitated the passing of federal electric energy legislation because the decision precluded states from regulating interstate electricity transactions. See *id.*

<sup>21</sup> When Part II of the FPA was passed in 1935, electricity was primarily locally generated and distributed to local markets with very little interstate commercial activity. See Joseph T. Kelliher & Maria Farinella, *The Changing Landscape of Federal Energy Law*, 61 ADMIN. L. REV. 611, 614 (2009).

<sup>22</sup> 273 U.S. 83 (1927).

<sup>23</sup> See *id.* at 84.

<sup>24</sup> *Id.* at 89-90 (holding that the states could not regulate the interstate electric markets because they were imposing undue burdens on interstate commerce in violation of the Commerce Clause); see also MCGREW, *supra* note 20, at 139-40.

<sup>25</sup> MCGREW, *supra* note 20, at 140.

<sup>26</sup> See H.R. REP. NO. 74-1318, at 7-8 (1935) (“Under the decision of the Supreme Court of the United States in *Public Utilities Commission v. Attleboro Steam & E. Co.* (273 U.S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. . . . The bill takes no

Federal Power Commission, had responsibility for furthering the public interest, in part through the setting of just and reasonable rates, terms, and conditions of transmission service.<sup>27</sup> But, the Commission's authority was expressly limited to the transmission of electricity and the wholesale sale of electricity in interstate commerce.<sup>28</sup>

In enacting Part II of the FPA, Congress provided an express limitation on the scope of federal jurisdiction over electric energy.<sup>29</sup> Section 201 states that "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."<sup>30</sup> Congress thus intended for the states to be primarily responsible for the regulation of electricity, with the federal agency having authority only in those circumstances where the states are constitutionally unable to regulate. Moreover, the Supreme Court considered the line between state and federal regulation to be a "bright line," stating that each had absolute authority within its domain.<sup>31</sup>

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authority from State commissions and . . . [t]he new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority . . ."; S. REP. NO. 74-621, at 48 (1935) ("[Section 201(a)] also declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States . . . but not to impair or diminish the powers of any State commission. . . . The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in *Public Utilities Commission v. Attleboro Steam & Electric Co.* (273 U.S. 83), to be beyond the reach of the States."); see also *New York v. FERC*, 535 U.S. 1, 20-21 (2002) ("It is clear that the enactment of the FPA in 1935 closed the '*Attleboro* gap' by authorizing federal regulation of interstate, wholesale sales of electricity—the precise subject matter beyond the jurisdiction of the States in *Attleboro*. And it is true that the above-quoted language from § 201(a) concerning the States' reserved powers is consistent with the view that the FPA was no more than a gap-closing statute."); *Jersey Cent. Power & Light Co. v. Fed. Power Comm'n*, 319 U.S. 61, 67-68 (1943) ("The primary purpose of Title II, Part II, of the 1935 amendments to the Federal Power Act . . . was to give a federal agency power to regulate the sale of electric energy across state lines. Regulation of such sales had been denied to the states by [*Attleboro*]."); MCGREW, *supra* note 20, at 139-40 (describing the events and issues facing the electric industry that precipitated the passing of Part II of the FPA in 1935).

<sup>27</sup> See 16 U.S.C. § 824(a) (2006) ("It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest . . ."); *id.* § 824d(a) (providing the federal agency authority to set just and reasonable rates); see also Joshua Z. Rokach, *FERC's Jurisdiction Under Section 205 of the Federal Power Act*, 15 ENERGY L.J. 83, 85 (1994) (describing FERC's expansive Section 205 authority to set just and reasonable rates, terms, and conditions of electric transmission service).

<sup>28</sup> 16 U.S.C. § 824(a) ("Federal regulation [extends to] the transmission of electric energy in interstate commerce and the sale of [electric] energy at wholesale in interstate commerce . . . such Federal regulation, however, [extends] only to those matters which are not subject to regulation by the States.").

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis."); see also Clinton A. Vince & John S. Moot, *Federal Preemption Versus State Utility Regulation in a Post-Mississippi Era*, 10 ENERGY L.J. 1, 11-12 (1989) (noting that the FPA transformed the bright line test from a constitutional Commerce Clause analysis to a statutory federal preemption analysis).

Once a federal agency properly exercised its jurisdiction under the FPA, the state regulations were preempted.<sup>32</sup> Congress has never amended this provision of Section 201.<sup>33</sup>

FERC’s interpretation of the FPA, however, has evolved to allow federal regulation to accommodate changed circumstances affecting the transmission of electricity in interstate commerce.<sup>34</sup> For example, FERC and the courts have broadly interpreted the FPA’s provisions as giving FERC jurisdiction over all electric transmissions that commingle with interstate transmissions.<sup>35</sup> In *Federal Power Commission v. Florida Power & Light Co.*,<sup>36</sup> the Supreme Court held that FERC had jurisdiction over the intrastate transmission of electricity on the interstate transmission system because both the interstate and intrastate electric transmissions become commingled.<sup>37</sup> Courts also have been willing to further expand federal regulatory authority by allowing FERC to consider extrajurisdictional factors in setting jurisdictional rates,<sup>38</sup> while also limiting the ability of states to review federally set wholesale rates when setting retail rates.<sup>39</sup>

#### B. *Regional Transmission Organizations and Regional Transmission Planning*

A by-product of the move toward competitive electric markets was the formation of voluntary regional transmission organizations.<sup>40</sup> Beginning with Order No. 888, FERC encouraged transmission owners to join together

<sup>32</sup> See Vince & Moot, *supra* note 31, at 12.

<sup>33</sup> Congress has never substantially amended Section 201(a) of the FPA. See 16 U.S.C. § 824(a). However, the judicial expansion of the Commerce Clause has substantially increased FERC’s jurisdiction under Section 201(a). See *Fed. Power Comm’n v. Fla. Power & Light Co.*, 404 U.S. 453, 463 (1972).

<sup>34</sup> Neither the interstate transmission grid nor large-scale interstate electricity markets existed when Part II of the FPA was passed in 1935. See Kelliher & Farinella, *supra* note 21, at 614. However, federal agency reinterpretations of statutory language, court decisions, and legislative amendments have allowed federal regulation to keep pace with new electric industry advancements. See *id.* at 613.

<sup>35</sup> See *Fla. Power & Light*, 404 U.S. at 462-63.

<sup>36</sup> 404 U.S. 453 (1972).

<sup>37</sup> The Supreme Court accepted the expert opinion of the Federal Power Commission that “[p]ower supplied to the bus from a variety of sources is said to merge at a point and to be commingled just as molecules of water from different sources . . . would be commingled in a reservoir.” *Id.* at 461.

<sup>38</sup> See, e.g., *Fed. Power Comm’n v. Conway Corp.*, 426 U.S. 271, 272-73 (1976).

<sup>39</sup> See *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358, 1363 (R.I. 1977) (“We conclude, therefore, that for the purpose of fixing intrastate rates, the [state commission] must treat [the utility’s] interstate rate filed with the [Federal Power Commission] as a reasonable operating expense.”); see also Vince & Moot, *supra* note 31, at 16-17.

<sup>40</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitted Utilities, Order No. 888, 61 Fed. Reg. 21,540, 21,595-97 (May 10, 1996) [hereinafter Order No. 888] (to be codified at 18 C.F.R. pts. 35 & 385).

and form voluntary organizations designed to reduce the opportunities for transmission owners to discriminate against their transmission service customers.<sup>41</sup> Regional transmission organizations were required to comply with eleven principles designed to ensure nondiscriminatory access to transmission service on a regional basis.<sup>42</sup>

Properly formed, FERC-approved regional organizations operate as FERC-jurisdictional entities.<sup>43</sup> As a FERC-jurisdictional entity, regional organizations are required to file a tariff with FERC that neither favors nor disfavors any “user or class of users.”<sup>44</sup> Thus, a regional organization must “provide open access to the transmission system and all services under its control . . . pursuant to a single, unbundled, grid-wide tariff that applie[d] to all eligible users in a non-discriminatory manner.”<sup>45</sup>

After Order No. 888, FERC again modified the regional transmission organization principles in an attempt to better protect customers.<sup>46</sup> FERC stated that it continued to believe that regional participation would reduce the opportunity for discriminatory practices while also lowering electricity prices.<sup>47</sup> The new requirements sought to realize the benefits of regional transmission organizations that had operational control over a region-wide transmission system and to benefit customers by promoting increased competition in electric markets.<sup>48</sup> Participation in regional transmission organizations remained voluntary, but all electric utilities subject to FERC’s jurisdiction were required to make a filing describing their plans to participate in a regional organization that complied with the standards.<sup>49</sup>

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<sup>41</sup> *Id.* (encouraging utilities to join together and form a type of regional transmission organization known as independent system operators); *see also* Charles H. Koch, Jr., *Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring*, 61 ADMIN. L. REV. 71, 77-79 (2009) (discussing how FERC sought to eliminate anticompetitive behavior in electricity markets by pushing transmission owners to form independent regional transmission organizations).

<sup>42</sup> Order No. 888, *supra* note 40, at 21,596-97.

<sup>43</sup> *Id.* at 21,596.

<sup>44</sup> *Id.* (stating that “[a]n [independent system operator] should have clear tariffs for services that neither favor nor disfavor any user or class of users”).

<sup>45</sup> *Id.*

<sup>46</sup> Order No. 2000 introduced new minimum characteristics and functions that regional transmission organizations must possess. Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 810, 811 (Jan. 6, 2000) [hereinafter Order No. 2000] (to be codified at 18 C.F.R. pt. 35). The minimum characteristics are: (1) “Independence”; (2) “Scope and Regional Configuration”; (3) “Operational Authority”; and (4) “Short-term Reliability.” *Id.* The minimum functions are: (1) “Tariff Administration and Design”; (2) “Congestion Management”; (3) “Parallel Path Flow”; (4) “Ancillary Services”; (5) “OASIS and Total Transmission Capability (TTC) and Available Transmission Capability (ATC)”; (6) “Market Monitoring”; (7) “Planning and Expansion”; and (8) “Interregional Coordination.” *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 811-12.



In 2007, FERC determined that the transmission planning process was opaque and potentially closed off to customers.<sup>50</sup> FERC’s Order No. 890 adopted new regional transmission planning principles and policies applicable to regional transmission organizations in the following subject areas: (1) coordination; (2) openness; (3) transparency; (4) information exchange; (5) comparability; (6) dispute resolution; (7) regional participation; (8) economic planning studies; and (9) cost allocation for new projects.<sup>51</sup> All regional organizations were required to develop a transmission planning process that complied with the nine planning requirements.<sup>52</sup> Each organization’s transmission planning process had to be filed with FERC as part of the entity’s FERC-filed tariff.<sup>53</sup> Order No. 1000 has expanded on Order No. 890 and now requires all traditional electric utility transmission providers, even if they were not previously regional organization participants, to amend their tariffs to indicate their participation in a regional transmission planning organization that meets the Order No. 890 principles.<sup>54</sup>

Under most regional planning processes, regional organization participants propose transmission projects, from which the regional organization selects projects to include in the regional transmission plan.<sup>55</sup> The regional organization then designates the transmission construction entity based on the service territory where the selected projects are located.<sup>56</sup> This zonal designation scheme is what FERC considers the incumbent owner’s right of first refusal. The regional process also incorporates input from state regulatory officials in an attempt to facilitate state approval of selected transmission projects.<sup>57</sup> Even though FERC mandates regional transmission plan-

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<sup>50</sup> See Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266, 12,318 (Mar. 15, 2007) [hereinafter Order No. 890] (to be codified at 18 C.F.R. pts. 35 & 37).

<sup>51</sup> See generally *id.* at 12,321-36.

<sup>52</sup> *Id.* at 12,320.

<sup>53</sup> *Id.* at 12,321.

<sup>54</sup> Order No. 1000, *supra* note 5, at 49,845.

<sup>55</sup> See generally Amended and Restated Operating Agreement of PJM Interconnection, L.L.C., 441, 444 (Aug. 10, 2011), available at <http://www.pjm.com/planning/~media/documents/agreements/oa.ashx> [hereinafter Operating Agreement]. This process is not as simple as selecting project A or B. The regional organization will consider a variety of schemes and suggestions that may or may not require building proposed transmission infrastructure.

<sup>56</sup> See, e.g., *id.* at 446 (“To the extent that one or more Transmission Owners are designated to construct, own and/or finance a recommended transmission enhancement or expansion, the recommended plan shall designate the Transmission Owner that owns transmission facilities located in the Zone where the particular enhancement or expansion is to be located. Otherwise, any designation under this paragraph of more than one entity to construct, own and/or finance a recommended transmission enhancement or expansion shall also include a designation of proportional responsibility among them.”).

<sup>57</sup> See *id.* at 64 (noting the different committees that include the applicable state regulatory officials and agencies); see also Order No. 890, *supra* note 50, at 12,320 (“[W]e establish a process through which transmission providers must coordinate with customers, neighboring transmission providers, affected State authorities, and other stakeholders . . .”).

ning, the states retain ultimate authority over the approval and siting of new transmission infrastructure.<sup>58</sup>

### C. *Defining the Federal Right of First Refusal*

A right of first refusal, similar to an option contract, is a general right of a person or company to be offered the opportunity to take an action before another entity receives the same offer.<sup>59</sup> In this instance, a federal right of first refusal is a set of terms and conditions contained in a transmission owner's or regional transmission organization's FERC-filed tariff that arguably grants incumbent transmission owners the right to construct regionally approved transmission projects located within their service territory.<sup>60</sup> Incumbent transmission owners are traditional investor-owned utilities, municipalities, and cooperatives that construct transmission infrastructure and have load-serving obligations within their footprints.<sup>61</sup> Whether a particular FERC-tariff contains a right of first refusal is a matter of interpretation because no tariff explicitly grants such a right.

Prior to joining a regional transmission organization, incumbent transmission owners are solely responsible for proposing, constructing, and maintaining the transmission infrastructure within their service territories.<sup>62</sup> Even after joining a regional transmission organization, many incumbent transmission owners claim to have retained the right to construct regional transmission projects within their traditional footprints.<sup>63</sup> FERC, however, has strictly interpreted a regional organization's tariff, making it unclear

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<sup>58</sup> Cf. Order No. 890, *supra* note 50, at 12,320-21 (encouraging open and transparent processes that involve transmission customers but not attempting to assert authority over the ultimate construction or siting of the regionally approved transmission facilities).

<sup>59</sup> See Notice of Proposed Rulemaking, *supra* note 8, at 37,887 n.21 (defining the federal right of first refusal). Black's defines an "option" as "[t]he right or power to choose; something that may be chosen," and an option contract as "[a]n offer that is included in a formal or informal contract" and "[t]he right conveyed by such a contract." BLACK'S LAW DICTIONARY 1203 (9th ed. 2009).

<sup>60</sup> Notice of Proposed Rulemaking, *supra* note 8, at 37,887 n.21.

<sup>61</sup> See Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the "Public Interest" in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705, 719-20 & n.57 (2010) ("Historically, electric utilities were vertically integrated, providing generation, transmission, and distribution, primarily for the purpose of serving customers within their monopoly franchise area.").

<sup>62</sup> See *id.* at 719-20 (describing how traditionally electric utilities built, owned, and operated their own transmission lines).

<sup>63</sup> See Notice of Proposed Rulemaking, *supra* note 8, at 37,895 (indicating that some incumbent transmission owners have stated that they joined a regional transmission organization based on the understanding that they would "retain the right to invest in and earn a return on" new transmission facilities located in their traditional service territories).

how many tariffs FERC recognizes as containing a right of first refusal.<sup>64</sup> Most incumbent transmission owners assumed the existence of a right of first refusal based on their continuing obligation to build transmission infrastructure within their service territories, as long as the new infrastructure was required under a regional transmission plan.<sup>65</sup>

In Order No. 1000, FERC found that the right of first refusal reforms proposed in the Transmission Planning and Cost Allocation notice of proposed rulemaking are needed to protect against undue discrimination.<sup>66</sup> In part, Order No. 1000 concluded that any federal rights of first refusal must be removed from FERC-approved tariffs.<sup>67</sup> FERC is concerned that a federal right of first refusal may result in the loss of transmission infrastructure investment, discourage independent transmission company participation in regional processes, and increase costs.<sup>68</sup> Any rights of first refusal, therefore, must be removed to eliminate the potential for undue discrimination against independent transmission companies and to ensure an open and inclusive regional planning process.<sup>69</sup> Order No. 1000 states that a nondiscriminatory regional planning process is required to ensure just and reasonable rates, terms, and conditions of transmission service.<sup>70</sup>

Prior to issuing Order No. 1000, FERC strictly interpreted one regional transmission organization’s tariff to remove provisions that it construed as establishing a right of first refusal.<sup>71</sup> In *Primary Power*, FERC indicated that the regional transmission organization’s tariff should be interpreted in a nondiscriminatory fashion.<sup>72</sup> Despite language in the tariff suggesting that the regional organization was required to select incumbent transmission owners to build transmission facilities located within their service territo-

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<sup>64</sup> See *Primary Power, LLC*, 131 FERC ¶ 61,015, at ¶¶ 62-65 (2010) (discussing the ambiguity in the PJM tariff and FERC’s contention that the tariff must be interpreted in a nondiscriminatory manner).

<sup>65</sup> See Order No. 1000, *supra* note 5, at 49,884.

<sup>66</sup> *Id.* at 49,885 (“Failure to do so would leave in place practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers.”).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; see also Notice of Proposed Rulemaking, *supra* note 8, at 37,896 (“[An independent] transmission developer risks losing its investment in developing a proposal for submittal to the regional transmission planning process, even if that proposal is selected for inclusion in the regional transmission plan. We are concerned that it may be unduly discriminatory or preferential to deny a [independent] transmission developer . . . the rights of an incumbent transmission provider . . .”).

<sup>69</sup> See Order No. 1000, *supra* note 5, at 49,885-86 (suggesting that discriminatory behavior against independent transmission companies in the regional planning process may violate the Order No. 890 principles and result in rates, terms, and conditions that are unjust and unreasonable).

<sup>70</sup> See *id.* at 49,887 (explaining FERC’s decision to reform federal rights of first refusal).

<sup>71</sup> See *Primary Power, LLC*, 131 FERC ¶ 61,015, at ¶¶ 62-65 (2010) (determining that the PJM tariff was ambiguous and interpreting it so as to remove a potential right of first refusal).

<sup>72</sup> *Id.* ¶ 62 (“PJM must designate projects under the relevant tariff provisions in a not unduly discriminatory manner, whether sponsored by transmission owners or others.”).

ries, FERC concluded that, under the tariff, the regional organization should select the entity that proposed the transmission project.<sup>73</sup> FERC stated that if the regional organization selected an entity other than the one that proposed the project to construct the transmission infrastructure, then it had to provide adequate justification for its actions to be considered nondiscriminatory.<sup>74</sup>

Participants in the regional transmission organization that was the subject of the *Primary Power* order have petitioned FERC for rehearing.<sup>75</sup> FERC issued Order No. 1000, however, before reaching a decision on the request for rehearing.<sup>76</sup> Order No. 1000 disclaims the first-in-time selection process that appears in *Primary Power* and the proposed rulemaking, but it remains unclear what selection processes regional planning organizations will adopt, and what procedures FERC will ultimately approve, in order to comply with Order No. 1000.<sup>77</sup> FERC has stated that complying selection processes will provide both incumbent transmission providers and nonincumbent transmission developers an equal opportunity to sponsor, own, and collect regional charges for regionally selected transmission projects.<sup>78</sup>

## II. FERC'S MANDATE UNDER SECTION 206 OF THE FEDERAL POWER ACT

This Part examines FERC's authority to remedy undue discrimination in electric transmission under FPA Section 206 and demonstrates that FERC's mandate is to protect customers. It then addresses the requirement that FERC consider potentially anticompetitive behavior when reviewing rates, terms, and conditions of transmission service under Section 206. It finds that FERC is tasked with promoting competition in instances that will protect customers from unjust and unreasonable rates, terms, and conditions of transmission service. This Part concludes that Order No. 1000 protects competitors rather than promoting beneficial competition that protects cus-

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<sup>73</sup> See *id.* ¶¶ 62-65. The tariff stated that “[t]o the extent that one or more Transmission Owners are designated to construct, own, or finance a recommended transmission enhancement or expansion, the recommended plan shall designate the Transmission Owner that owns the transmission facilities located in the Zone where the particular enhancement or expansion is to be located.” *Id.* ¶ 64.

<sup>74</sup> *Id.* ¶ 65 (“PJM should administer this tariff provision in a not unduly discriminatory manner; in this regard it should handle the study of Primary Power’s application no differently than that of any other application proposing to build a project, be it an existing transmission owner or an ‘other entity,’ and would need to *adequately justify* its action if it denied the sponsor of the project the right to construct that project and receive the economic benefit of its project.” (emphasis added)).

<sup>75</sup> Primary Power, LLC, Order Granting Rehearing for Further Consideration, FERC Docket Nos. ER10-253-001, EL10-14-001 (June 11, 2010).

<sup>76</sup> See generally Order No. 1000, *supra* note 5.

<sup>77</sup> See *id.* at 49,900.

<sup>78</sup> *Id.* at 49,898-99.

tomers. Because the removal protects competitors, this Part contends that Order No. 1000 is an attempt by FERC to expand its Section 206 authority beyond the protection of customers.

A. *Section 206 Protects Customers*

One of FERC’s major functions is to ensure that transmission customers are protected from unjust and unreasonable rates, terms, and conditions of electric transmission service.<sup>79</sup> Pursuant to FPA Section 205, electric utilities are required to file tariffs with FERC that list the rates, terms, and conditions of any transmission service or sale subject to FERC’s jurisdiction.<sup>80</sup> When previously approved rates, terms, or conditions are challenged, FERC can rely on its FPA Section 206 authority to unilaterally modify an electric utility’s filed rates, terms, and conditions of transmission service. Section 206 of the FPA states that:

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. Any complaint or motion of the Commission to initiate a proceeding under this Section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein.<sup>81</sup>

Section 206 requires FERC to first make a finding that the utility’s previously approved rates, terms, or conditions of electric transmission service are now “unjust, unreasonable, unduly discriminatory or preferential.”<sup>82</sup> Once FERC has made the appropriate finding, it is then required to determine the just and reasonable rates, terms, or conditions and order changes to the utility’s tariff accordingly.<sup>83</sup> Section 206, however, does not specify

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<sup>79</sup> 16 U.S.C. § 824e(a) (2006).

<sup>80</sup> *Id.* § 824d(c) (“Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges . . . .”); *see also* Order No. 888, *supra* note 40, at 21,541 (stating that all public utilities subject to FERC’s jurisdiction must “file open access non-discriminatory transmission tariffs that contain the minimum terms and conditions of . . . service”).

<sup>81</sup> 16 U.S.C. § 824e(a).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; *see also* MCGREW, *supra* note 20, at 21-22 (discussing FERC’s Section 206 authority, including that FERC must demonstrate that its proposed Section 206 remedy is just and reasonable).

how FERC should make the finding that a rate, term, or condition of electric transmission service is “unjust, unreasonable, unduly discriminatory or preferential.”<sup>84</sup> As a result, FERC has been able to expand its test for undue discrimination in order to protect transmission customers as the electric industry has evolved.

FERC originally held that a utility’s rates, terms, and conditions were unduly discriminatory or preferential when factual differences did not justify different rates, terms, and conditions of electric transmission service for similarly situated customers.<sup>85</sup> A proper, nondiscriminatory FERC-tariff provided like rates, terms, and conditions of transmission service to similarly situated customers.<sup>86</sup> This test was effective when electric utilities were vertically integrated and controlled both the transmission and generation of electricity within their service territories.<sup>87</sup> Transmission service customers typically were local municipalities or electric cooperatives that purchased power from the vertically integrated electric utilities.<sup>88</sup> The traditional test protected the transmission service customers by preventing electric utilities from favoring or disfavoring one third-party customer or customer class over another similarly situated customer or customer class, unless specific factual differences justified the different rates, terms, and conditions of electric transmission service.<sup>89</sup> Due to the fact-specific nature of the inquiry, courts reviewing FERC’s traditional Section 206 findings were limited to determining “whether the record exhibits factual differences to justify . . . differences among the rates charged.”<sup>90</sup>

Beginning in 1994, FERC recognized that the electric industry was changing and that its fact-specific undue discrimination test was no longer adequately protecting customers.<sup>91</sup> Markets for electric energy had started to develop as a result of the number of independent generators that were be-

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<sup>84</sup> See 16 U.S.C. § 824e(a).

<sup>85</sup> *New Eng. Power Pool*, 67 FERC ¶ 61,042, 61,132 (1994).

<sup>86</sup> See *Pub. Serv. Co. of Ind. v. FERC*, 575 F.2d 1204, 1211-12 (7th Cir. 1978) (describing the Federal Power Commission’s burden when reviewing factual differences used to justify different rates charged to different customers).

<sup>87</sup> See, e.g., *id.* at 1208 (indicating that the electric utility at issue was vertically integrated); see also *Kelliher & Farinella*, *supra* note 21, at 613-16 (outlining the history of energy regulation, including the original lack of interstate electricity markets, which ultimately developed and precipitated the change from the factual undue discrimination inquiry).

<sup>88</sup> See *Rossi*, *supra* note 6, at 27 (noting that traditional electric utilities provided generation, transmission, and distribution services with the obligation to extend service to all customers located within their geographic service territories).

<sup>89</sup> See *St. Michaels Utils. Comm’n v. Fed. Power Comm’n*, 377 F.2d 912, 915 (4th Cir. 1967) (stating that Section 205 is designed to “prevent favoritism by insuring equality of treatment on rates for substantially similar services,” and that “differences in rates are justified where they are predicated upon differences in facts” (emphasis omitted)).

<sup>90</sup> *Pub. Serv. Co. of Ind.*, 575 F.2d at 1211 (alteration in original) (quoting *St. Michaels*, 377 F.2d at 915) (internal quotation marks omitted).

<sup>91</sup> See *Am. Elec. Power Serv. Corp.*, 67 FERC ¶ 61,168, 61,490 (1994).

ginning to sell power in electricity markets.<sup>92</sup> These generators relied on the traditional electric utilities for transmission service but were increasingly in competition with the utility’s generators.<sup>93</sup> The traditional utilities also were selling power in the electric markets and were able to access transmission service on their own systems under more favorable rates, terms, and conditions of transmission service than those available to competitor independent generators.<sup>94</sup> The different treatment in transmission service rates, terms, and conditions resulted in a change in the type of undue discrimination claims submitted to FERC.<sup>95</sup> Section 206 complaints began focusing on the discrepancy in the rates, terms, and conditions offered to third-party transmission customers when compared to the electric utility’s use of its own transmission system, instead of differences in the rates, terms, and conditions offered to similarly situated third parties.<sup>96</sup>

In *American Electric Power Service Corp.*,<sup>97</sup> FERC reacted to the industry changes and modified its application of the undue discrimination test. In the watershed decision, FERC stated that it would interpret the prohibition against undue discrimination to require a utility’s FERC-filed tariff to “offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider’s uses of its system.”<sup>98</sup> The new “comparability” standard ensured that utilities could not favor their own generators over independent generators when providing electric transmission service.

In a departure from its traditional case-by-case, fact-specific undue discrimination inquiry, FERC adopted the “comparability” standard on an industry-wide basis in Order No. 888.<sup>99</sup> As a result of Order No. 888, all electric utilities subject to FERC’s jurisdiction were required to file transmission tariffs that complied with the “comparability” standard, even if no factual evidence had been offered to show that the individual utility’s tariff was unduly discriminatory or that it had engaged in specific discriminatory behavior. FERC’s goal in adopting Order No. 888 was to ensure that customers enjoyed the benefits of competitively priced generation that devel-

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<sup>92</sup> *See id.*

<sup>93</sup> *See id.* (determining that the electric industry had changed, such as the increase in nontraditional generation sources, and that transmission customers were no longer adequately protected under the traditional factual difference test for undue discrimination).

<sup>94</sup> *See* Order No. 888, *supra* note 40, at 21,546 (discussing the increase in independent generators, electric markets, and the resulting market power that traditional vertically integrated utilities gained as a result of their control over the electric transmission system).

<sup>95</sup> *Am. Elec. Power Serv. Corp.*, 67 FERC ¶ 61,168, 61,490 (1994).

<sup>96</sup> *See id.*

<sup>97</sup> 67 FERC ¶ 61,168 (1994).

<sup>98</sup> *Id.* at 61,490.

<sup>99</sup> Order No. 888, *supra* note 40, at 21,562 (“Thus, we conclude that we have the authority to remedy undue discrimination and anticompetitive effects by requiring all public utilities that own, control or operate transmission facilities to file non-discriminatory open access transmission tariffs.”).

oped as the industry shifted toward electricity markets.<sup>100</sup> On appeal, the D.C. Circuit upheld Order No. 888 and found that FERC was responding to an industry-wide discriminatory practice that likely resulted in increased customer costs due to the exclusion of lower-cost generation from the market.<sup>101</sup>

Since adopting Order No. 888, FERC has continued to modify its Section 206 regulations to better protect customers in the changed electric energy environment.<sup>102</sup> In Order No. 2000, FERC stated that competition is the best way to protect customers in the electric markets and sought to increase competition by encouraging transmission owners to form regional transmission organizations subject to FERC's jurisdiction.<sup>103</sup> FERC stated that regional organization formation and participation would remove control over the regional transmission system from the individual electric utilities and give operational control to a single regional entity.<sup>104</sup> All regional organization participants would take service under the same regional organization tariff, thus increasing competition and removing the potential for discriminatory behavior that would harm customers.<sup>105</sup> FERC's further adoption of Order No. 890 was designed to eliminate the remaining opportunities for electric utilities to unduly discriminate against transmission customers in the post-Order No. 888 world.<sup>106</sup> In Order No. 890, FERC again focused on the possibility that electric utilities would limit access to transmission service out of self-interest, thereby increasing the costs to transmission customers.<sup>107</sup>

Even though the electric industry has changed significantly since 1935, the basis on which FERC exercises its Section 206 authority has not. FERC has consistently sought to protect transmission service customers from unduly discriminatory rates, terms, and conditions of transmission

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<sup>100</sup> See *id.* at 21,546-48.

<sup>101</sup> See *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 683-84 (D.C. Cir. 2000).

<sup>102</sup> See generally Order No. 890, *supra* note 50; Order No. 2000, *supra* note 46.

<sup>103</sup> See Order No. 2000, *supra* note 46, at 811 ("Competition in wholesale electricity markets is the best way to protect the public interest and ensure that electricity consumers pay the lowest price possible for reliable service.").

<sup>104</sup> *Id.*

<sup>105</sup> See *id.* at 817 (describing how discriminatory behavior continues to inflate customer rates because utilities still act in their own self-interest when administering their tariffs).

<sup>106</sup> See Order No. 890, *supra* note 50, at 12,267 (explaining that Order No. 890's reforms are needed to eliminate possible discriminatory behavior that remains even under the Order No. 888 open access tariff).

<sup>107</sup> See *id.* at 12,273 ("As the Commission found in Order No. 888, it is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide to themselves. Such an incentive can lead to unduly discriminatory behavior against third parties, particularly if public utilities have unnecessarily broad discretion in the application of their tariffs." (footnote omitted)).



service.<sup>108</sup> As customers’ needs and expectations for transmission service have changed, FERC has responded by adapting its undue discrimination test to account for those changes. Regardless of the test used or the situation in which FERC has acted pursuant to Section 206, FERC has always used its authority to protect customers.

#### B. *FERC Must Consider Anticompetitive Behavior Under Section 206*

While promoting competition in electricity markets has been at the forefront of all recent expansions of FERC’s undue discrimination standards, it was not always clear to what extent federal energy regulation should address anticompetitive practices. In *Otter Tail Power Co. v. United States*,<sup>109</sup> the Supreme Court first attempted to clarify the importance of ensuring competition among electric power companies when it held that the FPA does not exempt electric utilities from federal antitrust laws.<sup>110</sup> The Court stated that one of the FPA’s main policy objectives was to “maintain[] competition to the maximum extent possible consistent with the public interest.”<sup>111</sup> The *Otter Tail* case was the first time the Supreme Court addressed the effect of the antitrust laws on electric utilities subject to federal regulation under the FPA and firmly established the importance of protecting customers from harmful anticompetitive activities.<sup>112</sup>

Courts have expanded on the *Otter Tail* holding in subsequent cases involving anticompetitive behavior. In *Gulf States Utilities Co. v. Federal Power Commission*,<sup>113</sup> the Supreme Court held that the FPA’s public interest mandate required the Federal Power Commission to consider potential anticompetitive effects in the interstate operations of electric utilities.<sup>114</sup> The Court stated that the Commission must consider potential anticompetitive effects when taking action under numerous sections of the FPA, including the Section 206 undue discrimination provision.<sup>115</sup> The *Gulf States* decision

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<sup>108</sup> See generally Order No. 890, *supra* note 50; Order No. 2000, *supra* note 46; Order No. 888, *supra* note 40.

<sup>109</sup> 410 U.S. 366 (1973).

<sup>110</sup> *Id.* at 372 (“Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.”).

<sup>111</sup> *Id.* at 374.

<sup>112</sup> See *id.* at 373-74 (comparing the FPA to the Natural Gas Act and stating that there is nothing in the legislative history demonstrating that Congress intended to insulate electric utilities from antitrust laws).

<sup>113</sup> 411 U.S. 747 (1973).

<sup>114</sup> *Id.* at 758-59 (“[The Federal Power Commission’s] power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§ 202 and 203, and under like directives contained in §§ 205, 206, and 207.”).

<sup>115</sup> *Id.*

was based on the Court's determination that one of the primary purposes of the FPA was "to curb abusive practices of public utility companies" in the transmission or wholesale sale of electricity in interstate commerce.<sup>116</sup>

FERC's adoption of Order No. 888 targeted the same concerns described by the Court in *Gulf States*. Order No. 888's reforms sought to remedy industry-wide anticompetitive practices that blocked competition in developing electricity markets.<sup>117</sup> Allowing electric utilities to offer rates, terms, and conditions of transmission service to other power suppliers that were different than the rates, terms, and conditions under which the utility's own generators took transmission service could unduly increase customer costs by limiting access to other power supplies.<sup>118</sup> FERC, therefore, protected customer rates and rights by eliminating anticompetitive tariff provisions and increasing customer access to third-party power suppliers.<sup>119</sup> Despite addressing harmful anticompetitive behavior as required by *Otter Tail* and *Gulf States*, Order No. 888 was highly controversial.

Numerous electric utilities challenged FERC's authority to remedy anticompetitive behavior without a factual finding that each utility's tariff was unduly discriminatory under Section 206.<sup>120</sup> In *Transmission Access Policy Study Group v. FERC*,<sup>121</sup> the D.C. Circuit determined that FERC's generalized factual findings were reasonable and upheld its industry-wide undue discrimination remedy.<sup>122</sup> The court indicated that FERC's Section 206 authority was expansive, as was FERC's ability to regulate the interstate transmission of electricity, and did not preclude FERC from implementing

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<sup>116</sup> *Id.* at 758.

<sup>117</sup> *See* Order No. 888, *supra* note 40, at 21,566 ("We have identified a fundamental generic problem in the electric industry: owners, controllers and operators of monopoly transmission facilities that also own power generation facilities have the incentive to engage, and have engaged, in unduly discriminatory practices in the provision of transmission services by denying to third parties transmission services that are comparable to the transmission services that they are providing, or are capable of providing, for their own power sales and purchases. These practices drive up the price of electricity and hurt consumers.").

<sup>118</sup> *See id.*

<sup>119</sup> *Id.* at 21,568-69 & n.266 (discussing the increase in independent power suppliers, the benefit they provide to customers, and the need for electric utilities to alter their tariffs to provide for open access).

<sup>120</sup> *See* *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 685 (D.C. Cir. 2000) (reciting the petitioners' argument that FERC does not have the authority to adopt the Order No. 888 remedy on a generic, industry-wide basis).

<sup>121</sup> 225 F.3d 667 (D.C. Cir. 2000).

<sup>122</sup> *Id.* at 687-88 (applying cases addressing similar provisions in the Natural Gas Act to the FPA and determining that FERC does not have to make specific factual findings, but can rely on properly applied economic theory so long as it amounts to more than "unsupported or abstract allegations" (quoting *Wis. Gas Co. v. FERC*, 770 F.2d 1144, 1158 (D.C. Cir. 1985)) (internal quotation marks omitted)).

a broad remedy.<sup>123</sup> As a result, the court concluded that FERC could institute an industry-wide remedy designed to protect customers without developing a factual record demonstrating that each utility had engaged in unduly discriminatory behavior.<sup>124</sup>

Moreover, in *New York v. FERC*,<sup>125</sup> the Supreme Court affirmed the D.C. Circuit ruling that the Order No. 888 reforms were jurisdictional within FERC’s interstate commerce jurisdiction.<sup>126</sup> In addition, the Court reaffirmed that all electric transmissions by public utilities, as defined by the FPA, on the interconnected grid were interstate transmissions subject to federal regulation.<sup>127</sup> The Court’s decision suggests that FERC has the authority to remedy anticompetitive, discriminatory behavior on an industry-wide basis if it involves any aspect of electric transmission service using the existing interconnected grid.<sup>128</sup> The Court ultimately concluded that FERC had the authority to remedy anticompetitive behavior under Section 206, which “den[ied] consumers the substantial benefits of lower electricity prices.”<sup>129</sup>

Under the *New York* view, FERC would be within its authority to find and remedy undue discrimination in the interstate transmission of electricity, even if the activity at issue differs from what FERC had previously considered unduly discriminatory.<sup>130</sup> As a result, FERC can afford to take an expansive view of its Section 206 power as courts have consistently endorsed expansions of its authority and deferred to its findings.<sup>131</sup>

While FERC’s authority is expansive, it is not unlimited. FERC remains a “creature of statute,” and its actions must be consistent with its statutory authority.<sup>132</sup> Unlike the broad Order No. 888 reforms, the D.C.

<sup>123</sup> See *id.* at 686-87 (discussing the similarities between the Natural Gas Act and FPA provisions and subsequently interpreting Section 206 as giving FERC broad authority to remedy undue discrimination).

<sup>124</sup> See *id.* at 687-88.

<sup>125</sup> 535 U.S. 1 (2002).

<sup>126</sup> *Id.* at 15, 20 (describing the D.C. Circuit’s decision in *Transmission Access Policy Study Group* about the expanse of Section 201 and affirming that interpretation of Section 201).

<sup>127</sup> *Id.* at 16 (“[W]e agree with FERC that transmissions on the interconnected national grids constitute transmissions in interstate commerce.”).

<sup>128</sup> See *id.* at 14-15 (describing the expansive nature of both Section 201 and Section 206, as well as FERC’s ability to undertake a broad remedy without specific factual support).

<sup>129</sup> See *id.* at 26-27 (internal quotation marks omitted) (evaluating the argument that FERC was required to extend its regulation to other activities that may be harming customers and suggesting that FERC could have remedied potential discrimination even more attenuated from its Section 201 jurisdiction).

<sup>130</sup> See *id.* at 27 (accepting an expansive view of what constitutes undue discrimination and FERC’s mandate to remedy discriminatory behavior).

<sup>131</sup> See *New York*, 535 U.S. at 20-21; *Gulf States Utils. Co. v. Fed. Power Comm’n*, 411 U.S. 747, 757-58 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

<sup>132</sup> *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (“As a federal agency, FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those

Circuit in *Atlantic City Electric Co. v. FERC*<sup>133</sup> found that FERC exceeded its FPA authority when it attempted to strip electric utility participants in regional transmission organizations of their statutorily granted rights.<sup>134</sup> The court held that FERC could not prevent electric utilities from unilaterally filing changes to their cost-of-service rate design under FPA Section 205 simply because the utilities had joined a regional transmission organization.<sup>135</sup> Even though FERC's interpretation of its FPA authority usually receives substantial deference, the court stated that this deference does not apply when FERC's actions are contrary to the plain meaning of the statute.<sup>136</sup> The court, therefore, concluded that "FERC cannot rely on one of its own regulations to trump the plain meaning of a statute."<sup>137</sup>

The *New York* and *Atlantic City* cases mark the current boundaries of FERC's authority. In *New York*, the Court upheld FERC's adoption of the Order No. 888 reforms as consistent with its Section 201 and Section 206 jurisdiction because the reforms sought to protect customer rates and rights from anticompetitive practices in the interstate transmission of electricity.<sup>138</sup> On the other hand, the *Atlantic City* court precluded FERC from taking an action outside the scope of its FPA authority, even though FERC argued that its regulation flowed from a "bedrock" principle of Order No. 888 and thereby was intended to protect customers.<sup>139</sup> After these two cases, FERC has full, nearly unimpeachable authority to protect customers on an industry-wide or individualized basis as long as FERC is acting in a manner consistent with its limited, statutorily defined jurisdiction. Courts, however,

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authorities conferred upon it by Congress." (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)); see also *Tex. Pipeline Ass'n v. FERC*, No. 10-60066, 2011 WL 5027748, at \*5 (5th Cir. 2011) ("[A]gencies cannot manufacture statutory ambiguity with semantics to enlarge their congressionally mandated border. 'Ambiguity is a creature not of definitional possibilities but of statutory context.'" (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994))).

<sup>133</sup> 295 F.3d 1 (D.C. Cir. 2002).

<sup>134</sup> *Id.* at 11 ("No matter how 'bedrock' the principle of [regional transmission organization] independence may be, Order No. 888 is *merely a regulation*. It cannot be the basis for denying the petitioners their rights provided by a statute enacted by both houses of Congress and signed into law by the [P]resident. . . . In sum FERC lacks the authority to require the petitioners to cede their right under section 205 of the [FPA] to file changes in rate design with the Commission." (emphasis added)).

<sup>135</sup> See *id.* at 9-11 (discussing FERC's attempt to strip electric utilities of their statutorily granted rights and stating that the desire to have regional transmission organizations is insufficient to overrule statutorily granted rights).

<sup>136</sup> *Id.* at 11 ("As FERC believes [a regional transmission organization] to be a public utility within the scope of the Federal Power Act, and thus entitled to make section 205 filings, FERC contends that its decision 'is entirely reasonable, and is entitled to *Chevron* deference.' Yet, FERC's approach would turn *Chevron* on its head. FERC cannot rely on one of its own regulations to trump the plain meaning of a statute."); see also *Tex. Pipeline Ass'n*, 2011 WL 5027748, at \*5.

<sup>137</sup> *Atl. City*, 295 F.3d at 11.

<sup>138</sup> See *New York v. FERC*, 535 U.S. 1, 14, 20-21 (2002).

<sup>139</sup> *Atl. City*, 295 F.3d at 11 (internal quotation marks omitted) (assessing FERC's argument that it was relying on Order No. 888 to institute new requirements in the electric industry).

will give FERC little deference when it attempts to circumvent or exceed its statutorily granted authority even if FERC’s action is intended to protect customers.

C. *Order No. 1000 Protects Independent Transmission Owners, Not Customers*

Order No. 1000’s reforms are designed to protect independent transmission developers, not customers. Under the FPA and antitrust laws, however, FERC is tasked with promoting beneficial competition so as to ensure a plentiful supply of electricity at reasonable rates.<sup>140</sup> In Order No. 1000, FERC concluded that depriving nonincumbent transmission developers of the ability to construct transmission projects that they proposed for inclusion in the regional transmission plan may constitute unduly discriminatory behavior.<sup>141</sup> Because independent transmission companies lack service territories, they do not receive any benefit from a federal right of first refusal. Rather, these companies may be entirely precluded from constructing their proposed projects because they fall within an incumbent owner’s service territory.<sup>142</sup>

Under Section 206, FERC’s decision that rights of first refusal are unduly discriminatory or preferential and must be removed from FERC-filed tariffs must be based on a finding that the removal is necessary to protect customers.<sup>143</sup> FERC’s Section 206 undue discrimination findings traditionally were based on a factual record demonstrating that the discriminatory behavior negatively affected the particular utility’s electric transmission or wholesale sale customers.<sup>144</sup> Yet, in *National Fuel Gas Supply Corp. v. FERC*,<sup>145</sup> the D.C. Circuit suggested that FERC could make a finding using solely a theoretical basis, as long as the theory was correctly applied, and in *Transmission Access Policy Study Group*, the D.C. Circuit allowed FERC to adopt an industry-wide remedy without particularized factual findings.<sup>146</sup> As a result, Order No. 1000 concludes that the theoretically anticompetitive

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<sup>140</sup> *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 666-67 (1976).

<sup>141</sup> *See* Order No. 1000, *supra* note 5, at 49,885-86.

<sup>142</sup> *See id.* at 49,886 (describing how independent transmission developers risk losing their investment even if their project is chosen for construction, due to the right of first refusal).

<sup>143</sup> *See* 16 U.S.C. § 824e(a) (2006) (“Whenever the Commission . . . shall find . . .”).

<sup>144</sup> *Pub. Serv. Co. of Ind. v. FERC*, 575 F.2d 1204, 1212 (7th Cir. 1978) (describing how the complaining company was only required to show that it was being charged a substantially different rate when compared to a similarly situated customer, and then the Federal Power Commission must rely on specific factual differences between the two customers in order to justify the specific rate charged by the electric utility).

<sup>145</sup> 468 F.3d 831 (D.C. Cir. 2006).

<sup>146</sup> *Id.* at 844 (“[W]e express no view here whether a theoretical threat *alone* would be sufficient . . .”); *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 686-87 (D.C. Cir. 2000).

effect of a federal right of first refusal harms transmission customers even though FERC provided no factual evidence showing that any customers have actually been harmed.<sup>147</sup>

Order No. 1000 incorrectly assumes that all increases in competition benefit transmission customers. There are many other considerations that impact the construct of transmission infrastructure, and increasing the number of competitors does not, on its own, ensure a plentiful supply of electricity at reasonable rates.<sup>148</sup> In Order No. 1000, FERC did not adequately address the risks associated with requiring equal treatment in regional planning of companies that are not similarly situated. Without addressing those risks, FERC's finding that the removal of the right of first refusal protects customers is flawed. FERC needed to do more than show that theoretically anticompetitive behavior limits the number of potential competitors and may increase customer rates because Section 206 requires "just and reasonable rate[s]", not simply the lowest cost rate.<sup>149</sup>

FERC has not adequately explained why discrimination against nonincumbent transmission owners adversely affects transmission customers through decreased competition. Strong arguments can be made that giving a right of first refusal to incumbent transmission owners actually protects transmission customers. There are numerous other risks involved in the construction of transmission facilities, including cost, reliability, and completion concerns. Incumbent transmission owners have acquired substantial expertise in regards to their transmission system because, to date, the incumbent has constructed all transmission infrastructure in its service territory.<sup>150</sup> As a result, the incumbent owners likely have an advantage in constructing and integrating new transmission facilities into the system located in their footprint because they know how their system functions.<sup>151</sup>

Moreover, incumbent owners' familiarity with the interconnected transmission system likely benefits transmission customers because they have experience limiting the impact that new transmission facilities have on the rest of the transmission system, thereby increasing reliability.<sup>152</sup> Incumbents are also required by state and federal regulations to maintain system reliability within their service territories.<sup>153</sup> Reliability may be negatively affected by allowing third party construction to alter the incumbent's inter-

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<sup>147</sup> Order No. 1000, *supra* note 5, at 49,852-53.

<sup>148</sup> *See id.* at 49,887-88.

<sup>149</sup> *See* 16 U.S.C. § 824e(a) (2006).

<sup>150</sup> *See* Notice of Proposed Rulemaking, *supra* note 8, at 37,894-95 (articulating why incumbent transmission owners may be in the best position to develop transmission projects located in their service territories).

<sup>151</sup> *Id.* at 37,895.

<sup>152</sup> *See id.*

<sup>153</sup> *Id.* (noting that incumbent transmission owners are legally required to maintain reliability on their systems).

connected system.<sup>154</sup> In addition, incumbent owners may reduce transmission construction costs through their experience with state siting and permitting processes.<sup>155</sup> The incumbent’s experience with state and local processes thus benefits customers who will ultimately bear the costs of newly constructed new transmission facilities.

Some incumbent transmission owners have stated that their participation in regional organizations was based, in part, on the understanding that they had the right to build transmission infrastructure within their service territories.<sup>156</sup> The removal of federal rights of first refusal from FERC-filed tariffs may decrease the incentive for transmission owners to join or remain in regional organizations.<sup>157</sup> Dissenting from Order No. 1000’s treatment of the right of first refusal, Commissioner Moeller argued that eliminating rights of first refusal for projects that are limited to a utility’s service territory, but whose costs will be regionally allocated, could lead to less regional cooperation.<sup>158</sup> Since Order No. 888 was issued, FERC has maintained that regional organization and planning benefits customers.<sup>159</sup> If Order No. 1000 arguably decreases regional participation as Commissioner Moeller suggests, then the final rule may actually harm customers in contravention of FERC’s statutory mandate.

On the other hand, nonincumbent transmission developers and FERC contend that the federal right of first refusal discourages competition, reduces the incentive for incumbents to invest in their own systems, makes financing difficult if investors are concerned about the exercise of a preemption right, and may cause independent companies to lose their upfront investment if construction of the project is awarded to an incumbent owner.<sup>160</sup> While all of these concerns may be valid, FERC must still explain how those issues negatively impact electric transmission customers and lead to unjust and unreasonable rates, terms, and conditions of transmission service.<sup>161</sup> Order No. 1000’s claim that decreased competition through a

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<sup>154</sup> See Order No. 1000, *supra* note 5, at 49,973 (Moeller, Comm’r, dissenting).

<sup>155</sup> Notice of Proposed Rulemaking, *supra* note 8, at 37,895 (arguing that incumbent transmission owners benefit customers through familiarity with “[s]tate and local permitting and siting processes”).

<sup>156</sup> *Id.* (“Some [incumbent transmission owners] contend that the right of first refusal should be preserved because an incumbent transmission owner that voluntarily joined [a regional transmission organization] did so with the understanding that it would retain the right to invest in and earn a return on new facilities within its system.”).

<sup>157</sup> *Id.*

<sup>158</sup> See Order No. 1000, *supra* note 5, at 49,973 (Moeller, Comm’r, dissenting).

<sup>159</sup> See Order No. 888, *supra* note 40, at 21,595-96 (“While the Commission is not requiring any utility to form [a regional transmission organization] at this time, we wish to encourage the formation of properly-structured [regional transmission organizations]. . . . The primary purpose of [a regional transmission organization] is to ensure fair and non-discriminatory access to transmission services . . . for all users of the [transmission] system.”).

<sup>160</sup> Order No. 1000, *supra* note 5, at 49,881-82 (listing the various comments made arguing against the retention of the federal right of first refusal).

<sup>161</sup> See 16 U.S.C. § 824e(a) (2006).

right of first refusal leads to less transmission investment and construction is tenuous and insufficient to demonstrate that action under Section 206 is warranted.<sup>162</sup> To date, there is no evidence that incumbent transmission owners have not been investing in the transmission system and would not construct all regionally approved projects located within their footprint. Furthermore, incumbent transmission owners are subject to an obligation to build regionally approved transmission infrastructure located within their service territories and are bound by state law to provide transmission service at reasonable rates.<sup>163</sup> State regulations and existing regional planning obligations undercut FERC's contention that fewer transmission projects are proposed because of a lack of competition. Incumbent transmission owners are required by the states to look for and consider alternatives that would decrease or limit increases to consumer rates. Order No. 1000 failed to articulate how the benefits associated with having the incumbent owners retain their control over their individual service territories is outweighed by the harm that the anticompetitive nature of a right of first refusal causes transmission customers.

FERC, however, correctly backed away from specifying a sponsorship criterion in Order No. 1000. Instead, Order No. 1000 requires regional transmission planning entities to formulate a nondiscriminatory process that treats incumbents and nonincumbents equally.<sup>164</sup> In short, Order No. 1000 requires regional planning entities to treat incumbents and nonincumbents as being similarly situated for the purposes of selection criteria. FERC believes that all transmission developers who meet the planning region's procedures and are qualified to propose transmission projects should have the ability to own, construct, and receive cost allocation treatment for regionally selected projects.<sup>165</sup> But, the decision to abandon the first-in-time sponsorship approach created an amorphous compliance standard, which fails to articulate how the regional entity must treat the respective project sponsors.<sup>166</sup> Uncertainty over how to comply with Order No. 1000 will further slow the regional transmission selection and the transmission construction processes as regional entities attempt to comply with the new rule.<sup>167</sup>

Arguably, the problems caused by the removal of any rights of first refusal may increase customer costs, thereby making the removal unjust and unreasonable.<sup>168</sup> Incumbent owners and nonincumbent developers are not

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<sup>162</sup> See Order No. 1000, *supra* note 5, at 49,886.

<sup>163</sup> Notice of Proposed Rulemaking, *supra* note 8, at 37,895 (stating that incumbent transmission owners are required to provide transmission service at reasonable rates); Operating Agreement, *supra* note 55, at 457.

<sup>164</sup> Order No. 1000, *supra* note 5, at 49,897-900.

<sup>165</sup> See *id.* at 49,899.

<sup>166</sup> See *id.* at 49,897-900 (providing the general framework for compliance, but no specific guidance).

<sup>167</sup> See *id.*

<sup>168</sup> See *id.* at 49,886-88.



similarly situated. Regional planning entities mix and match proposed projects, such that any particular proposal may be broken down into different parts. If the nonincumbent became insolvent or decided not to construct the project, incumbent owners continue to have an obligation to construct all transmission infrastructure that is included in the regional plan and located within their service territory.<sup>169</sup> Without a factual finding that these differences are clearly outweighed by the need to treat the classes equally in order to protect electric transmission customers, FERC has not supported its Section 206 undue discrimination finding.<sup>170</sup> Moreover, FERC’s remedy does not adequately protect customers if the right of first refusal is in fact unduly discriminatory. Requiring regional organizations to develop a non-discriminatory process through agreement amongst the various regions’ members, subject to FERC approval, may not actually yield a process that treats the nonincumbent developers and incumbent owners equally. Order No. 1000 does not state what FERC would consider to be a viable selection process.

Order No. 1000 represents an attempted expansion of Section 206 beyond the protection of customers. FERC inadequately considered the differences between incumbent transmission owners and nonincumbent developers in order for Order No. 1000 to be a valid exercise of FERC’s Section 206 authority. Without more analysis, FERC did not demonstrate why these entities are similarly situated for purposes of regionally planning and constructing transmission facilities.<sup>171</sup> Order No. 1000 attempts to encourage nontraditional investment by granting special benefits to nonincumbent owners. Section 206, however, has never before been extended to protect competitors.

Even if FERC could justify the removal of the right of first refusal as necessary to protect transmission customers, FERC’s interpretation of the right of first refusal clause in *Primary Power* and the Order No. 1000 reforms introduce new regional planning sponsorship rules that are inconsistent with FERC’s jurisdictional statute.<sup>172</sup> FPA Section 201 circumscribes

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<sup>169</sup> See Operating Agreement, *supra* note 55, at 457.

<sup>170</sup> See 16 U.S.C. § 824e(a) (2006).

<sup>171</sup> The foundation of FERC’s authority has been to protect customers, and FERC’s current proposal modifies the status quo without increasing customer protection. See, e.g., *Pa. Water & Power Co. v. Fed. Power Comm’n*, 343 U.S. 414, 418 (1952) (“A major purpose of the [FPA] is to *protect power consumers* against excessive prices.” (emphasis added)). First, FERC would need to demonstrate that all of the concerns expressed by the incumbent transmission owners are unlikely to negatively affect customers, or that the benefit of allowing independent transmission companies to construct transmission facilities that they propose outweighs any possible negative ramifications. See Notice of Proposed Rulemaking, *supra* note 8, at 37,895. Second, FERC would need to also show that its proposed first-in-time remedy would benefit customers, either on a factual or theoretical basis. See *id.* at 37,897.

<sup>172</sup> *Primary Power, LLC*, 131 FERC ¶ 61,015, at ¶¶ 62-65 (2010) (“[The regional organization] would need to adequately justify its action if it denied the sponsor of the project the right to construct that project and receive the economic benefit of its project.”); Notice of Proposed Rulemaking, *supra*

FERC's jurisdiction with respect to the regulation of electricity, and any expansion of Section 206 would have to be consistent with the limitations imposed under Section 201.

### III. CAN FERC RELY ON SECTION 201 TO PROTECT COMPETITORS UNDER SECTION 206?

While FERC's Section 206 undue discrimination mandate previously has been limited to the protection of customers, this Part concludes that undue discrimination is a subset of FERC's broader mandate to take actions in the "public interest." It then demonstrates that the "public interest" mandate is significantly limited due to the Supreme Court's requirement that actions taken in the "public interest" must be designed to further the purpose of the FPA. This Part determines that, while the "public interest" mandate requires FERC to consider anticompetitive, nonjurisdictional factors when evaluating the right of first refusal, FERC is entirely limited to jurisdictional remedies.

#### A. *FERC's Power to Remedy Undue Discrimination is a Subset of Its Limited "Public Interest" Mandate*

Based on the new problems facing the electric industry, FERC may be attempting to expand its undue discrimination mandate beyond the protection of customers.<sup>173</sup> Courts, and FERC itself, have recognized that the FPA's overarching goal and FERC's mandate is to take actions furthering the "public interest."<sup>174</sup> FERC could therefore argue that expanding its Section 206 undue discrimination protection is necessary in the "public interest."

FERC's "public interest" mandate is derived from FPA Section 201.<sup>175</sup> Section 201 states that:

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest . . . and . . . that part of such business

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note 8, at 37,897 ("We also propose to require each public utility transmission provider to amend its [tariff] to describe how the regional transmission planning process in which it participates provides for the sponsor . . . of a facility that is selected . . . for inclusion in the regional transmission plan to have a right, consistent with State or local laws or regulations, to construct and own that facility.").

<sup>173</sup> *Cf. Pa. Water & Power Co.*, 343 U.S. at 418-19.

<sup>174</sup> *See NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976) (internal quotation marks omitted) (concluding that the "public interest" argument was a broader statutory argument than Section 206); Order No. 890, *supra* note 50, at 12,270 (indicating that the Order No. 890 reforms resulted from FERC's consideration of what other steps were necessary in the "public interest").

<sup>175</sup> 16 U.S.C. § 824(a) (2006).

which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest . . . .<sup>176</sup>

In the federal regulation of electricity, Section 201 serves as the foundation for the specific grants of FERC authority, and the “public interest” mandate provides the broadest justification for FERC’s actions.<sup>177</sup> A court reviewing FERC’s attempted expansion of authority would likely review FERC’s actions under both Section 201 and the more specific grants of authority provided by other FPA sections.<sup>178</sup> As long as Order No. 1000’s reforms are consistent with one FPA section, it will be upheld.

The Supreme Court provided its interpretation of how Section 201 interacts with the other FPA provisions in *NAACP v. Federal Power Commission*,<sup>179</sup> where the Court held that the Federal Power Commission’s undue discrimination authority was a subset of its broader authority to take actions in the public interest.<sup>180</sup> In *NAACP*, the Court was tasked with determining whether the Commission could require electric utilities to engage in equal opportunity employment practices consistent with the scope of the FPA.<sup>181</sup> The Court determined that Section 201’s “public interest” mandate was broader than the requirement that the Commission set “just and reasonable” rates under its Section 205 authority.<sup>182</sup> In fact, the Court stated that when the Federal Power Commission sets “just and reasonable” rates it does so in the “public interest.”<sup>183</sup> The Court reviewed the Section 201 and Section 205 arguments separately and held in the latter instance that if the Commission could show that unnecessary costs were being passed to customers due to employment discrimination, then the Commission could disallow the utility’s recovery of the identified costs consistent with Section 205.<sup>184</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> Section 201 provides the broadest language granting FERC jurisdiction. *See id.* The Supreme Court has also reviewed an attempt to expand FERC’s authority under both FPA Section 205 and the broader language of Section 201. *See NAACP*, 425 U.S. at 665-69 (stating that the Federal Power Commission’s action is being contested under two different statutory bases).

<sup>178</sup> *See NAACP*, 425 U.S. at 665-69.

<sup>179</sup> 425 U.S. 662 (1976).

<sup>180</sup> *See id.* at 671.

<sup>181</sup> *Id.* at 665 (“The question is not whether Congress could authorize the Federal Power Commission to combat such discrimination. It clearly could. The question is simply whether or to what extent Congress did grant the Commission such authority.”).

<sup>182</sup> *See id.* at 669-70.

<sup>183</sup> *See id.* at 671.

<sup>184</sup> *Id.* at 666-68. The Court gave the following examples:

(1) duplicative labor costs incurred in the form of back pay . . . (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.

When interpreting Section 201, however, the Court refused to expand the “public interest” standard beyond the limited purposes of the FPA.<sup>185</sup> When enacting Section 201, Congress did not expressly define “public interest,” instead leaving it to the courts and FERC to interpret the mandate.<sup>186</sup> Despite the NAACP’s argument that the “public interest” standard was broad enough to allow the Federal Power Commission to remedy issues of national importance, the Court opted for a narrow definition tailored to electric regulation.<sup>187</sup> The Court stated that the “public interest” mandate is not “a broad license to promote the general public welfare. Rather, the [public interest] take[s] meaning from the purposes of the regulatory legislation.”<sup>188</sup> Therefore, the Court held that the “public interest” mandate “is a charge to promote the orderly production of plentiful supplies of electric energy . . . at just and reasonable rates” consistent with the other provisions of the FPA.<sup>189</sup>

Any attempt by FERC to expand its Section 206 undue discrimination authority beyond the protection of customers must be consistent with the NAACP decision’s interpretation of the “public interest.”<sup>190</sup> Removing federal rights of first refusal and requiring similar treatment of both incumbent and nonincumbent transmission owners is an attempt to protect independent transmission companies that may lose or lack capital if the incumbent transmission owner has a federally sanctioned right to construct regionally selected transmission facilities in its service territory.<sup>191</sup> Order No. 1000, however, failed to demonstrate how the removal and proposed new policy will increase the supply of electricity at reasonable rates.<sup>192</sup> Order No. 1000 assumes this outcome on the faulty basis that increasing the number of competitors automatically better serves customers,<sup>193</sup> regardless of whether the competitors are similarly situated and without consideration of the other relevant factors that could substantially impact customer rates.

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NAACP, 425 U.S. at 667.

<sup>185</sup> See 16 U.S.C. § 824a(a) (2006) (“For the purpose of assuring an abundant supply of electric energy throughout the United States . . . .”); NAACP, 425 U.S. at 669 (“[T]he use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.”).

<sup>186</sup> 16 U.S.C. § 824(a) (failing to define the public interest except as by inference to the reasons behind the enactment of the FPA).

<sup>187</sup> NAACP, 425 U.S. at 670 (“The use of the words ‘public interest’ in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination . . . .”).

<sup>188</sup> *Id.* at 669.

<sup>189</sup> *Id.* at 670.

<sup>190</sup> *Id.*

<sup>191</sup> See Order No. 1000, *supra* note 5, at 49,886.

<sup>192</sup> See NAACP, 425 U.S. at 669-70 (“The use of the words ‘public interest’ . . . is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.”).

<sup>193</sup> See Order No. 1000, *supra* note 5, at 49,883-84.

The “public interest” mandate remains limited to the protection of customers.<sup>194</sup> Federal regulations ensuring a consistent, reasonably priced supply of electricity are clearly designed to benefit customers. Electricity is costly to produce and is not produced unless there is customer demand. The Supreme Court has stated that the major purpose of the FPA is to protect customers from excessive rates.<sup>195</sup> As a result, FERC’s ability to demonstrate that the removal of rights of first refusal provisions is consistent with Section 201 is plagued by the same issues as Section 206.<sup>196</sup> Even if Order No. 1000 did demonstrate that the removal and new reforms protect customers by ensuring a plentiful supply of electricity at reasonable rates, FERC would still need to demonstrate that it has jurisdiction to remedy discrimination in transmission construction.

B. *FERC Must Consider Extrajurisdictional Factors but Is Limited to Solely Jurisdictional Remedies*

Despite limiting the “public interest” standard to the purposes of the FPA, the Supreme Court also has indicated that FERC must consider the impact of its decisions on extrajurisdictional rates when making decisions in the “public interest.”<sup>197</sup> In *Federal Power Commission v. Conway Corp.*,<sup>198</sup> the Court held that the Federal Power Commission must consider the impact a utility’s jurisdictional rate will have on nonjurisdictional rates.<sup>199</sup> *Conway* involved a so-called “price squeeze” where the electric utility’s FERC-jurisdictional wholesale rate would be set at a high enough level that the utility’s retail competitors would be required to raise their retail rates.<sup>200</sup> Thus, the electric utility was effectively using its wholesale rate to eliminate its retail competition. The Court determined that even though the retail rate is normally outside the scope of the Commission’s jurisdiction, the Commission must consider all arguments that the jurisdictional rate is potentially discriminatory or anticompetitive.<sup>201</sup> The Court

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<sup>194</sup> *Pa. Water & Power Co. v. Fed. Power Comm’n*, 343 U.S. 414, 418 (1952). Combining the need to protect customers from excessive rates with the *NAACP* view that the “public interest” is limited to actions ensuring “plentiful supplies of electric energy and natural gas at just and reasonable rates” suggests that the primary concern remains the protection of customers. See *NAACP*, 425 U.S. at 670; *Pa. Water & Power Co.*, 343 U.S. at 418.

<sup>195</sup> *Pa. Water & Power Co.*, 343 U.S. at 418.

<sup>196</sup> See *supra* notes 79-139 and accompanying text.

<sup>197</sup> See *Fed. Power Comm’n v. Conway Corp.*, 426 U.S. 271, 277 (1976).

<sup>198</sup> 426 U.S. 271 (1976).

<sup>199</sup> *Id.* at 277-79.

<sup>200</sup> *Id.* at 274-75.

<sup>201</sup> *Id.* at 277 (“A jurisdictional sale is necessarily implicated in any charge that the difference between wholesale and retail rates is unreasonable or anticompetitive. If the undue preference or dis-

stated that “[i]f the undue preference or discrimination is in any way traceable to the level of the jurisdictional rate,” then the Commission must consider the arguments when setting the wholesale rate.<sup>202</sup>

Even though *Conway* involved a “price squeeze,” which necessarily implicates the nonjurisdictional rates, it is likely applicable to other Section 206 undue discrimination cases that involve the terms and conditions of transmission service. Courts have previously been willing to apply the principles underlying the *Conway* decision in non-price squeeze cases because considering the impact of a jurisdictional action on a nonjurisdictional rate does not exceed FERC’s statutory jurisdiction since FERC is not taking a nonjurisdictional action.<sup>203</sup> Further, the FPA’s broad purpose of protecting customers likely underscores the importance of considering nonjurisdictional effects that may negatively affect customers. Thus, when FERC is acting pursuant to its “public interest” authority, it must consider the potentially anticompetitive or discriminatory impact its decision will have on nonjurisdictional areas.<sup>204</sup>

Assuming that *Conway* extends to all rates, terms, and conditions of transmission service, FERC would be required to consider all arguments alleging discriminatory or preferential behavior traceable to its jurisdiction when making an undue discrimination finding or taking an action in the public interest.<sup>205</sup> While transmission construction has never been regulated at the federal level, *Conway* provides a basis for considering potential discrimination in the regional organization transmission construction selection process, even if transmission construction is ultimately outside of FERC’s Section 201 jurisdiction.<sup>206</sup> Mandating consideration of extrajurisdictional factors constituted a significant expansion of FERC’s authority because it is now likely required to look for and consider whether FERC-jurisdictional rates, terms, and conditions of transmission service lead to discriminatory behavior in nonjurisdictional areas.

The Court in *Conway*, however, refused to grant the Federal Power Commission the authority to order an extrajurisdictional remedy.<sup>207</sup> The

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crimination is in any way traceable to the level of the jurisdictional rate, it is plain enough that [Section 205] would to that extent apply . . .”).

<sup>202</sup> *Id.*

<sup>203</sup> *See, e.g.,* *N. States Power Co. v. FERC*, 176 F.3d 1090, 1094 (8th Cir. 1999) (discussing the applicability of *Conway* to proposed revisions to the electric utilities tariff that do not involve a “price squeeze”); *Fla. Power & Light Co. v. FERC*, 660 F.2d 668, 675-76 (5th Cir. 1981) (applying the principles set out in *Conway* to a case involving the wheeling of electricity).

<sup>204</sup> *Conway*, 426 U.S. at 277.

<sup>205</sup> *See id.*

<sup>206</sup> *See id.* at 276-77 (indicating that the Federal Power Commission has no authority to undertake an extrajurisdictional remedy, such as ordering an increase in retail rates, but holding that the Commission is required to consider any discriminatory behavior in an extrajurisdictional area that is traceable to the jurisdictional rate).

<sup>207</sup> *See id.* at 277.

Court stated that the Commission would not “have power to remedy an alleged discriminatory or anticompetitive relationship between wholesale and retail rates by ordering the company to increase its retail rates.”<sup>208</sup> As the Commission itself pointed out, and the Court agreed, the FPA’s legislative history expressly limited the Commission to jurisdictional remedies.<sup>209</sup>

FERC remains a “creature of statute” whose remedial authority is limited to the jurisdiction granted by the statute.<sup>210</sup> *Conway* emphasizes that any remedy is limited to the jurisdictional rate and cannot “invade a nonjurisdictional area.”<sup>211</sup> While FERC is required to consider the extrajurisdictional effects of its jurisdictional decisions, it is clearly unable to use that responsibility as a basis for expanding its jurisdiction.<sup>212</sup>

FERC’s ability to remedy the rates, terms, or conditions of transmission service is thus limited to actions consistent with Section 201. Under *Conway*, FERC’s remedy must target either the interstate transmission of electricity or the wholesale sale of electricity in interstate commerce.<sup>213</sup> A federal right of first refusal, however, implicates discriminatory behavior in the construction of transmission infrastructure. To date, no court has found that transmission construction implicates either the transmission of electricity in interstate commerce or the wholesale sale of electric energy in interstate commerce, and it has never been a subject of federal regulation.<sup>214</sup>

As a result, Order No. 1000’s removal of rights of first refusal from FERC-filed tariffs and requirement of nondiscriminatory regional selection processes for how regional transmission organizations create the potential for FERC to exceed its jurisdiction.<sup>215</sup> Order No. 1000 did not mandate a selection process, but FERC will review potential processes through Order No. 1000 compliance filings. Despite Order No. 1000’s claim not to preempt the states, any federally mandated or altered selection process creates a substantial risk of conflict with state regulations. Moreover, courts will not presume that traditional state regulatory authority has been preempted if FERC seeks to impose a remedy that is inconsistent with the historical understanding of electric energy regulation.<sup>216</sup> It is well-settled law that FERC cannot do indirectly that which it cannot do directly.<sup>217</sup>

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<sup>208</sup> *Id.* at 276-77.

<sup>209</sup> *Id.* at 277.

<sup>210</sup> *See Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (internal quotation marks omitted); *see also Tex. Pipeline Ass’n v. FERC*, No. 10-60066, 2011 WL 5027748, at \*5 (5th Cir. 2011).

<sup>211</sup> *Conway*, 426 U.S. at 276-77, 279.

<sup>212</sup> *See id.* at 276-77; *Atl. City*, 295 F.3d at 11.

<sup>213</sup> *See Conway*, 426 U.S. at 276-77.

<sup>214</sup> *See* 16 U.S.C. § 824a(a) (2006); *see also Santa & Sikora, supra* note 10, at 125 (“[T]he siting and authorization of transmission facilities is subject to state, not federal regulation.”).

<sup>215</sup> *See* 16 U.S.C. § 824a(a).

<sup>216</sup> *See Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 314 (4th Cir. 2009) (“[I]f Congress had intended to take the monumental step of preempting state jurisdiction *every time* a state commission

#### IV. PRESUMPTIONS AGAINST THE PREEMPTION OF STATE REGULATORY AUTHORITY

Splitting the regulatory authority of electricity between the states and the federal government created the potential for conflicting policies. This Part describes the various ways that federal law can preempt state law under the Constitution, but highlights the general presumption that federal laws do not preempt state laws. It then discusses the FPA's express limitations on preempting state regulatory authority and how the Supreme Court reviews challenges to the scope of a federal agency's authority. This Part concludes that FERC has never had authority over transmission construction, which has traditionally been regulated by the states. Absent new legislation, FERC lacks the authority to regulate transmission construction and cannot use its removal of right of first refusal provisions as a pretext to try to influence the way transmission is sited, licensed, and constructed.

##### A. *Preemption of State Law under the U.S. Constitution*

After Congress passed the FPA, federal preemption became central to the resolution of conflicts between state and federal electric energy regulations.<sup>218</sup> As such, analysis of these conflicts begins with the Supremacy Clause. The Supremacy Clause states that “[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”<sup>219</sup> Therefore, state laws that directly conflict with federal statutes or treaties will be preempted under the Supremacy Clause.<sup>220</sup>

Besides direct conflict between state and federal law, there are several other ways for federal action to preempt the states.<sup>221</sup> The Supreme Court has recognized three types of preemption: explicit federal preemption, implicit federal preemption, and dominant federal interest preemption.<sup>222</sup> Ex-

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denies a permit . . . it would surely have said so directly.”); *Atl. City*, 295 F.3d at 9 (“FERC cannot point to any statute giving it authority for its unprecedented decision to require the utility petitioners to cede rights expressly given to them in section 205 of the Federal Power Act.”).

<sup>217</sup> See, e.g., *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1091-92 (9th Cir. 2010) (quoting *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996)).

<sup>218</sup> See *Vince & Moot*, *supra* note 31, at 12 (noting that the FPA transformed the bright-line test from a constitutional Commerce Clause analysis to a statutory federal preemption analysis).

<sup>219</sup> U.S. CONST. art. VI, § 1, cl. 2.

<sup>220</sup> See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“It is basic to this constitutional command that all conflicting state provisions be without effect.”); see also Robin Kundis Craig, *Constitutional Contours for the Design and Implementation of Multistate Renewable Energy Programs and Projects*, 81 U. COLO. L. REV. 771, 783 (2010) (stating that “[c]onflict preemption is absolute”).

<sup>221</sup> Craig, *supra* note 220, at 782 (indicating that the Supreme Court has identified several different ways for federal preemption to arise).

<sup>222</sup> *Id.* at 782-83.



licit federal preemption arises when Congress chooses to specifically preempt state law in a federal statute.<sup>223</sup> Federal law can implicitly preempt state law when a court finds that Congress’s intent in passing the statute was to preempt state law, such as if Congress had the intent to “occupy the legislative field.”<sup>224</sup> Courts have also found that state laws were preempted under the Supremacy Clause when a federal statute involves a field where “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”<sup>225</sup>

Here, it is important to note the constitutional provision on which Congress relies when passing legislation.<sup>226</sup> In the case of the FPA, Congress relied on its Commerce Clause powers.<sup>227</sup> The Commerce Clause gives Congress the power “[t]o regulate Commerce . . . among the several States.”<sup>228</sup> Congress’s powers under the Commerce Clause have been interpreted broadly, giving the federal government a significant amount of authority.<sup>229</sup> Consequently, authority over electric energy has been broadly construed under the commingling theory, such that federal regulation extends to all electric transmissions using transmission facilities connected to an interstate grid.<sup>230</sup> Any attempt to limit the preemptory reach of federal

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<sup>223</sup> *Id.* at 782. However, the extent of explicit preemption for any given statute will likely be determined by the federal courts, which have generally interpreted congressional attempts at explicit preemption narrowly to preserve some of the states’ power. *Id.*

<sup>224</sup> *Id.* (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008)) (internal quotation marks omitted). The key to this inquiry is Congress’s intent, and in the case of the FPA, the legislative history helps provide Congress’s reasoning. *Id.*; *see also* H.R. REP. NO. 74-1318, at 7-8 (1935); S. REP. NO. 74-621, at 48 (1935).

<sup>225</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also* *Craig*, *supra* note 220, at 783 (providing examples of dominant federal interest cases, such as navigation of the seas or fraud on federal agencies).

<sup>226</sup> *See* *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”).

<sup>227</sup> *See* 16 U.S.C. § 824(b)(1) (2006) (“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 . . . .”); *see also* *Pub. Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927) (determining that the state regulations placed a direct burden on interstate commerce and, thus, were invalid under the Commerce Clause).

<sup>228</sup> U.S. CONST. art. I, § 8, cl. 1, 3.

<sup>229</sup> *See, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (stating that Congress can regulate local activities that have a substantial effect on interstate commerce); *Fed. Power Comm’n v. Fla. Power & Light Co.*, 404 U.S. 453, 462-63 (1972) (determining that electric transmissions using the interstate grid were subject to federal regulation as part of interstate commerce based on the commingling theory of electricity); *Perez v. United States*, 402 U.S. 146, 150 (1971) (indicating that the Commerce Clause allows Congress to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and the activities affecting interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that Congress can regulate activities under the Commerce Clause that have a “substantial economic effect” on interstate commerce).

<sup>230</sup> *See Fla. Power & Light Co.*, 404 U.S. at 462-63.

electricity regulation must be consistent with the modern, broad federal authority to regulate interstate commerce.

Despite the expansive nature of federal power under the Court's modern interpretation of the Commerce Clause, federalism dictates that there is a presumption against preempting state authority.<sup>231</sup> When addressing issues historically regulated by the states, the Supreme Court assumes "that the historic police powers of the States were *not to be superseded* by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>232</sup> In *New York v. FERC*, however, the Supreme Court stated that if Congress has given a federal agency authority, and the issue is over the scope of that authority, then "we must interpret the statute to determine whether Congress has given FERC the power to act as it has, and we do so without any presumption one way or the other."<sup>233</sup> Regardless of the presumption, and absent explicit conflict between federal and state laws or regulations, it is important to determine Congress's intent in enacting the statute.<sup>234</sup>

#### B. *Federal Power Act*

Congress openly indicated its intent by including an express presumption against the preemption of state regulatory authority over electricity when it enacted Part II of the FPA.<sup>235</sup> Section 201 of the FPA states that "[f]ederal regulation [is] to extend only to those matters which are not subject to regulation by the States."<sup>236</sup> This provision is consistent with the reason the FPA was expanded to include electric regulation, namely the need to close the "Attleboro Gap."<sup>237</sup> When the language of Section 201 is consi-

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<sup>231</sup> *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted)); *see also* *Craig*, *supra* note 220, at 781-82 ("[T]he U.S. Supreme Court does not presume that federal preemption exists when state and federal laws govern related subjects—indeed, just the opposite.").

<sup>232</sup> *Rice*, 331 U.S. at 230 (emphasis added).

<sup>233</sup> *New York v. FERC*, 535 U.S. 1, 18 (2002).

<sup>234</sup> *Craig*, *supra* note 220, at 782 (stating that it can be critical to determine Congress's intent in enacting the statute when evaluating a potential conflict between state and federal law).

<sup>235</sup> *See* 16 U.S.C. § 824(a) (2006).

<sup>236</sup> *Id.*

<sup>237</sup> *See* H.R. REP. NO. 74-1318, at 7-8 (1935) ("Under the decision of the Supreme Court of the United States in *Public Utilities Commission v. Attleboro & E. Co.* (273 U.S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. . . . The bill takes no authority from State commissions and . . . [t]he new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority . . ."); S. REP. NO. 74-621, at 48 (1935) ("[Section 201(a)] also declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States . . . but not to impair or diminish the powers of any State commission. . . . The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held

dered with the reason for enacting Part II of the FPA, it is clear that federal oversight over electricity was only to close the gap between federal and state regulation of electricity created by the Supreme Court in *Attleboro*.<sup>238</sup> The FPA was expanded to ensure that there was a federal entity able to regulate electricity transactions taking place in interstate transmission of electricity.<sup>239</sup>

Section 201’s limited jurisdictional grant is markedly different from the authority granted to FERC under the Natural Gas Act (“NGA”), which was passed in 1938.<sup>240</sup> Section 7(c) of the NGA provides that:

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . .<sup>241</sup>

Under this provision, Congress directly preempted the states’ authority to regulate the construction, siting, and permitting of natural gas facilities. The contrast between the FPA and the NGA demonstrate Congress’s intent to treat the natural gas industry and the electric industry differently in terms of federal regulation. The FPA limited federal control over the electric industry, whereas the NGA provided for significant federal oversight of natural gas. As a result, the FPA should not be construed to grant FERC additional authority over the electric industry, if similar authority was expressly conveyed in the NGA.<sup>242</sup> In such cases, Congress could have given FERC the same authority over electricity as it did over natural gas, but instead Congress intentionally chose a different regulatory framework.

To date, federal regulation of the transmission of electricity has expanded consistent with both the commerce power and FPA Section 201.<sup>243</sup>

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in *Public Utilities Commission v. Attleboro Steam & Electric Co.* (273 U.S. 83), to be beyond the reach of the States.”); MCGREW, *supra* note 20, at 139-40 (describing the events and issues facing the electric industry that precipitated the passing of Part II of the FPA in 1935).

<sup>238</sup> See MCGREW, *supra* note 20, at 140 (indicating that Congress passed Part II of the FPA to address the *Attleboro* gap).

<sup>239</sup> See *id.*

<sup>240</sup> See 15 U.S.C. § 717 (2006).

<sup>241</sup> *Id.* § 717(c)(1)(A).

<sup>242</sup> Supreme Court precedent establishes that the NGA and FPA should be interpreted interchangeably only in cases where the relative statutory provisions are the same. See, e.g., *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (“In this opinion we therefore follow our established practice of citing interchangeably decisions interpreting the pertinent sections of [the NGA and the FPA].” (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 820-21 (1968), and *Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956))).

<sup>243</sup> See generally Order No. 890, *supra* note 50; Order No. 2000, *supra* note 46; Order No. 888, *supra* note 40.

The extension of federal regulatory jurisdiction to all transmission facilities that are capable of transmitting electricity interstate, even if they are only used to transmit electricity intrastate, has been held as consistent with the Court's interpretation of Congress's modern Commerce Clause power.<sup>244</sup> Further, the expansive nature of the commerce power is a product of the legislative and judicial branches of government, not an administrative agency.<sup>245</sup> FERC regulations that appear to have encroached on state authority did so consistent with the evolving legislative and judicial understanding of interstate commerce.<sup>246</sup> FERC has never unilaterally preempted state authority by exceeding its Section 201 mandate to regulate the interstate transmission of electricity or the wholesale sale of electricity in interstate commerce.

### C. *Transmission Construction and Siting*

States have regulated the construction and siting of transmission facilities as part of their traditional regulatory powers both prior to and since the enactment of the FPA.<sup>247</sup> All states and localities have processes and procedures in place to facilitate the construction of transmission facilities while also balancing citizen concerns.<sup>248</sup> The intrusion into a traditional state power and the perceived inability of a federal agency to balance the competing utility and local interests make federal siting and construction authorization controversial.<sup>249</sup>

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<sup>244</sup> See *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 462-63 (1972).

<sup>245</sup> See *id.*; see also *New York v. FERC*, 535 U.S. 1, 18 (2002) (“[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[.] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.” (second, third, and fourth alterations in original) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)) (internal quotation marks omitted)).

<sup>246</sup> All major reforms have been directed at the interstate transmission of electricity or the wholesale sale of electricity in interstate commerce. See generally Order No. 890, *supra* note 50; Order No. 2000, *supra* note 46; Order No. 888, *supra* note 40. Courts had also accepted the commingling theory of electricity prior to the major transmission reforms. See *Fla. Power & Light Co.*, 404 U.S. at 462-63.

<sup>247</sup> See *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 312-13 (4th Cir. 2009) (acknowledging the petitioners' argument that transmission siting has been historically state regulated and concluding that FERC's interpretation, potentially stripping the states of this exclusive power, was contrary to the plain meaning of the statute); see also *Santa & Sikora*, *supra* note 10, at 125 (indicating that transmission siting and authorization has always been regulated at the state level, even when the facilities are planned on the regional level, and states historically retain the right to reject the proposed facilities).

<sup>248</sup> See, e.g., VA. CODE ANN. § 56-46.1 (2009); MD. CODE REGS. 20.79.04.01 to -04.04 (2004).

<sup>249</sup> See Debbie Swanstrom & Meredith M. Joliver, *DOE Transmission Corridor Designations & FERC Backstop Siting Authority: Has the Energy Policy Act of 2005 Succeeded in Stimulating the Development of New Transmission Facilities?*, 30 ENERGY L.J. 415, 418 (2009) (describing the competing views of state regulatory authority over transmission construction).

Unlike the siting and permitting of a natural gas pipeline, electric transmission construction remains a state and local, not federal, matter.<sup>250</sup> Siting and construction of transmission is highly contentious with significant local impacts. Examples of the issues are “Not in My Backyard” landowners and potential health concerns associated with electromagnetic fields.<sup>251</sup> These examples demonstrate the direct impact that transmission facilities have on the citizens where the facilities are to be located.

The shift toward regional planning of transmission projects did not divest states of any authority over the construction and siting of projects located within their borders.<sup>252</sup> Regional planning processes generally incorporate input from state officials to account for particular state regulatory issues in the planning process.<sup>253</sup> Moreover, all transmission projects included in a regional plan must still be approved, sited, and constructed in accordance with applicable state regulations.<sup>254</sup> This is true even if the transmission project spans multiple states, which have differing regulations and approval processes.<sup>255</sup>

Congress attempted to solve some of the issues presented by state and local control over major electric transmission facility construction. The Energy Policy Act of 2005 expanded federal electric regulatory authority over transmission.<sup>256</sup> One purpose of the Energy Policy Act of 2005 was to stimulate new transmission construction. As such, the Energy Policy Act

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<sup>250</sup> See *id.* (“[S]ome view this state authority to site [and authorize] electric transmission facilities as a vital component of state responsibilities to protect the health, safety and welfare of their citizens or to address inherently local land use issues . . . .”); Santa & Sikora, *supra* note 10, at 126 (describing the potential issues states are forced to confront when authorizing and siting transmission facilities, such as densely populated areas and potential health risks associated with electromagnetic fields).

<sup>251</sup> See Santa & Sikora, *supra* note 10, at 126.

<sup>252</sup> *Id.* at 125.

<sup>253</sup> See Operating Agreement, *supra* note 55, at 438-39 (describing the committees that include the relevant state regulatory officials); see also Order No. 890, *supra* note 50, at 12,320 (“[W]e establish a process through which transmission providers must coordinate with customers, neighboring transmission providers, affected State authorities, and other stakeholders . . . .”).

<sup>254</sup> Santa & Sikora, *supra* note 10, at 125 (“[E]ven when transmission planning is done on a regional basis, authorization for siting is obtainable only at the state level.”).

<sup>255</sup> One example of the large-scale transmission projects currently being undertaken is the Trans-Allegheny Interstate Line Company. See Va. Elec. & Power Co., Case No. PUE-2007-00033, at 1-2 (Va. Corp. Comm’n Oct. 7, 2008), available at [http://www.dom.com/about/electric-transmission/meadow-brook/pdf/scc\\_order\\_100708.pdf](http://www.dom.com/about/electric-transmission/meadow-brook/pdf/scc_order_100708.pdf). This project involves both Allegheny Energy and Dominion Virginia Power constructing new transmission facilities across Virginia, West Virginia, and Pennsylvania. See *id.* In order to construct the new transmission facilities, the companies had to get approval from all three state commissions responsible for permitting new transmission facilities consistent with each state’s laws and regulations. See *id.*; see also Trans-Allegheny Interstate Line Co., Docket No. G-00071229, at 75-78 (Pa. Pub. Util. Comm’n Dec. 12, 2008), available at <http://www.aptrailinfo.com/downloads/Opinion-Order-11-13-2008.pdf>; Press Release, Allegheny Energy, *Allegheny Energy Announces Favorable Regulatory Ruling in Transmission Line Project* (Feb. 17, 2009), available at <http://www.aptrailinfo.com/downloads/021709AYETrAILreconsiderationFINAL.pdf>.

<sup>256</sup> See 16 U.S.C. § 824p (2006).

added Section 216 to the FPA, which granted FERC backstop transmission line siting authority in three specific instances.<sup>257</sup> Two of these instances, however, are meant to cover scenarios where states may not have siting authority.<sup>258</sup> The remaining grant of authority in Section 216 involves instances where the state has siting authority but has “withheld approval for more than 1 year after the filing of an application seeking approval.”<sup>259</sup> Thus, in a final rule, FERC stated that it would exercise its backstop transmission siting in instances where the state had denied the siting permit.<sup>260</sup> FERC justified its interpretation on the basis that if a state denied siting authority, then it “withheld approval for more than 1 year.”<sup>261</sup>

In *Piedmont Environmental Council v. FERC*,<sup>262</sup> the Fourth Circuit heard an appeal of FERC’s final order asserting that it had the authority to exercise backstop siting authority after the state had denied the permit. The *Piedmont Environmental* court rejected FERC’s interpretation of Section 216.<sup>263</sup> Following the Supreme Court’s instruction in *New York*, the appellate court applied no presumption against preempting traditional state authority because the case involved the scope of Congress’s grant of authority to an administrative agency.<sup>264</sup> Nevertheless, the court determined that Section 216 was clear and unambiguous, and that FERC’s interpretation was thus contrary to the plain meaning of the statute.<sup>265</sup> The court stated that a

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<sup>257</sup> *Id.* § 824p(b)(1)(A)-(C). The three instances are: (1) where “a State in which the transmission facilities are to be constructed or modified does not have authority to—(i) approve the siting of the facilities; or (ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State”; (2) “the applicant for a permit is a transmitting utility under this chapter but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State”; or

[(3)] a State commission or other entity that has authority to approve the siting of the facilities has—(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or (ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible . . . .

*Id.*

<sup>258</sup> *See id.* § 824p(b)(1)(A)-(B).

<sup>259</sup> *Id.* § 824p(b)(1)(C)(i).

<sup>260</sup> *See* Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, Order No. 689, 71 Fed. Reg. 69,440, 69,445 (Dec. 1, 2006) (to be codified at 18 C.F.R. pts. 50 & 380) (“Therefore, the Commission finds that when a State fails to act *or rejects* an application, it has withheld approval and the proposed facility would be subject to the Commission’s jurisdiction.” (emphasis added)).

<sup>261</sup> *See id.* (explaining how the definition of “withhold” is synonymous with the term “deny”).

<sup>262</sup> 558 F.3d 304 (4th Cir. 2009).

<sup>263</sup> *Id.* at 313 (“Simply put, the statute does not give FERC permitting authority when a state has affirmatively denied a permit application within the one-year deadline.”).

<sup>264</sup> *Id.* at 312.

<sup>265</sup> *See id.* at 313-15 (evaluating the meaning of the word “withhold” and determining that FERC’s interpretation was contrary to the statutory language because “withhold” implies a continuous act, whereas denial is a completed action).

state’s denial of a siting permit was a “legitimate use of its traditional powers,”<sup>266</sup> and that “if Congress had intended to take the monumental step of preempting state jurisdiction *every time* a state commission denie[d] a permit . . . it would surely have said so directly.”<sup>267</sup>

This decision stands in stark contrast to the deference traditionally shown toward agency interpretations of their own authority.<sup>268</sup> This is especially true when the statutory language is ambiguous.<sup>269</sup> If a court determines that the statutory language is plain and unambiguous, however, an agency’s interpretation cannot be inconsistent with the statute’s plain meaning.<sup>270</sup>

The *Piedmont Environmental* decision firmly backed the traditional power of states to regulate the siting of transmission infrastructure.<sup>271</sup> The court strictly interpreted Section 216 in a way that preserved one of the traditional state regulatory functions, despite the deference usually given to FERC’s interpretations of its own authority.<sup>272</sup> Additionally, the court’s belief that Congress would directly assert its intention to preempt traditional state siting authority indicates the reticence courts have in preempting traditional state regulatory authority when Congress has not expressly addressed the issue. Following the decision, FERC has never had a chance to exercise its backstop siting authority in any capacity, and Congress has not passed new legislation expressly granting siting authority to FERC in cases where the state denies a permit.<sup>273</sup>

## V. FERC CANNOT REGULATE TRANSMISSION CONSTRUCTION UNDER THE GUISE OF REMEDYING UNDUE DISCRIMINATION

States remain the ultimate repository of regulatory authority over electricity until Congress decides to vest those rights in a federal regulatory

<sup>266</sup> *Id.* at 315.

<sup>267</sup> *Id.* at 314.

<sup>268</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (indicating that if the statutory language is not clear and unambiguous then the agency’s interpretation need only be “based on a permissible construction of the statute”).

<sup>269</sup> *Id.*

<sup>270</sup> See *Piedmont Envtl. Council*, 558 F.3d at 315 (concluding that FERC’s interpretation of the word “withhold” was contrary to the clear and plain meaning of the statute).

<sup>271</sup> See *id.* at 314 (suggesting that courts are unwilling to strip states of their traditional powers unless Congress has clearly intended for that to be the case).

<sup>272</sup> See *id.* at 315.

<sup>273</sup> *Swanstrom & Jolivert*, *supra* note 249, at 450. FERC petitioned for rehearing en banc of the *Piedmont* decision with FERC’s supporters arguing that *Piedmont* “effectively nullifies the transmission siting authority Congress gave to FERC under the [Energy Policy Act of 2005].” *Id.* FERC’s petition was denied and subsequently only one pre-filing request for federal siting authority has been filed with FERC. *Id.* However, this pre-filing petition was withdrawn, and FERC has never had an actual opportunity to exercise its backstop transmission siting authority. See *id.*

body.<sup>274</sup> As such, state silence on the issue of an incumbent right of first refusal, whether by choice or informal practice, does not create a void whereby FERC can exercise regulatory authority.<sup>275</sup> States are free to impose any regulatory barriers or procedures in transmission construction, as long as the state regulations do not conflict with valid federal law.<sup>276</sup> Whether states choose to enact electric regulations that are preferential to independent transmission companies or incumbent transmission owners in the siting or construction of transmission facilities is an issue outside the scope of federal jurisdiction.

FERC itself has repeatedly noted that it must defer to the states on transmission siting, permitting, and construction issues.<sup>277</sup> Participation in regional transmission organizations and regional planning has never exempted incumbent or independent transmission developers from state siting and construction regulations.<sup>278</sup> In fact, FERC has emphasized the importance of including the relevant state personnel in the regional planning process to ensure that the regional plan will not conflict with state regulatory laws.<sup>279</sup> Transmission companies and FERC both recognize that transmission construction issues must be addressed with the relevant state laws or regulations.

In Order No. 1000, FERC's conclusion that a right of first refusal should not be in a federal tariff is a decision within its jurisdiction.<sup>280</sup> FERC is within its authority to control the terms of its tariff. A federal right of first refusal creates the potential for conflict with states that implement innovative regulatory schemes.<sup>281</sup> A requirement that incumbent transmission owners shall be selected to construct transmission infrastructure within their service territory may conflict with a state's public policy initiatives. Moreover, Section 201 of the FPA provides the states with full regulatory authority over electricity in all areas not expressly granted to federal authority.<sup>282</sup> As a result, a FERC-sanctioned right of first refusal would exceed FERC's

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<sup>274</sup> 16 U.S.C. § 824(a) (2006).

<sup>275</sup> See *id.* (leaving to the states all regulatory authority not expressly granted to the federal government); see also *New York v. FERC*, 535 U.S. 1, 18 (2002) (“[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[.] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.” (second, third, and fourth alterations in original) (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)) (internal quotation marks omitted)).

<sup>276</sup> U.S. CONST. art. VI, § 1, cl. 2; see also *Craig*, *supra* note 220, at 781-82.

<sup>277</sup> Order No. 1000, *supra* note 5, at 49,891.

<sup>278</sup> Order No. 2000, *supra* note 46, at 811-12 (forming regional transmission organizations that included collaboration from state officials).

<sup>279</sup> *Id.*

<sup>280</sup> Order No. 1000, *supra* note 5, at 49,885.

<sup>281</sup> See Notice of Proposed Rulemaking, *supra* note 8, at 37,895 (listing the problems that the right of first refusal causes to transmission development and independent transmission companies).

<sup>282</sup> 16 U.S.C. § 824(a) (2006).



jurisdiction under Section 201.<sup>283</sup> A right of first refusal controls who can construct transmission facilities, which is an issue not subject to federal regulation.<sup>284</sup>

Similar to the federal government, states change laws and regulations as the political climate and citizen preferences change. FERC recognition of an incumbent right of first refusal could create conflicts with states that want to allow nontraditional entities to construct transmission. States serve as the nation’s laboratories, and federal regulations should not unnecessarily limit states’ abilities to experiment with new regulatory schemes.<sup>285</sup>

Order No. 1000, however, was not limited to mandating the removal right of first refusal clauses. Instead, Order No. 1000 concluded that rights of first refusal are unduly discriminatory or preferential, and FERC is requiring utilities to file revised tariffs with proposed selection processes that treat incumbents and nonincumbents equally.<sup>286</sup> Upon review of the compliance filings, FERC will determine what constitutes a nondiscriminatory selection process.<sup>287</sup> As a result, Order No. 1000 does not ensure that the removal of the right of first refusal clause will prevent further infringement on state regulatory rights.<sup>288</sup> Mandating the development of new federal selection procedures for regionally approved projects does not remedy the jurisdictional problems created by the federal right of first refusal clause.<sup>289</sup> Federal procedures designed to protect nonincumbent transmission owners by mandating equal treatment between entities that are not similarly situated replaces a right of first refusal with another, different rule that equally infringes on state regulatory authority.<sup>290</sup>

Order No. 1000 is a significant shift in FERC’s view of its jurisdiction. The problem of independent companies seeking to invest in and construct transmission lines in the footprint of traditional electric utilities was not envisioned at the time the tariffs were filed with FERC. Thus, the existence of a right of first refusal clause is a matter of interpretation because most

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<sup>283</sup> See *id.*; Notice of Proposed Rulemaking, *supra* note 8, at 37,896.

<sup>284</sup> See Order No. 1000, *supra* note 5, at 49,885-86 (describing how a federal right of first refusal controls transmission construction by mandating that the incumbent be selected to construct the new facilities).

<sup>285</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (“[T]he States cannot serve as laboratories for social and economic experiment if they must pay an added price when they meet the changing needs of their citizenry . . . .” (citation omitted)).

<sup>286</sup> Order No. 1000, *supra* note 5, at 49,895-96.

<sup>287</sup> *Id.* at 49,897-99 (discussing the framework adopted under Order No. 1000, but indicating that FERC would not provide more particularized guidance until it reviewed compliance filings).

<sup>288</sup> The right of first refusal should be removed without substituting a new policy that equally restricts the states. Any removal should ensure that the states have full, unquestioned authority to adopt any transmission authorization regulations that they deem appropriate because FPA Section 201 left the authority to the states. See 16 U.S.C. § 824(a) (2006).

<sup>289</sup> Order No. 1000, *supra* note 5, at 49,899-900.

<sup>290</sup> See 16 U.S.C. § 824(a).

regional organizations did not consider the need for such a right, in part due to the obligation to build.<sup>291</sup> Rather than clarifying that the federal tariffs contain no rights of first refusal with respect to selection processes, Order No. 1000 would actively control how transmission construction entities will be selected in the individual regions.<sup>292</sup> Far from believing that there is no federal authority to support a right of first refusal, FERC's decision in Order No. 1000 demonstrates the Commission's desire to facilitate increased investment in the transmission system through the regulation of regional transmission construction.<sup>293</sup>

FERC's insistence in Order No. 1000 that it is not preempting the states<sup>294</sup> does not preclude the inherent conflict that results from allowing FERC to dictate procedures that may directly conflict with state regulations. The likely conflict between Order No. 1000's reforms and state regulations ensures that the direct preemption issue will arise in future cases where FERC's policy goals are being frustrated by state regulatory processes. Moreover, the decision of the *Piedmont Environmental* court indicates that FERC has no jurisdiction, and will not be allowed to unilaterally expand its authority, over traditional state electric regulatory decisions.<sup>295</sup> FERC cannot use Order No. 1000 as a means to challenge state siting and permitting policy under the guise of preventing undue discrimination. It is also irrelevant whether or not FERC intends to preempt the states because of the inherent conflicts that will arise between potentially competing federal and state initiatives. FERC cannot indirectly regulate how states control the construction of needed transmission infrastructure through conflict-creating policy initiatives because *Piedmont Environmental* demonstrates that FERC cannot regulate transmission construction directly.<sup>296</sup> Ultimately, FERC has no more authority to require that states address or comply with a federally sanctioned nondiscriminatory construction selection policy than FERC did to require them to abide by a federal right of first refusal clause. Order No. 1000 will create significant tension between state regulatory policy focused on citizen complaints and reliability, and federal policy focused on bringing new, increased capital into transmission construction. Unless and until Congress grants FERC authority over transmission construction, FERC, or

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<sup>291</sup> See generally *Primary Power, LLC*, 131 FERC ¶ 61,015 (2010) (interpreting the PJM tariff as not containing a right of first refusal, despite the clearly stated obligation to build).

<sup>292</sup> Order No. 1000, *supra* note 5, at 49,897-900 (requiring the formulation of specific federal procedures that must be complied with in the regional planning of new transmission infrastructure).

<sup>293</sup> *Id.* at 49,885-86.

<sup>294</sup> *Id.* at 49,891.

<sup>295</sup> *Piedmont Env'tl. Council v. FERC*, 558 F.3d 304, 313 (4th Cir. 2009).

<sup>296</sup> See *id.*; see also *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1091-92 (9th Cir. 2010) (citing *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996) (“[T]he Commission was indeed attempting to do indirectly what it could not do directly, that is, intercede in a matter that the Congress reserved to the State.”)).

ultimately the courts, must ensure that federal regulations do not create unnecessary conflicts with state regulatory laws.<sup>297</sup>

On rehearing of Order No. 1000, FERC should order the removal of any federal rights of first refusal on the grounds that transmission construction is a state-jurisdictional matter and indicate that all regional transmission construction decisions should be made consistent with the individual regional organization processes and state law.<sup>298</sup> Removing the federal right of first refusal clause from FERC tariffs will eliminate the potential conflict with state jurisdiction. Further, the removal will allow states to modify their regulatory schemes to account for any potential benefits realized by allowing independent transmission developers to construct transmission infrastructure in an incumbent’s service territory. More so than FERC, states are sensitive to customer and citizen concerns that arise out of the inherently local impact of transmission construction.<sup>299</sup> There is no reason to suspect that states would not encourage nontraditional transmission investment if it provides a benefit to its citizens and electricity customers.

#### CONCLUSION

The FPA provides FERC limited jurisdiction over the transmission of electricity and the wholesale sale of electricity in interstate commerce. Based on the modern interpretation of the Commerce Clause, FERC’s authority is expansive, but not unlimited. Courts have been willing to find some limitation on FERC’s ability to unilaterally expand its authority without legislative approval or in a manner inconsistent with the FPA’s statutory language. These limitations preclude FERC from taking actions that exceed the scope of federal regulatory authority over the electric industry. Thus, FERC cannot infringe on traditional state regulatory authority without a clear congressional mandate.

The federal right of first refusal should not be included in regional organizations’ FERC-filed tariffs. The right of first refusal creates a potential conflict with state regulatory authority. FERC-tariffs and regional planning processes could end up in direct conflict with state regulations if a state chose to modify its regulations to make nontraditional transmission infrastructure investment more attractive. Because transmission construction is outside of FERC’s jurisdiction, a federal right of first refusal would not preempt a state’s decision to favor nontraditional investment. Order No.

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<sup>297</sup> In fact, FERC is statutorily bound to respect the states’ jurisdiction over electric energy that is not transmitted or sold in interstate commerce. *See* 16 U.S.C. § 824(a) (2006).

<sup>298</sup> *See id.*; Santa & Sikora, *supra* note 10, at 125 (“[T]he siting and authorization of transmission facilities is subject to state, not federal regulation.”).

<sup>299</sup> *See* Santa & Sikora, *supra* note 10, at 126 (describing the perceived health risks and population problems that plague transmission construction projects).

1000, however, does not eliminate the jurisdictional issues associated with the federal right of first refusal. Mandating the use of federally approved selection procedures for regional transmission construction merely substitutes one statutorily unsupported regulation for another. On rehearing of Order No. 1000, FERC should order the elimination of any rights of first refusal clause from FERC-filed tariffs and require that transmission construction issues be left to the regional processes and decided according to applicable state regulatory law. If FERC is unwilling to remove itself from the transmission construction process, then the federal courts of appeals must recognize that Order No. 1000 is an attempt by FERC to regulate transmission construction. It is not a secret that FERC believes transmission construction, siting, and permitting issues preclude or slow construction of much needed infrastructure.<sup>300</sup> Courts, however, must recognize that this regulation is a wolf in sheep's clothing, which would mark a significant expansion of FERC's authority that was never envisioned during the passage of the FPA or subsequently sanctioned by Congress.

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<sup>300</sup> See Order No. 1000, *supra* note 5, at 49,972-73 (Moeller, Comm'r, dissenting) (noting that transmission construction is a major issue, but highlighting the problem areas that Order No.1000 does not address, including state issues).