

Moving Past Dual Federalism to Advance Electric Grid Neutrality

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I. INTRODUCTION

In a rapidly changing technological world, it is time for energy law to definitively cast away its stagnant vestiges of dual federalism. Electricity has changed in so many ways since the passage of the Federal Power Act (“FPA”)—a 1935 statute that allocated jurisdiction over electricity between states and the federal government¹—that the Act’s division of state and federal authority is increasingly irrelevant and artificial.² Increasingly, electricity flows from

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1. 16 U.S.C. § 824(b) (2012) (specifying that the Act provides for federal jurisdiction over “the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce” but not “over facilities used for the generation of electric energy or over facilities used in local distribution”).

2. Scholars and judges have recognized the perils of relying on strict state-federal lines in federal energy acts and ignoring the gray areas in between. In the Natural Gas Act, which has state-federal jurisdictional language nearly identical to the Federal Power Act, Justice Douglas in a strong dissent noted the perils of interpreting federal jurisdiction over the “sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use” to apply to sales of gas from an independent producer to an interstate pipeline, thus regulating the price of gas at the wellhead. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 688–90 (1954) (Douglas, J., dissenting). The Act, like the Federal Power Act, also specifies that states control certain sales, as it provides that federal jurisdiction “shall not apply . . . to the production or gathering of natural gas.” 15 U.S.C. § 717(b) (2012). Justice Douglas therefore noted that the sale of gas from an independent producer could be deemed as falling under either federal or state jurisdiction, observing: “[It] is a ‘sale in interstate commerce . . . for resale.’ It is also an integral part of the ‘production or gathering of natural gas.’” *Phillips Petroleum*

small, medium, and large generators within and across state lines to small, medium, and large population centers.³ This flow is on an ever more “neutral” electricity transmission and distribution grid—one that is blind to whether the generator using the lines to transport electricity is the owner of a small wind farm or a massive coal-fired power plant—and that enables more competition in generation.⁴ Further, the energy flow on the grid is increasingly bi-directional: population centers are no longer passive consumers of electricity. Retail electric customers who once simply bought their electricity from utilities are now sophisticated participants in the energy

Co., 347 U.S. at 688. He noted the importance, in deciding who had jurisdiction, of understanding the practical effects of control—in this case, giving FERC control over wellhead sales created a mandate that FERC could not practically or effectively implement. *Id.* at 689–90.

In the electricity context, Judge Cudahy of the Seventh Circuit has noted the regional implications of FERC’s decisions, asserting that in allocating the rates charged for the use of transmission lines to various utilities, the Federal Energy Regulatory Commission (“FERC”) should not have to specifically calculate the benefits of the lines to each individual utility, as building certain new types of lines enhances electric reliability and benefits the entire region. *Ill. Commerce Comm’n v. Fed. Energy Regulatory Comm’n*, 756 F.3d 556, 565 (2014) (Cudahy, J., dissenting); *Ill. Commerce Comm’n v. Fed. Energy Regulatory Comm’n*, 576 F.3d 470, 481 (2009) (Cudahy, J., concurring in part and dissenting in part). While cost allocation does not address federalism directly, it causes state-federal conflicts. Some states argue that FERC must show how new transmission lines benefit utilities within states, while FERC takes the more regional perspective of Judge Cudahy. A growing number of scholars have discussed the impediments to renewable energy caused by certain preemption and dormant commerce clause issues rooted in dual federalism, as well as by lingering state control in the area of transmission line siting. *See, e.g.*, Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1107 (2013) (describing how many states prohibit the use of eminent domain or the recovery of rates for transmission lines that do not benefit in-state customers); Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1803–04 (2012) (describing how states block the siting of interstate transmission lines needed to carry electricity from rural areas to populous load centers); Felix Mormann, *Requirements for a Renewables Revolution*, 38 ECOLOGY L.Q. 903, 951–53 (2011) (describing how the Public Utility Regulatory Policies Act impedes state feed-in tariffs that support renewable energy). Hari Osofsky and I also describe energy governance as involving a complete array of local, state, regional, and federal actors, which collaborate and conflict both vertically (e.g., state-federal, or state-local), and horizontally (e.g., state-state, or federal agency-federal agency). Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 829–31 (2013); Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, 2014 U. ILL. L. REV. 1, 4–5 [hereinafter Osofsky & Wiseman, *Hybrid Energy Governance*].

3. *Cf.* U.S. ENERGY INFO. ADMIN., ELECTRIC POWER ANNUAL 2013 tbl.3.3.A (2015), available at <http://www.eia.gov/electricity/annual/pdf/epa.pdf> (showing more than 1.5 billion megawatt hours of electricity produced by independent generators (as opposed to public utilities) in 2012 in the United States).

4. There are, however, specific standards governing how and when certain types of generators may connect to and use the grid. These standards are necessitated by the fact that some generators are more intermittent and thus could cause grid reliability issues, sending too much or too little electricity through the wires at various times and upsetting the delicate voltage balance within the wires. *See generally* Interconnection for Wind Energy, 70 Fed. Reg. 75,005 (Dec. 19, 2005) (to be codified at 18 C.F.R. pt. 35).

system, offering electricity to utilities experiencing high demand⁵ or curtailing electricity use to alleviate this demand, thus creating “negawatts.”⁶ With the growing participation of a geographically diverse array of small, medium, and large actors in the electricity system, the system is increasingly a national one. Private individuals, local governments, states, regional entities, and the federal government all play crucial roles within this national system. Attempting to sort out these roles through a dual federalism framework—one that clearly allocates authority to state or federal actors⁷—is unrealistic and forced in light of current energy governance needs. Further, forcing electricity governance into dual federal-state frameworks creates obstacles to the goal of expanding the number of negawatt generators in wholesale energy markets, deterring a beneficial trend that could decrease prices for customers and make electricity generation and consumption “greener” and more efficient.⁸

In her thorough, timely, and richly-theorized Article *Bypassing Federalism and the Administrative Law of Negawatts*, Professor Sharon Jacobs argues that the Federal Energy Regulatory Commission (“FERC”)—the federal agency charged with regulating wholesale sales and transmission of electricity—has addressed these modern realities by “bypassing” federalism.⁹ The antiquated FPA gives states authority over retail sales of electricity, which are sales from electric utilities to individual customers.¹⁰ Yet FERC allows retail electric customers to bid valuable services (electricity “non-use,” or negawatts) into

5. Retail customers that have solar panels on their roofs or small wind turbines in their backyards can generate electricity during peak or near-peak times of day and occasionally send excess electricity back to the utility. This excess electricity can sometimes offset the need for the utility to buy expensive cheap generation on the wholesale market. See, e.g., U.S. DEP’T OF ENERGY, THE POTENTIAL BENEFITS OF DISTRIBUTED GENERATION AND RATE-RELATED ISSUES THAT MAY IMPEDE THEIR EXPANSION: A STUDY PURSUANT TO SECTION 1817 OF THE ENERGY POLICY ACT OF 2005, at 3-5 (2007), available at <http://www.ferc.gov/legal/fed-sta/exp-study.pdf> (noting that “when power consumption is reduced [due to on-site generation], particularly during peak periods, the market price of electricity is reduced for all consumers” (internal quotation marks omitted)); see also *In re Investigation of Proposed Net Metering Rule*, No. E-100, SUB 83, 2005 WL 2709031 (N.C. Utils. Comm’n Oct. 5, 2005) (noting that although sometimes customers with solar panels on their roofs draw electricity from a utility during times of peak demand and produce electricity during off-peak hours, when it is not needed, net metering can also “reduc[e] peak demand”).

6. See Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 865, 896–900 (2015) (describing demand response).

7. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005) (“Dual federalism defined the core issue of federalism as the separation of state and national power.”).

8. See Jon Wellinoff & David L. Morenoff, *Recognizing the Importance of Demand Response: The Second Half of the Wholesale Electric Market Equation*, 28 ENERGY L.J. 389, 419 (2007).

9. See Jacobs *supra* note 6, at 913.

10. See 16 U.S.C. § 824(b) (2012) (giving what was then the Federal Power Commission (“FPC”) jurisdiction over, inter alia, “the sale of electric energy at wholesale in interstate commerce, but” not over “any other sale of electric energy” except for certain other provisions of the Act that provide for FPC authority over specific entities).

wholesale electric markets through demand response programs. Demand response is valuable because wholesale markets sometimes experience exceedingly high (“peak”) demand for electricity, and asking individuals to reduce their energy use and receive payment for it¹¹ can be far cheaper than purchasing generation to meet demand in certain areas.¹² In allowing this practice, FERC is “bypassing” federalism, Jacobs suggests, because it has not fully preempted the states.¹³ States still regulate retail electricity customers, although under the system FERC has implemented, these customers also may choose to participate in wholesale markets. FERC has not allowed full state control, though, because it has interfered with retail markets by allowing customers to reduce their electricity use and sell their negawatts on the wholesale rather than retail market. Thus, FERC walks a middle path, as described by Professor Jacobs—a path on which it does not fully preempt state power but also intrudes into states’ regulatory turf. Jacobs notes that in a world of federal legislative gridlock, bypassing federalism will likely be an increasingly common method of addressing “new exigencies.”¹⁴ And while she explores some benefits, including the creation of a more uniform demand response market, she addresses a variety of concerns associated with FERC’s federalism bypass.

In this Essay, I reframe Professor Jacobs’s argument to suggest that we have already moved far beyond the “bypassing” stage. Although the courts occasionally pretend that such a framework still exists, there is no longer any dual federalism framework that FERC must bypass in this area. Due to the complexities of electricity and its governance, regulation of generation, transmission of electricity between utilities, and distribution to individual energy customers involves a web of local, state, regional, and federal actors all playing different and sometimes overlapping roles within one regulatory space. And courts have, with some important exceptions, recognized and validated this scheme.¹⁵ Thus, FERC, by allowing retail customers to

11. Professor Jacobs explores other types of demand response as well, which do not directly involve incentive payments but rather use time-of-use pricing or other economic models. *See* Jacobs, *supra* note 6, at 896–900.

12. *Cf.* U.S. DEP’T OF ENERGY, BENEFITS OF DEMAND RESPONSE IN ELECTRICITY MARKETS AND RECOMMENDATIONS FOR ACHIEVING THEM: A REPORT TO THE UNITED STATES CONGRESS PURSUANT TO SECTION 1252 OF THE ENERGY POLICY ACT OF 2005, at 7–8 (2006), *available at* http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/DOE_Benefits_of_Demand_Response_in_Electricity_Markets_and_Recommendations_for_Achieving_Them_Report_to_Congress.pdf (noting that in situations of high electricity demand—which can occur because most electricity consumers pay a fixed price for electricity that does not go up during periods of peak demand—generators can exercise market power).

13. *See* Jacobs, *supra* note 6, at 913.

14. *Id.* at 938.

15. *See, e.g.*, Joel B. Eisen, *Who Regulates the Smart Grid?: FERC’s Authority over Demand Response Compensation in Wholesale Electricity Markets*, 4 SAN DIEGO J. CLIMATE & ENERGY L. 69, 73 (2013) (“[T]he Supreme Court has empowered FERC to regulate in similar situations of mixed federal-

participate in wholesale markets, is simply working within this overlapping governance space, where wholesale and retail markets are inextricably intertwined, as are regulatory actors.

In addition to arguing that FERC is not bypassing federalism but rather working within a complex multi-layer private-local-state-regional-federal governance sphere, I suggest that this is a good thing. In this short response piece, I focus more on the benefits of FERC's involvement in demand response than on the equally important concerns that Jacobs raises. While Jacobs is correct that FERC might be reducing experimentation by states, states under FERC's demand response orders are still allowed to run their own demand response programs and opt out of FERC involvement.¹⁶ Besides, Jacobs notes that 40 out of the 50 states have done very little with their demand response programs despite having the opportunity to do so.¹⁷ Therefore, this might be a situation that demands federal involvement to design a cohesive experiment and to spur experimentation.¹⁸

And FERC, by taking the demand response reins, is encouraging experimentation "all the way down."¹⁹ Private entities who consume electricity are crafting individualized methods of participating in demand response markets, and are thus experimenting from the ground up. They are choosing to turn off manufacturing processes at certain times, or run back-up generators, or shift certain business operations to periods of non-peak demand, among numerous other tools. Further, while Jacobs is concerned that FERC's approach to demand response will prevent legislation that is badly needed to update an antiquated statute, demand response might be the very sort of issue that we should not to leave to Congress—either the current, relatively gridlocked one or even future, potentially more productive bodies. Rather than drawing bright and relatively inflexible lines that specify who should regulate what within this complex, technical area of demand response, we might prefer a combination of FERC, private actors, states, and regional entities all working together to solve the problem. If Congress later feels that it needs to step in, perhaps it will have good models to adopt based on the experiment that FERC has initiated.

Part II of this response describes the multilayered governance space in which FERC operates—a space that the courts, for the most part, have

state jurisdiction [similar to Order 745], even if it might have some adverse impacts on state programs.").

16. See Jacobs, *supra* note 6, at 916–18.

17. *Id.* at 910.

18. For the observation that the federal government can sometimes better design and direct experiments by states through, for example, a cooperative federalism regime, see Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1904–05 (2014). For discussion of how the federal government can use its own sub-entities to experiment, see Dave Owen, *Regional Federal Administration*, UCLAL. REV. (forthcoming 2015).

19. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 28–30 (2010) (describing the importance of non-governmental sublocal participants in federalism).

recognized as legitimate within the confines of the Federal Power Act and that I argue does not require “bypassing.” Part III describes the benefits of governing demand response in this manner, responding to some of Jacobs’s concerns about FERC’s involvement. In responding to some of the costs that Jacobs identifies, I do not question the validity of her arguments but rather suggest an alternate view. In her rich piece detailing complex governance of a complex energy area, Jacobs has further exposed a practice—demand response—and a governance approach that will be increasingly common, and she provides a clear, sophisticated lens through which to address this important issue.

II. GOVERNING, NOT BYPASSING

In the FPA (originally enacted as the Federal Water Power Act of 1920), Congress created a dual federalist scheme, dividing federal and state power over electricity on the basis of wholesale and retail sales.²⁰ The Federal Power Commission, which was later renamed FERC, was tasked with regulating wholesale electricity sales, which are sales from one utility to another for resale, and the transmission of wholesale electricity.²¹ States retained jurisdiction over retail sales—sales from the utility to customers.²² Although this appeared to be a bright line between federal and state authority, it has, from the start, been a blurry line due to the nature of electricity.

Take the following typical transaction: Utility A, which is tasked with serving a large territory of customers within a state, generates some of its own electricity but also buys electricity from Utility B. If Utility B’s wholesale rates go up, as is allowed by FERC,²³ Utility A will ask the state public utility commission for permission to raise its retail rates. Additionally, if the FERC-approved rate for transmitting electricity between Utility B and A goes up, Utility A will seek a retail rate increase at the state level. Retail rates, in other words, are influenced by wholesale rates and transmission rates, both of which are regulated by FERC. Early on, courts prevented states from interfering with FERC’s wholesale rates too much—for example, states couldn’t prohibit Utility A from recovering certain costs in Utility B’s wholesale rate approved by FERC,²⁴ but states could simply prohibit Utility A from purchasing power from Utility B if they determined this would cause retail rates to be too high.

20. 16 U.S.C. § 824(b) (2012).

21. *Id.*

22. *Id.*

23. FERC now allows utilities to charge a market-based wholesale rate (a rate set by market forces rather than a regulator), although it monitors these transactions, and FERC’s allowance of market rate is still considered an official “filed” rate, which prevents certain challenges to the rate other than challenges brought through FERC. *See* Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc., 384 F.3d 756, 758–59 (9th Cir. 2004).

24. *See* Richard J. Pierce, Jr., *The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity*, 132 U. PA. L. REV. 497, 546–47 (1984) (noting that “[o]nce FERC allows the owner of the plant to charge the sponsoring utilities a rate reflecting the investment in the plant,

The interconnectedness of retail and wholesale transactions and federal and state regulation is further demonstrated by delving deeper into the system of transmitting electricity. FERC has jurisdiction over the use of nearly all transmission lines—even those lines that run wholly within one state.²⁵ In a series of orders, FERC required these transmission lines to accept any generators who wished to use the lines to transport electricity, provided there was space in the lines and that adding more generators would not reduce the reliability of electricity delivery.²⁶ FERC also strongly encouraged regional operation of the transmission grid so that generators would have more access to far-away consumers searching for cheap energy.²⁷ These regional organizations, which Jacobs discusses in her Article, are called regional transmission organizations (“RTOs”) and independent system operators (“ISOs”).²⁸ They are nonprofit entities, regulated by FERC, and, with permission of transmission line owners, they take control of individual utilities’ transmission lines within a region. The RTOs and ISOs (called RTOs here, for brevity) operate the lines and, in so doing, run wholesale electricity markets.²⁹

Any generators wishing to use the lines to send electricity to other utilities place bids with the RTO—indicating how much electricity they are offering at a particular price³⁰—and the utilities wanting electricity on a given day also

the state commissions with regulatory authority over each sponsoring utility are required by the supremacy clause of the United States Constitution to allow each utility to recover the cost of the FERC-approved rate in its retail rates” and citing cases, including *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358 (R.I. 1977), which created the “Narragansett” doctrine.

25. This is so because any line through which electricity from out of state *might* have flowed is an interstate transmission line. See *Fed. Power Comm’n v. Fla. Power & Light Co.*, 404 U.S. 453, 467–69 (1972).

26. See, e.g., Standardization of Small Generator Interconnection Agreements and Procedures, 70 Fed. Reg. 34,190 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75); Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) (to be codified at 18 C.F.R. pts. 35, 385).

27. See generally Regional Transmission Organizations, 65 Fed. Reg. 810 (Jan. 6, 2000) (to be codified at 18 C.F.R. pt. 35) (encouraging the formation of RTOs further and providing updated standards for the criteria that they must meet); Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (Apr. 24, 1996) (to be codified at 7 C.F.R. pts. 35, 385) (encouraging but not requiring the formation of RTOs).

28. See Jacobs, *supra* note 6, at 894.

29. See, e.g., MONITORING ANALYTICS, LLC, QUARTERLY STATE OF THE MARKET REPORT FOR PJM: JANUARY THROUGH SEPTEMBER 4 (2014), available at http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2014/2014q3-som-pjm-sec1.pdf (noting that the RTO “coordinates and directs the operation of the transmission grid” and operates a variety of energy markets).

30. See PHILLIP BROWN, CONG. RESEARCH SERV., R42818, U.S. RENEWABLE ELECTRICITY: HOW DOES WIND GENERATION IMPACT COMPETITIVE POWER MARKETS? 4 (2012), available at <https://www.fas.org/sgp/crs/misc/R42818.pdf> (describing the bids placed by generators).

submit bids.³¹ A clearing price for electricity emerges, although the price is different at different points within the RTO, depending on the demand in a particular area and how “congested” (crowded) the lines are.³² As Jacobs discusses, there are different types of auctions³³—some for capacity, which provide commitments for electricity generation far in advance of the electricity being needed; some for ancillary services, which provide last-minute electricity needed to maintain the proper voltage in the wires; and other day-ahead and fifteen minute-ahead auctions. It is these regional auctions into which retail customers who reduce their electricity use are now allowed to offer megawatts. If utilities submit bids indicating that they need 10 megawatts of power (in addition to previously-scheduled bilateral contracts for electricity sales), then the RTO will schedule the 10 cheapest generators to dispatch electricity to the grid, or, alternatively, schedule 10 megawatts—promises that 10 megawatts of electricity will not be used. In lieu of drawing on expensive generation to meet rising demand, the RTO simply relies upon customers who promise to reduce their usage. As Jacobs explains, entities often aggregate a variety of promises from customers to reduce their electricity use during peak times, and these customers receive payments for reducing their use.

In other work, Hari Osofsky and I have described the complexity of the RTOs that are so crucial to electricity governance.³⁴ The RTOs operate under a tariff from FERC, which describes how they must offer generators open access to transmission lines and specifies the rates that they may charge for use of the lines.³⁵ Yet public utilities, states, and municipally-owned utilities also influence how RTOs operate, providing pressure from the ground up.³⁶ FERC has placed demand response within this regional space.

In allowing retail consumers to bid demand response into regional wholesale electricity markets, FERC is simply drawing from a new type of “generator”—a generator that can cause wholesale prices to meaningfully decline.³⁷ Consumers can, and sometimes do, offer the same service at the

31. See, e.g., *About 60% of the U.S. Electric Power Supply Is Managed by RTOs*, U.S. ENERGY INFO. ADMIN. (Apr. 4, 2011), <http://www.eia.gov/todayinenergy/detail.cfm?id=790> (noting that “RTOs dispatch power by feeding both day-ahead and real-time bids from both generators and load-serving entities into complex optimization software”).

32. See BROWN, *supra* note 30, at 5 (describing locational marginal prices).

33. For a brief introduction to the types of auctions offered by one RTO, see MONITORING ANALYTICS, LLC, *supra* note 29, at 4.

34. See generally Osofsky & Wiseman, *Hybrid Energy Governance*, *supra* note 2.

35. See, e.g., *Transmission, Markets, and Services Tariff*, ISO NEW ENGLAND, <http://www.iso-ne.com/participate/rules-procedures/tariff> (last visited May 17, 2015) (summarizing the tariff).

36. See Osofsky & Wiseman, *Hybrid Energy Governance*, *supra* note 2, at 8–9, 49, 52–54 (explaining that utilities are members of RTOs and describing how states and utility members influence the RTOs).

37. See, e.g., *Elec. Power Supply Ass’n v. Fed. Energy Regulatory Comm’n*, 753 F.3d 216, 232, 239 (D.C. Cir. 2014) (Edwards, J., dissenting) (noting FERC’s authority over practices that

retail level, where a utility providing service to individual customers must ensure that it has enough megawatts to fulfill all demand. Yet as Jacobs notes, when consumers offering demand response have the option of selling their product in the wholesale as opposed to the retail market, they typically choose the wholesale market because it is more lucrative. In Order 745—an order deemed by the D.C. Circuit to exceed FERC’s authority, thus leaving the status of the Order in flux until the U.S. Supreme Court decides the case³⁸—FERC required that aggregators that collect various consumers’ demand response products and bid them into electricity markets receive the same payment as generators, thus creating the lucrative option.³⁹ In choosing wholesale markets, it appears that demand response providers are putting their product to its highest valued use—they are selling megawatts in markets that have high electricity prices because of high demand and crowded transmission lines.

Retail and wholesale electricity markets are tightly intertwined—after all, reductions in retail electricity demand have always impacted wholesale practices and prices. And state, regional, and federal entities are all involved in at least one aspect of electricity regulation. As such, FERC’s allowance of demand response participation in regional electricity markets—those that are federally governed but rest between the federal government and states—seems to follow naturally from other energy governance schemes. Just as independent generators may choose to sell their electricity at retail level with approval from states, or at the wholesale level, or both, FERC has allowed generators of megawatts to choose their markets. Thus, FERC might not be bypassing federalism, but simply doing what it normally does: allowing electricity generators to participate in regional markets governed by FERC but also strongly influenced by regionals board of directors and by states operating within RTO jurisdiction.

III. THE BENEFITS OF FERC-GOVERNED DEMAND RESPONSE

In normatively exploring FERC’s approach to demand response, Jacobs notes the potential uniformity benefit of what she calls FERC’s “bypass” but quickly moves to concerns, including worries that FERC’s favoring of demand response is pushing out energy efficiency (the overall reduction in electricity use, as opposed to shifting use to non-peak times) and preventing Congress from passing needed legislation to clarify authority boundaries. She also observes that FERC is adjusting the boundaries of power without the typical

affect wholesale electricity rates and concluding: “FERC had jurisdiction to issue Order 745 because demand response is not unambiguously a matter of retail regulation under the Federal Power Act, and because the demand response resources subject to the rule directly affect wholesale electricity prices”), *cert. granted in part*, 83 U.S.L.W. 3835 (2015).

38. *See generally id.*

39. *Id.* at 224 (majority opinion) (“Because the Federal Power Act unambiguously restricts FERC from regulating the retail market, we need not reach Chevron step two.”).

checks that would occur through a legislative process and potentially impeding important state experimentation, among other concerns.

These are all legitimate concerns, and Jacobs's proposals—which recognize that bypass will likely continue to occur as a consequence of pressing regulatory concerns and congressional inaction—wisely suggest procedural reform within FERC to address some of these problems. Yet some challenges might not be as bad as they sound. In terms of demand response pushing out energy efficiency, which is a greener practice, this could be easily fixed if FERC expanded the rules to encourage the bidding of both demand response and energy efficiency resources into electricity markets. Indeed, as Jacobs notes, at least one RTO already allows bids from energy efficiency providers.

With respect to the larger, legislative-based concerns, Congress can use FERC's action as an excuse to refuse to enact new legislation clarifying the boundaries of authority, which might not be a bad thing. As long as the courts do not step in and attempt to enforce the false dual federalism line that emerges from readings of the FPA that are not based in reality or on previous, more flexible interpretations of the Act, then states, FERC, RTOs, and private actors within the electricity system can all continue to negotiate the boundaries of power, changing their positions as new technologies and new practices demand different allocations of authority. Indeed, fluid boundaries might be needed in this area even though they can create confusion, encourage fights among different levels of government, and raise the costs of governing. Indeed, as Jacobs observes, while states did not strongly resist FERC's allowance of demand response bidding in RTO markets, they went to battle when FERC raised the stakes of the game by providing that demand response participants in wholesale markets would receive the same rate that generators did—a promise that sent demand response participants flocking to the wholesale side. Yet these types of negotiation, including the use of lawsuits, occur even when a statute has drawn clear lines of authority, as Erin Ryan has noted, and they might be an inevitable aspect of complex issues that require state, regional, and federal governance.⁴⁰

Moreover, although FERC's governing part of the demand response sphere impedes some state experimentation, Jacobs notes that states do not appear to be experimenting much anyway. Rather, the participants in demand response markets are the ones crafting the important experiments, showing how some demand response schemes are legitimate and some are not, suggesting which types of demand response might be more valuable, and providing other useful examples of what an ideal demand response program might look like. If Congress ever feels compelled to step in and draw clearer lines, it will have useful models to work from. And states still have room to

40. See Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 19–21 (2011).

experiment if they wish to. As Jacobs notes, FERC expressly allows states to prohibit retail electricity customers from participating in wholesale markets.

Taken together, these and other concerns could be viewed in a more or less positive light, and there are likely workable solutions for all of them. In the meantime, FERC, states, RTOs, and demand response providers will continue jousting over who should regulate demand response and why, and a healthy solution will hopefully emerge. At times, there might even be cooperation, as states that benefit from cheaper wholesale electricity prices—particularly states that import much of their electricity from out of state—might welcome cheap demand response resources, regardless of whether they are offered in wholesale or retail markets.

IV. CONCLUSION

As Jacobs briefly notes, much of the opposition to FERC's regulation of demand response—regulation that has infused cheaper "generation" options into electricity markets—has come from generators who oppose competition. From a somewhat cynical standpoint, states also might be jealously guarding their demand response resources for themselves, while these resources could be put to their highest valued use in a distant wholesale market where electricity prices are quite high and cheap demand response alternatives would be welcomed. There are legitimate concerns that FERC's grabbing the demand response reins ignores certain state perspectives and, notice and comment procedures aside, might not receive as much public scrutiny as legislation. But FERC's efforts so far seem to be producing a great deal of value. FERC is continuing to open up and diversify wholesale electricity markets, thus creating an environment that could potentially drive down electricity prices. While this has pulled valuable demand response resources from retail markets, from a national perspective this is likely efficient—demand response resources are flowing to markets where they are most needed and most valued. (Alternatively, as Jacobs notes, demand response resources that receive the same price as generators in wholesale markets might be overpaid, and price signals therefore may be inaccurate). But if demand response is truly valuable and in high "demand," then there should be enough to go around, both in retail and wholesale markets. The low-hanging fruit of wholesale demand response will be picked first, but there will still be space for more participants. And while there has been problematic gaming of the demand response market, Jacobs notes that FERC is working to monitor gaming and punish bad actors.

The most pressing threat to effective demand response, and to ever-more-open electricity markets, appears to be the courts, which have recently attempted to force demand response into an antiquated dual federalism box. Because electricity cannot be clearly divided between wholesale and retail sales, this backward movement toward dual federalism is problematic. It fails to recognize the increasingly complex regional electricity markets that

operate between the state and federal sphere, and it limits the opportunities for demand response, energy efficiency, and other products to add ever more diversity, and potential efficiency, to these markets.