COMMENT

FPA PREEMPTION IN THE 21ST CENTURY

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INTRODUCTION

On February 24, the Supreme Court will hear oral argument in *Hughes*

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v. Talen Energy Marketing. The first question that the Court must tackle is whether an effort by the State of Maryland to incentivize the construction of new power plants is field preempted by the Federal Power Act ("FPA")—that is, whether the Maryland law intrudes on an area that is exclusively the federal government's to regulate. The FPA is a quintessential dual-federalist statute. It divides jurisdiction over the electricity sector, generally giving the federal government authority over its interstate aspects, while reserving the remaining aspects for state regulation.[1] Applying a series of Supreme Court cases decided between the 1960s and 1980s, the Fourth Circuit Court of Appeals in *Hughes* invalidated Maryland's regulation after concluding that it intruded on the federal government's exclusive jurisdiction to regulate certain electricity-sector transactions.[2]

This Comment will argue that the preemption standard applied by the Fourth Circuit is ill-suited to the contemporary electricity sector. Over the last twenty-five years, the federal government and several States have fundamentally restructured their electricity-regulation paradigms. These reforms have increased the importance of the federally regulated aspects of the electricity sector, even for the aspects subject to state jurisdiction. Although some diminution in state authority over the electricity sector may be the natural consequence of these reforms, the Court's preemption cases, as applied by the Fourth Circuit, take it too far, potentially impairing the dual-federalist model that lies at the heart of the FPA.

Hughes gives the Court a chance to stem this tide. In particular, the Court should clarify that field preemption—a doctrine that prohibits *any* state regulation in a particular area of the law—applies only when a State targets the core aspects of federal jurisdiction under the FPA, namely the Federal Energy Regulatory Commission's ("FERC") ability to determine whether a wholesale rate is just and reasonable. Conflict preemption—which provides that state laws are preempted only when they interfere with or frustrate the federal regulatory regime—provides a better framework for evaluating the type of law at issue in *Hughes*.

Getting this preemption framework right is critical. First, it implicates the basic dual-federalist model that is the heart of the FPA. Second, a conflict-preemption framework will enable the States to pursue better public policy. As explained further below, the FPA vests the States with the authority to regulate generation facilities (i.e., power plants). Pursuant to

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[1] *See* New York v. FERC, 535 U.S. 1, 6 (2002) (explaining that the FPA "authorized federal regulation of electricity in areas beyond the reach of state power," but also noting that the Act gave the federal government authority to regulate "some areas that previously had been state regulated").

[2] PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467, 476 (4th Cir. 2014).

this authority, States have developed a range of policies to incentivize new electricity generation. These policies address important state interests, such as ensuring the reliable supply of electricity, addressing the environmental effects of electricity generation, and, more generally, adapting to the changing electricity sector. Conflict preemption enables States to pursue these measures effectively, while nevertheless ensuring that they do not interfere with the federal scheme. Finally, greater reliance on conflict preemption would have the counterintuitive effect of *increasing* FERC's leeway to manage effectively the aspects of the electricity sector under its jurisdiction—a result that should produce more efficient regulation of the sector as a whole.

This Comment explains how the Court's FPA preemption jurisprudence can be read to support a less intrusive field-preemption inquiry than that applied by the Fourth Circuit below. To be sure, this Comment is hardly the first to warn of excessive reliance on field preemption. Other scholars, including Jim Rossi in particular, have argued that an overly broad field-preemption regime ill serves the purposes of the FPA.[3] The contribution of this Comment is to marry this concern with the doctrine and the facts presently before the Court, providing it with a path to reach a better outcome in *Hughes*.

The Comment proceeds as follows. Part I discusses how the Court has developed a preemption inquiry to reflect the FPA's dual-federalist model. Part II explains the recent evolution of the electricity sector and the implications for the Court's current preemption jurisprudence. Part III advocates adopting a preemption framework focused primarily on conflict preemption and explains how this proposed shift will better serve the electricity sector. Part IV applies this framework to *Hughes*.

I
FEDERAL PREEMPTION AND THE FPA

This Part explains the principles behind the Court's FPA preemption jurisprudence. It begins with an overview of the Court's preemption case law generally, before explaining how it has applied these principles to the somewhat unusual situation presented by the FPA.

A. The Principles of Preemption

The Constitution's Supremacy Clause provides Congress with the power to preempt state law, which it may do in one of several ways.[4]

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[3] *E.g.*, Jim Rossi, *Clean Energy and the Price Preemption Ceiling*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 243, 265 (2012); Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors,* 91 N.C. L. REV. 1283, 1325 (2013).

[4] Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).

Congress most clearly invokes this power when it enacts a statute that expressly preempts state action.[5] But even in the absence of an express statement, federal law may nevertheless displace state law in two other instances. First, Congress may "occupy the field" by creating "a framework of regulation so pervasive that [it leaves] no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[6] Thus, "[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."[7] Second, even where Congress has not occupied the field, federal law will nevertheless preempt any state law that renders "compliance with both federal and state regulations . . . a physical impossibility,"[8] or that frustrates the federal scheme by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[9]

Although there are similarities between these doctrines—and an "imminent possibility" of conflict may support a finding of field preemption[10]—the doctrines differ in important respects. In particular, where conflict preemption applies, States are free to regulate—even to regulate aggressively—so long as they do not frustrate the federal scheme.

Whether these preemption doctrines apply is, first and foremost, a question of congressional intent.[11] The most reliable indicator of Congress's intent is, of course, "the language of the pre-emption statute and the statutory framework," although courts will also consider a statute's purpose through a "reasoned [examination] of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."[12] As the description of field preemption

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5 *Id.* at 2500–01 ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.").

6 *Id.* at 2501 (internal quotation marks and ellipses omitted).

7 *Id.* at 2502; *see also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.").

8 *Arizona*, 132 S. Ct. at 2501 (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

9 *Id.* at 2501 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The Court has not always been so clear on the distinction between these two categories. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 n.6 (2000) (recognizing that "the categories of preemption are not rigidly distinct" (internal quotation marks omitted)).

10 *See, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 310 (1988).

11 Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (internal quotation marks omitted)).

12 *Id.* at 486; *see also* Wyeth v. Levine, 555 U.S. 555, 566 (2009) (reviewing the history of "federal regulation of drugs and drug labeling" when determining the preemptive effect of federal drug labeling provisions under the Food, Drug, and Cosmetic Act).

suggests, one of the chief considerations in evaluating its application is whether the statute in question so comprehensively regulates an area of the law that it is clear that Congress left no room for state regulation.[13] In conducting this review, the Court will look to the relevant federal scheme to determine whether it leaves a role for state regulation or, instead, forecloses the possibility of any supplemental state action.[14] When it comes to determining conflict preemption, courts will consider the effect of the state law on the effectiveness and administrability of the federal scheme.[15]

The Court is especially reluctant to find preemption where the federal statute addresses an area of traditional state authority. This presumption against preemption follows from the proposition that "the States' coordinate role in government counsels against reading federal laws . . . to restrict the States' sovereign capacity to regulate in areas of traditional state concern."[16] Accordingly, in assessing whether a federal statute occupies a field in which States have traditionally regulated, the Court will decline to apply field preemption unless the federal scheme clearly forecloses any state regulation.[17]

B. Federal Preemption and the FPA

1. The FPA's Division Between State and Federal Authority

The electricity sector is generally divided into three principal components: the generation of electricity, its transmission at high voltage over long distances, and its ultimate distribution and sale to end-use consumers.[18] The basic jurisdictional scheme of the FPA largely maps onto

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13 *See, e.g.*, *Arizona*, 132 S. Ct. at 2502–03 (concluding, in that case, that "Congress intended to preclude States from complementing the federal law, or enforcing additional or auxiliary regulations" (internal quotation marks and brackets omitted)). For a discussion of the factors that the Court considers in determining whether state law is impliedly preempted, see Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1165–76 (1998).

14 *See, e.g.*, Sprietsma v. Mercury Marine, 537 U.S. 51, 68–70 (2002) (examining whether and what role the federal statute preserved for state regulation); Anderson v. Edwards, 514 U.S. 143, 156 (1995) (explaining that a federal law did not occupy the field because it left open the possibility that a State could supplement the federal baseline).

15 *See, e.g.*, Hillman v. Maretta, 133 S. Ct. 1943, 1951–53 (2013) (evaluating whether a state law is conflict preempted).

16 CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2185 (2014) (internal quotation marks omitted); *see Wyeth*, 555 U.S. at 565 ("[T]he historic police powers of the States [generally are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (internal quotation marks omitted)).

17 *See, e.g.*, De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814–16 (1997) (holding that a state law was not field preempted, in part because of the "considerable burden" of overcoming the presumption against preemption).

18 *See* Paul L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. ECON. PERSPS. 119, 121 (1997) (describing the structure of the electricity

these distinctions. Section 201 of the Act gives FERC jurisdiction over wholesale sales of electricity—sales made to an entity that then resells the electricity, usually to the ultimate consumer[19]—and the transmission of electricity in interstate commerce.[20] Thus, the FPA generally vests FERC with jurisdiction over the electricity sold by generators and its subsequent transmission to distribution utilities.

Federal regulation of wholesale sales and transmission of electricity is necessary because those transactions are presumptively in interstate commerce, meaning that state regulation violates the Dormant Commerce Clause.[21] Sections 205 and 206 of the Act establish FERC's core substantive authority. Section 205 empowers FERC to ensure that all wholesale-electricity rates and "all rules and regulations affecting or pertaining to such rates [are] just and reasonable."[22] Section 206, in turn, provides that, if FERC determines that any wholesale rate, rule, or regulation is "unjust, unreasonable, unduly discriminatory or preferential," it shall affirmatively prescribe a just-and-reasonable rate.[23] Thus, FERC generally does not set the wholesale rate; instead, that rate is set by the entities subject to FERC regulation, with FERC stepping in to set a rate only where it has determined that the rate agreed upon by those entities violates the FPA.[24]

The FPA also preserves a significant role for the States, giving them jurisdiction over the aspects of the electricity sector that are not federally regulated. This includes jurisdiction over retail sales—i.e., the ultimate sale of electricity to consumers—and over the "facilities used for the generation of electric energy"[25]—i.e., over the power plants themselves, even though FERC regulates these plants' sales of electricity. In 1935, the year that the

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sector and classifying retailing functions as an element of a utility's broader distribution functions).

19 16 U.S.C. § 824(d) (2012).

20 16 U.S.C. § 824(b)(1) (2012).

21 *See* Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 86 (1927) ("The transmission of electric current from one State to another . . . is interstate commerce."); *see also* FPC v. Fla. Power & Light Co., 404 U.S. 453, 460–63 (1972) (affirming the conclusion that electricity from a particular company was comingled with electricity that traveled in interstate commerce and therefore subject to federal regulation under the FPA).

22 16 U.S.C. § 824d(a) (2012); Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 531 (2008). The comingling basis for federal jurisdiction discussed above, *supra* note 21, does not apply to electricity generated and transmitted in Hawaii, Alaska, and most of Texas. *See* New York v. FERC, 535 U.S. 1, 7 (2002) (explaining that it is only within these States "that electricity is distributed entirely within a single State").

23 16 U.S.C. § 824e(a) (2012).

24 *See Morgan Stanley Capital Grp.*, 554 U.S. at 531–32; *cf.* FERC v. Elec. Power Supply Ass'n, No. 14-840, 2016 WL 280888, at *6 (U.S. Jan. 25, 2016) ("[T]he FPA obligates FERC to oversee all prices for those interstate transactions and all rules and practices affecting such prices.").

25 16 U.S.C. § 824(b)(1) (2012).

FPA was enacted, "most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems," and "States possessed broad authority to regulate [these] utilities."[26] The FPA's reservation of jurisdiction to the States thus encompassed significant authority to regulate utility operations. Today, States engage in a range of actions under this authority. For example, pursuant to their authority over generation, many States engage in "integrated resource planning," a process through which States attempt to identify a comprehensive plan for meeting future electricity demand in a low-cost, reliable manner—an exercise that encompasses considerable planning regarding the development of new generation.[27]

2. Federal Preemption under the FPA

In theory, the FPA's neat division of authority should translate into a simple preemption inquiry. As noted, FERC has jurisdiction over the interstate transmission and sale of electricity and, it might be presumed, the federal occupation of this field preempts any state regulation of the federally regulated field. Thus, one might imagine that a field-preemption inquiry under the FPA requires only that a court determine whether a state law regulates the wholesale rate.

In practice, however, the inquiry is not so simple. Although the FPA's conceptual division between the state and federal spheres is neat, one sovereign's regulation of matters within its sphere frequently has a significant effect on matters subject to the other sovereign's exclusive authority.[28] For example, any state law regulating demand by end-users—such as a law promoting energy efficiency or a tax on electricity consumption—will affect demand for electricity in wholesale markets and, thus, the federally regulated wholesale rate. Similarly, any state law that promotes the construction of new generation facilities may, by increasing the supply of electricity, drive down the wholesale market price. There is thus much that a State can do within its sphere of jurisdiction that will significantly impact the matters within FERC's jurisdiction. A rule that preempted all such state action could eviscerate the authority that the FPA reserves for the States.

At the same time, however, the Supreme Court has recognized that

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26 *New York*, 535 U.S. at 5.

27 16 U.S.C. § 2602(19) (2012); *see* RACHEL WILSON & PAUL PETERSON, SYNAPSE ENERGY ECON., INC., A BRIEF SURVEY OF STATE INTEGRATED RESOURCE PLANNING RULES AND REQUIREMENTS (2011), http://www.cleanskies.org/wp-content/uploads/2011/05/ACSF_IRP-Survey_Final_2011-04-28.pdf (describing integrated resource planning and the States that engage in it).

28 *Cf. Elec. Power Supply Ass'n*, 2016 WL 280888, at *14 (noting that "wholesale and retail markets in electricity . . . are not hermetically sealed from each other").

States can take actions that would appear to be within their general authority, but that, in practice, constitute prohibited regulation of the wholesale rate.[29] Accordingly, to effectuate the FPA's dual-federalist purpose, the preemption inquiry must strike a delicate balance. It must give States room to exercise the powers that the FPA reserves to them—even if that action significantly affects the wholesale rate—while also ensuring that States do not cross the line into *de facto* regulation of matters within FERC's exclusive jurisdiction.

For that reason, the Supreme Court has developed a somewhat unusual field-preemption inquiry for the FPA. As the Court recently observed, the critical question in determining whether a state law is field preempted is whether the "the *target* at which the state law *aims*" is a matter under FERC's exclusive jurisdiction.[30] In *Oneok v. Learjet*, the Court relied on a series of cases involving the FPA and the similarly structured Natural Gas Act ("NGA")[31] to hold that state antitrust statutes are not field preempted even when those statutes are applied to sales of gas that are also subject to FERC regulation.[32] The Court reasoned that the application of these statutes was not field preempted because they regulated "background marketplace conditions" and thus were not "directed at" matters within FERC's exclusive jurisdiction.[33] In reaching that conclusion, the Court rejected an argument advanced by FERC, and adopted by two dissenting Justices, that state laws were preempted wherever they regulated "a matter already subject to regulation by [FERC]."[34] That is, the Court rejected the proposition that regulation by FERC necessarily preempted any coincident regulation by the States.

Thus, a claim of field preemption under the FPA turns not only on the scope of the exclusively federal field, but also on the target of the

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29 As explained further below, the Court has long recognized that state action within its sphere can impermissibly intrude on the federally regulated markets. *See, e.g.*, Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 376–77 (1988) (conflict preemption); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 307–08 (1988) (field preemption); *see also* Pub. Utils. Comm'n of Cal. v. FERC, 900 F.2d 269, 274 n.2 (D.C. Cir. 1990) ("Even where state regulation operates within its own field, it may not intrude indirectly on areas of exclusive federal authority." (internal quotation marks omitted)).

30 Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015).

31 Because the FPA and the NGA share the same basic structure, the Court has "established [a] practice of citing interchangeably decisions interpreting the pertinent sections" of the FPA and NGA. Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981). As recently as 2015, the Court has treated the preemption inquiry under the statutes as being one and the same. *Oneok*, 135 S. Ct. at 1601–02 (discussing FPA preemption case law in a case concerning the NGA).

32 *Oneok*, 135 S. Ct. at 1599–1601 (citing N. Nat. Gas Co. v. State Corp. Comm'n of Kan., 372 U.S. 84, 85–86, 92, 94 & n.1 (1963) and *Schneidewind*, 485 U.S. at 306–10 & n.13).

33 *Id.* at 1599–1602.

34 *Id.* at 1604 (Scalia, J., dissenting).

potentially preempted state statute.[35] Any law that "aims at" or "targets" an area within FERC's exclusive jurisdiction, is prohibited. But a law that is not directed at the federal sphere of jurisdiction will be preempted only where it actually conflicts or interferes with the federal scheme. In theory, this standard should provide States leeway to exercise their authority preserved by the FPA while ensuring that they do not stray into the federal sphere. This approach appeared to have worked reasonably well—at least so long as the electricity sector neatly matched the FPA's jurisdictional divisions.

II
THE EVOLUTION OF THE ELECTRICITY SECTOR

Electricity regulation, however, has undergone a massive transformation since the Court adopted its basic preemption framework in the middle part of the 20th century. In general, the underlying reforms reflected the belief that a utility's natural monopoly—i.e., the set of services that could be more cheaply provided by a single company than through competition—was shrinking (largely due to technological advancements) and that fostering greater competition would reduce electricity prices.[36] Because these reforms maintained significant areas of regulation, they are generally described as a "restructuring" rather than a deregulation of the electricity sector. This Part briefly explains the principal changes, starting at the federal level before turning to the state-level reforms.

A. Federal Reforms

At the federal level, FERC has shifted most of the wholesale sales under its jurisdiction from a model in which the rates are determined based on the generator's cost of service to one in which the rate is set through a competitive market.[37] Beginning in the 1980s, FERC began granting generators permission to sell electricity at rates set through competitive markets or market-like structures, at least where those generators lacked market power.[38] In the early 1990s, aided by congressional legislation that,

35 *See id.* at 1599–1600 (collecting cases).

36 *See* Joskow, *supra* note 18, at 124–26 (describing the origins of electricity restructuring); Joseph T. Kelliher & Maria Farinella, *The Changing Landscape of Federal Energy Law*, 61 ADMIN. L. REV. 611, 616–17 (2009) (describing the role of technology in the changing electricity sector). For a discussion of the theory of natural monopoly, see ALFRED E. KAHN, 2 THE ECONOMICS OF REGULATION 119–23 (1971) ("The critical and—if properly defined—all-embracing characteristic of natural monopoly is an inherent tendency to decreasing unit costs over the entire extent of the market.").

37 New York v. FERC, 535 U.S. 1, 7–10 (2002).

38 Kelliher & Farinella, *supra* note 36, at 642–45.

among other things, made it easier for generators to qualify for market-based rates, the number of generators seeking and securing permission to charge market-based rates surged.[39] By the mid-1990s, FERC concluded that the primary obstacle to further growth of the competitive marketplace was utilities' ability to use their transmission networks to the advantage of their own generation assets, even where third parties could supply lower-cost electricity.[40] FERC sought to remedy this problem through a rule known as "Order 888," which required transmission-owning companies to allow third parties to send electricity over their transmission facilities under terms and conditions no less favorable than the companies that provided their own generation.[41] In effect, Order 888 turned transmission facilities subject to the rule into common carriers that must treat similarly-situated generators alike.

Nevertheless, just three years later, FERC concluded that Order 888 had not gone far enough to remedy undue discrimination against third-party generators.[42] It thus promulgated a follow-on rule that encouraged—but did not require—transmission owners to transfer operational control of their transmission facilities to an independent grid operator, known as a "Regional Transmission Organization" ("RTO").[43] Over the last decade, RTOs have assumed a central role in the wholesale market. There are currently seven RTOs[44] in the United States and more than two-thirds of the electricity consumed in the United States is within these RTOs.[45]

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39 LEONARD S. HYMAN ET AL., AMERICA'S ELECTRIC UTILITIES: PAST, PRESENT AND FUTURE 182 (8th ed. 2005).

40 *See* Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, 60 Fed. Reg. 17,662, 17,663–64 (Apr. 7, 1995) ("The key to competitive bulk power markets is opening up transmission services. Transmission is the vital link between sellers and buyers. To achieve the benefits of robust, competitive bulk power markets, all wholesale buyers and sellers must have equal access to the transmission grid.").

41 Promoting Wholesale Competition Through Open Access Non–Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) [hereinafter *Order 888*]; *see also* John S. Moot, *Whither Order No. 888*, 26 ENERGY L.J. 327, 327 (2005) ("The purpose of [Order 888] was to place competitors on the same footing as vertically integrated utilities in obtaining access to the transmission grid and thereby facilitate increased competition in [wholesale] power markets.").

42 Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361, 1364 (D.C. Cir. 2004) (describing how, "[b]y 1999, FERC had come to a less sanguine view of the curative powers of functional unbundling").

43 Regional Transmission Organizations, 65 Fed. Reg. 810 (Jan 6, 2000). Many RTOs are organized as Independent System Operators. For the sake of simplicity, this Comment refers to these organizations collectively as RTOs.

44 *Regional Transmission Organizations (RTO)/Independent System Operators (ISO)*, FERC, http://www.ferc.gov/industries/electric/indus-act/rto.asp (last visited Jan. 24, 2016).

45 OFFICE OF ENFORCEMENT, FERC, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 40 (Nov. 2015), http://www.ferc.gov/market-oversight/guide/energy-primer.pdf (hereinafter ENERGY PRIMER). This figure includes the RTO covering Texas, which, as noted, is generally not subject to FERC jurisdiction. *Supra* note 22.

The RTOs' role extends far beyond simply managing transmission assets within their territory. RTOs operate sophisticated auction markets for procuring the electricity needed to satisfy the demand within their territories.[46] As a general matter, these markets require generators to submit bids stating the amount of electricity they will supply at specified prices, and the RTO accepts the lowest-cost bids until it has procured sufficient electricity to satisfy all the demand.[47] The cost of this electricity is then apportioned among the load-serving entities that serve customers within the retail sector.[48]

Most RTOs also operate capacity markets, which are, in essence, forward markets in which load serving entities are required to purchase their share of options for the delivery of electricity in the future.[49] Unlike energy markets, which satisfy current demand for electricity, capacity markets are intended to ensure that there will be sufficient supply to satisfy the future demand for electricity.[50] Entities that can provide capacity bid their capacity into a market auction run by an RTO, which then pays a market-clearing price to all capacity based on the need to fulfill projected demand at certain points in the future.[51] The payments—and corresponding price signals—produced by these markets are intended to provide a price signal that would either incentivize the construction of new generation or forestall the otherwise imminent retirement of existing generation.[52] The presence of these markets notwithstanding, a significant amount of energy and capacity is secured through bilateral contracts between load-serving entities and generators.[53]

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46 *See* FERC v. Elec. Power Supply Ass'n, No. 14-840, 2016 WL 280888, at *19 (U.S. Jan. 25, 2016) (describing the role of RTOs in the federal scheme).

47 ENERGY PRIMER, *supra* note 45, at 59–61. In practice, procuring the electricity is quite a bit more complicated, but a full discussion of the technical complexity of these sophisticated markets is well outside the scope of this Comment.

48 *Id.*

49 *Id.* at 61. For a discussion of capacity market and specific examples, see *Capacity Market (RPM)*, PJM, http://learn.pjm.com/three-priorities/buying-and-selling-energy/capacity-markets.aspx (last visited Feb. 4, 2016). Capacity-market payments are not limited to generation and can be made in exchange for resources that decrease demand in addition to those that increase supply. *See* Conn. Dep't of Pub. Util. Control v. FERC, 569 F.3d 477, 482 (D.C. Cir. 2009).

50 Richard B. Miller, Neil H. Butterklee & Margaret Comes, *"Buyer-Side" Mitigation in Organized Capacity Markets: Time for a Change?*, 33 ENERGY L.J. 449, 452 (2012); *see* PJM Interconnection, LLC, 132 FERC ¶ 61,173, 61,870 (2010) (describing how PJM operates as a capacity market).

51 *See Conn. Dep't of Pub. Util. Control*, 569 F.3d at 482 (discussing FERC's authority to regulate the administrative demand curves by which capacity demand is determined).

52 Either way, these markets help ensure that there is enough generation to meet demand. Julia E. Sullivan, *The Intersection of Federally Regulated Power Markets and State Energy and Environmental Goals*, 26 FORDHAM ENVTL. L. REV. 474, 487–88 (2015). For an example, see PJM Interconnection, LLC, 132 FERC ¶ 61,870.

53 *See, e.g.*, PPL EnergyPlus, LLC v. Nazarian, 974 F. Supp. 2d 790, 816 (D. Md. 2013) (describing energy procurement through the use of a "spot market").

B. State Reforms

Many states have engaged in their own reforms to the aspects of the electricity sector under their jurisdiction. For most of the 20th century, the vast majority of electricity consumers within the United States were served by vertically integrated utilities—i.e., utilities that owned generation, transmission, and distribution.[54] Beginning in the mid-1990s, however, several states required their utilities to "unbundle," either by selling their generation assets to a third party or by transferring them to a separately managed affiliate.[55] By the late 2000s, non-utility generators owned more than a third of the generation capacity in the United States, with significantly higher percentages in the States that aggressively pursued restructuring.[56] As a general matter, unbundling was most extensive in States whose transmission infrastructure was part of the newly established RTOs.[57]

State public utility commissions ("PUCs") have historically exercised extensive control over the power plants constructed by their integrated utilities. Because state PUCs could allow utilities to recover the cost of any new power plant through the retail rates under their jurisdiction—thereby *guaranteeing* an opportunity to earn an acceptable rate of return—a PUC could "effectively determine[]" whether and under what circumstances a new power plant would be constructed.[58] States could thus exercise their authority over generation facilities through their authority to set the retail rate.[59]

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54 Severin Borenstein & James Bushnell, *The US Electricity Industry After 20 Years of Restructuring*, 7 ANN. R. ECON. 437, 438 (2015).

55 Jeff Lien, *Electricity Restructuring: What Has Worked, What Has Not, and What is Next* 6–7 (Dep't of Justice Economic Analysis Group, Discussion Paper No. EAG 08-4, 2008), *available at* http://www.justice.gov/sites/default/files/atr/legacy/2008/04/30/232692.pdf.

56 Borenstein & Bushnell, *supra* note 54, at 441–42 & fig.2.

57 *Compare id.* at 441 fig.2 *with id.* at 442 fig.1. Nevertheless, most states continue to rely on the vertically integrated model. *See* SUSAN F. TIERNEY, GREENHOUSE GAS EMISSION REDUCTIONS FROM EXISTING POWER PLANTS: OPTIONS TO ENSURE ELECTRIC SYSTEM RELIABILITY 54 fig.21 (2014). It just so happens that the States with the largest electricity markets in the country have largely unbundled their utilities. *Id.*

58 *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d at 814 (describing Maryland's regulation of new generation facilities prior to the enactment of its unbundling statute); *see also* Steven Ferrey, *Pentagon Preemption: The 5-Sided Loss of State Energy and Power*, 2014 J.L. TECH. & POL'Y 393, 418 (explaining that the "shift from [state] jurisdiction . . . to FERC was engineered entirely by the states themselves").

59 This is not to suggest that new generation was built *only* in response to these incentives. *See* Joskow, *supra* note 18, at 124 (describing new generation built by non-utility generators). But what matters for the purpose of this Comment, is that States had the ability to incentivize new generation, should they so choose and that this incentive was an important component of state regulation of generation facilities. After all, all else equal, a rate of return that is guaranteed through the retail market will always be preferable to taking one's chances in the wholesale market.

Unbundling deprived state PUCs of this authority. Because decisions to invest in new generation are now taken by the independent generators, rather than the regulated utilities subject to state PUC jurisdiction, the prices in the wholesale markets—the only markets in which these independent generators sell their electricity—became the primary determinant of when and where new generation was constructed.[60] In other words, the revenue earned by new generation in unbundled States is now in large part a function of the federally regulated wholesale market rather than state PUC–approved rates, with obvious consequences for the balance between state and federal authority over the construction of new generation.[61] Collectively, these federal and state reforms have cast into doubt some of the clear jurisdictional boundaries at the heart of the FPA.

III
REVISITING FIELD PREEMPTION UNDER THE FPA

The Court should revisit its FPA preemption jurisprudence in light of these changes. As explained above, the wholesale rate now plays multiple roles in the electricity sector. One is as a price for electricity. A second, at least in the case of the capacity price,[62] is to provide a price signal for new generation.[63] The "core objects" of FERC's exclusive jurisdiction—that is, "protect[ing] 'against excessive prices' and ensur[ing] effective transmission of electric power," align much more closely with the first

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60 *See PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d at 815 (discussing how the marketplace—not Maryland's PUC—determines "the need for new generation stations in Maryland"); COMM'N STAFF, FERC, CENTRALIZED CAPACITY MARKET DESIGN ELEMENTS 1 (2013), *available at* https://www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf (explaining how capacity markets filled a need created by the loss of "guarantee[d] . . . cost recovery" for new generation). This is not to suggest that restructured States have *no* authority over the generation mix within their State. States can pursue nonelectricity regulation measures to promote certain forms of generation, such as direct subsidies, tax incentives, or preferred financing arrangements. In addition, States can use their authority over the siting of new generation to influence where and when any new generation is built. *See* Conn. Dep't of Pub. Util. Control v. FERC, 569 F.3d 477, 481 (D.C. Cir. 2009) (discussing steps that States can take to influence the generation mix even in States where in-state generators participate in capacity markets).

61 *See* Carmen L. Gentile, *The* Mobile-Sierra *Rule: Its Illustrious Past and Uncertain Future*, 21 ENERGY L.J. 353, 373 (2000) (explaining how "FERC and state agencies are totally reshaping the electric industry in a manner that is producing a massive shift in regulatory jurisdiction from the states to the FERC").

62 Of course, the wholesale price of electricity (as opposed to capacity) can also be thought of as an incentive to build generation, since high electricity prices should bring new generators into the market, even without capacity-market payments. But the capacity market is certainly a more direct effort to incentivize generation. *See* NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 558 U.S. 165, 168–70 (2010) (noting that this is the purpose of capacity markets).

63 Or secure a commitment to reduce demand. *See Conn. Dep't of Pub. Util. Control*, 569 F.3d at 482.

consideration—i.e., the price of electricity.[64] The second consideration, by contrast, encompasses important state concerns, including whether and where new generation is built as well as what type of generation it is. These are matters that fall within States' core responsibility over generation facilities. The Court should protect these state interests by adopting a preemption framework that is focused on conflict preemption, not field preemption.[65] A greater emphasis on conflict preemption would give States leeway to fulfill their public policy goals, while nevertheless preempting any state law that actually interferes with the federal scheme. As the next section explains, the Court can do so by clarifying that the field that FERC occupies is a narrow one.

A. The Preemption Inquiry Should Focus on Whether the State Regulation Targets FERC's Ability to Approve a Transaction as Just and Reasonable

1. FERC's Field of Exclusive Jurisdiction Is Narrow

The Supreme Court's energy-law jurisprudence supports greater emphasis on conflict preemption. The key to this approach is the recognition that the field that FERC occupies is fairly narrow. As the Supreme Court has explained, "FERC has exclusive authority to determine the reasonableness of wholesale rates."[66] That is, the FPA vests FERC with the sole authority to determine whether a wholesale rate is a just and reasonable price for electricity and to do the same for rates and practices "affecting or pertaining to" the wholesale rate.[67] The Act also provides FERC with authority to set a wholesale rate if it determines that a wholesale rate or practice is not just and reasonable.[68]

That authority, however, is primarily reactive.[69] As the Court has

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64 FERC v. Elec. Power Supply Ass'n, No. 14-840, 2016 WL 280888, at *19 (U.S. Jan. 25, 2016); *see also* New York v. FERC, 535 U.S. 1, 6 (2002) (describing the FPA's purpose as "provid[ing] effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce").

65 This is not to suggest that FERC's regulation oversteps its jurisdictional bounds. FERC's jurisdiction to regulate these incentives, notwithstanding their effect on generation facilities, is well established. *See, e.g.*, N.J. Bd. of Public Utils. v. FERC, 744 F.3d 74, 95–96 (3d Cir. 2014). The point is merely that States should be able to do so too, as long as the state regulation does not interfere with the federal scheme.

66 Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 371 (1988).

67 16 U.S.C. §§ 824(a), 824d(a) (2012); *see NRG Power Mktg.*, 558 U.S. at 167 (explaining how FERC "superintend[s]" the wholesale rate-setting process). As noted, it also vests FERC with authority to review rates to determine whether a rate is unduly preferential. *See* 16 U.S.C. § 824d(b) (2012). For the sake of simplicity, this section will encompass both standards as part of the just-and-reasonable determination.

68 16 U.S.C. § 824e(a) (2012).

69 That is not to say that FERC's authority is only reactive. After all, the Commission can,

explained, FERC's authority "is simply the power to review rates and contracts made in the first instance by [regulated entities] and, if they are determined to be unlawful, to remedy them."[70] In other words, those entities—be they generators, utilities, or RTOs—develop wholesale rates, which FERC then reviews to ensure that they comply with the FPA, setting a rate itself only where it concludes that the rate developed by the these entities violates the FPA.[71] The exclusive authority vested in FERC by the FPA requires only that FERC be able to review the wholesale rate, unencumbered by any similar determination by a State.

This exclusive authority to determine whether a wholesale rate is a just-and-reasonable price for electricity does not necessarily preclude any state regulation that addresses the effect of the wholesale rate more generally. So long as a state regulation does not usurp—in whole or in part—FERC's ability to determine whether the wholesale rate is just and reasonable, there is nothing in the text or structure of the FPA that compels the conclusion that the state regulation is necessarily preempted. Instead, the FPA is perfectly consistent with the conclusion that such a regulation should be preempted only if it actually interferes with FERC's regulatory regime.

Applying the Court's recent decision in *Oneok*, this understanding of FERC's exclusive jurisdiction suggests that a state law should be field preempted only where it "aims at" or "targets" FERC's review of whether a wholesale rate is just and reasonable.[72] This test would not, however, field preempt all state efforts to shape how the wholesale rate affects the aspects of the electricity sector that the FPA reserves for state regulation. In other words, if the state regulation is aimed at an aspect of the wholesale rate that is "firmly on the States' side of that dividing line," it is not field preempted.[73] Thus, a State might seek to supplement the price signal from a wholesale market, it might seek to reduce the volatility of that price signal, or it might find some way to otherwise blunt the impact of the wholesale price on the generation facilities under its jurisdiction. Under this framework, these efforts would not be preempted unless they conflict with the federal scheme.

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and does, initiate rulemakings that proactively address issues under its jurisdiction. *E.g.*, *Order 888*, *supra* note 41; *see also* Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658 (Mar. 24, 2011).

70 United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 341 (1956).

71 *NRG Power Mktg.*, 558 U.S. at 167; Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 531–32 (2008).

72 Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599–1600 (2015); *see also* Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 513–14 (1989).

73 *Oneok*, 135 S. Ct. at 1600 (quoting *Nw. Cent. Pipeline Corp.*, 489 U.S. at 514).

2. *The Supreme Court's Cases Are Consistent with this Narrow Field*

The Court's FPA and NGA jurisprudence supports this understanding of FERC's exclusive jurisdiction. In each of the Court's seminal preemption cases, it has equated FERC's exclusive jurisdiction with the right to determine whether the wholesale rate is just and reasonable. To be sure, the Court has at times also spoken of FERC's exclusive jurisdiction over wholesale rates generally[74]—language that might suggest that any state action aimed at the wholesale rate is field preempted. On careful inspection, however, it is clear that the Court's actual holding in these cases was merely that States may not usurp FERC's right to review the justness and reasonableness of a wholesale rate.[75]

The critical point to understand in all of these cases is that, for much of the history of the FPA, there was little need to review wholesale rates for anything other than whether they amounted to a "just and reasonable" cost for electricity. But after unbundling, as the wholesale rate has assumed increased importance for the matters subject to state jurisdiction—especially the construction of new generation—States now have a greater interest in shaping the impact of the wholesale rate on matters that fall on their side of the FPA's jurisdictional divide. States may thus seek to shape the impact of the wholesale rate on these matters without addressing whether that rate is a just and reasonable price for a wholesale sale of electricity. Nothing in the Court's preemption jurisprudence to date requires the conclusion that these efforts to shape the impact of the wholesale rate fall within FERC's exclusive jurisdiction.

That jurisprudence generally falls into one of two categories. In the first category, the Court has held field preempted state laws that target FERC's ability to review whether a wholesale rate is just and reasonable. The leading case for this proposition is *Schneidewind v. ANR Pipeline Co*., which involved a Michigan statute that required natural gas pipelines to secure approval from the state PUC before issuing long-term securities.[76] *Schneidewind* arose during a period in which FERC assessed the reasonableness of a wholesale rate in large part by reviewing a natural gas pipeline's expenses and capital structure.[77] Thus, these securities were one

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74 *See, e.g.*, Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 956 (1986) ("Nantahala filed a proposed wholesale rate increase with FERC, which has exclusive jurisdiction over interstate wholesale power rates.").

75 *See, e.g.*, *id.* at 966 ("Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable.").

76 485 U.S. 293, 296–97, 308 (1988).

77 *See id.* at 301–02 (discussing how FERC "exercise[s] its authority to determine a 'just and reasonable' rate for the transportation or sale of natural gas subject to its jurisdiction"); *see generally Oneok*, 135 S. Ct. at 1596–97 (discussing FERC's history of wholesale-rate regulations in natural gas markets).

of the critical components for FERC's just-and-reasonable review.

The Court invalidated the Michigan statute, concluding that the State had sought "to ensure that [pipelines] will charge only what Michigan considers to be a 'reasonable rate,'" a determination that was exclusively FERC's to make.[78] In particular, the Court explained that the problem with the Michigan statute was that it gave the State veto power over the pipelines' securities issuances. Critically, by exercising this authority before the pipelines could issue long-term securities, the statute precluded FERC from ever reviewing the securities that Michigan deemed imprudent, thereby preventing FERC from overruling Michigan's decision.[79] It was this usurpation of FERC's exclusive right to evaluate whether the rate was just and reasonable that rendered the Michigan statute field preempted, not merely the fact that it was addressed at the wholesale rate generally.

Many of the Court's other field-preemption cases can be understood similarly. Consider *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, decided the year after *Schneidewind*.[80] In that case, the Court explained that its seminal decision in *Northern Natural Gas Co.* had held a state law field preempted because that law regulated pipelines in "a way as to affect their cost structures."[81] As noted, these cost structures were the basis for FERC's assessment of whether the pipeline's rates were just and reasonable. Thus, as in *Schneidewind*, the effect of the state law was to partially usurp FERC's right to determine whether the wholesale rate was just and reasonable.

In the second category of cases, by contrast, the Court has generally applied a conflict-preemption framework to state laws that address the impact of the wholesale rate on matters subject to state jurisdiction. The leading case for this proposition is *Mississippi Power & Light*—which the Court recently explained is "best read as a conflict pre-emption case, not a field pre-emption case."[82] In that case, FERC allocated the electricity from a nuclear power plant in different shares to a series of different utilities, in the process determining that these shares were a just and reasonable allocation of the cost of the nuclear plant.[83] When the local utility, Mississippi Power and Light ("MP&L"), sought a rate increase to cover

78 485 U.S. at 308.

79 *See Oneok*, 135 S. Ct. at 1600 (explaining that the holding in *Schneidewind* was based on the conclusion that the Michigan statute was designed to "ensur[e] lower wholesale rates").

80 489 U.S. 493 (1989).

81 *Id.* at 513–14 (citing N. Nat. Gas Co. v. State Corp. Comm'n of Kan., 372 U.S. 84, 92 (1963)).

82 *Oneok*, 135 S. Ct. at 1601. To be sure, the decision can be read to suggest that the law at issue in *Mississippi Power & Light* could also have been field preempted. *Oneok*, however, provides little explanation of why that would be the case. The better reading of *Mississippi Power & Light*, especially in view of *Oneok*, is as a conflict preemption holding.

83 Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 360–63, 373–74 (1988).

this cost, the Mississippi PUC asserted the right to review the appropriateness of the cost of electricity allocated to MP&L as part of its authority over retail rates.[84]

The Supreme Court concluded that the FPA preempted Mississippi's prudence review. Observing that a "state agency's 'efforts to regulate commerce must fall when they conflict with or interfere with federal authority,'" the Court held that a state could not use its retail-ratemaking authority in a way that would deny effect to FERC's determination that a rate was just and reasonable.[85] Specifically, it held that a state could not use its authority over the retail rate to preclude a utility from recovering a wholesale cost that FERC determined was just and reasonable.[86] In reaching that conclusion, the Court relied heavily on its similar decision in *Nantahala Power & Light Co. v. Thornburg*, another case involving FERC's allocation of the cost of electricity between distribution utilities.[87] As in *Mississippi Power & Light*, *Nantahala* held that a state could not use its retail-ratemaking authority to prevent recovery of a FERC-approved rate because to do so would "conflict[] with FERC's orders."[88]

These two categories of cases can be reconciled if FERC's exclusive jurisdiction extends only to the review of whether a wholesale rate is just and reasonable, rather than to all aspects of the wholesale rate more generally. In *Schneidewind*, the Court concluded that the State aimed at FERC's exclusive jurisdiction because it had asserted the right to review whether the inputs to the wholesale rate were just and reasonable, thereby usurping FERC's role. But in *Mississippi Power & Light* and *Nantahala*, the State targeted the effect of the FERC-approved rate on the retail rate, not FERC's ability to conduct its just-and-reasonable review in the first place.[89] Accordingly, reading these cases together suggests that when a

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84 *Id.* at 365–66.

85 *Id.* at 377 (quoting Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318–19 (1981)).

86 *Id.* at 373 ("Once FERC sets . . . a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable.").

87 476 U.S. 953 (1986).

88 *Id.* at 970–73.

89 *Nantahala* is often cited for the proposition that FERC's exclusive jurisdiction cannot depend on "a case-by-case analysis of the impact of state regulation upon the national interest," Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1607 (2015) (Scalia, J., dissenting) (quoting *Nantahala*, 476 U.S. at 966), a phrase that might suggest that conflict preemption is incapable of policing the FPA's jurisdictional divide. But that concern about case-by-case analysis emerged in an opinion addressing the *applicability* of the FPA, not its preemptive effect. Specifically, the Court held that FERC's jurisdiction did not depend on a technical assessment of whether the transaction in question affected interstate commerce, but instead turned only on whether the sale in question met the FPA's definition of wholesale sale. *See* Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 207, 215–16 (1964).

But the question of whether the FPA applies—meaning that FERC, not the State, has exclusive jurisdiction to evaluate whether a rate is just and reasonable—is distinct from the

state exercises its electricity-sector jurisdiction in a way that does not target FERC's review of the wholesale rate, then the state action is not field preempted. Instead, that state action is preempted only if it conflicts with the federal scheme.

Although *Oneok* does not speak directly to this framework, the Court's holding in that case is consistent with this understanding. As noted, *Oneok* considered whether state antitrust laws could be applied to sales of natural gas that were also subject to FERC regulation. The Court held that the FPA did not preempt the application of these laws to FERC-jurisdictional entities because the laws addressed "background marketplace conditions" and targeted "practices affecting *retail* rates," which are "firmly on the States' side of [the NGA's] dividing line."[90] In addition, Court also rested its conclusion on the basis that the state antitrust laws were not aimed "*directly at* interstate purchasers and wholesales for resale."[91]

Oneok thus appears to provide two similar-but-distinct bases for its holding. First, the decision observed that laws that do not directly "target" entities subject to FERC jurisdiction are not field preempted.[92] Second, it also suggested that state laws that target matters on the States' side of the FPA's jurisdictional divide are not field preempted, even if those laws also apply to factors that affect the wholesale rate.[93]

Although both interpretations supported the outcome in *Oneok*, that would not necessarily be the case for state laws that regulate the electricity sector rather than "background marketplace conditions." For example, laws that address generation facilities are, by definition, aimed at entities that are also subject to FERC jurisdiction since those generators sell their electricity in the wholesale market. Accordingly, the better understanding of *Oneok*'s application to state electricity-sector regulation is that the FPA does not field preempt state laws "directed at practices affecting [matters that] are 'firmly on States' side of [the FPA's] dividing line,'" even if those practices are also subject to FERC regulation.[94]

This interpretation of *Oneok* suggests that FERC's exclusive jurisdiction cannot extend to the impact of the wholesale rate on the matters that the FPA reserves for the States. After all, in shaping the impact of the

question of whether States can consider the impact of that rate on the matters under their jurisdiction. In other words, the fact that FERC's jurisdiction does not turn on a technical assessment of whether a sale affects interstate commerce in no way suggests that the FPA necessarily prohibits a case-by-case determination of whether a state law conflicts with the federal scheme.

90 135 S. Ct. at 1600–01 (internal quotation marks omitted).

91 *Id.* at 1600.

92 *Id.* at 1599–1600.

93 *Id.* at 1600.

94 *Id.*

wholesale rate, the state regulation is directed at matters that fall firmly on the States' side of the dividing line. Accordingly, a fair reading of *Oneok* is consistent with the narrow conception of FERC's exclusive jurisdiction outlined in this Comment.

B. A Conflict-Preemption Framework Better Suits the Purposes and Policies Underlying the FPA

Not only is this interpretation of FERC's exclusive jurisdiction consistent with the Supreme Court's case law, it is also, for several reasons, a better approach to furthering the purposes and policies that underlie the FPA.

First, a conflict-preemption regime better suits the core principles of the Court's preemption jurisprudence. As an initial matter, it is more consistent with the "ultimate touchstone" of preemption jurisprudence: the congressional purpose underlying the FPA.[95] The Court has described that purpose as "provid[ing] effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce,"[96] while nevertheless preserving for the States the authority to regulate the remainder of the electricity sector, including the "facilities used for the generation of electric energy."[97] A conflict-preemption framework does just that.[98] It gives States leeway to regulate the incentives facing generation facilities, while nevertheless invalidating state laws that conflict with the federal regulation of interstate sales and transmission of electricity.[99] In addition, as noted, just last month the Court reiterated that

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95 Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

96 New York v. FERC, 535 U.S. 1, 6 (2002) (quoting Gulf States Utils. Co. v. FPC, 411 U.S. 747, 758 (1973)).

97 16 U.S.C. § 824(b)(1) (2012).

98 This approach works well in other areas of the law in which the federal government has exclusive jurisdiction to apply a standard that happens to affect state interests. Consider the case of intellectual property protections. The Constitution vests the federal government with exclusive jurisdiction to issue patents. U.S. CONST. art. I, § 8, cl. 8. Congress has since codified various requirements for an idea to be patentable, including novelty, nonobviousness, and utility. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146–50 (1989). A logical extension of this principle is that States cannot issue essentially "patent-like protection[s]" under state law. *Id.* at 156; *see also* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231–32 (1964). Nevertheless, notwithstanding the exclusively federal character of the patent-worthiness determination, the Supreme Court has made clear that state laws protecting intellectual property are to be evaluated for conflict preemption. *E.g., Bonito Boats*, 489 U.S. at 159–60, 168.

99 Where a State participates in a multistate RTO, the incidental effects of this type of state action will not necessarily be limited to the particular State in question. For example, a state policy that causes a significant increase in the amount of generation within that State could, by increasing the total supply of generation within an RTO, lead to a decrease in the price paid to generation in other States. As noted, however, this is true of any state policy affecting the generation mix in a multistate RTO and any such effects would be considered as part of a conflict preemption argument.

the FPA's "core object[]" is to "protect 'against excessive prices' and ensure effective transmission of electric power," neither of which encompasses the impacts of those prices on the matters reserved for state regulation.[100]

Conflict preemption is also more consistent with another bedrock principle of preemption: the presumption against federal preemption in areas of traditional state authority.[101] Although it is true that the federal government has long regulated the wholesale rate,[102] the same cannot be said for the economic incentives favoring new generation, which have been subject to state regulation even long after the enactment of the FPA.[103] A conflict-preemption approach preserves this role for state regulation, unless it actually conflicts with the federal scheme.

Second, a conflict-preemption approach would have the highly desirable effect of shifting review of state regulation of the electricity sector from the federal courts to FERC—the agency with expertise and experience in the electricity sector. Conflict preemption may thus provide for more "effective federal regulation" of the electricity sector.[104] Consider the following. If state electricity-sector laws are evaluated under a conflict-preemption framework, the parties that benefit from those laws will have a strong incentive to seek FERC review of the resulting rates and practices under Section 205 of the FPA. After all, if FERC determines that the rates or practices are just and reasonable, it seems most unlikely that a court would subsequently determine that they conflict with the federal scheme. By contrast, even where a party opposed to a state law brings a preemption challenge in court and loses, it may still seek a determination from FERC that the rate or practice is not just and reasonable. Accordingly, supporters of the state law have a strong incentive to seek an authoritative determination from FERC as early as possible, rather than waiting and giving opponents of the law two chances to have it invalidated. The consequence would be that state laws would be more likely to stand or fall based on FERC's assessment of their effect on the electricity sector rather than a court's interpretation of the FPA's jurisdictional divide.

And even where FERC does not have a chance to issue a Section 205 ruling, courts would likely afford significant weight—if not formal deference—to a position from FERC that explains in detail why the state

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100 FERC v. Elec. Power Supply Ass'n, No. 14-840, 2016 WL 280888, at *19 (U.S. Jan. 25, 2016).

101 *E.g.*, CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2185 (2014).

102 PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467, 477 (4th Cir. 2014).

103 *See supra* note 58 and accompanying text.

104 New York v. FERC, 535 U.S. 1, 6 (2002) (quoting Gulf States Utils. Co. v. FPC, 411 U.S. 747, 758 (1973)).

action interferes with the federal scheme.[105] *Oneok* raised the possibility of deference, but did not resolve the issue because the Court concluded that there was no FERC determination of preemption.[106] What, if any, deference an agency should receive is outside the scope of this Comment.[107] It is sufficient for present purposes to note that, even under the less deferential *Skidmore* framework—which defers to agency interpretations based on their "power to persuade"[108]—it is hard to believe that courts would not readily defer to a well-reasoned explanation from FERC of why this type of state law conflicts with the federal scheme.[109] In short, far from hampering FERC's ability to regulate wholesale rates, a greater emphasis on conflict preemption would empower FERC to exercise its expert judgment rather than leaving these issues to the courts.

Finally, a greater emphasis on conflict preemption may also promote better policy. As noted, in States that have unbundled their utilities, the price signals from the wholesale market have displaced retail-rate cost recovery as the critical factor affecting the development of new generation. A preemption framework that allows States to shape the price signals created by wholesale markets would provide the States with greater freedom to pursue their public policy goals.[110] As explained further below, this is exactly what happened in *Hughes*. Whether Maryland acted wisely

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105 *Cf.* Albany Eng'g Corp. v. FERC, 548 F.3d 1071, 1074–75 (D.C. Cir. 2008) (discussing the idea of affording *Chevron* deference to agency findings of preemption).

106 Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1602–03 (2015).

107 And one that other scholars have examined in depth. *See, e.g.*, Gregory M. Dickinson, *Calibrating Chevron for Preemption*, 63 ADMIN. L. REV. 667 (2011); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008).

108 United States v. Mead Corp., 533 U.S. 218, 228 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

109 *Cf.* Aera Energy LLC v. FERC, 789 F.3d 184, 190 (D.C. Cir. 2015) (noting that courts are "particularly deferential" to FERC on the "highly technical" question of ratemaking) (quoting E. Ky. Coop. Inc., v. FERC, 489 F.3d 1299, 1306 (D.C. Cir. 2007)); Wash. Gas Light Co. v. FERC, 532 F.3d 928, 930 (D.C. Cir. 2008) (observing that courts will "afford FERC an extreme degree of deference" when reviewing matters within its technical expertise (internal quotation marks omitted)).

110 To the extent that this Comment addresses individual state policies, it focuses primarily on the Maryland regulation currently before the Court. Nevertheless, the outcome of this case—whichever way it is decided—will have a significant impact on pending litigation involving other state programs to incentivize renewable generation. For example, shortly before publication, a FERC order cleared the way for a suit that challenged on preemption grounds one of Connecticut's principal means of incentivizing renewable generation. *See* Allco Fin. Ltd. v. Klee, 805 F.3d 89, 96–98 (2d Cir. 2015) (holding that Allco must exhaust administrative remedies before bringing its preemption claim); Allco Renewable Energy Ltd., 154 FERC ¶ 61,007 (Jan. 8, 2016) (declining to intervene, a result that likely means that Allco has exhausted its administrative remedies). Suffice it to say, the Court's decision in *Hughes* define the landscape for the many FPA preemption challenges that could be filed in the next several years.

in pursuing this particular policy is well beyond the scope of this Comment to evaluate. What is important, though, is that Maryland determined that this approach represented the best available means of addressing the perceived reliability concerns facing the State. Federal preemption jurisprudence should give States the latitude to make these choices, thereby protecting their role as policy innovators and laboratories of democracy.[111]

Perhaps the best argument against a conflict-preemption framework is that the current situation is a "problem" of the States' own making. As noted, the States that elected to unbundle their utilities did so on their own accord, largely on the theory that doing so could help reduce the cost of electricity for their citizens.[112] Why, one might argue, should the Court worry about the loss of state authority when it was the States themselves that engineered this outcome, especially when a State that desired greater control over generation could always revert to the old bundled model?

As an initial matter, it is not clear that States understood that they would be giving up the ability to shape the impact of the wholesale rate, even as they knowingly allowed it to take on increased importance.[113] After all, in many cases the restructuring statute expressly preserved PUC authority over aspects of the electricity sector that would be highly affected by the wholesale rate. In Maryland, for example, the relevant statute required the PUC to "assess the amount of electricity generated in Maryland as well as the amount of electricity imported from other states in order to determine whether a sufficient supply of electricity is available to customers in the State"[114]—precisely what that the Maryland PUC did in this case.

In any event, even after unbundling, nobody questions that States retain authority to directly influence the generation mix through policies such as direct subsidies and renewable portfolio standards—both of which may significantly affect the wholesale rate.[115] Shaping the impact of the

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111 *See* Rossi & Hutton, *supra* note 3, at 1333–34 (discussing how "states and other subnational authorities" have served as laboratories of democracy in the area of "energy regulation, particularly in addressing climate change and promoting clean energy").

112 *See supra* notes 36, 52–57 and accompanying text.

113 Indeed, PJM did not have a capacity market when Maryland enacted its unbundling statute in 1999. Joseph Bowring, *Capacity Markets in PJM*, 2 ECON. OF ENERGY & ENVTL. POL'Y 47, 47 (2013). *See also* Electric Customer Choice and Competition Act of 1999, MD. CODE ANN., PUB. UTIL. COS. § 7-505 (2010); PJM Interconnection, LLC, 115 FERC ¶ 61,079, 61,237 (Apr. 20, 2006). PJM's current capacity market model, with its requirements of long-term commitments, did not emerge until several years later. Bowring, *supra*, at 48–49; *see* PJM Interconnection, LLC, 117 FERC ¶ 61,331 (Dec. 22, 2006) (approving the current capacity market model).

114 MD. CODE ANN., PUB. UTIL. COS. § 7-505(e)(1) (2010).

115 *Cf.* PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467, 478 (4th Cir. 2014) (noting that the decision does not address "direct subsidies or tax rebates[] that may or may not differ in important ways from the Maryland initiative"); *see also* PPL Energyplus, LLC v. Solomon, 766

wholesale rate is just another way of achieving the same purpose. There is no compelling reason to deprive the States of this tool, at least provided that they do not exercise it in a manner that interferes with the federal scheme. This is exactly the result that an approach based on conflict preemption would provide.

IV
THE ORDER IN *HUGHES* SHOULD NOT BE FIELD PREEMPTED

This Part applies the theory developed above to *Hughes*. As the heading suggests, it concludes that Maryland's program should not be field preempted because it does not target FERC's ability to determine whether the wholesale rate is just and reasonable. The section does not, however, address whether the rule is conflict preempted because the relevant considerations have not been developed in this Comment.

A. The Contract for Differences

As noted, the case involves an effort by the Maryland PUC to address a perceived reliability concern by incentivizing the construction of new generation within certain parts of the State.[116] As an incentive to build new generation, Maryland issued a request for proposals in which it offered to provide generators with a "contract for differences," which effectively guaranteed that the generator would ultimately receive a fixed rate for electricity and capacity sold into the markets operated by the Pennsylvania-New Jersey-Maryland ("PJM") RTO. The contract worked as follows. The generator was required to bid its output into the federally regulated markets for electricity and capacity.[117] If the market-clearing price received by the generator was below this guaranteed price, the State would make up the difference through a surcharge on ratepayers. If, on the other hand, the market-clearing price exceeded this guaranteed level, the generator would rebate the difference.[118] Either way, the generator would receive the guaranteed price.

B. The Contract Does Not Target FERC's Ability to Review the Wholesale Rate

Applying the field-preemption standard developed in this Comment, the Maryland order would fall outside FERC's exclusive jurisdiction. That

F.3d 241, 254–55 (3d Cir. 2014) (discussing limiting principles for the FPA's preemption of state authority over generation facilities).

116 The generation could also be located within the District of Columbia, which is part of the same "reliability zone." *See PPL EnergyPlus, LLC v. Nazarian,* 753 F.3d at 473.

117 PPL EnergyPlus LLC v. Nazarian, 974 F. Supp. 2d 790, 821 (D. Md. 2013).

118 *Id.* at 821–22.

is because the contract for differences does not target FERC's ability to determine whether it is just and reasonable, either as a wholesale rate or as a practice affecting wholesale rates.[119] FERC remains free to review whether the contract is just and reasonable, unencumbered by a similar judgment by the State.

That is a stark contrast to *Schneidewind* and *Northern Natural*, the court's leading field-preemption cases. In these cases, the States directly regulated the inputs FERC considered when making its just-and-reasonable determination, thereby effectively passing judgment on the reasonableness of the rate before FERC and, thus, usurping FERC's ability to do so itself.[120] Unlike those cases, the Maryland contract does not aim at or target FERC's ability to conduct its just-and-reasonable determination. Thus, under *Oneok*, the Maryland contract should not be field preempted because it does not aim at FERC's sphere of exclusive jurisdiction.

Instead, this case more closely parallels the facts of *Mississippi Power & Light*—the Court's leading conflict-preemption case. In that situation, the State exercised its authority over retail rates but, the Court concluded, in a manner that effectively disallowed a FERC-approved rate, on the grounds that the relevant costs were not prudently incurred.[121] Specifically, the Court held that the state action was conflict preempted because it interfered with federal regulation by denying recovery for a rate that FERC had determined to be just and reasonable.[122] But, importantly, Mississippi's action did not intrude on FERC's ability to conduct that just-and-reasonable determination in the first place. The Maryland law is similar. Maryland has targeted a matter under its jurisdiction, albeit in a manner that is closely tied to the wholesale rate, but has not usurped FERC's right to determine whether the rate was just and reasonable.

Accordingly, the Court should apply a conflict-preemption framework and decide the case by determining whether the contract actually conflicts with or frustrates the federal scheme that FERC has established under the FPA.

Because a determination of conflict preemption depends on an assessment of the actual impact of the contract for differences, resolving

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119 Indeed, the State of Maryland conceded that the contract for differences is, in its entirety, subject to FERC review under Section 205 of the FPA. Brief for Petitioners at 2–3, 5, Hughes v. PPL EnergyPlus, LLC, No. 14-614 (U.S. Dec. 8, 2015), 2015 WL 8290212.

120 Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 308 (1988) (explaining that the Michigan law was to ensure that pipelines could charge only "what Michigan considers to be a 'reasonable rate'"); N. Nat. Gas Co. v. State Corp. Comm'n of Kan., 372 U.S. 84, 92 (1963) (explaining that one of the bases for holding a state law field preempted was the concern that it "could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers").

121 Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 373–74 (1988).

122 *Id*.

this question is well outside the scope of this Comment. Indeed, the district court itself did not reach the question. Although that court conducted extensive fact-finding, its discussion of the contract's impact on the wholesale market was relatively limited. Given this, one option for the Court would be to vacate the Fourth Circuit's field-preemption holding and remand to the district court to conduct any additional fact-finding needed to resolve the conflict-preemption question. Nevertheless, whether the Court elects to remand the case or decide the conflict-preemption inquiry itself on the facts found by the district court, the question of actual conflict should determine whether the contract is preempted.

CONCLUSION

The electricity sector has been transformed since the Court's seminal energy-law preemption decisions. In particular, the federally regulated markets have assumed increased importance, even for aspects of the electricity sector that the FPA preserves for state jurisdiction. This Comment urges the Court to adopt a preemption standard that prioritizes conflict preemption over field preemption by recognizing that field preemption applies only where a state has usurped FERC's exclusive right to determine whether a wholesale rate is just and reasonable. That inquiry is consistent with the FPA's jurisdictional divide as well as the Supreme Court's seminal energy-law jurisprudence. In addition, it will also promote better public policy: It will shift the evaluation of these state efforts from the courts to FERC, the agency with the expertise to resolve these disputes effectively. Moreover, by giving states leeway to shape the economic variables that affect their public policy goals, a conflict-preemption approach may enable more effective regulation of the factors that are critical to the aspects of the electricity sector under state jurisdiction. As applied to *Hughes*, this standard would lead to the conclusion that the FPA does not field preempt Maryland's efforts, meaning that the preemption question should ultimately turn on the actual effect of those efforts on the federal regulation of the wholesale market.