



**HARVARD LAW SCHOOL**

Environmental Law Program

POLICY INITIATIVE

# The Federal Power Act in the 21<sup>st</sup> Century

**Summary Report of a Discussion Marking the 80<sup>th</sup>  
Anniversary of the Enactment of FPA Title II**

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# The Federal Power Act in the 21st Century

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The Harvard Environmental Policy Initiative and Duke University's Nicholas Institute convened a group of experts from academia, industry, public utility commissions, and environmental organizations to mark the 80<sup>th</sup> anniversary of the Federal Power Act. The group discussed the challenges of governing an evolving industry with an eighty-year old legal framework, identified opportunities for continued adaptation and reform, and suggested topics that warrant further research and discussion.

The discussion was divided into three sessions:

1. Ensuring Resource Adequacy and Diversity through Planning and Markets
2. Transmission and Non-Transmission Alternatives
3. The Future of the FPA: Evolution or Reform?

Each session began with two discussants framing the session topic. These introductory remarks were followed by a free-flowing discussion among all participants.

This summary report highlights the major areas of discussion during each session as well as questions that were raised by participants that warrant further exploration by academics and policymakers. Discussions were off-the-record, and therefore none of the statements in this report are attributed to any individual. Participants did not reach agreement on particular policy or legal issues, and this report is not intended to reflect the recommendations of any particular participant.

A statutory supplement with portions of the Federal Power Act that are most relevant to this summary document is available at [statepowerproject.org/FPAat80](http://statepowerproject.org/FPAat80). Suggested reading materials, such as FERC orders, court decisions, and law review articles, are listed at the end of this document.

## INTRODUCTION: FERC Regulation and the Federal Power Act

Enacted in 1935, Title II of the Federal Power Act (FPA) provides the Federal Energy Regulatory Commission (FERC) with jurisdiction over transmission of electric energy and wholesale sales of electric energy in interstate commerce (§ 201). The FPA explicitly limits FERC's jurisdiction, stating that it does not extend to "facilities used for the generation of electric energy or [ ] facilities used in local distribution or only for the transmission of electric energy in intrastate commerce."

FERC's primary responsibilities under the Act are to ensure that rates under its jurisdiction are just and reasonable and not unduly discriminatory (§ 205) and to remedy rates that it finds are unjust, unreasonable, or unduly discriminatory (§ 206). These core provisions have remained largely unchanged since 1935. Section 201's capacious jurisdictional language and the flexible standards in Sections 205 and 206 have enabled FERC to respond to shifts by the industry as well as to initiate and encourage structural changes.

One such structural change was the creation of Regional Transmission Organizations (RTOs), a development enabled by a FERC rule that required transmission owners to provide nondiscriminatory

service.<sup>1</sup> For these reforms, FERC relied primarily on its rate authority (§§ 205, 206) and on section 202 of the FPA, which empowers FERC “to divide the country into regional districts for the voluntary interconnection and coordination” of facilities. Today, one of FERC’s core functions is to oversee wholesale auction markets organized by the RTOs. FERC’s rate authority provides it with jurisdiction over RTO market tariffs. Under section 205, FERC approves or disapproves of tariff amendments proposed by RTOs, while under section 206 FERC may initiate reforms of market rules. FERC has also relied on this rate authority to set rules for regional transmission planning and require all utilities to engage in that process.

One consequence of the regionalization and restructuring of the electric industry is that the once bright jurisdictional lines between state and federal authority in section 201 have blurred. The FPA’s denial of jurisdiction over “facilities used for generation” leaves states with authority over fuel choices, but the statute’s grant of jurisdiction over wholesale sales of electricity gives FERC authority over generators’ compensation when sales are in interstate commerce. This split of authority can sow jurisdictional uncertainty, particularly when fuel choices are intertwined with financial incentives. Recent appellate court decisions highlight clashes between state incentives for new generation and their effect on wholesale market prices and hence, federal jurisdiction. Whether and to what extent state incentives and mandates are preempted by FERC regulation of RTOs are open questions.

Regionalization of the grid has also highlighted the incongruence between transmission planning and siting authority. Congress did not explicitly address transmission line siting in the FPA until 2005, when it provided limited authorities to the Department of Energy and FERC. Transmission line siting is implicitly left to the states, and developers of interstate lines need permission from each state (or in some cases, local governments) in order to construct projects. States’ decisions are often based on local concerns and may ignore regional benefits. Whether FERC can and should play a larger role in transmission line siting are open questions.

On its eightieth birthday, the Federal Power Act remains vibrant. The statute’s broad jurisdictional language and malleable standards allow for continued regulatory adaptation and innovation. And yet, it remains useful to revisit the language and its interpretation by FERC and the courts, to identify ways to improve its application to the modern electricity sector.

## DISCUSSION

### ➤ Session 1: Ensuring Resource Adequacy and Diversity through Planning and Markets

*Major Areas of Discussion:* Resource adequacy, capacity market design, natural gas-electric market coordination

*Questions Raised During the Discussion:*

- How can we judge the effectiveness of a capacity market?
- Should FERC require capacity markets?
- Should FERC be more active in reforming capacity markets?
- Should FERC revisit its determination not to require utilities to join an RTO?

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<sup>1</sup> See FERC Order No. 2000 (advancing the formation of and establishing minimum characteristics for RTOs) and FERC Order No. 888 (requiring public utilities to file open-access transmission tariffs).

- Should FERC be involved in Clean Power Plan implementation, and if so, what should its role be?
- Should Clean Power Plan implementation (along with other market developments) intensify FERC's efforts to coordinate electric and natural gas markets?

**Discussant 1: Capacity Markets and Regulatory Tensions.** Regulation under the FPA is rife with tensions, between FERC and states over jurisdiction, between regions with different resource mixes, between markets and planning, and between market-based pricing and concern for consumer impacts. Capacity markets reflect many of these tensions.

Recent decisions by the Third and Fourth Circuits — which held the FPA preempted New Jersey and Maryland incentives that provided guaranteed revenue to new generators — illustrate these tensions. These states largely ceded their oversight over resource planning to capacity markets. However, New Jersey and Maryland legislators and regulators later perceived deficiencies in the markets' abilities to bring investment into their states to alleviate high consumer prices and enacted incentives to spur new construction.

These tensions raise a number of questions about capacity markets: What is their purpose? To what extent are they reacting to short-term problems? Are they able to react to long-term trends? Are they compatible with a global trend towards zero-marginal cost generation? What will be the role of demand response in these markets, particularly as demand is increasingly 'peaky'? To what extent should RTOs be rewarding or dictating specific resource attributes, and at what point do these mandates cross over into planning? Will states react to the Clean Power Plan with planning, markets, or both?

**Discussant 2: Resource Adequacy—Definitions and Regulatory Roles.** Capacity markets and state-utility planning are both intended to ensure that a utility or region has sufficient *resource adequacy*. There are two definitions of resource adequacy.

First, resource adequacy was defined traditionally as sufficient megawatts of generation capacity to meet consumers' projected peak demand. Under this definition, what matters is that the megawatts will perform under peak conditions, and not the types of generation that provide the megawatts.

A second emerging definition of resource adequacy considers the operational attributes of the capacity, such as ramping capability, carbon intensity, and on-site fuel storage. These attributes can be driven by state policies, such as renewable portfolio standards and siting statutes. At the federal level, some markets' rules compensate for certain attributes.

In some states with vertically integrated utilities, resource adequacy standards are set by regulators who have established specific reserve requirements that apply to each utility. Where RTOs exist, market rules can dictate resource adequacy parameters, which can be informed by states' policies. Plant retirements generally require regulatory approval, at the state or RTO level or both.

### *Discussion*

#### Topic: Resource Adequacy

**FERC Authority.** FERC's tools to address resource adequacy are limited. In general, FERC acts under its rate authority, which enables it to address some aspects of resource adequacy. Most directly, FERC oversees RTO capacity markets where they exist, approving market rules and prices that are "just and reasonable" and induce adequate supplies of electricity. For all regulated utilities, FERC

has limited planning oversight under Order Nos. 890 and 1000 and indirect authority over reliability via its authority over NERC rules.

**Limitation on FERC Authority over Generation.** RTO rules typically require unit owners to notify the RTO about retirement plans, and provide out-of-market payments to uneconomic resources that the RTO deems necessary for reliability. However, if a generator ceased operations, despite a FERC-approved contract with an RTO providing for its continued operations, FERC would likely lose in court if it attempted to compel a generator to continue to operate. The Secretary of Energy, and not FERC, has the authority to require a generator to operate (see FPA § 202(c); DOE Organization act, 42 U.S.C. § 7172(a)(1)(B), withholding emergency interconnection authority from FERC).

**Clean Power Plan.** Concerns about resource adequacy have been raised in the context of the Clean Power Plan. Those concerns assume that EPA could take an enforcement action against a generator that would jeopardize reliability, or that in drafting compliance plans states would not adequately consider reliability. Some participants expected that states would assume the responsibility of ensuring reliability during this process.

#### Topic: Capacity Market Design

**FERC's Market Design Role.** FERC's role in capacity market design has been reactive. RTOs file tariff changes under FPA § 205, and FERC approves or disapproves those proposals. FERC has authority to change market rules under § 206, if FERC can demonstrate that rates are unjust and unreasonable or unduly discriminatory, and that its rule will result in rates that are FPA-compliant.

However, FERC has generally declined to undertake this resource-intensive task, choosing instead to react to RTO proposals under § 205. Given this, stakeholders that are interested in changing capacity market rules may have more success working with an individual RTO to convince it to make a § 205 filing, rather than petitioning FERC to change market rules under § 206.

This dynamic between §§ 205 and 206 (discussed in more detail in session 3) may explain why PJM's capacity performance rule was developed and approved so quickly. PJM identified potential adequacy issues and proposed a solution under § 205, that FERC could vote up or down. A majority of FERC commissioners agreed with PJM that concerns about adequacy could be alleviated through the proposed reform of the capacity market. If it had rejected the specific proposal, FERC would have needed to provide an alternative, which is a significant undertaking for the Commission.

**Evaluating Market Performance.** If the purpose of a capacity market is to shift money around to keep existing plants open, then, in general, capacity markets are effective. If the purpose is to motivate efficient investment in new plants, then one view is that they largely do not work. Renewable generation is largely built based on power purchase agreements, not capacity market prices. Capital intensive coal and nuclear projects are being built only in traditionally regulated markets. Some see this as a flaw of the competitive markets; others view the lack of capital-intensive projects in RTO regions as a sign that markets are in fact working. Markets prevent extravagant projects from even being attempted.

**Role of State Incentives.** State planning with non-market incentives or directives, such as renewable portfolio standards or long-term contract requirements, should supplement markets to generate long-term capacity solutions that meet state goals. Capacity markets should not be relied upon to conduct such long-term planning.

**Time Frame.** Despite the mismatch between capacity markets with relatively short-term award payments and the long-term assets that they compensate, there may be little benefit in extending capacity market award terms. From the perspective of project developers, award terms are typically too short to bring a plant online, although the difference may matter for demand response and distributed resources. Extension could lock in questionable choices for a longer period of time.

**Mandatory RTOs?** In Order No. 2000, FERC rejected making RTO membership mandatory. If FERC reevaluates this policy, it must establish a reason for requiring RTO membership. What problem would it be trying to solve?

#### Topic: Natural Gas-Electric Markets Coordination

**New England.** The New England market is the canary in the coal mine for natural gas reliance. The region has largely phased out coal, has already seen a major nuclear plant shut down, and relies on natural gas for approximately 50% of its power. There are ongoing debates about whether or not the region needs to build more pipeline capacity, and if it does, who will pay for the construction.

**NAESB and FERC Efforts.** Because of the increasing interdependencies between the two markets, the North American Energy Standards Board (NAESB) has attempted to develop standards that can be voluntarily agreed upon by members of both industries. Although NAESB has produced some agreed-upon changes, there remain inconsistencies and tensions between standards (which NAESB can address), business practices (which remain the domain of individual companies), and policy, which FERC may eventually have to resolve through rulemakings and/or other guidance. FERC has expended considerable resources fact-finding about the issue, but additional work will be required as more regions become increasingly dependent on natural-gas-fired generation. The natural gas industry is resisting reforms, while RTOs responded with limited interest.

Part of FERC's role in encouraging gas-electricity coordination has been informal, such as convening technical conferences. Technical conferences on winter fuel assurance and the Clean Power Plan were useful. FERC should continue to play this role.

**Clean Power Plan.** The Clean Power Plan could intensify the demand for natural gas and pipelines.

#### ➤ Session 2: Transmission and Non-Transmission Alternatives

*Major Areas of Discussion:* Transmission line siting and the roles and authorities of FERC, the Department of Energy, and states

*Questions Raised During the Discussion:*

- How does the RTO planning process affect state siting decisions? Are projects that emerge from an RTO process more likely to be approved by states?
- Should RTOs have a role in facility siting?
- How should DOE evaluate National Interest Electric Transmission Corridors (NIETC) designations in light of the Clean Power Plan?
- Could DOE delegate its corridor designation authority or its § 1222 siting authority to FERC?
- Could FERC's rate authority provide it with authority over transmission line siting, or is Congressional action needed to provide FERC with this authority?
- If FERC were to assert that it has jurisdiction to site a particular line (because a state law creates undue discrimination and results in unjust and unreasonable rates), is there a limiting principle

that would provide FERC with jurisdiction over only that specific line and not over transmission line siting generally?

- Could FERC have authority to determine that a line gets constructed, while states retain authority over the precise route? Alternatively, might this be a model for Congress to adopt in providing FERC with additional siting authority?
- Does FERC siting authority under Title I for hydro projects and related transmission lines provide a model to adapt to siting other lines?
- Should FERC address state laws relevant to the siting process that may violate the dormant Commerce Clause, and if so, how?

**Discussant 1: Order No. 1000 and Non-Transmission Alternatives.** Order No. 1000 includes two reforms that account for environmental concerns. Because RTOs have very recently submitted Order No. 1000 compliance filings, the implications of these two reforms are not yet clear.

First, Order No. 1000 requires transmission plans to take “consideration” of public policies, such as renewable portfolio standards. The Order does not require transmission planners to take any concrete action. Second, Order No. 1000 requires “comparable consideration” of non-transmission alternatives (NTAs), but does not mandate regional cost sharing for NTAs. It is not clear how the “comparable consideration” standard will be effectuated.

In practice, NTAs are rarely implemented. This result may be due to institutional and/or cultural reasons. The transmission planning process is run by transmission engineers who are trained to implement transmission-based solutions. The planners may work for companies who benefit financially from transmission, and may even be harmed by NTAs. In addition, the scale of NTAs required to displace a transmission project means that participation of multiple utilities and states may be necessary. This coordination may be difficult to achieve.

Vermont Electric Power Co., the state’s transmission-only company, is an exception. It implemented NTAs, but had to pay for the projects itself because they were not implemented with the benefit of regional cost sharing. Ideally, RTOs would allocate costs of these projects among all beneficiaries.

**Discussant 2: Transmission Line Siting—Role of Federal Government.** The siting process is fragmented across state lines, and each state is typically focused on the benefits it receives while ignoring regional benefits or benefits that accrue to other states.

Federal agencies play limited roles in the siting of transmission lines. The Department of Interior has siting authority on federal lands (43 U.S.C. §§ 1761–1771). FERC has siting authority to interconnect hydro projects (FPA Title I) as well as backstop siting authority pursuant to the Energy Policy Act of 2005 (FPA § 216) over lines located in DOE-designated National Interest Electric Transmission Corridors (NIETCs). This authority has proven ineffective, in part due to court rulings.<sup>2</sup>

The Department of Energy also has siting authority under § 1222 of the Energy Policy Act of 2005. The law allows DOE, through the Western Area Power Administration or Southwestern Power Administration (SWPA), to partner with private transmission companies and exercise eminent domain authority for these projects without state siting approvals. Clean Line Energy, a developer that responded to a DOE RFP and is currently seeking to partner with SWPA, could request that DOE

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<sup>2</sup> See *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009); *California Wilderness Coalition v. U.S. Dep’t of Energy*, 631 F.2d 1072 (9th Cir. 2011).

exercise this authority. DOE has yet to use the siting authority, but doing so could support its goal of modernizing transmission infrastructure as described in the 2015 Quadrennial Energy Review.

### *Discussion*

#### Topic: FERC and DOE Authority over Transmission Line Siting

**FERC Siting Authority.** FERC has never asserted jurisdiction over transmission line siting under Title II. While the Natural Gas Act provides FERC with plenary siting authority over interstate pipelines, the FPA explicitly grants FERC only backstop authority to site interstate transmission lines in very limited circumstances. However, if FERC finds that transmission rates are unjust and unreasonable, and argues that siting authority is a remedy to assure just and reasonable rates, it could assert that it has siting authority under §§ 205 and 206. Such an assertion of authority would surely be challenged in court. Regardless of the legal defensibility of this maneuver, it is currently politically improbable that FERC would make this assertion.

**FERC Preemptive Authority.** Even if FERC does not have siting authority through its rate authority, it may still possess some preemptive authority. Some states' laws restrict who can participate in the transmission line siting process or use eminent domain authority. For example, merchant transmission line developers are barred by some states' laws. FERC could argue that it has authority to preempt such an absolute barrier to participating in a state transmission siting process. To the extent FERC has such authority, FERC may only be able to set nationally applicable rules rather than be able to surgically preempt specific siting laws in particular situations.

**Chairman Bay's Recent Concurrences about the Dormant Commerce Clause.** Chairman Bay's recent concurrences in proceedings about Order No. 1000 compliance filings suggest that state grants of "rights of first refusal" to in-state utilities may violate the dormant Commerce Clause. The dormant Commerce Clause may also limit other state laws that inhibit the siting of interstate transmission lines, such as prohibitions on out-of-state companies from applying to site transmission projects or exercise eminent domain, although Chairman Bay has not mentioned these laws. FERC has not shown an appetite for addressing these problems.

**Concerns about Expanding FERC's Siting Authority.** FERC may be too far removed from local concerns to exercise siting authority effectively. In natural gas siting proceedings, FERC can seem distant from the process and from relevant local issues. FERC also has been criticized for not sufficiently considering potential environmental impacts of projects or requiring environmental mitigation as a condition of approval. In Maryland and Massachusetts, as examples, there has been significant opposition to siting natural gas infrastructure. We should expect similar opposition to federal siting of electric transmission lines.

**Analogy to Title I of the FPA.** Title I of the FPA provides a different model for possible reforms. FERC has exclusive siting authority for hydropower projects, while other actors (including other federal and state agencies) have influence over certain components of the process. FERC provides a single forum where parties can provide input and expertise. By contrast, siting a multi-state transmission line project involves fragmented processes in each state that are typically not coordinated.

**Role of RTOs.** One benefit of Order No. 1000 is increasing transparency in non-RTO regions, particularly the Southeast. Transmission planning had been largely conducted internally by the major utilities. Order Nos. 890 and 1000 mandated open and transparent planning processes. Stakeholders have more access, and project selection is more transparent.

**Interregional Planning.** Order No. 1000 requires “coordination” between regions on transmission planning for interregional lines. Interregional “planning” is not required. One problem is that the metrics of different regions do not align. A benefit to one region may be a burden for another.

Topic: DOE Authority over Transmission Line Siting and Transmission Corridor Designations

**Clean Line Energy Projects.** The Clean Line Energy-SWPA project would bring renewable energy from the Oklahoma Panhandle region to eastern states. The project is politically appealing because it is a merchant project (relying on voluntary commitments from generators and not captive ratepayers to pay for the line) and nearly all of the energy to be transmitted will be renewable. However, states in the middle of the line (so-called pass-through states) have different interests, and can prevent construction by denying siting authority. This is the kind of problem where the federal government should intervene because parochial concerns may be preventing the optimal solution. DOE has authority under § 1222 of the Energy Policy Act to exercise eminent domain for this project but thus far appears reluctant to do so.

If DOE does exercise its § 1222 siting authority for the project, could it build momentum for Congress to provide FERC with workable siting authority?

**Designation of National Corridors.** The 2005 Energy Policy Act empowered DOE to designate NIETCs. DOE published studies in 2006 and 2009, and in 2014 the Department published a draft study, which anticipates “a fresh study of transmission constraints and congestion impacts” in 2015. Future studies could account for transmission needs that arise due to Clean Power Plan compliance.

Topic: State Authority over Transmission Line Siting

**Importance of Providing Benefits to Each Host State.** Many state siting legal regimes are premised on the state receiving direct benefits from a transmission project. A state typically does not want to host a transmission line that merely passes through. Regional multi-value projects that deliver benefits to all participating states are more likely to be approved by all states.

A multi-state Hydro-Quebec project is a good example of a project that provided benefits to all states. The Center for Rural Affairs has ideas for how to provide benefits to the people who bear the burden of these projects. Clean Line is planning a line drop in Missouri to provide power to what would otherwise be a “pass-through” state.<sup>3</sup>

**Interstate Compacts.** Section 216(i) of the FPA, which authorizes states to join together to form siting bodies, has failed because FERC’s siting authority under the 2005 Energy Policy Act has no teeth. Without the threat of preemption, there is no stick to motivate states to join together. Even if there were a motivation, getting states to agree on these siting decisions is difficult because states often focus on how a particular line would benefit or harm ratepayers in their own state, while ignoring benefits that accrue to other states.

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<sup>3</sup> A few days after the conference, Missouri regulators nonetheless rejected Clean Line Energy’s application.

➤ Session 3: The Future of the FPA: Evolution or Reform?

*Major Areas of Discussion:* FERC authority under §§ 205 and 206, RTO governance

*Questions Raised during the Discussion:*

- If Congress were to amend the FPA, is it sensible to divide sections 205 and 206 into provisions relevant for RTOs and a parallel set for utilities that are not in RTOs?
- Should FERC convene additional technical conferences on market design issues?
- Does FERC's oversight of RTOs amount to a delegation of authority to private bodies? If so, is this delegation warranted due to political pressures faced by RTOs or some other reason?
- How can we assess whether an RTO decision or process is aligned with the public interest?
- Is more stringent oversight of RTOs warranted? Are management audits appropriate? Would an OMB/GAO review of RTO budgets be useful?

*Discussant 1: Evolution vs. Reform.* Much of the discussion today has been about evolution rather than reform. FERC's jurisdiction has shifted over the years; sometimes the movements are subtle and unexplained. It has evolved, in part through the "practices affecting rates" language. *EPSA v. FERC* (the Supreme Court case about FERC's demand response pricing order) is fundamental to what FERC can do under the FPA, and may bring some clarity.

The failure here, to the extent there is one, is not a limitation of the FPA to enable change; rather the failure is FERC's use of that authority to affect change in the industry. Tensions will continue. Amending the FPA is difficult, although not impossible.

*Discussant 2: FERC Authority under Sections 205 and 206.* Under § 205, FERC responds to an RTO's proposed market rule, typically with an up or down vote, without amending the RTO's proposal. The burden is on the filer to show that its proposal will result in just and reasonable rates. FERC sees its authority in reviewing and approving rules as rather narrow.

Under § 206, FERC takes action based on evidence that the status quo is unjust, unreasonable, or unduly discriminatory. FERC sees § 206 as giving it more flexibility, but it also presents a hurdle because FERC must show that its solution is necessary to maintain just and reasonable rates. It is burdensome to build a record that shows that rates are unjust and unreasonable or unduly discriminatory, and that a particular FERC action can remedy those rates.

The result of this § 205 / § 206 authority is that FERC has been largely reactive. It generally responds to RTO proposals without amendment and only in relatively few instances does it build a § 206 case to make global policies.

*Discussion*

Topic: FERC Authority under §§ 205 and 206

**FERC as a Reactive Regulator.** FERC took a more active approach in the late 1990s when it undertook reforms to mandate open-access transmission tariffs and encourage RTO formation. It

has since retreated to a more reactive stance. The challenge is political will, not the FPA. Democratic chairs often preside over at least one major rule.<sup>4</sup>

**FERC's Rulemaking Authority.** FERC is reactionary in part because of the nature of its key rulemaking power, which emanates from its statutory authority to review the justness and reasonableness of rates. FERC's major rules on open transmission access, RTO formation, and regional transmission planning, as examples, were founded on FPA § 206 and findings that the status quo involved undue discrimination or unjust and unreasonable rates.

**Reforming Market Rules.** In order for FERC to use § 206, there has to be a bad market design for it remedy. Maybe some frustrations about frequent capacity market design changes demonstrate how the FPA should work: RTOs make mistakes and then FERC has authority to remedy them. FERC can also react to a theoretical threat. It did so under Order No. 1000, and the D.C. Circuit upheld it.

FERC is at a disadvantage, compared to the RTOs it regulates. Market rules are complex, and FERC simply does not have the resources to develop these rules on its own. At best, it can evaluate a proposal brought before it, but the Commission cannot take on the RTOs' market design functions. FERC intervention may less be a question of statutory authority and more an issue of whether it has adequate information and resources to identify a problem or design a policy response.

**Role of Congress.** It might be liberating for the Commission if Congress provided instruction on how it should oversee and reform RTO markets. However, whether recent proposals in Congress provide the right direction is a matter of debate.

#### Topic: RTO Governance

**Stakeholder Participation.** In theory, a well-designed RTO stakeholder process should lead to market rules that address states' concerns and reflect input from environmental advocacy and other groups. In practice, some believe that RTOs are short-circuiting the stakeholder process. On the one hand, we want robust stakeholder participation. On the other hand, a stakeholder process that is too robust has the potential to cripple the RTOs.

**Shift from Public to Private Authority.** Because FERC typically approves RTOs' § 205 filings, FERC's deference to RTOs could be viewed as a delegation of its authority to private entities. If RTOs are acting for the benefit of their members and not in the public interest, then this delegation is troubling. FERC's deferential review may be assuming that stakeholder processes align RTOs with the public interest. However, in practice, it is not clear whether those processes are disciplining RTOs. In fact, RTOs may be acting like dominant vertically integrated utilities that are able to exert their own political pressures to obtain outcomes that suit their own needs.

**RTO Members.** The relationship between an RTO and its members informs the RTO's priorities. MISO's tariff, for example, is clear that the RTO's primary obligation is to transmission owners, which relinquished their rights to the RTO. This structure has particular implications for NTAs and rights of first refusal. Many transmission owners still think like integrated utilities, with a monopoly mindset.

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<sup>4</sup> Under Chair Wellinghoff, FERC promulgated Order Nos. 745 and 1000. Under Chair Moler, who was designated as chair by President Clinton, FERC issued Order No. 888.

**RTO Budgets.** RTOs are pseudo-government entities with captive sources of financing, and their budgets have grown astronomically. Because states are rarely unified on regional electric issues, RTOs are insulated from political criticism (although individual states have raised concerns).

FERC has authority to analyze RTO budgets as if it were cost-of-service ratemaking, or to require a third party management audit. By contrast, New York does management audits of New York utilities and is considering the same for NYISO. The Commission has yet to take action to discipline RTO budgets. A GAO report on RTO budgets could provide more transparency and suggest reforms.

#### Additional Readings:

##### *Session 1: Ensuring Resource Adequacy and Diversity through Planning and Markets*

- [PPL EnergyPlus v. Nazarian](#), 753 F.3d 467 (4th Cir. 2014) (striking down Maryland’s incentive for a new natural gas fired generator); [PPL EnergyPlus v. Solomon](#), 766 F.3d 241 (3rd Cir. 2014) (striking down New Jersey’s incentives for new natural gas fired generators); <http://statepowerproject.org/states/maryland-and-new-jersey/> (summarizing cases and providing all filings).
- [FERC Order No. 2000](#): Regional Transmission Organizations (1999) (advancing the formation of and establishing minimum characteristics for RTOs).
- [FERC Order No. 809](#): Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities (2015) (summarizing previous FERC actions on this issue and revising regulations to coordinate the scheduling of natural gas and electricity markets).
- Peter Cramton and Axel Ockenfels, [Economics and Design of Capacity Markets for the Power Sector](#) (2011) (explaining the economic motivation for a capacity market and exploring design approaches); William W. Hogan, [On an ‘Energy-Only’ Electricity Market Design for Resource Adequacy](#) (arguing that scarcity pricing could create sufficient incentives for operations and investment and obviate a need for a capacity market).
- [Order Accepting Tariff Sheets and Establishing Hearing](#), FERC Docket No. ER15-1535 (Jun. 19, 2015) (providing an example of RTO tariff provisions that provide out-of-market compensation to a generator needed to maintain resource adequacy).

##### *Session 2: Transmission and Non-Transmission Alternatives*

- [Piedmont Environmental Council v. FERC](#), 558 F.3d 304 (4th Cir. 2009) (limiting FERC’s backstop transmission line siting authority granted by the Energy Policy Act of 2005); [California Wilderness Coalition v. U.S. Dep’t of Energy](#), 631 F.2d 1072 (9th Cir. 2011) (vacating DOE’s designations of National Interest Electric Transmission Corridors).
- Alexandra Klass and Jim Rossi, [Revitalizing Dormant Commerce Clause Review for Interstate Coordination](#) (MINNESOTA LAW REVIEW, Fall 2015) (arguing that dormant Commerce Clause jurisprudence invalidates many existing state statutes that bar out-of-state applicants from seeking to build multi-state energy infrastructure projects and requires that a state grant eminent domain authority to out-of-state applicants on reciprocal terms to those offered to in-state incumbents).
- Shelley Welton, [Non-Transmission Alternatives](#) (HARVARD ENVIRONMENTAL LAW REVIEW, Fall 2015) (examining why energy efficiency, demand response, distributed generation and other alternatives to constructing high-voltage transmission lines have played a limited role in addressing electricity grid constraints).

- Missouri Public Service Commission, [In the Matter of the Application of Clean Line LLC for a Certificate of Convenience and Necessity](#), File No. EA-2014-0207 (Jul. 1, 2015) (rejecting siting application).
- The Council of State Governments, [Interstate Compacts as a Policy Option to Enhance the Electric Transmission Line Siting Process](#) (outlining challenges of the state-by-state siting process and explaining how interstate compacts can improve cooperation).

*Session 3: The Future of the FPA: Evolution or Reform?*

- Michael H. Dworkin and Rachel Aslin Goldwasser, [Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations](#) (ENERGY LAW JOURNAL, 2007 Vol. 2) (outlining RTO governance structures and recommending reforms to align them with the public interest).
- David Shaffer, [States Question Whether Power Grid Operator Watches Out for Consumers](#), STAR TRIBUNE (Aug. 15, 2015) (highlighting state regulators' concerns with MISO processes and recent actions).
- [FERC Order No. 719](#): Wholesale Competition in Regions with Organized Electric Markets, at PP 477–583 (summarizing comments on RTO governance issues and requiring RTOs to submit compliance filings); [Order No. 719-A](#), at PP 171–194.
- [PJM Power Providers Group's Request for Rehearing](#), FERC Docket ER13-535-002 (Jun. 3, 2013), at pgs. 12–14 (arguing that in modifying a PJM proposal submitted under § 205, FERC applied the wrong standard of review and failed to make necessary findings to justify its alternative rate).