The constitutionalism of Electricity Restructuring: A Case Study in Statutory Reinterpretation

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1. Introduction

The U.S. electricity sector is among the largest and most complex industries anywhere in the world. In 2011, the sector generated roughly 3,879 billion kilowatt hours of electricity,[1] about twenty percent of global electricity consumption.[2] The development of the electricity sector has been one of the most important economic stories of the last hundred years. For the last one hundred years, electricity consumption has grown in more or less lockstep fashion with U.S. economy.[3] Today the U.S. electricity sector is valued at over three hundred billion dollars.[4]

It has also become increasingly complex. In the early 20th Century, power plants served consumers within its neighborhood. In the early 21st Century, power plant can effectively serve consumers hundreds, if not thousands, of miles away.[5] Electricity is also produced from a vast range of resources.[6] Generation facilities are owned and operated by a varied set of private companies as well as federal, state, and local governments.[7] Needless to say, any impact on the country's electricity generation industry has the potential to affect economic significantly the country's prospects for growth and prosperity.[8]

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[1] Annual Energy Outlook: Electricity Generation, U.S. ENERGY INFO. ADMIN. (Jan. 23, 2012), http://205.254.135.7/forecasts/aeo/er/early_elecgen.cfm.
[2] *Compare id. with* UNITED STATES ENERGY INFO. ADMIN., INTERNATIONAL ENERGY OUTLOOK 2011, tbl.11, *available at* http://www.eia.gov/forecasts/ieo/table11.cfm (listing global electricity generation).
[3] JOSEPH P. TOMAIN & RICHARD D. CUDAHY, ENERGY LAW IN NUTSHELL 261, fig. 3 (2004)
[4] *Id.* at 257.
[5] BOSSELMAN ET AL, ENERGY, ECONOMICS, AND THE ENVIRONMENT 581-82 (2010)
[6] *Electricity Net Generation: Total (All Sectors),* U.S. ENERGY INFO. ADMIN (Apr. 2012), *available at* http://205.254.135.7/totalenergy/data/monthly/pdf/sec7_5.pdf.
[7] TOMAIN & CUDAHY, *supra* note 3, at 260.
[8] For example, in 2010, the U.S. Energy Information Administration, part of the Department of Energy, estimated that a modest cap and trade proposal that increased the cost of electricity could reduce GDP growth by 450 million over a twenty-year period. *See Climate Bill Would Reduce U.S. GDP by $452 Billion, Energy Department Says*, BLOOMBERG (July 16, 2010), http://www.bloomberg.com/news/2010-07-16/climate-bill-would-reduce-u-s-gdp-by-452-billion-energy-department-says.html.

Since 1935, shortly after the Supreme Court held that state regulation of interstate electricity transactions violated the Dormant Commerce Clause of the U.S. Constitution,[9] the federal government has been the primary regulator of wholesale electricity generation. The Federal Power Act (FPA), which was passed to remedy the regulatory "gap" created by the Supreme Court's holding, has received significant amendments in 1978, 1992 and 2005. Nonetheless, the basic crux of the Act, a requirement that federal regulators ensure "just and reasonable" rates and prevent "undue discrimination" or "undue preference,"[10] has remained relatively unchanged since 1935. Yet the regulatory structures created to enforce those obligations would be unrecognizable to one of those early regulators. Indeed, federal electric utility regulation has evolved from a classic New Deal model based on "the cost of service" to a market-based regime premised on vigorous competition. Throughout the first fifty years of the FPA's history, electricity generators filed tariffs with government technocrats who, at the request of an affected party, could review the generator's cost to produce the electricity to determine whether the rates in the tariff were "just and reasonable." Today, the rate of return on most sales of electricity is determined by market competition. Rather than scrutinizing a utility's books, regulators ensure that rates are just and reasonable by maintaining a healthy market.

This "revolution" in electricity regulation occurred during a twenty-year period between 1980 and 2000. Surprisingly, given the scope and significance of the reforms,

[9] Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927). *See infra* notes 30-31 and accompanying text.

[10] Although the FPA empowers FERC to remedy both undue discrimination and undue preference, during the period covered by this paper the Commission relied primarily on its authority to remedy undue discrimination. Throughout the paper I refer primarily to undue discrimination, but also note when the Commission relied on its authority to remedy both undue discrimination and undue preference.

the changes were initiated largely through rulemaking and adjudication by the Federal Energy Regulatory Commission (FERC or "the Commission"), rather than congressional legislation. Although Congress ratified the Commission's changes to the regulatory structure in both 1992 and 2005, Congress did not play a leading role in restructuring[11] the electricity industry. Instead, the changes were the result of FERC's reinterpretation of what was permitted and required by the basic standards in the 1935 version of the FPA — "just and reasonable" and "undue discrimination" or "undue preference."

Yet, despite the scope and significance of FERC's reinterpretation of the FPA, no scholar has examined restructuring as a case study in statutory interpretation. The time is ripe to do so. Recent work on statutory interpretation by administrative agencies provides a valuable paradigm for understanding FERC's role in restructuring. Restructuring reflects many characteristics of what Professors William N. Eskridge and John Ferejohn have termed "Administrative constitutionalism."[12] Eskridge and Ferejohn define Administrative constitutionalism as the process by which agencies consider a statute's purpose, the Constitution's requirements, and "public norms and needs" to interpret (or reinterpret) the agency's obligations and authority under the statute.[13] It is the process by which agencies use their implementation of a statute to reflect fundamental normative commitments. Prominent academics have begun applying this framework to diverse

[11] FERC did not deregulate the electricity sector. Instead it "restructured" the role of regulation within sector. This term has come to encompass the reforms discussed in this paper and I will follow that convention. *See* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 Wis. L. Rev. 763, 781 n.70 (1994).
[12] WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 31-32 (2010). The authors consciously do not capitalize the c to distinguish this process from pure interpretation of the Constitution of the type engaged in by the courts. Lower case c constitutionalism considers public norms as a quasi-constitutional consideration when issuing regulations to implement the normative contained in statutes. *Id.* at 32-33.
[13] *Id.* at 29-74.

examples of government regulation.[14] This trend is a laudable approach for understanding government regulation and why agencies act the way they do. In this paper, I argue that FERC's reinterpretation of the FPA is best understood as another example of this phenomenon.

At it its heart, restructuring was a process by which FERC considered the basic purpose of the FPA and its amendments and then refashioned the regulatory paradigm to meet changed circumstances. Why was this change necessary? Two reasons. First, the facts on the ground had changed. The electricity sector was a different industry by 1980 than it was in 1935. It was more complex, both technically and economically. And the 1970s brought a sharp increase in the cost of electricity that created an impetus to react to those changes. But changed circumstances are an incomplete explanation. Although the industry had changed and encountered rising prices by the early 1970s, restructuring did not begin for another decade. The second reason was that America's economic consensus changed as well. Congress, industry, and the public at large no longer viewed strict command and control regulation as welfare enhancing. Instead, in almost all regulated industries, Congress and the executive agencies were busy replacing traditional modes of regulation with market competition.

Unlike many of the examples of Administrative constitution considered by Eskridge and Ferejohn, electricity restructuring was primarily about statutes—the Constitution played an insignificant role.[15] Restructuring thus bears several similarities to

[14] *E.g.* Sophia Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, VA. L. REV 799 (2010).
[15] Indeed the Constitution functioned primarily as the force that, through the Dormant Commerce Clause, created the need for federal regulation in the first place. *See infra* notes 24-31 and accompanying text.

what Eskridge has termed "dynamic statutory interpretation,"[16] a process by which interpreters of a statute, especially agencies, update their interpretation of a statute in way that may not reflect the original consensus when the statute was enacted. Although this phenomenon is often associated with statutory interpretation by courts, the example of electricity restructuring illustrates how it is often the initial interpreter of the statute—long before it reaches the judiciary—that matters most. Together the principles of Administrative constitutionalism and DSI provide the framework needed for understanding restructuring as a case study in statutory interpretation.

Although Eskridge and Ferejohn approve of Administrative constitutionalism and dynamic statutory interpretation, they recognize that both phenomena can raise concerns about democratic legitimacy.[17] Federal courts are composed of unelected judges and agency decisionmaking is separated and, especially in the case of a Commission, insulated from Congress, the branch of government that enjoys the most democratic legitimacy. Electricity restructuring would appear to raise some of the most significant legitimacy concerns of any example of Administrative constitutionalism or dynamic interpreation. First, FERC is an independent commission whose heads are removable only "for cause." [18] They are less politically accountable than a politicized agency like the Environmental Protection Administration. Second, unlike many of the examples considered by Eskridge and Ferejohn, FERC was not implementing a new statute.[19] Instead FERC revolutionized its regulatory paradigm to suit a new economic consensus and contemporary theories of government. Third, in many cases, the Commission

[16] William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION 5-7 (1994).
[17] *See, e.g., id.* at 6.
[18] 42 U.S.C. § 7171 (2006).
[19] *See* ESKRIDGE & FEREJOHN, *supra* note 13, at 29-74 (discussing the Equal Employment Opportunity Commission. *But see id.* at 119-64 (discussing the "common law" federal antitrust statutes).

attempted, or arguably attempted, to enact by regulation policies that Congress rejected—albeit long after Congress reached that decision and a time when circumstances had changed dramatically.

Despite these concerns, this Article argues that FERC's role in restructuring was a politically legitimate example of Administrative constitutionalism. On the one hand, the Commission remained within two significant limits on its authority. First, it did not reach beyond the substantive authority provided by the FPA. The FPA is a broad New Deal statute that articulates a regulatory ethos rather than a comprehensive regime.[20] Standards like "just and reasonable," "undue discrimination," and "undue preference" endowed the Commission with enormous flexibility to implement the FPA. Second, the Commission reformed areas that were already within its jurisdiction; it did not attempt to extend its authority to new segments of the electricity industry. Thus, FERC's action is different from the type of jurisdictional expansion rejected by the Supreme Court in *FDA v. Brown & Williamson*.[21]

Although remaining within those limits may be necessary for politically legitimate statutory reinterpretation, it is not sufficient. It would be troubling to conclude that a politically-insulated commission could revolutionize the regulatory framework for one of the most important sectors of the economy, in whatever fashion it wished, so long as it did not overstep limits as amorphous as "just and reasonable" or jurisdiction as broad as "transmission or sale of electric energy" in interstate commerce.[22] Two other aspects of restructuring, however, mitigate the legitimacy concerns. First, the

[20] Thus for my theory the rights revolution statutes of the 1970s and 1980s, such as the Clean Air Act, the Clean Water Act, and the Occupational Safety and Health Act represent a different species of statute entirely.
[21] 529 U.S. 120 (2000).
[22] 16 U.S.C. §824(e) (2006)

Commission's reforms considered and reflected the enacting Congress intent for the FPA as well as the preferences of the contemporary Congress. Although restructuring might have inverted the traditional understanding of congressional-agency relationships—in which Congress sets priorities that agencies implement—Congress still played an integral roll in setting the course of restructuring. Second, FERC acted incrementally. It often tested potential reforms through administrative "experiments" or implemented them first on a case-by-case basis before applying them to the industry as a whole. This is a common characteristic of Administrative constitutionalism.[23] This incrementalism promoted a dialogue between the Commission, Congress, States, and industry. That dialogue produced consensus around the Commission's reforms and helped ensure their responsiveness to popular concerns.

Thus this Article argues that electricity restructuring provides an excellent example of politically legitimate Administrative constitutionalism or statutory reinterpretation. By acting pursuant to its delegated authority, within its established jurisdiction, and in a way that reflected Congressional preferences commission, the Commission exercised its authority in a politically legitimate fashion. Moreover, by doing so incrementally, it promoted deliberation, both within the Commission and with stakeholders in industry and Congress, about how its regulations should evolve. Of course this deliberation cannot give the agency the power to do what a statute says it cannot. But where a statute is vague or unclear, a robust dialogue and the involvement of outside stakeholders mitigate the concern about agencies "run amok." Indeed, combining robust agency deliberation with its experience and expertise should promote effective

[23] ESKRIDGE & FEREJOHN, *supra* note 12, at 33.

regulation that is responsive to the needs of industry and the policy preferences of Congress. This type of regulatory change is a desirable means of addressing statutory ambiguity and should be accepted, both by courts and in the scholarly understanding of the administrative state.

This paper proceeds as follows: Part II provides a background history for the FPA from its enactment through the first major amendments, the Public Utility Regulatory Policies Act (PURPA). Part III explores how FERC first introduced market competition into the regulation of wholesale electricity generation and then used its rulemaking and adjudicative authority to expand the role of markets. Part IV explains how FERC sought and received ratification for its market-based initiatives in the Energy Policy Act of 1992. Part V discusses how FERC shifted gears and focused on eliminating barriers to competition. It explains how the Commission effectively imposed common carrier requirements on large segment of the industry through what is arguably still the most significant rulemaking in its history of electricity regulation. Part VI engages the legitimacy question.

2. The Traditional Model: Federal Electricity Regulation from 1935-1980

A. The Origins of Federal Electricity Regulation

In 1935, Congress enacted the Public Utility Act and inaugurated the era of comprehensive federal energy regulation. Prior to the Act, States had exclusive responsibility for electricity regulation. The federal government's sole role was the Federal Power Commission's (FPC) authority to license hydroelectric projects. The Public Utility Act revolutionized electricity regulation in the United States. Title I of the

Act, known as the Public Utility Holding Company Act (PUHCA), sought to remedy the abusive practices of the monopolistic holding companies[24] that dominated the electricity sector in the 1920s.[25] The holding companies used their monopoly power to charge extremely high electricity rates,[26] which threatened the country's growing electricity demand. Title I provided the Securities and Exchange Commission with enhanced jurisdiction over the securities of public utility holding companies and the authority to regulate the holding structures of gas and electric utilities.[27]

Title II of the Public Utility Act,[28] known as the Federal Power Act (FPA) gave the FPC jurisdiction over interstate sales of electricity, including both its generation and transmission.[29] Congress passed Title II to plug the so-called Attleboro Gap, named after the Supreme Court case that held that States lacked the power to regulate interstate electricity transactions. In an early application of the Dormant Commerce Clause,[30] the Court held that only Congress could place a "direct burden upon interstate commerce," and thus a State could not regulate a transaction that crossed state boundaries.[31] Title II gave the FPC the authority to fill the "Attleboro Gap" by regulating interstate sales of electricity.

Somewhat surprisingly given the subsequent history of the FPA, the enacting Congress viewed the original regulatory structure as a way to promote competition. The

[24] Holding companies would purchase and integrate several small electricity grids, giving the company control over an area's electricity. LEONARD S. HYMAN ET AL, AMERICA'S ELECTRIC UTILITIES: PAST, PRESENT AND FUTURE 135-38 (7th ed. 2000).
[25] Joseph Tomain, *Electricity Restructuring: A Case Study in Government Regulation*, 22 TULSA L.J. 827, 830-31 (1998).
[26] TOMAIN & CUDAHY, *supra* note 3, at 266. At the peak of market concentration sixteen holding companies owned eighty-five percent of the total generation capacity. *Id*.
[27] CHARLES F. PHILLIPS JR., THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE 533-34 (1985).
[28] 16 USC §§ 824-824(m) (2006)
[29] PHILLIPS, *supra* note 27, at 534.
[30] TOMAIN & CUDAHY, *supra* note 3, at 267.
[31] Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927).

Act was predicated on the theory of natural monopoly. A natural monopoly occurs in industries with extremely high fixed costs, such that a single producer can provide the product more efficiently than can multiple entities that must both incur those fixed costs.[32] By regulating natural monopolies to prevent the abuse of monopoly power, the Act was thought to support market competition.[33] The FPC administered the "regulatory compact" needed to manage natural monopoly: utilities could continue operating as monopolies, but the FPC could address any abuses of monopoly power by regulating wholesale rates and the terms and conditions of service for interstate sales of electricity.

The Act, however, did not go as far as some supporters hoped. A group of legislators had argued that utilities should be treated as common carriers.[34] An earlier draft of the FPA required utilities to open their transmission lines to competitors rather than retaining those lines as proprietary assets to serve only their generation units. Those provisions were "eliminated to preserve 'the voluntary action of the utilities.'"[35] In their place, the Act empowered the FPC to prevent "undue discrimination" and "undue preference" Exactly what those terms encompassed was left to the FPC.

The FPA also provided the FPC with authority to regulate the rates charged by generators subject to its jurisdiction, requiring that they be "just and reasonable."[36] Much like "undue discrimination" and "undue preference," "just and reasonable" was a broad standard that gave the FPC significant policymaking discretion. At the time, state public

[32] HYMAN ET AL, *supra* note 24, at 4.
[33] In subsequent interpretations of the FPA, the Supreme Court has held that in enacting the Federal Power Act, Congress had "an overriding policy of maintaining competition to the maximum extent possible," and therefore "rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). The Court also noted that Congress's purpose in passing the PUHCA was similarly pro-competitive: to combat "the evils of concentrated ownership by holding companies." *Id.* at 383.
[34] See H.R. REP 74-5423 (1935); S. REP 74-1725 (1935).
[35] Otter Tail Power Co. v. United States, 410 U.S. at 374 (citing S. REP 74-1725, at 19 (1935)).
[36] 18 U.S.C. 824d(a) (2006).

utility commissions "predominately utilized a 'cost of service' approach to regulate the rates utilities charged their customers."[37] The cost-of-service approach calculated a utility's total compensation using a two-step process. First, a public utility commission determined the utility's variable costs, such as labor, fuel, and maintenance. Second, it calculated a "reasonable rate of return" on the utility's capital investment in generation, transmission, and distribution facilities. It then set rates such that the utility would cover its variable costs while also recouping that "reasonable rate" of return.[38]

The FPC acted much like a public utility commission for the two areas under its jurisdiction: wholesale generation and transmission of electricity.[39] Section 205 of the FPA provided that tariffs in both the generation and transmission markets must be filed with the FPC. If consumers believed the rates were not "just and reasonable," they could file a complaint with the FPC, which had the power under section 206 to enforce the just and reasonable requirement.[40] In 1935, this rate model was uncontroversial.

B. Golden Age of Electricity Regulation

The next three decades brought the electricity a period of sustained growth and prosperity—a "Golden Age."[41] Increasing economies of scale led to decreasing marginal costs, lowering the average price of electricity and providing consumers with stable or

[37] TOMAIN & CUDAHY, *supra* note 3, at 269.
[38] *Id.* at 268-70.
[39] *Id.* at 268.
[40] *Id*. at 269.
[41] Tomain, *supra* note 25, at 833

declining rates.[42] When combined with the overall prosperity and economic expansion of the postwar era, the regulatory compact appeared successful.[43]

This stability obscured a pair of important trends that would subsequently help catalyze electricity restructuring. First, the cost-of-service rate formula provided a powerful incentive for utilities to invest in capital stock. Because a utility earned a "reasonable rate" of return on their invested capital, the principle constraints on their growth were the amount of money they could raise and the rate at which they could build new plants.[44] They built ever-larger power plants, even as the marginal price of generation crept up.[45] The Atomic Energy Act exacerbated this trend as utilities invested in nuclear power plants, which required a considerably larger capital investment.[46]

Second, most utilities charged "declining block" rates: as a customer's consumption increased, she paid less for each marginal "block" of electricity that she purchased.[47] The "Golden Age" preceded the modern environmental movement and took place during a time when electricity consumption was still viewed as a public good the consumption of which should be encouraged by the government.[48] Declining block rates fostered the continued growth in electricity consumption, and encouraged utilities to invest in ever-larger generation units. Together, cost-of-service ratemaking and the

[42] HYMAN ET AL, *supra* note 24, at 151-57. Because of the cost-of-service model, the average cost was what mattered for ratemaking.
[43] Tomain, *supra* note 25, at 833; Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL. L. 435, 450 (2002).
[44] Known as the Averch-Johnson effect, the idea is that if companies are permitted to earn too a high a rate of return, they will overinvest in capital accumulation, creating inefficient results. Thus the cost-of-service approach is not necessarily inefficient, provided regulators set the right the correct. Harvey Averch & Leland Johnson, *Behavior of the Firm under Regulatory Constraint*, 52 Am. Econ. Rev. 1052 (1962). In practice, however, that proves hard to do. *See* Tomain, *supra* note 25, at 833-34.
[45] *Id.*
[46] HYMAN ET AL, *supra* note 24, at 41-45.
[47] RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 74-77 (1999).
[48] *Id.* at 75.

steadily increasing demand for electricity led the utility in one direction: ever-bigger power plants.

C. Initial Turmoil

Anything entitled the "Golden Age" is bound to come to an end. By the late 1960s the industry's investment and consumption patterns had caught up with it. Utilities that built new power plants under the assumption that larger plants would be more efficient found that they struggled to achieve increasing returns to scale.[49] Nuclear plants, which were supposed to produce "electricity too cheap to meter,"[50] encountered severe cost overruns, delaying projects and in some cases preventing plants from ever coming online.[51] Indeed, many of the large plants constructed during this period turned out to be less efficient than their smaller predecessors. Utilities, however, were compensated on the basis of their "prudently"[52] invested capital, not the marginal cost of generation. Consequently, they sought to recover their investments by increasing the rates they charged. Electricity prices thus crept steadily upward.[53]

A host of other factors exacerbated the situation. The Arab oil embargo and the fuel price crises of the 1970s further increased the cost of electricity.[54] Meanwhile, the burgeoning environmental movement regarded the utilities as a principle villain. As these

[49] HIRSH, *supra* note 47, at 55-58.
[50] JOSEPH P. TOMAIN, NUCLEAR POWER TRANSFORMATION 8 (1987) (quoting Lewis Strauss, Chairman of the United States Atomic Energy Commission).
[51] TOMAIN & CUDAHY, *supra* note 3, 324-29.
[52] A state public utility commission could deny the inclusion of an investment in the rate base if it could show that the investment was not "prudent." Debates of the prudence of an investment often became complicated. *See, e.g.*, Duquesne Light Company v. Barasch, 488 U.S. 299 (1989).
[53] HYMAN ET AL, *supra* note 24, at 167-69.
[54] Tomain, *supra* note 25, at 834.

groups mounted campaigns to decrease resource consumption, utilities and the practice of "declining block" ratemaking became a favored target.[55]

D. PURPA

The combination of increasing electricity prices and expanding environmental consciousness pushed electricity sector reform onto the national agenda. Energy policy and the cost of energy, including both oil and electricity, were major themes of the 1976 presidential election and one of the primary concerns of the President Jimmy Carter's Administration.[56] The Carter Administration sought to enact sweeping changes to how electricity was produced, priced, and consumed. It proposed ambitious legislation aimed at decreasing reliance on foreign fuels by "mandating" that power plants switch from oil to coal, improving energy efficiency, and encouraging state public utility commissions to replace the "declining block" method of electricity pricing with a model based, at least in part, on the marginal cost of generation.[57]

Carter's proposal, however, encountered significant opposition in Congress and, ultimately, did not survive Congress intact. Like many subsequent attempts to reform aspects of the energy sector, the proposal threatened entrenched interests and generated staunch opposition to its key elements. The Senate removed provisions that would have given the given the Federal Energy Regulatory Commission (FERC), as the FPC had been renamed,[58] the authority to require states to consider marginal cost in ratemaking.[59]

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[55] HIRSH, *supra* note 47, at 63-68.
[56] *See* John C. Barrow, *An Age of Limits: Jimmy Carter and the Quest for a National Energy Policy*, *in* THE CARTER PRESIDENCY: POLICY CHOICES IN THE POST-NEW DEAL ERA 158-78 (Gary M. Fink & Hugh Davis, eds. 1998).
[57] HIRSH, *supra* note 47, at 78-80.
[58] The Commission was renamed as part of the Department of Energy Organization Act. Pub. L. No. 95-91, 91 Stat. 565 (1977).
[59] HIRSH, *supra* note 47, at 80.

In general, the Senate balked at the Administration's efforts to increase federal jurisdiction over electricity sales. Congress ultimately enacted a considerably more restrained version of Carter's proposals in the Public Utility Regulatory Policies Act of 1978 (PURPA).

Although watered down, PURPA nonetheless contained portents of the electricity restructuring to come. First, the public focus on fuel mandates and marginal cost rates obscured a modest proposal intended to encourage non-traditional forms of generation.[60] Section 210 created two privileged classes of generators: "qualifying small power production facilities"[61] and "qualifying cogeneration facilities,"[62] known together as "qualifying facilities" (QFs).[63] PURPA created a guaranteed market for QFs by requiring utilities to purchase the electricity the QFs produced at the utility's "avoided cost"—or, in other words, the cost the utility would have incurred had it produced the electricity itself.[64] A QFs profits were the difference between the utility's cost of service and its own.[65] QFs could thus "compete" with utilities by producing electricity below the utilities' avoided cost and taking advantage of the guaranteed market provisions. Producing cheap electricity cheap allowed QFs to increase both their market share and their profit per unit of electricity sold. They thus faced a significantly different set of incentives than the traditional utilities. Despite representing such a departure from the

[60] *Id.* at 81 (discussing Congress's consideration of section 210)
[61] A "qualifying small power production facility" generates electricity from biomass waste or other renewable resources and met guidelines subsequently promulgated by FERC on energy efficiency, reliability, etc. *See* HIRSH, *supra* note 47, at 87.
[62] A "qualifying cogeneration facility" captured the heat produced during electricity production—e.g., from burning coal—and used reused it for other industrial processes. *See* HIRSH, *supra* note 47, at 87.
[63] *Id.*
[64] *Id*. at 86-88. Avoided cost itself had to be determined. And that too was often difficult to ascertain. Nonetheless, the focus on avoided cost helped shift the regulatory emphasis toward promoting efficient generation.
[65] *Id.* at 87-88.

traditional approach to pricing electricity, "Section 210 elicited little comment from legislators or utility lobbyists."[66]

Second, PURPA sections 111 and 112 provided a list of "rate-making standards" that states were required to consider in designing retail electricity pricing mechanisms. The standards included principles for rate design, resource management, and energy efficiency.[67] An earlier draft of PURPA made these standards mandatory, but this requirement was removed in the Senate.[68]

The failure to pass mandatory ratemaking criteria blunted a major prong of President Carter's energy conservation agenda. Although the discretionary ratemaking standards signaled a general dissatisfaction with the status quo, few observers believed that salutary standards would force states to make hard choices that might increase the price of electricity or cut into the profits of major utilities.

Nonetheless those standards are an important aspect when considering the political legitimacy of electricity restructuring. Although Congress lacked the will to mandate reforms, the discretionary standards were an explicit recognition by Congress that it no longer regarded cost-based rates as the most desirable approach to pricing electricity. By signaling Congress's dissatisfaction with the status quo, those considerations provided a signal for FERC's subsequent restructuring efforts.

Moreover, one of the principle criticisms of mandatory standards was that they ran afoul of federalism principles, particularly the States' traditional role in electricity

[66] *Id*. at 88.
[67] Jeffrey S. Dennis, *Twenty-Five Years of Electricity Law, Policy, and Regulation: A Look Back*, 25 NAT. RESOURCES & ENV'T 33, 34 (2010).
[68] HIRSH, *supra* note 47, at 79-80.

regulation.[69] But Federalism presented no problem in the segments of the electricity sector regulated exclusively by federal law. The combination of the clear change in congressional preferences and the absence of federalism concerns[70] left FERC ideally situated to embark on an *administrative* approach to electricity sector reform.[71]

3. Creating Competition in Wholesale Generation

In retrospect it is easy to see how the small-scale competition introduced by PURPA's QF requirement led to broader reforms. In 1978, however, there was little reason to believe that PURPA represented a step towards deregulation, much less the beginning of a fundamental shift in electricity regulation.[72] First, Congress eliminated many of the proposed provisions that would have encouraged marginal cost pricing. PURPA might have seemed, if anything, a victory for opponents of marginal cost pricing. Second, the vast majority of electricity rates were set at the state level. Congress had just neutered the Carter Administration's attempt to reform state ratemaking practices. On this front as well, PURPA seemed a victory for the status quo.

Third, few observers—if any—foresaw the central role that section 210 would play in the future of electricity regulation. Legislators and commentators both viewed the QF rules requirement as a means of promoting electricity conservation, supporting certain

[69] HIRSH, *supra* note 47, at 78-79.
[70] Recall that at this point FERC's jurisdiction extended to the segments of the electricity sector that states were constitutionally precluded from regulating under the Dormant Commerce Clause. *See supra* notes 28-31 and accompanying text.
[71] This is not to suggest that FERC was the only entity reforming rates. Some states, including New York and Wisconsin, had begun moving away from the declining block method even before PURPA. HIRSH, *supra* note 47, at 77. Moreover, some states used PURPA's avoided cost mandate to introduce novel market concepts, such as bid auctions, to their approach for purchasing electricity. *See id.* at 94-98.
[72] Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992—A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447, 453 (1993) (citing H.R. Rep. 95-543, at 5-6, 8 (1978); *see also* Am. Paper Inst. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 417-18 (noting that PURPA's "basic purpose [was] ... to increase utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels").

forms of energy generation, and possibly reducing electricity prices.[73] No one suspected that it would catalyze fundamental changes in the regulatory paradigm.

Fourth, FERC had not yet begun in earnest to restructure the natural gas sector. The Commission's success in introducing competition to natural gas markets—which were governed by a statute identical to the FPA in many respects[74]—became the model for electricity restructuring.

Nonetheless, five years after PURPA's passage, FERC began experimenting with market-based electricity regulation. A little more than a decade after PURPA, FERC had developed rules and standards that made market competition an important component of rate regulation The story of how the Commission reached this point is multifaceted. Although the subsequent sections will focus on how FERC interpreted its authority under the FPA and relevant judicial decisions, it is important first to recognize a set of structural factors that led to the Commission's experiments with competition.

1. *Failings of the traditional model*. By the late 1970s the cost-of-service model was no longer maintaining low or decreasing electricity rates.[75] Quite the contrary. Electricity rates were skyrocketing[76] at the same time that rates in deregulated industries, such as airlines and natural gas,[77] were falling. Supporters of traditional regulation could no longer claim that the model was successfully delivering cheap electricity.

2. *Success of PURPA section 210*. The QF requirement created small competitive experiments. Section 210 *required* a utility to purchase electricity generated by QFs at the

[73] Tomain, *supra* note 25, at 840.
[74] So much so that a decision on a shared provision in the natural gas law would sometimes be cited as binding authority for a parallel case under the electricity statute. *See, e.g.*, Associated Gas Distributors v. FERC, 824 F.2d 981 (1987).
[75] *See supra* notes 50-55 and accompanying text.
[76] HYMAN ET AL, *supra* note 24, at 171 tbl.19-6.
[77] Joseph Kearney & Thomas Merrill, *The Great Transformation of Regulated Industries Law*. 98 COLUM. L. REV. 1323, 1335-41 (1998).

utility's avoided cost, rather than QFs cost of service. Whereas traditional utilities made a profit by producing electricity, QFs made a profit by producing *cheap* electricity. Section 210 also allowed QFs to gain market share by installing additional generation that operated below the utility's avoided cost. As in a competitive market, QFs were compensated only for the electricity that they actually sold.[78] QFs thus brought with them all the basics of market-based regulation.

This experiment succeeded. QFs produced cheaper electricity than many utilities.[79] Although the natural monopoly model had been questioned for decades,[80] for many the QF experiment confirmed that electricity generation no longer qualified as a natural monopoly, giving force to the intellectual critique of cost-of-service ratemaking.[81] Indeed, the QFs' initial success in producing low cost electricity encouraged some states to introduce even more competition than section 210 required. California, for example, created auctions among QFs to ensure that the QF with the lowest cost of service supplied the electricity.[82] The success of QFs at the retail level further strained the support for the cost-of-service method in wholesale markets.[83]

The flip side of the QF's success was that it revealed the inefficiencies associated with the traditional model. Although some utilities performed relatively well compared with the QFs, others lagged significantly behind their performance. Those differences

[78] This was a stark contract to the rate-base model, in which the value of invested capital, not operating efficiency, determined a utility's return on investment. The success of this "pay for performance" principle painted a stark contrast to the cost overruns and poorly conceived investments produced by cost-of-service regulation. For a discussion of the "pay for performance principle," see HIRSH, *supra* note 47, at 127-29.
[79] *Id.* at 123.
[80] *Id.* at 120-22.
[81] *Id.* at 75-77.
[82] *See* HIRSH, *supra* note 47, at 93-100.
[83] *Id.* at 123-31.

revealed the potential efficiency gains of permitting competition between the traditional utilities as well.[84]

3. *Competition succeeded in other industries*. Deregulation also gained supporters as it succeed in reducing costs in other formerly regulated industries. For example, the Civil Aeronautics Board, which maintained prices for airline travel, was disbanded entirely under Alfred Kahn, one of the most vocal academic critics of traditional regulation.[85] Many of the deregulatory efforts begun by the Carter Administration accelerated with the election of Ronald Reagan.[86] This included the pricing method for the production of natural gas, which was mostly deregulated by the late 1980s.

4. *The individuals in charge.* FERC's composition changed as well. Although the Carter Administration had pushed for marginal cost pricing, Reagan was an even more enthusiastic proponent of regulation through markets. By 1984, all five FERC commissioners had been appointed by Reagan.[87] Three of his first four appointees were from the private sector, rather than government.[88] Those three came from industries, telecommunications and natural gas, where the failures of traditional model were most evident. The fourth had served as legislative assistant to senator Bennett Johnston, a

[84] Paul L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. ECON. PERSPECTIVES 119, 124-25 (1997).
[85] Kearney & Merrill, *supra* note 77, at 1366-67.
[86] *See Id. at* 1399.
[87] *Previous Commissioners*, FERC, http://www.ferc.gov/about/com-mem/prev-comm.asp (last visited Jan. 28, 2012).
[88] *See Nomination of Anthony G. Sousa To Be a Member of the Federal Energy Regulatory Commission*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=4379 (last visited Jan. 28, 2012); *Nomination of Raymond J. O'Connor To Be a Member of the Federal Energy Regulatory Commission, and Designation as Chairman*, RONALD REAGAN PRESIDENTIAL ARCHIVES, http://www.reagan.utexas.edu/archives/speeches/1983/92883c.htm (last visited Jan. 28, 2012); *Nominations, October 7, 1985* RONALD REAGAN PRESIDENTIAL ARCHIVES, http://www.reagan.utexas.edu/archives/speeches/1985/100785a.htm (last visited Jan. 28, 2012).

major energy figure on capital hill.[89] The Commission's leadership no longer had ties to the traditional regulatory model.

The focus on economic efficiency increased after Reagan nominated Charles Stalon, a former member of the Illinois Commerce Commission with a background in economics.[90] James Hoecker, a future FERC commissioner who at the time was serving as a FERC staff attorney, has subsequently noted that "anti-regulatory and anti-government sentiments of some of the Reagan-era leaders" exceeded the reformist tendencies of the Carter Administration officials.[91] Even if a degree of electricity restructuring was inevitable, the onset of the Reagan revolution hastened its arrival.

The next several Sections of this Article explain how those structural factors and the decisions taken by FERC brought about the revolution in electricity ratemaking.

A. The Background: The Just and Reasonable Standard

In the 1980s, FERC began experimenting with alternatives to cost-of-service ratemaking. Those alternatives did not represent the wholesale adoption of market-based rate regulation. In fact the Supreme Court had recently held that FERC *could not* rely exclusively on markets to determine rates under its parallel regulation of the natural gas sector.[92] Instead, the first forays into market-based electricity regulation began as an

[89] *Nomination of Oliver G. Richard III To Be a Member of the Federal Energy Regulatory Commission,* RONALD REAGAN PRESIDENTIAL ARCHIVES, http://www.reagan.utexas.edu/archives/speeches/1982/71382c.htm (last visited May 7, 2012).
[90] *Nomination of Charles G. Stalon To Be a Member of the Federal Energy Regulatory Commission,* RONALD REAGAN PRESIDENTIAL ARCHIVES, http://www.reagan.utexas.edu/archives/speeches/1988/070188e.htmlast visited May 7, 2012); Interview with Oliver G. Richard III, Former Commissioner , Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 16, 2012).
[91] *Powering a Generation: James Hoecker Interview,* SMITHSONIAN INSTITUTE, http://americanhistory.si.edu/powering/ohi/hoecker/hoecker1.htm (last visited Jan. 28, 2012).
[92] Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 397 (1974) ("For the purposes of the proceedings that may occur on remand, we should also stress that in our view the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act."). As discussed above, decisions

attempt to rationalize anomalies between the traditional regulatory model and the competition created by PURPA, section 210's QF program, and the natural gas sector reforms.

Although the cost-of-service approached had dominated ratemaking since the passage of the FPA, the Supreme Court recognized that the FPA did not itself require the cost-of-service model.[93] The D.C. Circuit reiterated this understanding in 1982, shortly before FERC began experimenting with market-based rates.[94] Those decisions held that the FPA required only that FERC ensure that rates were "just and reasonable"—a standard that did not require any particular method.[95] The court, however, acknowledged that "it has come to be well established that electrical rates should be based on the costs of providing service to the utility's customers, plus a just and fair return on equity"—i.e., the cost-of-service model.[96] Thus while the substance of "just and reasonable" was ultimately up to FERC, the cost-of-service model was by the accepted method of regulation.

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on the Natural Gas Act were often considered binding on the structurally identical components of the FPA. *See supra* note 74.

[93] Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) ("the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments"); Fed. Power Comm'n v. Natural Gas Pipeline Co. of Am., 315 U.S. 575, 586 (1942) ("The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.").

[94] *E.g.*, Alabama Elec. Co-op., Inc. v. FERC, 684 F.2d 20, 27 (D.C. Cir. 1982) ("[n]either statutes nor decisions of this court require that the Commission utilize a particular formula or a combination of formulae to determine whether rates are just and reasonable . . . .'") (internal citations omitted).

[95] 16 U.S.C. § 824d (2006) ("All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable"). *See generally* G. William Stafford, *Electric Wholesale Power Sales at Market-Based Rates*, 12 ENERGY L.J. 291, 294-98 (1991) (discussing judicial decisions on ratemaking authority).

[96] *Alabama Elec. Co-op*, 684 F.2d at 27.

B. Experimenting with Bulk Power

FERC took its first concerted step toward electric restructuring with a pair of extraordinary orders—which it termed "experiments"—that introduced voluntary competition to segments of wholesale electricity market. In addition to testing how competition would affect the industry, these experiments began a discussion about the proper role of regulation in electricity markets that involved regulators, industry, courts, and eventually Congress.

1. Public Service Company of New Mexico

In 1983, FERC approved the creation of a regional competitive market for two types of electricity products ("the Southwestern Experiment").[97] Six utilities in Arizona, New Mexico, and Texas submitted a "highly unusual" rate filing that requested permission to charge market-based rates for certain transactions.[98] Noting that the arrangement was "unusual because it proposes a competitive market experiment,"[99] FERC acknowledged that the filing was "not unexpected, because we have actively encouraged it."[100]

The year prior, FERC announced a program to improve regional coordination between electricity providers.[101] Pointing directly to congressional concerns about reliability, the Commission explained the initiative as an effort to implement congressional intent—albeit expressed through an unenacted bill, rather than statutory

[97] Pub. Serv. Co. of New Mexico, 25 F.E.R.C. ¶ 61469 (Dec. 30, 1983).
[98] *Id.* ¶ 62029.
[99] *Id.* ¶ 62029.
[100] *Id.*
[101] *Id.*; *FERC As a Least-Cost Regulator: Hearing before the H. Subcomm. on Energy Conservation and Power*, 97th Cong., 30 (April 23, 1982) (statement of C.M. Butler, III, Chairman, FERC)

text.[102] The Commission subsequently spent a year soliciting feedback on the proposal and identifying volunteer utilities.[103]

FERC's order created a contained market in which companies could conduct certain wholesale transactions. Known as "coordination transactions,"[104] those sales of electricity allowed utilities to purchase power from another company, usually a neighboring utility, when doing so would be cheaper than generating the electricity themselves.[105] The innovation of the the Southwestern Experiment was that the rate for electricity purchased through coordination transactions would be set through private bargaining rather than cost-of-service ratemaking. The Commission concluded that these arms length negotiations would create competition in the market for coordination transactions. To ensure vigorous negotiations, the Commission created a profit motive for the participants: although seventy-five percent of the savings relative to self-generation would go to retail customers, the remaining twenty-five percent would be paid to the shareholders of the purchasing company.[106] That twist gave purchasers an incentive to seek out the lowest-cost electricity producer. The opportunity to secure those sales also gave producers a corresponding incentive to produce electricity as cheaply as possible.

[102] Pub. Serv. Co. of New Mexico., 25 FERC ¶ 62031 (citing H.R. REP. 98-217, at 132-133 (1983) (stating that "[i]n light of recent predictions of generating capacity shortages in the late 1980's and early 1990's, it is incumbent on the Commission to explore any options that would facilitate strong and active inter- and intraregional trading between utilities should such shortages arise"). *Id.*

[103] The order approving the experiment went to great lengths to demonstrate public support and explain that the participants were taking part voluntarily.

[104] Coordination transactions were generally intended to achieve some combination of cost savings and reliability enhancements. Floyd Norton et al, *Competition and Market Pricing for Power, in* ELECTRIC POWER PURCHASING HANDBOOK 5 (1993). They made an excellent test case for competition because they are largely voluntary and between sophisticated parties. Concerns about protecting customers are less salient in the context of coordination transactions. Even prior to this case, coordination transactions were regulated somewhat differently from standard wholesale transaction because they were often part of a larger arrangement that could benefit considerations important to FERC, such as reliability. *See, e.g.*, Municipalities of Groton v. FERC, 587 F.2d 1296 (D.C. Cir. 1978).

[105] *See supra* note 98.

[106] Pub. Serv. Co. of New Mexico, 25 F.E.R.C. ¶ 62054-56.

As with PURPA section 210, the Southwestern Experiment replaced cost-of-service rates with the incentives of market competition. Although the Commission required that rates fall within a "zone of reasonableness," it presumed that the presence of a competitive market meant that the rates were "just and reasonable," and thus fall within that zone.[107]

The question for FERC was how to reconcile this approach with the cost-of-service method that governed the vast majority of the transactions under its jurisdiction. FERC did so by reference to the original purpose of the FPA:

> This filing is important because it enables the Commission to go "back to basics," by providing an opportunity to determine whether our current regulation of coordination sales contributes to the efficient or least-cost supply of electricity. It is well known that "[a] major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices." We serve this purpose by complying with the "legislative command" to establish "just and reasonable" rates; that is, "to allow only such rates as will prevent consumers from being charged any unnecessary or illegal costs." As the courts have pointed out, this is a mandate to bring about the production of electricity "at the lowest possible cost to the consumer in the long run—in the economist's terms, to insure the efficient performance of an industry." Our "basic goal" in regulating the electric utility industry thus is "to achieve the most efficient allocation of resources possible."[108]

Similarly, the Commission presented its ruling as wholly consistent with FPA precedents: "The Supreme Court has recognized that, in enacting the Federal Power Act, Congress had 'an overriding policy of maintaining competition to the maximum extent possible,' and therefore 'rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships.'"[109] In other words, the Southwestern Experiment was but another means of carrying out the basic purpose behind the FPA.

[107] *Id.* ¶ 62048.
[108] *Id.* ¶¶ 62032-33 (internal citations omitted).
[109] *Id.* ¶ 62037 (citing *Otter Tail*).

Importantly, FERC based its conclusion that the transactions would be part of a competitive market on two findings that would form the basis of its subsequent restructuring efforts. First, the utilities that owned transmission facilities agreed to allow other utilities to use their transmission lines to "wheel" electricity to a purchasing entity. Electricity "wheeling" is the transportation of electricity from one supplier across the transmission lines of an intermediate utility for delivery to a third party.[110] This meant that the participants could not use their transmission lines to create a competitive advantage; all generators had to compete on price and price alone.[111] Second, FERC concluded that no participant had "market power"—the ability to manipulate the market-clearing price.[112]

The Commission also provided a thorough discussion of its authority to conduct the experiment, relying heavily on actions by Congress and the courts. First it analogized to interpretations of the Natural Gas Act: "it is clear from the case law interpreting the parallel provisions of the Natural Gas Act that this Commission has substantial freedom to move away from cost-based ratemaking in appropriate circumstances. That body of law demonstrates that appropriate circumstances are indeed present here."[113]

Second, the Commission argued that its order was consistent with Congress's preferences for the electricity sector: "by approving the [market-based] rate, we would be fulfilling our statutory mandate under PURPA to promote greater efficiency in electric

[110] HYMAN ET AL, *supra* note 24, at 307.
[111] Pac. Gas & Elec. Co., 38 F.E.R.C. ¶¶ 62045-46 (Mar. 12, 1987) (noting that the participating entities had agreed to "make transmission available among themselves for the two commodities, so that a utility which wants to buy power can 'shop around' among the participating companies for the cheapest source. If that source is not a contiguous utility, the power will have to be wheeled for the transaction to take place. This means, of course, that there may be occasions when a utility that is not the least-cost supplier will have to provide wheeling even though, as a result, it will lose the sale.")
[112] *Id.* ¶¶ 62041-42.
[113] *Id.* ¶ 62060

generation through encouraging greater coordination. Since that mandate derives from a statute enacted after the Federal Power Act, we have no doubt that Congress intended the Act's "just and reasonable" standard to be flexible enough to accommodate itself to rational attempts to comply with that mandate."[114] Although correct, this blithe assessment understated the significance of FERC's actions. Since the passage of the FPA in 1935, FERC had regulated rates almost exclusively under the cost-of-service method. Introducing market competition, especially when similar industries were being deregulated, was an enormously significant development.

The Southwestern Experiment gave deregulated wholesale electricity markets an audition. It even had a judge. FERC hired the RAND Corporation to evaluate the experiment. RAND monitored the experiment for two years, providing periodic assessments. Those findings produced two principle conclusions: (1) the experiment succeeded admirably in creating competition, but (2) the effect on efficiency was less clear.[115] RAND found that the experiment increased the potential efficiency of the market, but there was no clear evidence that it increased its *actual* efficiency.[116]

[114] *Id.* ¶ 62061 (internal citations omitted). The Commission had been arguing for this interpretation of PURPA's effect on the FPA for a few years by the time it heard PG&E. For example, in hearings before the House Subcommittee on Energy Conservation and Power, Commissioner Butler, implied that the success of PURPA's QFs and avoided cost pricing was partially behind its efforts to introduce competition into electricity generation: "I believe that a healthy electricity future is possible if reasoned regulation and inter-fuel competition are combined to permit and encourage technologies *of all types and sizes* [i.e., not only the limited generators eligible for QF status] *to compete* for a share of the energy market." *FERC As a Least-Cost Regulator, supra* note 101, at 97-152.

[115] Pac. Gas & Elec. Co., 38 F.E.R.C. ¶ 61781 ("The results of the Southwest Experiment's first year were somewhat mixed. With regard to competition, the results were positive. The Rand Corporation found that 'the market had become more competitive' after the participating utilities 'had been granted substantial freedom in setting prices. *See* J. Acton and S. Besen, *Regulation, Efficiency, and Competition in the Exchange of Electricity: First Year Results From the FERC Bulk Power Marketing Experiment* (October 1985) *(1985 Rand Report)* at 108-109. On the other hand, the effect of the experiment on efficiency was more ambiguous.[4])

[116] *Id.*

Although the Southwestern Experiment ended after two years, the experience influenced subsequent market-based regulation.[117] Indeed, the results of the experiment and RAND's findings shaped the next foray into restructuring.

2. Pacific Gas & Electric

In 1987 the Commission approved a second experimental competitive pricing initiative. The "Western Experiment" covered a much larger area that included California, the largest electricity market in the country, and initially involved fifteen utilities and fourty million customers.[118] The Commission also relaxed the transmission rules governing this experiment. It did not require that utilities provide open access transmission[119] as a condition of participation. Firms were encouraged to wheel electricity, but it was not a requirement as it had been for the Southwestern Experiment.[120] This was an important practical difference. FERC's wheeling authority—

[117] *See* Paul B. Mohler, *Experiments at the FERC-in Search of A Hypothesis*, 19 ENERGY L.J. 281, 289 (1998) ("The Southwest experiment was never made permanent, but it was the first step to a larger regional experiment which eventually was adopted on a permanent basis.")

[118] Envtl. Action v. F.E.R.C., 996 F.2d 401, 404 (D.C. Cir. 1993) ("The new pool [WSSP] began with 15 utilities serving 40 million customers in ten western states"); Pac. Gas & Elec. Co., 38 FERC ¶ 61782 ("The WSPP not only complements our objectives expressed in the NOI and the Southwest Experiment, but also provides an actual market test of the ideas discussed in the NOI, and is further reaching than the Southwest Experiment. The Southwest Experiment tested only a small submarket. The WSPP Experiment would involve an entire region. The WSPP Experiment involves utilities in ten states. It would directly affect over 11 million customers. Approximately 12 percent (82,000 MW) of the total electric generating capacity of the United States would be involved in the Experiment.").

[119] Open access transmission required owners of electricity transmission facilities to let competitors purchase the right to use those facilities to transport their own electricity. Open access thus prevented transmission owners from capturing a competitive advantage from their facilities. Open access enabled market competition by allowing all generators to compete based on price rather than a combination of price and transmission ownership. *See supra* notes 110-111 and accompanying text.

[120] Pac. Gas & Elec. Co., 38 F.E.R.C. at ¶ 61794 ("The experimental rates we accept today do not mandate transmission access. Rather, transmission will be treated like other commodities traded in the Pool. Transmission service will be voluntary and subject to a price ceiling. This treatment of transmission access is very different from the Southwest Experiment."). This was a crucial difference. Two members of the experiment protested that the experiment would not provide sufficient competition without mandatory transmission access. *Id.* ("APPA and ELCON oppose both the absence of a requirement for transmission access in the WSPP proposal and the flexible transmission pricing mechanism. ELCON and APPA say that the Participants have not given reasonable assurances of a competitive market to control prices; thus, there can be no assurances that the rates charged under the WSPP Agreement will be reasonable.").

the power to require transmission owners to allow other power producers to use their transmission lines—was extremely limited.[121] The Western Experiment thus provided a more realistic picture of how competition might operate of FERC's experiment.

Although FERC's order approving the Western Experiment shared several similarities with the Southwestern Experiment, the Commission went into much greater detail on (1) its authority to charge market-based rates and (2) the theoretical basis for efficiency gains produced by market competition. The latter effort perhaps representing a direct response to the ambiguous findings in the RAND report.[122]

The Commission explained its authority for concluding that market-based rates were "just and reasonable" by arguing that Congress's intent for the FPA had always been to promote competition. The difference was that the barriers to competition were different in the 1980s than in the 1930s. In the 1930s, Congress had worried about the stifling effects of monopoly power.[123] In the 1980s, the new concern was the artificially inflated electricity prices caused by illiquid markets and the inefficient incentives of cost-of-service pricing. The limited competition created by PURPA showed that market-based regulation could address those problems by improving resource allocation and lowering costs. FERC now claimed that a similar framework could achieve the same results for

[121] For a discussion of the scope of FERC's wheeling authority, see *infra* notes 176-179 and accompanying text.
[122] For the RAND report and its findings, see *supra* notes 115-116.
[123] Pac. Gas & Elec. Co., 38 F.E.R.C. ¶¶ 61789-90 ("The Commission's obligation to promote competition has long been recognized by the courts." (citing Otter Tail Power Company v. U.S., 410 U.S. 366, 374 (1973); Gulf States Utilities Company v. FPC, 411 U.S. 747, 758-759 (1973); Central Iowa Power Cooperative v. FERC, 606 F.2d 1156, 1162 (D.C. Cir. 1979); Public Systems v. FERC, 606 F.2d 973, 982 (D.C. Cir. 1979)).

more traditional utilities.[124] This, the Commission argued, would fulfill Congress's general intent for the FPA.

Second, FERC thoroughly elaborated the policy argument in favor of increased competition. As the order explained, "competition is valuable because it encourages utilities to make efficient decisions with a minimum of regulatory intervention. Ultimately, consumers should benefit from lower prices as competition improves efficiency."[125] FERC further noted that

> The Supreme Court has observed that the principal reason for promoting competition is that it leads to greater efficiency through 'the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress. Competition enhances efficiency through the "incentive for innovation by the regulated companies themselves and for their coming forward with proposals for better services, lower prices or both."[126]

The order also implemented new procedures—such as a central "hub" for electricity prices—for facilitating efficient transactions.[127]

The Commission then connected its legal authority to use market-based rates with the benefits of competition:

> Competition can be a valuable complement to regulation. Traditional regulation is essentially reactive. Its success can be questionable during times of changing industry conditions. Competition, on the other hand, encourages firms to make efficient decisions with a minimum of

[124] *Id.* ¶ 61804 ("We believe that the proposed rates would serve our overriding objectives in administering the Federal Power Act: to bring about the lowest cost to consumers in the long run, and to maximize efficiency in the production of electricity.")
[125] *Id.* ¶ 61790.
[126] *Id.* ¶ 61779 (internal citations omitted).
[127] The D.C. Circuit observed that this was one of the key elements of the WSPP when it approved FERC's decision to make aspects of the experiment permanent. *See Envtl. Action*, 996 F.2d at 404 ("The most important feature of the Agreement was its establishment of a "hub" or "electronic bulletin board" to provide WSPP members with information about trading opportunities. The hub consisted of a centralized computer that received daily offers to buy or sell energy and transmission services, incorporated them into a standard form, and transmitted the information electronically to all WSPP members. Although the hub itself did not execute sales or exchanges, it provided information about trading possibilities that interested participants could follow up and negotiate directly." (internal citations omitted)).

> regulatory intervention. Regulation should allow utilities to respond to market conditions where possible, in a manner consistent with the public interest.[128]

FERC thus explained both the benefits of competition and why it was now deploying market forces in response to changed circumstances.

The Western Experiment succeeded. In 1990, "the consulting firm retained by WSPP [the organization operating the Western Experiment] issued its report. SDG described the Pool as "an unqualified success."[129] In response to a petition from Pacific Gas & Electric, one of largest utilities in the experiment, FERC extended the Western Experiment for ten years, effectively converting it to a permanent arrangement.[130]

In doing so, however, FERC took a step back from the level of market reliance employed during the experiment. As the D.C. Circuit observed in upholding the permanent arrangement, "FERC . . . expressed uneasiness over the high experimental price ceilings and the possibility that sellers of services under the Pool Agreement could wield 'market power' to the disadvantage of buyers."[131] As a result, the court noted, "FERC developed and published uniform energy and transmission rate ceilings. These were designed to reflect the costs of a 'hypothetical' average utility and were set at about half the level of the ceilings in force during the experiment."[132]

Although re-introducing an element of cost-based pricing initially represented a step back from aggressive deployment of market principles, it is a mistake to see this as a

[128] Pac. Gas & Elec. Co., 38 F.E.R.C. ¶ 61242 (Mar. 12, 1987) (citing NOI, 50 Fed. Reg. at 23,445-23,446, *FERC Statutes and Regulations, Regulations Preambles 1982-85* at p. 35,628.).
[129] *Envtl. Action*, 996 F.2d at 404.
[130] *Id.* at 405.
[131] *Id.*
[132] *Id.* (internal citations omitted).

retreat to the traditional model.[133] In identifying market power and transmission access as the criteria for evaluating future market-based arrangements, FERC established its criteria for evaluating future experiments with competition. Rather than stepping back from its competitive experiment, FERC instead laid out the battleground for the next decade, setting the stage for its subsequent restructuring orders.

C. Introducing Competition Through Rulemaking

In 1988, FERC issued three notices of proposed rulemaking (NOPRs) that were intended to foster competition in wholesale markets. Pushed heavily by Commission Chairwoman Martha Hesse, the three NOPRs would have clarified rules for using market-based regulation and greatly expanded the role of competition in electricity regulation.[134] First, the Commission sought to "authorize state regulatory authorities and nonregulated electric utilities to implement bidding procedures as a means of establishing rates for power purchases from qualifying facilities" under PURPA.[135] Second, it sought to streamline regulation of independent power producers (IPPs),[136] including *inter alia* permitting "rates for IPPs to be determined through competitive bidding or rate negotiation subject to a price cap, thereby freeing IPPs from cost-based ratemaking while

[133] Notably, however, at least one FERC commissioner saw it as an unnecessary return to cost-of-service regulation. W. Sys. Power Pool, 55 FERC ¶ 61099, 61341 (Apr. 23, 1991) (Comm'r Trabrandt, dissenting) ("As a practical matter, by rejecting WSPP, the majority has squelched market pricing as an alternative").
[134] Interview with Charles Trabandt, Former Commissioner, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 11, 2012).
[135] Regulations Governing Bidding Programs, 53 FED. REG. 9324-01 (1988).
[136] Defined in the NPR as a utility that (1) "[s]ells or will sell electric energy produced by an independent power facility to a customer outside any retail service franchise territory that the public utility (or its affiliate) may have been granted" and (2) that does not own any transmission that is essential to the customer purchasing its electricity. Regulations Governing Independent Power Producers, 53 FED. REG. 9327-01 § 38.103(a)-(b) (1988).

ensuring rates fall within a zone of reasonableness."[137] The third NOPR sought to clarify the procedures for determining avoided cost under the QF program.[138]

The NOPRs never led to final rules. The proposals encountered resistance from states, investor-owned utilities, and public power providers, among others.[139] Partly in response to this resistance, the Commission, with pressure from the White House, determined that it was not the time to change dramatically the paradigm for electricity regulation—as the collective effect of the NOPRs would have done. Instead, the Commission took a much more measured course. As the next Section explains, FERC began introducing competition on a case-by-case basis rather than through generic rules that would have applied to the industry as whole. FERC's decision to not to finalize the NOPRs helped foster continued deliberation about electricity regulation. In part due to controversy over the scope of the NOPRs, electricity policy became an important part of President George H.W. Bush's National Energy Strategy, which laid the groundwork for the Energy Policy Act of 1992, the second major amendments to the FPA.[140] Together the case-by-case approach and the National Energy Strategy catalyzed a dialogue about the role of markets in electricity regulation.[141]

The NOPRs are thus an important consideration when evaluating the political legitimacy of FERC's action during restructuring. Had the NOPRs become final rules, they would have transformed the basis of electricity regulation at a time when there was little-to-no consensus about how regulation of the industry should evolve. By taking note

[137] Regulations Governing Independent Power Producers, 53 FED. REG. 9327-01 (1988).
[138] Regulations Governing Independent Power Producers, 53 FED. REG. 9331-01 (1988).
[139] Interview with Charles Trabandt, Former Commissioner, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 11, 2012).
[140] *Id.*
[141] *Id.*

of the broad resistance to the plan, FERC eventually shifted the debate over electricity regulation to Congress and the White House. As the next section explains, the Commission continued experimenting with competition in response to *requests* to charge market-based rates by individual generators. By working with generators that volunteered to be part of the experiment, the Commission avoided imposing competition on the whole sector unilaterally in a way that might have raised serious questions about the political legitimacy of its actions.

D. Case-by-Case Approval of Market-Based Rates

In the late 1980s, FERC began approving transactions that, directly following PURPA's model, used avoided-cost rather than rate base to determine whether a tariff was "just and reasonable." This effort began with a case known as *Ocean State*. As an independent power producer,[142] Ocean State wanted to sell power to large consumers using market-based rates—in this case, "market-based" meant rates set by negotiation with purchasers rather than a cost-of-service rate proceeding.[143] As FERC explained, Ocean State's petition relied on PURPA explicitly: "Ocean State states that the siting of its generating unit precludes conformance with the technical standards under PURPA but will avoid the inefficiency that might result from a contrived attempt to conform to PURPA."[144] Ocean State argued that qualifying as a QF would entail unnecessary costs and that treating it like a QF would further Congress's intent behind PURPA.

The Commission granted that request, but only after establishing similar prerequisites as required for Southwestern and Western Experiments: (1) that Ocean State

[142] *See supra* note 136.
[143] Ocean State Power, 44 F.E.R.C. ¶ 61261, 61981 (Aug. 19, 1988). In this respect, the form of competition was the same as in the two "experiments."
[144] *Id.* ¶ 61977.

lacked coercive market power[145] and (2) that Ocean State did not own any transmission capacity that could be used to pressure purchasers.[146] Importantly, the Commission concluded that competitive forces would keep rates within a zone of reasonableness because an arms length transaction would never produce prices so low as to be confiscatory—since the seller would never agree to such an arrangement—and customers would be protected from excessive rates because they would never pay more than the local utility's avoided cost.[147]

Although the *Ocean State* arrangement covered only a single power provider, it created a model for non-QF suppliers interested in charging market-based rates. A dissent by Commissioner Charles Trabandt revealed the stakes in the case: "This order, with its slipshod market analysis . . . deregulates electricity, at least in the Northeast United States.[148] Commissioner Trabandt ridiculed the Commission's statement that *Ocean State* applied only to its particular facts, as being akin to a "child who agrees to only one more ice cream, knowing full well he will ask for more."[149] Even allowing for some hyperbole, the claim shows how the future of restructuring was, at the very least, a background consideration as the Commission heard the case.

Subsequent events demonstrated the truth in Commissioner Trabandt's prediction. A host of generators soon petitioned FERC to charge market-based rates. The following year, in *Citizen's Power and Light Corp*., FERC approved *prospective* market-based

[145] *Id.* ¶ 61981.
[146] *Id.* ¶ 61982.
[147] Otherwise, the purchaser would generate electricity from its facilities. *Id.* ¶¶ 61,980-81.
[148] *Id.* ¶¶ 61985-86.
[149] *Id.* ¶ 61986.

contracts.[150] As a power marketer, Citizen's Power did not own generation or transmission assets. It bought rights to generation and transmission and used these assets to sell power in the wholesale market. Because it had no physical assets at the time of ratemaking, it did not have a rate base, which precluded the cost-of-service model.[151]

The key distinction between *Citizen's Power* and *Ocean State* was that FERC knew which company would purchase electricity from Ocean State, meaning that it could verify, at the time of the filing, that the rates would be less than the purchasers' avoided cost. That was impossible with prospective rate approval. Although FERC imposed a cap based on avoided cost, it concluded that market forces would ensure reasonable rates:

> the fact that purchases from Citizens Power are entirely voluntary, and the fact that Citizens Power lacks market power based on the findings herein, ensure a rate that is not excessive to the buyer and its customers. Because the rate also is obviously not confiscatory to the seller, it will fall within a zone of reasonable rates.[152]

As in *Ocean State*, FERC signaled its increasing comfort with market-based regulation by finding that prices would be within a zone of reasonableness provided that the applicant lacked market power and that the purchase price did not exceed the purchasers avoided cost.[153]

Following *Citizen's Power* FERC continued to approve the vast majority of petitions to charge market-based rates,[154] including thirteen cases in 1989 and 1990

[150] Citizens Power & Light Corp., 48 F.E.R.C. ¶ 61210 (Aug. 8, 1989). Power marketers bought and sold electricity but did not own the generation. The best analog is a retailer that purchases its inventory and sells it directly to customers.
[151] *Id.* ¶ 61776.
[152] *Id.* ¶ 61779.
[153] *Id.*
[154] In the hearings on what became the Energy Policy Act of 1992, FERC provided a list of thirty-four cases that it had heard that presented a request to charge market-based rates. *National Energy Strategy (pt. 4): Hearing on H.R. 1301, 1543, and 2224 before the H. Comm. on Energy and Commerce*, 27-36 (May 1, 2 & June 26 1991); Jeffery L. Hess, *Sun-Peak—Over the Rate Regulation Edge: Are Market-Based Rates "Just and Reasonable" or De Facto Deregulation?*, 28 IDAHO L. REV. 193, 202-04 (1992) (noting how like

alone.[155] The next case in which FERC denied market-based rates revealed how much things had changed since the Southwestern Experiment. In *Nevada Sun-Peak*, FERC concluded that the applicant could not prove that there was competitive market and thus denied the petition because Sun Peak "failed to demonstrate that it held no market power in generation."[156] Sun-Peak argued that the rates it would charge were reasonable because they would be cheaper than the cost of building a new plant, which was apparently the only alternative.[157]

Sun-Peak at first seems like a retreat from market-based regulation. Separate dissents by two Commissioners, however, reveal that deeper considerations were at play. Commissioner Trabandt, who authored the dissent in *Ocean State*, strongly criticized the majority in *Sun-Peak* for putting policy considerations above settled precedent. Trabandt's dissent claimed that the order showed that "transmission 'reform' lurks beneath the majority's action. This represents one more step in the trend that seems to point in the direction of allowing utility affiliates to participate or win in procurement only if the parent opens its transmission system."[158] He thus criticized the Commission for dynamically interpreting its precedents to support its new policy preferences, promoting open access transmission policies. In that respect, the significance of *Sun-Peak* was not that the Commission denied approval for market-based rates, but instead that

"small hole in a Dutch dike quickly expands from water pressure, so too did the requests for market-based rates increase after Ocean State.").

[155] In one case, the Commission approved market-based rates in part and denied them in part. In the other twelve cases, FERC approved market-based rates. *See* National Energy Strategy Hearings, *supra* note 154, at 27-36.

[156] *Id.* The matter was settled on rehearing when Sun-Peak dropped its request for market-based rates, accepting traditional cost-of-service based rates instead. *Id.* at 61163.

[157] Nevada Sun-Peak Ltd. P'ship, 54 F.E.R.C. ¶ 61264, 61771 (Mar. 8, 1991).

[158] *Id.* ¶ 61777. The majority did not, however, base its denial of market-based rates on the lack of transmission. Instead, it held that the absence of a competitive market was sufficient to deny the petition. *Id.* ¶ 61770.

aspirations for the future of the electricity market might be influencing individual ratemaking decisions.

In a separate dissent, Commissioner Moler explained her concerns about the majority's introduction of new standards for competition and transmission access: the "majority inexplicably departs from the case-by-case flexibility which, until now, has been the hallmark of the Commission's approach to nontraditional ratemaking."[159] In place of that flexibility, she argued, the majority had begun promulgating "absolute test[s]."[160]

Sun-Peak nicely illustrates what had become a growing tension in FERC's campaign for wholesale electricity market competition. The Commission identified two factors that it would evaluate in determining whether to allow market-based rates: market power and transmission access. Yet the Commission lacked the authority to affirmatively create either competition or transmission access. It could use its adjudicative authority to deny market-based rates because of inadequate transmission access, as it did in *Sun-Peak*. It could not, however, affirmatively require open access transmission.[161] That authority was beyond the Commission's power under the FPA and the PURPA amendments.

Nonetheless, as Commissioner Trabandt argued in his *Sun-Peak* dissent, policy considerations and the future of the wholesale electricity appeared to influence individual ratemaking decisions. By 1991, the overriding question was whether restructuring would continue as FERC reached the limits of its statutory authority. At this point, the locus of

[159] *Id.* ¶ 61781.
[160] *Id.*
[161] PURPA provided FERC limited authority to order wheeling under section 211. The courts had held, however, that this authority could be exercised only when there was no effect on competition. In practice, that standard was nearly impossible to meet and no orders were issued. *See* Watkiss & Smith, *supra* note 72, at 457-59.

the debate over wholesale market competition shifted to Congress. But that shift did not relegate FERC to the sidelines. Instead the Commission attorney's used their expertise and the lessons from the initial restructuring efforts to help shape the debate on the bill that would become the Energy Policy Act of 1992 (EPAct92).[162]

4. The Energy Policy Act of 1992

Prompted partly by the failure to promulgate final rules based on the 1988 NOPRs, the Bush Administration made electricity policy a major component of its National Energy Strategy (NES).[163] The NES, which served as the basis for much of the draft legislation that ultimately became EPAct 92,[164] incorporated perspectives from all the major constituents for electricity policy, including industry, consumers, and states.[165] Although the final NES reflected the views of the White House and President Bush's Department of Energy, it prompted a public discourse on the future of electricity regulation.

The NES prioritized two electricity reforms: (1) partially repealing PUHCA and (2) increasing transmission access.[166] Both reforms would promote wholesale electricity

[162] For about 12 years, the Act was known as "EPAct." In 2005, Congress passed the Energy Policy Act of 2005, after which point commentators began referring to the 1992 Act as "EPAct 92." For consistency with the contemporary literature I will full this convention.
[163] Interview with Charles Trabandt, Former Commissioner, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 16, 2012); Interview with Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 17, 2012).
[164] Interview with Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 17, 2012).
[165] Interview with Charles Trabandt, Former Commissioner, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 16, 2012); Interview with Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 17, 2012).
[166] U.S. DEP'T OF ENERGY, NATIONAL ENERGY STRATEGY 34-35 (1991).

competition as a means for increasing efficiency and decreasing the cost of electricity.[167] Repealing PUHCA would facilitate the market entry of electricity generators that were affiliated with traditional utilities. As a result, those generators would, almost by definition, lack market power and, thus, be eligible to charge market-based rates.[168] Similarly, increasing transmission access would allow for more efficient use of current generation, which in turn would incentivize investment in new generation.[169] Both effects would decrease the long-run cost of electricity.

The NES advocated different approaches to these goals. A repeal of PUHCA required congressional action and the NES spoke directly to Congress on that point.[170] On transmission access, however, the NES encouraged FERC to press forward with the authority it already had under the FPA: "the Administration supports full utilization of Department of Energy and FERC authorities to encourage more open access to electric transmission facilities for traditional utilities."[171]

A. FERC Goes to Congress

In 1991, Congress conducted a series of hearings on what would become the first major electricity legislation since PURPA.[172] The hearings covered topics as diverse as electric vehicles, nuclear waste, and research on electromagnetic fields. In previous years, Congress had held hearings on FERC's efforts to promote competition.[173] Commission

[167] *Id.*
[168] *Id.* at 34.
[169] *Id.* at 35.
[170] *Id.* at 34.
[171] *Id*. at 35. The NES did note that "legislative expansion of FERC's authority" might be necessary if that authority proved insufficient. *Id.*
[172] For a discussion on how EPAct 92 was passed, see Jim Rossi, *Lessons from the Procedureal Politics of the "Comprehensive" National Energy Policy Act of 1992*, 19 HARV. ENVTL. L. REV. 195 (1995).
[173] *See, e.g., Competitive Wholesale Electric Generation Act of 1989: Hearings on S. 101* (Nov. 9 & Nov. 16 1989).

attorneys testified at those hearings, providing details on restructuring and reaction to various proposed bills.[174] In the hearings on EPAct 92, however, members of FERC assumed a more prominent rule in the hearings on electricity market competition. Cynthia Marlette, an associate general counsel at FERC, provided testimony that included (1) a detailed analysis of FERC's efforts to deregulate wholesale generation and (2) an assessment of the areas where the Commission lacked adequate statutory authority to continue restructuring.

The testimony focused on the two indicators of competition that had become FERC's de facto litmus test for approving market-based rates. First, FERC's staff strongly supported proposals that would partially repeal the PUHCA by creating a class of generators that could sell power without being subject to the PUHCA's onerous reporting and securities requirements.[175] Because those generators were independent from the legacy utilities they would almost necessarily lack market power.

Second, the Commission staff highlighted the uncertainty about FERC's authority to mandate wheeling and the barriers to competition this created.[176] The testimony noted that the Commission had been able to increase transmission access on a case-by-case basis by requiring it as a *quid pro quo* for receiving FERC approval for mergers or

[174] *See id.*
[175] *See, e.g.*, National Energy Strategy Hearings, *supra* note 154, at 16 ("The Public Utility Holding Company Act has served a very useful purpose in breaking up an industry that was full of abuses in the 1920's and 1930's. However, 55 years have passed, and the statute as enacted is a severe barrier to the continued evolution of a competitive generation market.").
[176] National Energy Strategy Hearings, *supra* note 154, at 50 ("[T]he Commission has encountered some instances where additional transmission service would have improved the market alternatives available to wholesale buyers. . . . The Commission increasingly faces the questions of how to evaluate market-based proposals in the face of somewhat imperfect transmission service, and whether to accept filings that promote efficient wholesale trade but may be inadequate when compared to some other hypothetical alternative that might involve a larger degree of access to transmission service.").

pricing flexibility.[177] Nonetheless, the Commission staff observed that it lacked clear authority to reform transmission practices and that no federal court of appeals had ruled on possible arguments for it having that authority.[178] The testimony also noted instances where federal courts had rejected efforts to increase transmission access.[179]

As part of the testimony, FERC attorneys submitted a statement summarizing every case, beginning with the Southwestern Experiment, in which the Commission had considered market-based rates.[180] Those cases served as important evidence for the testimony. FERC used its experience to demonstrate both its success promoting competition[181] and where its initiatives were stymied by a lack of statutory authority.[182] The Commission staff also relied on these cases to assuage concerns about its willingness to scrutinize the conditions for market-based rates. Indeed, they used the Commission's deregulatory experiments as evidence that generators would not be permitted to exploit market-based regulations to consumers' detriment.[183]

[177] National Energy Strategy Hearings, *supra* note 154, at 45.
[178] *See* National Energy Strategy Hearings, *supra* note 154, 59 ("The legal authority to condition market-based rate approval on transmission access has not been appealed to any court."); *id.* at 61 ("[D]ecisions of various appellate courts paint an unclear picture on the issue of the Commission's authority to order wheeling as a remedy for undue discrimination.").
[179] *See id.* at 65 (citing Florida Power & Light Co. v. FERC, 660 F.2d 668 (5th Cir. 1981 Unit B) (holding that FERC lacked the statutory authority to require an electric utility to provide wheeling even at a reasonable request)); *id* at 61 (citing New York State Gas & Electric Co. v. FERC, 638 F.2d 821 (2d Cir. 1981) (ruling that neither the public interest nor enhancement of competition was a sufficient basis for a wheeling order)).
[180] The statement listed 34 cases in all. National Energy Strategy Hearings, *supra* note 154, at 31.
[181] *See, e.g.*, *id*. at 45-46.
[182] *See, e.g.*, *id*. at 50, 51-52, 53, 61.
[183] *See id.* at 19 ("As discussed in Enclosure A, the Commission has taken a tough stand on affiliate abuse issues and has recently enunciated a strict test for affiliate transactions which may affect pricing to non-affiliates."); *id.* at 18 (("[N]on- traditional generators engaging in wholesale sales (other than most QFs) are not non-utility generators, nor are they non- regulated generators. While the FERC in many instances has applied a different type of regulation to non-traditional generators—by allowing market-based rates and granting certain regulatory waivers—it has done so only after thoroughly scrutinizing the market power of the entity involved . . . .")

The precise impact of this testimony is hard to quantify. The earlier hearings on wholesale competition[184] indicated that there was already a constituency in favor of further restructuring. The National Energy Strategy also indicated an emerging coalition of supporters of electricity market reform. Indeed, the various proposed bills incorporated many of the proposals outlined in the NES.[185] Marlette, the FERC attorney who provided the testimony, has observed that Congress was already sympathetic to increased competition.[186]

Nonetheless, a careful reading of the legislative history suggests that the testimony from FERC staff played an important role in shaping the bill. The House committee report noted that two provisions had received strong support from FERC: (1) the creation of a new class of generators that would presumptively lack market power and (2) a provision granting FERC enhanced wheeling authority.[187] The report's rationale for creating a new class of generators closely tracked the Commission's testimony.[188]

[184] *See supra* note 173.
[185] Interview with Charles Trabandt, Former Commissioner, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 16, 2012); Interview with Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 17, 2012).
[186] Interview with Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 17, 2012).
[187] Comprehensive National Energy Policy Act, H.R. REP. 102-474 pt. 1, at 139-40 (1992).
[188] *Compare* Comprehensive National Energy Policy Act, H.R. REP 102-474 pt.1, at 139 (1991) ("While the U.S. electricity system has served the country well in terms of reliability of service and meeting load growth, it is clear that the recent emergence of competition in the generation sector has been beneficial to consumers and should be further encouraged.") *and id.* at 138 (("Although there were early doubts about the reliability of independent power, experience has proven these concerns to be unfounded. In a January, 1992, report to the Subcommittee on Energy and Power entitled "Electricity Supply: Potential Effects of Amending the Public Utility Holding Company Act," the General Accounting Office found that wholesale power purchases have not impaired electric service, and that utilities and state commissions have employed a variety of tools to ensure the reliability of IPPs. Today, many utilities value the option of purchasing wholesale power as a means of avoiding or forestalling the need to build new baseload facilities.") *with* National Energy Strategy Hearings, *supra* note 154, at 14 ("There is, however, a major barrier to the continued evolution of competition in the generation sector of the industry, and that is the Public Utility Holding Company Act. A growing number of entities have the ability and the expertise to supply generation, but they do not meet the qualifications under PURPA.").

Similarly, the section of the report discussing the enhanced wheeling authority pointed directly to FERC's testimony on the need for this authority:

> A second major impediment to IPP [independent power producer] development is the Federal Energy Regulatory Commission's (FERC) lack of clear authority under the Federal Power Act to order utilities to transmit, or 'wheel,' electricity for others. . . . . In hearings before the Subcommittee on Energy and Power, FERC witnesses spoke in favor of legislative clarification of the Commission's wheeling authority. Other witnesses testified that some utilities engage in discriminatory practices against PURPA owners, IPPs, and other utilities seeking transmission services."[189]

At the very least, the repeated references to FERC's testimony suggest that Congress viewed the FERC attorneys as especially credible witnesses on restructuring.

Their testimony also demonstrated the importance that the Commission's administrative experimentation had for its credibility before Congress. The Commission staff pointed to its use of market competition as support for additional restructuring authority. They also used the Commission's experience with market-based rates to explain how the current statutory framework created barriers to continued restructuring. And finally, they used FERC's experience to convince wary legislators that competition would not harm consumers.

B. EPAct 92 and Legislative Ratification

On October 24, 1992, President George H.W. Bush signed the Energy Policy Act of 1992 ("EPAct 92").[190] The Act represented a sea change for electricity restructuring. First, the Act created a class of utilities—exempt wholesale generators (EWGs)—that

[189] Comprehensive National Energy Policy Act, H.R. REP 102-474 pt.1, at 138 (1991).
[190] Pub. L. No. 102-486 (1992).

could generate power without being subject to the cumbersome restrictions of PUHCA.[191] Congress believed that the opportunity to invest in generation without having to comply with PUHCA would encourage (1) new investment in generation by (2) companies not affiliated with traditional utilities. It thus created an entire of class generators that could foster the competition needed for increased market-based regulation. [192]

Second, EPAct 92 gave FERC the authority to order a transmission-owning entity to wheel power in response to a petition from another regulated entity. Section 211 allowed FERC to order open access on a case-by-case basis, though with strict limits on its authority—e.g., it prohibited retail wheeling.[193] Unlike the PUHCA reforms, which were expressly requested in the NES,[194] section 211 went beyond the NES's statement that FERC should continue using its existing authority. By providing FERC with enhanced authority, Congress indicated its support for transmission reform.

Nonetheless, Congress's precise intent in adding this new authority was unclear. On the one hand, by going beyond the NES, Congress evinced a strong pro-competitive intent to promote wheeling. The new wheeling authority might thus be read as an indication that FERC should accelerate the pace of transmission reform. On the other hand, the wheeling authority could be invoked only in response to petition from a regulated entity. Thus Section 211 could also have indicated Congress's desire to channel transmission reform down a particular avenue: limited FERC adjudication rather than

[191] Recall that PUHCA had previously required that companies that generated electricity, with only the exceptions contained PURPA, had to comply with rigorous reporting requirements
[192] Because utilities and transmission-owning entities were already subject to the PUHCA, they would be affected by the new law, which would instead provide an additional incentive only for companies not already subject to the PUHCA.
[193] *See generally* Watkiss & Smith, *supra* note 72 (discussing the pro-competitive provisions of the Act).
[194] *See supra* notes 166-170 and accompanying text.

something more sweeping. At the time EPAct 92 was passed, it was not clear which interpretation best characterized congressional intent.

Nonetheless, the Act ratified FERC's administrative experiments while also providing explicit authority to continue restructuring.[195] The consensus among industry experts was that the role of competition would continue to increase.[196] Some even expected that the robust federal push toward competition would lead states to introduce competition at the retail level.[197] FERC, however, still faced significant barriers to its restructuring efforts. First, Congress did not give FERC authority to issue wheeling orders at the retail level—that authority remained exclusively with the state public utility commissions. Many of the same experts who predicted the continued transformation of the electricity sector worried that the nation's inefficient transmission system could thwart, or at least limit, further competition.[198] Requiring open access transmission had been essential to FERC's restructuring of the natural gas sector.[199] Open access permitted large retail consumers to purchase gas from producers, a practice that became an

[195] In perhaps the most reliable indication of future competition, "credit rating agencies hammered away at that point when they tightened their standards, because they believe that risk levels were increasing thanks to the potential for competition." HYMAN ET AL, *supra* note 24, at 184-85.
[196] *See, e.g.*, DAN WILLIAMS & LARRY GOOD, GUIDE TO THE ENERGY POLICY ACT OF 1992, 251 (1992) ("The Electricity Industry will undergo a complete transformation in the next several years); *id.* (comparing the expected changes from the Clean Air Act Amendments of 1990 and EPAct 92 to the effects "the break-up of AT&T had on the telecommunications industry"); Bernard S. Black & Richard J. Pierce, Jr, *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339, 1341 (1993) ("The industry has begun a period of radical change. When that process is complete, the electricity industry and its regulation will bear little resemblance to the patterns that have become familiar over the past century."); Watkiss & Smith, *supra* note 72.
[197] Recall that retail electricity is the local sale of electricity to an end-user. It falls outside interstate commerce and is thus regulated by state public utility commissions rather than FERC. Retail markets were one of the last segments of the economy dominated by traditional regulation. *See, e.g.*, Black & Pierce, *supra* note 196, at 1350-51.
[198] *Id.* at 1350 ("A more serious long-term concern is transmission bottlenecks.").
[199] Jim Rossi, *supra* note 11, at 786-87. Congress did not, however, prevent states from ordering retail wheeling. It determined only that retail competition would not be a federal project.

important driver of natural gas restructuring.[200] It was not clear that FERC could replicate those results in the electricity sector absent the same authority.

Second, the wheeling authority that Congress did provide FERC was limited. It could be invoked only in response to a petition from a regulated entity.[201] The 1992 amendments thus did not create the authority to issue broadly applicable generic wheeling orders.[202] Evaluating wheeling requests on a case-by-case basis had the potential to become exceedingly cumbersome as the number of requests increased with expanded competition.[203] This presented a serious limitation on the Commission's efforts to increase the scale of restructuring by requiring FERC's involvement in *nearly every* dispute over transmission access.

Third, the transmission orders that FERC would issue had the potential to impact price, reliability, and many other aspects of electricity generation. Any missteps in using its limited wheeling authority would complicate FERC's restructuring efforts, potentially sapping the support and credibility it had amassed over the last decade. The stakes were high to say the least.

[200] BOSSELMAN ET AL, ENERGY, ECONOMICS, AND THE ENVIRONMENT: CASES AND MATERIALS 507-10 (2010).
[201] Energy Policy Act § 722(3) (codified at 16 U.S.C. § 824k(h) (2006))
[202] Watkiss & Smith, *supra* note 72, at 460 ("A transmission order applies only to applicants—FERC is not empowered to require utilities to adopt transmission tariffs of general applicability").
[203] Moreover, as the Commission subsequently noted when imposing open access, the reactive approach to securing wheeling services did not fit well in an industry where "for competitive reasons, many transactions must be negotiated relatively quickly" and "[m]any competitive opportunities will be lost by the time the Commission can issue a final order under section 211. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 FR 21540-01, 21562 (May 10, 1996) [hereinafter Order 888].

5. Implementing Competition: From EPAct 92 to Order 888

The EWG provisions required relatively little of FERC. The number of EWGs grew rapidly through the early-to-mid 1990s, dramatically increasing the number of electricity generators that lacked market power.[204] Within a few years, the Commission began adopting presumptions that new generators lacked market power and could operate with minimal oversight.[205]

Transmission policy proved more complex. FERC invoked its new wheeling authority to require open access transmission in a number cases brought before the Commission. By 1996, FERC had heard 14 wheeling petitions requesting and ordered wheeling in 12 of them.[206] Nonetheless, by the mid-1990s, the Commission concluded that this reactive approach to wheeling would not provide the level of transmission access needed to support restructuring. In April 1996, FERC issued the most significant order in its history of electricity regulation.[207] Entitled Order 888, this rule required all entities under FERC's jurisdiction to provide open access transmission on equal terms to any generator.[208] In issuing this order, the Commission transformed electricity transmission into the type of common carrier regime that had been considered and ultimately rejected when the FPA was originally passed in 1935.[209] The following Sections explain how

[204] HYMAN ET AL, *supra* note 24, at 184-85.
[205] In 1994, the Commission assumed that newly installed generation facilities would not have market power. Instead, the Commission determined that its market power inquiries would focus on transmission dominance instead. Kansas City Power & Light, 67 F.E.R.C. 61,183 (1994); *infra* notes 238-239 and accompanying text.
[206] Order 888, *supra* note 203.
[207] U.S. ENERGY INFO. ADMIN., *The Changing Structure of the Electric Power Industry 2000: An Update*, http://205.254.135.7/cneaf/electricity/chg_stru_update/chapter7.html (last visited Jan. 28, 2011) ("Order 888 was considered the most far-reaching and ambitious project undertaken by FERC to eliminate deterrents to competition in the electric power industry.").
[208] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities, 75 F.E.R.C. P 61,080 (Apr. 24, 1996).
[209] *See supra* notes 34-35 and accompanying text.

FERC came to require Order 888 and how it dynamically interpreted the FPA to sanction its new position.

A. Testing the Waters: Initial Wheeling Orders

Following EPAct 92, FERC's regulatory focus shifted from a case-by-case assessment of the appropriateness of market-based rates, to promulgating standards that would make market-based competition the default form of electricity regulation. As part of that process, the Commission's efforts to open transmission access became the most important front in restructuring.

FERC heard the first case involving its new wheeling authority, *Florida Municipal*, in the fall of 1993.[210] A local power agency, Florida Municipal, requested that the Commission resolve a four-year dispute between it and Florida Power & Light, the utility, regarding the rates for using the utility's transmission network.[211] Florida Municipal wanted so-called "network access" rates, which would allow it to pay a single fee that reflected how it actually used Florida Power & Light's transmission lines. Florida Power & Light instead insisted on a much higher charge based on how Florida Municipal *might* use the transmission.[212] What is important for this inquiry is that network access required Florida Power & Light to charge a competitor as if the competitor were just another of Florida Power & Light's generation units. It would thus eliminate a competitive advantage for generators that also owned transmission lines.

[210] Florida Mun. Power Agency v. Florida Power & Light Co, 65 F.E.R.C. ¶ 61125 (Oct. 28, 1993).
[211] *Id*. at 61617.
[212] The dispute turned on a highly technical, but important difference. Florida Municipal wanted to pay for transmission based on the maximum amount of transmission that it could actually use—in other words, enough transmission to meet its full supply obligations. Florida Power & Light wanted to charge a fee that covered the potential permutations of transmission lines that Florida Municipal might potentially use, which could have resulted in a much higher figure. *See id.* at 61599 n.3.

Equally important was Florida's Municipal's justification for receiving network access rates. It urged the Commission to use *either* its authority under FPA sections 205 and 206—which were part of the 1935 FPA[213]—to remedy "undue discrimination" or the new wheeling authority under section 211. The Commission chose to resolve the matter by looking only at its section 211 authority. It found that network access would result in lower costs to consumers and thus met 211's "in the public interest" standard.[214] Although it is unclear why the Commission chose to analyze the case under section 211 rather than sections 205-206, the fact that it looked first to 211 and never discussed 205-206 in its written opinion suggests that, in 1993, the Commission viewed the new provision as its primary source of wheeling authority.

A month later the Commission resolved what appeared to be an unrelated case: a request by Commonwealth Edison for approval of a proposed slate of transmission access charges.[215] The Commission found that Commonwealth Edison had not shown that its proposed tariff was "just and reasonable" under section 205 and scheduled a hearing on the matter.[216] One of the issues to be considered at the hearing was whether Commonwealth Edison's decision not to provide access to parts of transmission network violated the FPA's prohibition on "undue discrimination."

This was a potentially ground breaking inquiry. As Commissioners Donald Santa and James Hoecker noted in separate concurrences, [217] the Commission had elected to

[213] *See supra* notes 39-40 and accompanying text.
[214] Florida Mun. Power, 65 F.E.R.C. ¶ 61615.
[215] Commonwealth Edison Co., 65 F.E.R.C. ¶ 61288 (Nov. 30, 1993).
[216] *Id.* ¶ 62356.
[217] *Id.* ¶ 62361 (Comm'r Santa, concurring) ("Even if a credible argument can be made that the Commission has the legal authority to condition voluntary transmission filings under section 205 of the FPA on a condition that the transmitter provide open access. I question whether it is wise to venture down this speculative path, especially when a clear procedural framework for fostering a more competitive

conduct a hearing that might well require it to issue a wheeling order under section 206.[218] Yet, as discussed above, the extent of the Commission's authority to require wheeling to remedy undue discrimination was not clear. Some courts had rejected FERC's authority to issue wheeling orders under sections 205 and 206[219] and EPAct 92 did not amend either section. Instead, Congress addressed concerns about transmission access by amending a different section of the FPA, section 211, to provide that authority. Commissioner Santa summarized the problem:

> Still, as much as title VII [of EPAct 92] enhanced the Commission's statutory authority, and as much as Congress intended that such authority be used to promote greater competition in bulk power markets, one cannot escape the fact that title VII's amendments to the FPA were limited in scope: (1) Congress amended FPA sections 211 and 212 to give the Commission the authority to order transmission service upon application; however, (2) Congress did not amend FPA sections 205 and 206, the Commission's general rate setting authority.[220]

The question now was how to reconcile section 211's pro-competitive purpose and its explicit, but limited, authority to order wheeling with the Commission's responsibilities to combat "undue discrimination" under sections 205-206.[221] On the one hand, EPAct 92 provided a strong congressional endorsement of restructuring that enhanced the Commission's authority. On the other, Congress expanded FERC's wheeling authority, but made it subject to strict procedural limits—namely that it could be exercised only in

environment has just been provided to the Commission by Congress (i.e., the section 211 complaint process).").

[218] *Id.* at 62356 (Comm'r Santa, concurring) (internal citations omitted).

[219] *See* Florida Power & Light Co. v. FERC, 660 F.2d 668, 677 (5th Cir. Unit B 1981); Sunflower Electric Cooperative, Inc. v. Kansas City Power & Light Co., 603 F.2d 791 (10th Cir. 1979); New York State Gas & Electric Co. v. FERC, 638 F.3d 821 (2d Cir. 1981).

[220] *Id.* at 62357 (Comm'r Santa, concurring).

[221] Commonwealth Edison Co., 65 F.E.R.C. ¶ 61288, 62364 (Nov. 30, 1993) ("[W]hat is required is a clearer vision of what we can accomplish under sections 205 and 206 and the amended section 211 in terms of a competitive bulk power market and a strategy for working with utilities and their customers to achieve that vision.")

response to a petition from a qualifying entity under FERC's jurisdiction.[222] The Commission thus faced a classic tension in deciding whether to look to Congress's specific or general intent. Both concurring Commissioners suggested that FERC thoroughly explore its mandate under sections 205-206 and respond with clear rules evaluating "undue discrimination" and "undue preference" in transmission access.

Early the following year, the Commission commenced a series of rulings that revealed that section 211 would not be the principle provision with which the Commission continued to pursued increased transmission access. First, in *New England Power Pool*, FERC announced that its "approach to analyzing whether a particular proposal is unduly discriminatory or preferential must be reexamined if we are to respond to changing conditions in the electric utility industry."[223] In other words, the Commission's traditional focus for undue discrimination or preference—whether companies applied different rates and conditions to similarly situated customers—was no longer adequate for assessing anti-competitive practices in the electricity industry.[224] Due to the emergence of "non-traditional suppliers," including EWGs, and "greater competition in bulk power markets," FERC observed that the principal barriers to competition had changed. The "new" problem occurred when transmission owners treated their generation assets differently from those of potential competitors.[225] But this was not actually a new phenomenon. Until recently transmission owners had been able to

[222] 16 U.S.C. § 824j (2006).
[223] New England Power Pool, 67 F.E.R.C. ¶ 61042 (Apr. 11, 1994).
[224] *Id*. ¶ 61132.
[225] *Id*. ¶ 61132; *see* Donald F. Santa, Jr., Clifford S. Sikora, *Open Access and Transition Costs: Will the Electric Industry Transition Track the Natural Gas Industry Restructuring?*, 25 ENERGY L.J. 113, 137 (2004).

deny competitors access to use their transmission entirely. The problem was "new" only in the sense that it was newly important as result of the last decade's restructuring efforts.

Commissioner Santa issued a concurrence similar to his separate opinion in *Commonwealth Edison*. He noted that the Commission had articulated a reasoned basis for refocusing its traditional standards: namely, that the industry has changed significantly.[226] Consequently he was more comfortable considering a novel interpretation of the Commission's power under sections 205 and 206.

A month later, in *American Electric Power Service Corporation*, the Commission confirmed that transmission owners would no longer be able to discriminate between their generation and that of competitors: "At this juncture, the Commission believes that an open-access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system."[227] The Commission then ordered a hearing into the differences between how America Electric and its competitors would use the transmission and whether there were any differences that justified disperate costs and conditions.[228]

Once again, Commissioners Santa and Hoecker issued concurrences that illuminated the undercurrents of the Commission's thinking. In reviewing FERC's statutory authority under the FPA, Commissioner Hoecker concluded that, as a "blueprint for the competitive revolution, it [the FPA] is indeed modest." Nonetheless, he observed, in the years since EPAct 92 FERC had shown "an unwillingness to be overtaken by events" and was once again adapting the FPA: "[i]n a comparatively short time, it has

[226] New England Power Pool, 67 F.E.R.C ¶ 61135.
[227] Am. Elec. Power Serv. Corp., 67 F.E.R.C. ¶ 61168, 61490 (May 11, 1994).
[228] *Id*. ¶ 61490.

become apparent that EPAct [92] and new competitive forces in the bulk power marketplace have made it necessary to address *quality* of [transmission] service" in addition to access to transmission.[229] He noted that several factors, including "new sources of generation" and "the pro-competitive philosophy of EPAct" 92 have led the Commission "to reexamine statutory standards for undue discrimination as applied to voluntary offers of transmission service."[230]

After reciting FERC's major post-EPAct 92 decisions, including *Florida Municipal*, *Commonwealth Edison*, and *New England Power Pool*, Commissioner Hoecker compared this new comparability requirement to the orders that unbundled the natural gas industry. Although he noted that this decision did not go quite so far as those orders, he nonetheless saw it as a "harbinger" whose "significance is part of a longer evolutionary process."[231]

Commissioner Santa reiterated his concern about whether FERC possessed adequate wheeling authority under section 206. Indeed, he noted that one option would be find undue discrimination under section 206 and then urge the affected parties to file a request for wheeling under section 211.[232]

Read together, this string of concurrences provides several insights into this stage of restructuring. First, these opinions were concurrences, not dissents. Commissioners Hoecker and Santa expressed strong support for continued restructuring, which they felt was now required by increased competition in the generation sector. Second, they agreed with the majority of the commission on a number of factors, including the importance of

[229] *Id.* ¶ 61491 (Comm'r Hoecker, concurring).
[230] *Id.*
[231] *Id.*
[232] *Id.* ¶¶ 61491-97 (Comm'r Santa, concurring)

the changed industry and Congress's general support for competition. Third, the concurrences show that the debate within the Commission was about means, not ends. The question was *how* it should interpret its statutory authority in order to promote transmission access. Could the Commission repurpose its antidiscrimination authority under sections 205 and 206 to require open access transmission or was section 211 its sole source of wheeling authority? The desired ends were agreed upon; the issue was how the Commission was going to get there.

Commissioner Hoecker's references to orders that unbundled the natural gas industry revealed a fourth important element. In *Associated Gas Distributers*, the D.C. Circuit had upheld FERC's authority under the Natural Gas Act (NGA) to "unbundle" the natural gas industry—i.e., separate the operation of transmission from the merchants that sold gas at the wellhead.[233] It is clear in retrospect that by the time of the order in *American Electric Power*, FERC saw its success with the NGA as a template for employing FPA sections 205 and 206 to provide the authority it needed for expanding the campaign to restructure the electricity industry.[234] Recall that the NGA and the FPA were so similar that courts often treated a decision under one as binding precedent for the analogous provision of the other.[235]

The NGA, however, did not have an equivalent to the explicit, but limited wheeling authority provided in section 211. Thus, while the antidiscrimination language in section 205 of the FPA had an obvious analogue in the NGA, there was a real argument that the explicit but limited wheeling authority in 211 meant that the Commission did not have

[233] Associated Gas Distributors v. FERC, 824 F.2d 981 (1987). It was "unbundled" in the sense a purchaser no longer bought a "bundle" of gas—i.e., both the gas itself and the requisite transmission access—from the same company.
[234] Am. Elec. Power Serv. Corp., 67 F.E.R.C. ¶ 61490.
[235] *See note 74* and accompanying text.

the same authority to unbundle, or "effectively"[236] unbundle, the electricity sector the way it did in the natural gas arena. Indeed, multiple courts of appeal had rejected previous attempts by FERC to order wheeling based on sections 205-206.[237] Although the parallels with the NGA and the more recent *Associated Gas Distributers* decision provided the Commission grounds for optimism, it was not clear that sections 205-206 gave FERC the authority to unbundle the electricity sector. Indeed, this uncertainty was at the heart of Commissioner Santa's concurrences in all three cases.

Meanwhile, FERC pressed ahead with its pro-competitive initiatives. In *Kansas City Power & Light*, the Commission announced that in reviewing applications to charge market-based rates by newly built power plants, it would no longer assess whether the plant possessed generation market power—i.e., the ability to influence the price of electricity itself in its market. Instead, the Commission would look only to whether the applicant possessed transmission market power—i.e., the ability to influence the price of transporting electricity—and whether the applicant could erect other barriers to entry.[238] FERC then instructed Kansas City Power & Light to modify its proposed transmission tariff in light of the *American Electric Power* comparability standard.[239] This order erased any lingering doubt that transmission access had become the Commission's principle concern.

[236] Open access was known as "effective unbundling" because it required generators that owned transmission to treat the transmission as if it was owned by a separate company.
[237] *See* Florida Power & Light Co. v. FERC, 660 F.2d 668, 677 (5th Cir. Unit B 1981); Sunflower Electric Cooperative, Inc. v. Kansas City Power & Light Co., 603 F.2d 791 (10th Cir. 1979); New York State Gas & Electric Co. v. FERC, 638 F.3d 821 (2d Cir. 1981).
[238] Kansas City Power & Light Co., 67 F.E.R.C. ¶ 61183, 61552 (May 13, 1994).
[239] *Id*. ¶ 61557.

Shortly thereafter the Commission significantly expanded its transmission comparability standard in *Heartland Services*.[240] That order announced a new rule: if a single subsidiary of a large electricity conglomerate sought to charge market-based rates, any transmission owned by the conglomerate would need to provide an open access consistent with the comparability requirement. The Commission thus conditioned access to the lucrative generation market on utilities' willingness to enact sweeping reforms in how they used their transmission assets. To receive permission to charge market-based rates, an applicant effectively had to treat its transmission network as a common carrier. This presaged a fundamental change. Congress had originally considered making transmission facilities into common carriers before passing original the FPA, but ultimately decided against that approach "in order to preserve the 'the voluntary action of the utilities.'"[241] The Commission was now poised to require just that result under an original section of the FPA.

Yet even as the Commission expanded its use of the undue discrimination standard in sections 205-206, it signaled its frustration with the limits imposed by section 211. In *Hermiston Generating Company*, issued two months after *Heartland Services*, the applicant for market-based rates raised section 211 as what amounted to an affirmative defense to a finding that it had transmission dominance.[242] *Hermiston* argued that it did not have dominance because another party could always apply for a wheeling order under section 211.[243] The Commission rejected the argument out of hand, concluding that "[t]he ability to spend time and resources litigating the rates, terms and conditions of

[240] Heartland Energy Services, Inc. Wisconsin Power & Light Co., 68 F.E.R.C. ¶ 61223, 62061-62 (Aug. 9, 1994).
[241] Otter Tail Power Co. v United States, 410 U.S. 366, 374 (1973) (citing S. REP 74-1725, at 19 (1935))
[242] Hermiston Generating Co., L.P., 69 F.E.R.C. ¶ 61035 (Oct. 13, 1994).
[243] *Id.*

transmission access is not equivalent to an enforceable voluntary offer to provide comparable service under known rates, terms and conditions."[244] The Commission no longer believed that section 211's reactive model of adjudicating complaints was sufficient to meet its ambitions for the transmission sector. The stage was set for FERC's biggest reform yet.

B. The "Mega NOPR"

On April 7, 1995 FERC issued a Notice of Proposed Rulemaking (NOPR) that one observer dubbed the "Mega NOPR."[245] The most significant component of the NOPR was a proposal that would require the owners of all transmission lines serving interstate commerce to provide non-discriminatory, non-preferential open access transmission services. The proposal required essentially all transmission lines to be treated as common carriers. FERC portrayed the effective[246] unbundling of the electricity industry as the necessary culmination of its decade –and-a-half-long restructuring project:

> 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.[247]

[244] *Id.* ¶ 61165.
[245] Alex Henney, *The Mega-NOPR*, PUB. UTIL. FORT., July 1 1995, at 29. It was actually five NOPRs released simultaneously in a single document.
[246] "Effective" because the NOPR did not suggest that FERC would require a generation-owning corporation to divest its transmission assets.
[247] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities; Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 60 FR 17662, 17663-17664 (1995).
[247] *Id.* at 17666 ("AGD demonstrates that our remedial power is very broad and includes the ability to order industry-wide non-discriminatory open access as a remedy for undue discrimination.)

What came next is particularly important for this Article. The NOPR addressed FERC's potential lack of authority to order wheeling under sections 205-206 and the potential conflict with the express, but limited, wheeling authority under section 211.

Addressing its authority under sections 205-206 first, the Commission clothed its affirmative argument in major D.C. Circuit decision known as *Associated Gas Distributors* (AGD). There the court upheld the Commission's unbundling of the natural gas sector based on the provisions in the Natural Gas Act equivalent to sections 205 and 206.[248] The Commission then examined the Supreme Court's principal discussion of FERC's wheeling authority. As FERC explained, in *Otter Tail v. United States*, the Court examined a suit under the Sherman Act suit in which the government sought to enjoin alleged monopolization attempts by the Otter Tail Power Company.[249] In considering whether the FPA insulated Otter Tail's operations from the Sherman Act, the Court reviewed the FPA's legislative history. The Court noted that the initial iteration of the FPA "included a 'common carrier' provision making it 'the duty of every public utility to . . . transmit energy for any person upon reasonable request'" and "empowered the Federal Power Commission to order wheeling if it found such action to be 'necessary or desirable in the public interest."[250] The Court then observed that Congress had opted for something less than common carrier status by removing those provisions and enacting the "undue discrimination" and "undue preference" standards instead.[251]

The NOPR distinguished the Court's discussion of common carrier status on the grounds that *Otter Tail* was an antitrust case and the holding did not involve sections 205

[248] *Id.*
[249] 410 U.S. 366, 368 (1973).
[250] *Id.* at 374.
[251] *Id.*

and 206.[252] That was correct. But the Commission's efforts to distinguish *Otter Tail* and the legislative history of the FPA understated the significance of its actions. Congress originally proposed to give the Commission the power to do it exactly what it sought to achieve through the NOPR. Yet Congress expressly decided against providing this authority, preferring "voluntary" commercial relationships instead. Sixty years later, however, the Commission was using changed circumstances—namely the introduction of competition—to justify imposing common carrier status.[253] In so doing, the Commission advanced an entirely new interpretation of its authority under sections 205-206 that conflicted directly with the understanding that many observers, including FERC, had at one pointed attached to *Otter Tail*.[254] Moreover, Congress had just redefined FERC's wheeling authority in EPAct 92. Those amendments allowed FERC to use that authority only in response to a complaint from a regulated entity, not as a prophylactic means for ensuring competition. Opponents of the order appeared to have a strong case that section 211, which was passed after *AGD*, prevented the Commission from expanding its wheeling authority under other sections of the statute.

The second important aspect of the NOPR is how the Commission reconciled its claimed wheeling authority under sections 205-206 with its explicit authority under 211. The Commission's assessment of 211 was simple: it was insufficient. The Commission argued that the limited, reactive wheeling authority no longer suited the reality of market

[252] *Id.*

[253] Prior to Order 888 the Commission had maintained the voluntary aspect of the program. It had largely required open access transmission only in response to a request of market-based rates or some other action by the transmission-owning entity. Here, however, it proposed all transmission owners to provide open access.

[254] In its testimony in the hearings on EPAct 92, the Commission began its discussion of the FPA's wheeling authority by quoting large sections of *Otter Tail* in support of the proposition that "FERC has limited authority to mandate wheeling other than under Sections 211 and 212 of the Federal Power Act . . . ." Page 53. The same testimony did note, however, that sections 205 and 206 might provide additional, albeit untested, authority to encourage wheeling. Otter Tail, 410 U.S. at 58.

competition and would not be sufficient to implement Congress's intent for EPAct 92. It noted two specific problems with relying on section 211: (1) the inherent delays of the adjudicative process, which frustrated the "many transactions [that] must be negotiated relatively quickly" and the "inherent" discrimination in a system in which some customers have generic open access transmission while others must rely on the section 211 process.[255] Those limitations frustrated "the intent of Congress to encourage competitive wholesale electric markets"—an intent evidenced by section 211 itself.[256] The Commission thus portrayed section 211 as proof that Congress would have approved of its decision to use other sections of the FPA to issue a wheeling order that it could not issue under section 211.

Section 211 also shaped the scope of its proposed order. In discussing the substance of the open access requirement the Commission proposed that transmission "[s]ervices must be available to any entity that could obtain transmission services under section 211."[257] In other words, transmission owners would need to provide an open access tariff applicable to all generators that could have petitioned for a section 211 wheeling order. Not only did FERC import the remedy from section 211 to its rule under section 206, it also incorporated the same jurisdictional provisions.

The Commission went on to explain how and why the order implemented effective unbundling[258] rather than corporate unbundling.[259] It also addressed several complications that would arise from the move to open access transmission, such as

[255] Promoting Wholesale Competition, *supra* note 247, at 17668.
[256] *Id*. at 17668.
[257] *Id*. at 17680.
[258] *Id*. at 17681 ("a public utility's uses of its own transmission system for the purpose of engaging in wholesale sales and purchases of electric energy must be separated from other activities")
[259] *Id.* ("The proposed rule does not require corporate unbundling (selling off assets to a non-affiliate, or establishing a separate corporate affiliate to manage a utility's transmission assets) . . . .")

"legitimate and verifiable" stranded costs—unrecoverable costs that regulated companies had incurred as part of investments based on their belief that FERC would continue the basic regulated utility model.[260]

C. Order 888

A year later, the Commission issued Order 888, implementing the vast majority of the proposals in the NOPR and codifying the principles from the Commission's post-EPAct 92 orders into a set of general rules on transmission access. [261] For the purposes of this Article, the marginal significance of the order on top of the NOPR is in how FERC responded to the comments on its authority to order open access transmission. Two areas are particularly important: (1) FERC's discussion of the constraints imposed by *Otter Tail* and (2) how FERC reconciled the use of its undue discrimination and undue preference[262] authority with the limitations on wheeling in section 211.

1. Otter Tail

After summarizing several comments that addressed *Otter Tail* and the language in the legislative history of the 1935 FPA, the Commission argued first that "legislative history is not even relevant, because courts have no authority to enforce principles

[260] *Id.* at 17664.
[261] Order 888, *supra* note 203. FERC also issued a companion order, Order 889, that provided implementing procedures and rules, such as a code of conduct for separating transmission operations from personnel from generation marketing personnel. Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 Fed. Reg. 21,737 (May 10, 1996); Cynthia A. Marlette, *FERC Open Access Transmission Rule and Utility Bypass Cases*, 37 NAT. RESOURCES J. 125, 125 (1997).
[262] Order 888 relied explicitly on both the Commission's undue preference and undue discrimination authority, although it focused primarily on the undue discrimination prong. Following Order 888, the undue preference authority assumed increased importance as the Commission has sought to prevent utilities circumventing Order 888 by giving preference to its affiliates. Email from Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, to Author (June 21, 2012).

gleaned solely from legislative history that has no statutory reference point."[263] Nonetheless, the Commission argued, even if the FPA's legislative history was relevant, it supported the Commission's interpretation of the FPA.[264]

The legislative that really mattered, FERC argued, was from the last twenty years, not the FPA's enactment. FERC reiterated the understanding that the Natural Gas Act and the FPA were drafted at the same time, aimed at the same problem, and understood to create similar regulatory mechanisms. Thus it argued against reading the FPA's legislative history to create differing limits on the Commission's regulatory authority under the two statutes. If it could take an action under the undue discrimination authority of the Natural Gas Act, the Commission argued, it logically should be able to do the same thing under the analogous provisions of the FPA.

Furthermore, the Commission argued that neither the specific limits in section 211 nor Congress's decision not to *require* common carrier status in 1935, suggested a limit on its broad remedial power under sections 205 and 206. To the contrary, FERC argued that any suggestion that Congress's decision not to require common carrier status prevented it from enforcing that status through enforcing the broad standards in the FPA "would 'turn statutory construction upside down . . . .'"[265]

2. Reconciling Sections 205, 206, and 211

A number of commenters reiterated the argument that Congress's inclusion of explicit, but limited, wheeling authority in section 211 curtailed any residual authority that the Commission might have had under the undue discrimination and undue

[263] Order 888, *supra* note 203, at 21564 (citing Associated Gas Distributors v. FERC, 824 F.2d 981 (1987))
[264] *Id.* at 21564-65.
[265] *Id.* 21564.

preference provisions—an argument strengthened by the fact that the section 211 limitations were enacted five years after the *AGD* decision.[266] The Commission's response to those comments revealed the importance of its 1980s experiments. First, it noted that a savings clause inserted in EPAct 92 provided that

> No provision of section 210, 211, 214, or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 210, 211, 214, or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.[267]

The Commission argued that this savings provision combined with the Commission's suggestion during the EPAct 92 hearings that it likely had the authority to order wheeling under sections 205-206 in response to an undue discrimination finding refuted any argument that section 211 limited its existing authority. "[H]ad Congress intended to limit the Commission's remedial authority under section 206 when it amended section 211," the Commission argued "we believe it would have explicitly done so in the language of the statute itself, or at least have indicated its intent to do so in the Conference Report on the Energy Policy Act."[268] Suggestions to the contrary were "misleading and disingenuous."[269] The Commission further asserted that the argument that section 211 prevented a generic wheeling order under sections 205 and 206 "would be entirely at odds with the underlying purposes of the Energy Policy Act. It would be ironic indeed to interpret the Energy Policy Act as eliminating our long-standing, broad

[266] *Id.* at 21569-21570.
[267] *Id.* (citing 16 U.S.C. § 824k(e)(1) (1994))
[268] *Id.* at 21570.
[269] *Id.*

authority to remedy undue discrimination, given the pro-competitive purposes of the statute."[270]

D. Judicial Review of Order 888

A host of effected grops appealed Order 888. Indeed, at the outset of its opinion reviewing the order, the D.C. Circuit observed that "[a]ll the key players have challenged various provisions" of the orders.[271] The case presented a host of questions involving the order, its implementation, and FERC's authority jurisdiction to implement those reforms.[272] The first question, and the only one relevant here, was whether FERC had the statutory authority to enact the open access requirement.[273]

After a brief recitation of the FPA's history—including an explanation of how Congress reacted to the "serious obstacle" of inadequate transmission access by passing EPAct 92 and "amend[ing] sections 211 and 212 of the FPA to authorize FERC to order utilities to 'wheel' power"[274]—the court addressed the statutory interpretation question of whether FERC could compel open access under sections 205 and 206. The court noted the potential objections to this authority based on *Otter Tail* and the argument that section 211 contained the full breadth of the Commission's authority to order wheeling.[275]

Nonetheless, the panel concluded that its prior decision in *AGD* controlled the entire statutory question.[276] Because *AGD* held that FERC could order unbundling under the Natural Gas Act, the court concluded that the Commission could do the same under

[270] *Id.*
[271] Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 681 (2000).
[272] The decision ran to almost seventy pages of the federal reporter—making it long even by the standards of complex rulemaking cases.
[273] For a summary of the D.C. Circuit's opinion, see *Report of the Judicial Review Committee*, 22 ENERGY L.J. 195, 204-16 (2001).
[274] *Id*. at 682.
[275] *Id.* at 685-86.
[276] *Id*. at 686.

the analogous sections of the FPA. The court further held that because it had applied *Chevron* deference to uphold the Commission interpretation in *AGD*, it was bound to do the same here.[277]

That was it. In just over two pages of the Federal Reporter the court resolved what was arguably the most important statutory interpretation question in the history of the U.S. electricity industry. The statutory question would at first appear to be a strong one for appeal to the Supreme Court. It was a question of tremendous significance and was unlikely to arise again in another circuit;[278] and the Court would not be bound be *AGD*, as was the D.C. Circuit. No party, however, appealed the question of the Commission's statutory authority under the FPA.[279] Although the reason for the lack of appeal it is open to speculation, the decision may reflect a consensus that open access was coming, either by order or statute, and the Commission's decision to permit full stranded cost recovery provided transmission owners the best bargain they were going to get.

The Court eventually granted certiorari on a number of questions arising from Order 888, including the Commission's jurisdiction over transmission for certain types of retail transactions.[280] It upheld Order 888 unanimously,[281] although three Justices concurred in part and dissented in parted, arguing that FERC had not gone far enough when assessing its jurisdiction to address undue discrimination and undue preference.[282]

[277] *Id.* at 687.
[278] Circuit conflicts are a principle reason why the Court decides to grant a case. Here the D.C. Circuit had exclusive jurisdiction to review Order 888, meaning that there would be no chance for another circuit to disagree.
[279] Interview with Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 17, 2012).
[280] New York v. Federal Energy Regulatory Commission, 535 U.S. 1, 4 (2002).
[281] *Id.* at 16.
[282] *Id.* at 28-29 (Thomas, J., concurring in part and dissenting in part).

In just under fifteen years, FERC had replaced cost-of-service ratemaking—the only form of regulation ever applied to the wholesale electricity sector—and achieved by administrative order exactly what the original New Deal electricity reformers had elected not to implement sixty years earlier. Yet the Commission achieved this milestone under an economic philosophy, reliance on market competition and the private sector, that had been used to justify dismantling vast tracts of New Deal regulation. The legitimacy of this sort of sweeping administrative reform is the subject of the next Part.

6. The Legitimacy of Electricity Restructuring

Electricity restructuring was a seminal period for the law of regulated industries. Many scholars have focused on restructuring's origins, impacts, and significance.[283] None, however, have examined the Commission's actions as a case study in how the executive branch reinterprets statutes. The history described in this Article warrants much greater attention. It provides one of the best examples of how the executive branch can achieve its policy preferences through statutory interpretation. Unlike the evolution of many other regulated industries, the changes to electricity regulation came primarily from the Executive Branch. When Congress and the judiciary became involved, they did so largely to ratify or expand initiatives that FERC had already put into place.[284]

This dynamic flips the traditional conception of congressional-executive relations on its head. In the traditional understanding, Congress sets priorities and major policies

[283] *See, e.g.*, Kearney & Merrill, *supra* note 77; Jeremy Knee, *Rational Electricity Regulation: Environmental Impacts and the "Public Interest"*, 113 W. VA. L. REV. 739, 748 (2011); Tomain *supra* note 25.

[284] *See, e.g.*, *supra* notes 190-201 and accompanying text (discussing EPAct 92 ratification of the Commission's initial experiments with market-based regulation); *supra* notes 271-279 (discussing how the D.C. Circuit upheld Order 888).

and then delegates their implementation to the executive branch.[285] Yet during restructuring, FERC undertook many of the major policy shifts without any congressional legislation. For example, FERC elected to experiment with market-based rates through the Southwestern and Western Experiments without a corresponding statutory mandate. Similarly, nothing in EPAct 92 plainly suggested that FERC should impose common carrier status the transmission of electricity.

Law journals are replete with explanations for why we might from a policy perspective prefer that the Commission, rather than Congress, lead a process like restructuring. The Commission has much greater expertise—a particularly important criterion for highly technical judgments required for the electricity sector. It also had greater leeway to "experiment" with competition and wheeling. Statutes on the order of the FPA, PURPA, and EPAct 92 are hard to pass, leaving Congress little room to change course if one of its initiatives proves unsuccessful. FERC, by contrast, can act incrementally and assess potential reforms before implementing them whole hog. And finally, the politically-insulated Commission might be better positioned to consider and plan for an emerging interest group, like QFs, power marketers , and non-utility generators.

The crucial statutory interpretation question, however, is not whether the Commission would do a good job restructuring the electricity sector, or even whether it would do a better job than Congress. The crucial question is what permits an agency or

[285] *See* Theodore Ruger, *The Story of* FDA v. Brown & Williamson *and the Norm of Agency Continuity*, *in* STATUTORY INTERPRETATION STORIES 334 (Eskridge, Frickey & Garrett, eds. 2011) (discussing more recent cases suggesting that "it is possible to discern a continuing judicial impulse to dampen unilateral administrative policy change on important questions . . . ."); *see also* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1762 n.2 (2002) (listing prominent critiques of the non-delegation doctrine.) Although this paper does not wrestle with the wisdom of congressional delegation of authority, those sources indicate a discomfort with overly bread policymaking by the executive branch.

commission to revolutionize the implementation of its statutory mandate *without* Congressional legislation. Agencies can alter regulations, issue new rules, and update how they apply particular provisions of a statute.[286] But what FERC did was different. It changed the two basic tenets of the regulatory paradigm for electricity. It replaced cost-of-service ratemaking with market-based rates, and it effectively imposed common carrier obligations on the electricity transmission system. Both decisions were an order of magnitude more significant than updating rules or procedures.

Part of the answer lies in the circumstances. As Kearney and Merrill observed shortly after FERC issued Order 888, electricity restructuring took place during an era of regulatory change—one that they called the "the Great Transformation."[287] At the time, agencies and commissions, with support from Congress, were deregulating the telecommunications and transport sectors and increasing their reliance on markets for regulating public utilities, like natural gas.[288] Surely the Commission thought it best to implement elements of the consensus emerging in other regulated industries. FERC's turn toward market regulation might have appeared much more significant had it begun a decade earlier.

Yet, as the previous Parts of this paper have explained, FERC undertook the most important aspects of restructuring without an explicit command from Congress. This was a stark contrast to the experience of other regulated industries, where a congressional statute either commenced or catalyzed the transformation.[289] There was no electricity

[286] The Supreme Court has held only that an agency must provide a reasoned explanation for this change. Federal Commc'ns Comm'n v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009); Motor Vehicle Mfrs' Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).
[287] Kearney & Merrill, *supra* note 77.
[288] *Id.*
[289] *Id.* (discussing railroads, airlines, communications, and natural gas industries among others)

sector equivalent to the Airline Deregulation Act of 1978[290] or the Telecommunications Act of 1996.[291] Congressional statutes ratified and in some cases expanded the Commission's initiatives, but they did not initiate them, much less require the Commission to take the steps it did.

Congressional legislation also played a more important role in the deregulation of the natural gas sector—the closest parallel to electricity restructuring. The Natural Gas Policy Act (NGPA) divided gas into different pricing categories with the understanding that "ultimately the market would be allowed to set this price without bureaucratic interference."[292] Similarly, it was Congress that finally abolished price controls on natural gas production through the Wellhead Decontrol Act of 1989[293]—albeit after the Commission helped create the necessary conditions for such market regulation.[294] Thus, although Commission orders were integral to the deregulation of the natural gas industry, those orders implemented congressional legislation that expressly contemplated the deregulation of the natural gas industry.[295]

Nor did the judiciary play a leading role during electricity restructuring. A few cases in the 1970s and early 1980s appeared to limit the Commission's discretion under the FPA.[296] And those cases may indeed have influenced the particular course of restructuring. Yet from the Southwestern Experiment onward, the Commission's electricity restructuring program was almost completely undisturbed by the courts. This

[290] Pub. L. No. 95-504, 92 Stat. 1705 (1978).
[291] Pub. L. No. 104-104, 110 Stat. 56 (1996).
[292] BOSSELMAN ET AL, *supra* note 200, at 499-500.
[293] Pub. L. No. 101–60, 103 Stat 157
[294] Cite to *United Illuminating Co.* 88 F.3d 1105, 1125-26 (D.C. Cir. 1996) (The Commission's creation of open access transportation was 'essential' to Congress' decision to completely deregulate wellhead sales.")
[295] The Natural Gas Policy Act, for example, explicitly assumed that the market would eventually set prices for interstate sales of natural gas. BOSSELMAN ET AL, *supra* note 200, at 499-500.
[296] See discussion of precedents on market-based ratemaking, *supra* notes 92-96, and wheeling, *supra* note 219.

was a stark contrast with the telecommunications sector, where the judiciary required competition when breaking up the AT&T monopoly while also limiting the Federal Communications Commission's freedom to relax regulation in the canonical statutory interpretation case, *MCI v. AT&T*.[297] Indeed, the Court's decision to reject the detariffing modifications in *MCI v. AT&T* was one of the factors that prompted Congress to enact the Telecommunications Act of 1996.[298] The judiciary also played a much more active and controversial role in FERC's restructuring of the natural gas sector.[299] The D.C. Circuit rejected several of FERC's initial attempts to transform the sector.[300]

The following Sections consider the political legitimacy of the agency-led reform that characterized electricity restructuring. Why was it that the Commission was able to enact such sweeping reforms without interference from the other branches? And even if the other branches could not interfere, was this a normatively desirable balance of responsibility between the Executive Branch, Congress, and the courts?[301] I argue that in this case it was. FERC's actions respected two key constraints on its authority: the statutory limits on its substantive authority[302] and the scope of its jurisdiction.[303] Those limits reflect important constitutional principles—especially the separation of powers—

[297] 512 U.S. 218 (1994).
[298] Kearney & Merrill, *supra* note 77, at 1378 ("The main effect of the courts' filed-rate doctrine decisions such as *Maislin* and *MCI v. AT&T* has been to require congressional authorization for agency efforts to detarifff (which was eventually forthcoming).").
[299] *Id.* at 1378-80; Rossi, *supra* note 11, at 773-75.
[300] Kearney & Merrill, *supra* note 77, at 1378-80; Rossi, *supra* note 11, at 773-75.
[301] For a recent argument that contemporary courts may be reluctant to let agencies, rather than Congress, make substantive policy changes, see Theodore Ruger, *The Story of* FDA v. Brown & Williamson *and the Norm of Agency Continuity*, *in* STATUTORY INTERPRETATION STORIES 334 (Eskridge, Frickey & Garrett, eds. 2011) (suggesting that "*Brown & Williamson* and related cases [may be] are best understood as articulating a kind of non-delegation rule that forces Congress rather than agencies to effectuate key policy shifts . . . .").
[302] *See supra* notes 92-96 (discussing FERC's broad authority to regulate rates for transmission and sale of electricity, but also noting restrictions, including that the Commission could not rely market-based rates alone when finding rates to be "just and reasonable.").
[303] Where it did expand its jurisdiction, the expansion was minor in effect and ancillary to the Commission's decision. *See infra* note 325.

and were recognized in seminal Supreme Court cases decided around the time of restructuring. The first two Sections of this Part discuss these limits and explain how the Commission remained within them.

But even within those limits, it cannot be the case that the Commission had the power to reinvent the regulatory paradigm in whatever fashion it desired. After all, Congress had legislated with a particular understanding of how the industry would be regulated. The decision to change course and depart from the traditional regulatory compact came with enormous consequences. The magnitude of which might suggest that the decision should be taken by Congress, rather than by a-politically insulated commission.

While recognizing these concerns, I argue that they do not apply to FERC's actions during restructuring. The type of authority on which the Commission relied and the way in which it implemented its reforms mitigated the legitimacy concerns that might otherwise attend such a dramatic change. On the one hand, the Commission acted pursuant to its mandate to ensure just and reasonable rates and to prevent undue discrimination—both of which are broad delegations of authority that provide the Commission considerable discretion to regulate the electricity sector. The breadth of those mandates gave FERC greater discretion to change its regulatory method than, say, the Environmental Protection Agency would have under a comprehensive regulatory statute like the Clean Air Act. Moreover, when the Commission changed its regulatory paradigm, it justified its changes by pointing to congressional intent, including both the intent of the enacting Congress and frequently also the expressed preferences of the contemporary Congress.

Equally important to the Commission's legitimacy was the way in which it implemented its reforms. In each of the examples discussed earlier, the Commission changed its regulations using incremental steps that provided a period to evaluate the potential effects of a reform while also fostering robust deliberation between the Commission, Congress, and other interested parties. The best examples are the coordination transaction "Experiments"[304] and the graduated introduction of competition through individual ratemaking.[305] In both cases, the Commission took incremental steps that permitted it and interested parties to evaluate how those reforms affected the industry. Even Order 888, the most avulsive regulatory change, came after three years during which the Commission experimented with wheeling orders based both on section 211 and on its authority to remedy undue discrimination in sections 205 and 206.[306] The final order itself came more than a year after the original NOPR, giving Congress and regulated entities time to consider and comment on the implications of the proposed rule.[307]

This incrementalism also allowed FERC to capitalize on its institutional competence. FERC possessed deep expertise in the electricity sector as well as valuable experience from restructuring the natural gas sector. FERC also possessed the capacity to respond quickly to changing circumstances, including the consequences of its orders. These characteristics gave the Commission an advantage when it came to the nuts and bolts of electricity reform. Although agencies generally possess greater expertise than Congress, that gap is likely to be both greater and more important in a highly

[304] *See supra* notes 97-132 and accompanying text.
[305] *See supra* notes 142-162 and accompanying text.
[306] *See supra* notes 210-244 and accompanying text.
[307] The NOPR was issued in April 1995 and the rule was finalized in May 1996.

sophisticated industry, such as electricity, than in a field like civil rights. This superior institutional competence partially justifies FERC taking a greater role in reinventing a statute than a body such as the Equal Employment Opportunity Commission—though of course such reinvention occurs in civil rights as well.[308] When combined with the Commission's attention

A. FERC Exercised Its Substantive Authority Under the FPA

A key element of restructuring is the broad discretion that the FPA affords FERC. The Commission relied on two parts of the Act for the authority to implement restructuring. It introduced market competition pursuant to its authority to ensure just and reasonable rates[309] and required open transmission access under its authority to remedy undue discrimination and undue preference.[310] In both cases, the amorphous language of those standards evinced a congressional intent to delegate broad discretion to the Commission. Recognizing the breadth of those standards, Congress and the courts treated the FPA as delegating more than the execution of particular statutory obligations; they interpreted the FPA to give the Commission something akin to the power to manage wholesale generation and transmission.[311] The breadth of this delegation helps to explain

[308] Indeed Eskidge and Ferejohn point to civil rights as a paradigmatic instance of this sort of agency-led reform. ESKRIDGE & FEREJOHN, *supra* note 13, at 29-74.
[309] *See supra* Sections IIIA-IIID.
[310] *See supra* Part V.
[311] *See* Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) ("the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments"); Fed. Power Comm'n v. Natural Gas Pipeline Co. of Am., 315 U.S. 575, 586 (1942) ("The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances."); *see also* Federal Power Comm'n v. Conway Corp., 426 U.S. 271 (1976) (affirming that the Commission can consider a broad set of factors, including rates outside of its jurisdiction, when exercising its authority).

why the other two branches of government gave the Commission such substantive discretion to execute restructuring.

Recall that in the early days of the electricity industry, Congress did not initially provide for federal regulation of electricity sales and transmission.[312] It left this role to the states, stepping in with the FPA only after the Supreme Court struck down state regulation of interstate electricity sales in *Attleboro Steam Co.*[313] Not surprisingly, Congress endowed the new FPC, as FERC was then known, with broad powers similar in many respects to the state PUCs that it partially replaced.[314] The Constitution provided basic rights to utilities, such as protections against having their property confiscated for public purpose without due process.[315] Beyond these minimal protections, however, most states chose to invest PUCs with broad discretion to manage the electricity sector as they saw fit.[316]

Almost from the outset, the courts interpreted the FPA's ratemaking authority to provide the Commission with substantial flexibility in its choice of rate regulation methodology. In the seminal rate regulation case, *Hope Natural Gas*, the Supreme Court determined that the judiciary would review only the end result of the Commission's

[312] *See* TOMAIN & CUDAHY, *supra* note 3, at 267-68.
[313] Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927); *supra* notes 30-31 and accompanying text.
[314] Shortly after the FPA and NGA were passed the court observed that federal utility regulation was intended to be analogous to the regulation done by state utilities, but for the jurisdictions that were now beyond state reach following *Attleboro Steam Company*. Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U. S. 456, 467 (1941) ("Congress contemplated a harmonious, dual system of regulation of the natural gas industry — federal and state regulatory bodies operating side by side, each active in its own sphere.").
[315] *E.g.*, Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U.S. 679 (1923) (constitutional right not be charged confiscatory rates).
[316] PUCs were originally vested with a combination of a court's common law authority and supplemental statutory authority. *See* BOSSELMAN ET AL, *supra* note 200, at 49-50.

ratemaking proceeding.[317] Provided that this result was just and reasonable, the courts would not disturb the Commission's determination, nor review the method it used.

Although subsequent cases recognized some limits on the Commission's discretion,[318] *Hope* and its progeny confirmed that the Commission would have substantial discretion in implementing the FPA's just and reasonable standard.

The expansive understanding of those standards is best appreciated in contrast to the limited discretion afforded regulators involved in restructuring other regulated industries. Telecommunications provides a revealing counterexample. Although a full discussion of telecommunications deregulation is well beyond the scope of this paper,[319] a few examples paint the picture. Courts played a much more active role in introducing competition by rejecting determinations made by the Federal Communications Commission (FCC).[320] For example, in *MCI Telecommunications Corp. v. Federal Communications Commission*, [321] the D.C. Circuit overturned the FCC's rejection of MCI's efforts to compete with AT&T in the market for long distance telephony. This decision played a central role in catalyzing the transition from monopoly to market completion in the telecommunications sector.[322]

Yet the courts also constrained the FCC's procompetitive efforts at other points. In a famous opinion by Justice Scalia, the Court rejected the FCC's determination that it could "modify" tariff filing requirements to exempt MCI and other nondominant carriers. Although this case is famous more for the Court's battle over the dictionary meaning of

[317] Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).
[318] For example, prior to restructuring, courts limited the extent to which the Commission could rely on market competition to determine rates. *See supra* notes 92-96 and accompanying text.
[319] It is, however, aptly examined in depth in Kearney & Merrill, *supra* note 77.
[320] *See* Kearney & Merrill, *supra* note 77, at 1374-75 (discussing the role that courts played during the deregulation of the telecommunications sector).
[321] MCI Telecomms. Corp. v. Fed. Commc'ns Comm'n, 561 F.2d 365, 380 (D.C. Cir. 1977).
[322] Kearney & Merrill, *supra* note 77, at 1343.

"modify," the "main effect of the courts' filed-rate doctrine decisions . . . [was] to require congressional authorization for agency efforts" to promote deregulation.[323] The FCC's experience with detariffing in the communications sector is hardly unique. Court decisions in the transport sector regulated by the Interstate Commerce Commission had a similar stymying effect on that Commission's efforts to detariff.[324]

The difference between FERC's experience and that of the FCC no doubt reflects several factors. But one of those factors was the sweeping *management* authority created the FPA's broad standards and the corresponding case law. Although electricity restructuring was an extraordinary example of this management authority, it was not inconsistent with the type of discretion that the Commission had exercised throughout its history. The breadth of this discretion helps to explain why the Commission could pursue reforms as extensive as those implemented during the restructuring era. Because FERC enjoyed such broad authority, statutory limits may not have posed much of an obstacle to restructuring. Nonetheless, FERC remained within those limits, and that is an important factor for understanding the legitimacy of restructuring.

B. FERC Regulated Activity Within Its Established Jurisdiction

Although electricity restructuring constituted a sea change in regulatory *method*, it applied to areas that had long been within the Commission's jurisdiction. Consistent with the compromises made in PURPA and EPAct 92, the Commission did not regulate outside its jurisdiction. FERC's restructuring assiduously preserved the exclusive domain

[323] Kearney & Merrill, *supra* note 77, at 1378.
[324] *Id.* (discussing Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130-31 (1990), which rejected efforts by the Interstate Commerce Commission to relax the filed rate doctrine).

of state PUCs.[325] Even the generic open access provisions of Order 888, which arguably pushed the envelope of FERC's authority under the FPA, [326] did not extend regulation to a *new* aspect of the electricity sector. This was a conscious choice by the Commission[327] and it meant that FERC treated electricity restructuring differently from the natural gas sector, where it required the equivalent of retail wheeling for gas pipelines.[328] Had FERC tried to exercise the same control over retail electricity distribution that it did over natural gas, Order 888 might have met a different fate.

The Supreme Court has increasingly policed the efforts of executive branch agencies to expand their jurisdiction, especially when that expansion would have significantly altered the regulation of an important part of the economy. Here the most apt comparison is another canonical statutory interpretation case. In *FDA v. Brown & Williamson*, the Court struck down the Food and Drug Administration's efforts to regulate the tobacco industry.[329] The precise reasoning in that case—including looking to other statutes to understand congressional purpose[330]—may not apply to electricity restructuring. Nonetheless, *Brown & Williamson* stands for the proposition that agencies many not affect a regulatory revolution that was not clearly contemplated by the statute—the canon against hiding elephants in mouse holes.[331] That canon is particularly strong

[325] This is not to suggest that FERC has stayed away from state PUCs entirely. Order 888 expanded FERC's regulation of transmission to include unbundled retail transmission, an area that had previously been left to the state PUCs. *See Dennis*, *supra* note 67, at 36. The Commission did, however, seek defer to state PUCs in a way to minimize any federal intrusion on areas traditionally within their exclusive jurisdiction. *See id.*
[326] Recall the concern that Order 888 elected not to rely on sections 210 and 211, which provided FERC with additional wheeling authority, but allowed it to issue a wheeling order only in response to a petition from an entity within its jurisdiction. *See supra* notes 248-249, 266-269 and accompanying text.
[327] Order 888, *supra* note 203, at 21542.
[328] Rossi, *supra* note 11, at 786-87.
[329] 529 U.S. 120 (2000).
[330] *Id.* at 137-39.
[331] *See, e.g.*, Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 31-34 (2010).

when new regulation would change a longstanding distinction in the regulatory scheme.[332] *Brown & Williamson's* principles are thus relevant for an evaluation of electricity restructuring.[333]

The Commission's introduction of market competition did not raise the sort of concerns articulated in *Brown & Williamson.* Although market-based ratemaking marked a fundamental shift in regulation, it was a change in method, not a change in scope. FERC's changes to its ratemaking practices were within the scope of its authority as recognized by *Hope Natural Gas* and other Supreme Court ratemaking precedents.[334] FERC also introduce the ratemaking reforms on an incremental basis, first through the Southwestern and Western Experiments and then through individualized ratemaking decisions following *Ocean State*.[335] Indeed, the Commission pulled back from a sudden, sweeping introduction of competition after encountering political resistance.[336]

The post-EPAct 92 transmission reforms and Order 888 might at first appear to present a more significant concern. In requiring that transmission facilities be operated like common carriers, FERC reversed a sixty-year history of practice. FERC also took a course of action quite similar to what had been specifically contemplated, but rejected, in the drafting process for the original FPA.[337] Moreover, there was at least a colorable

[332] *See* Theodore Ruger, *The Story of* FDA v. Brown & Williamson *and the Norm of Agency Continuity*, *in* STATUTORY INTERPRETATION STORIES 334 (Eskridge, Frickey & Garrett, eds. 2011).
[333] *Brown & Williamson* was decided after the events discussed in this paper. Nonetheless the case still serves as a useful lens for evaluating, in retrospect, the political legitimacy of the Commission's actions. Electricity is also one of the few federally regulated industries in which whole sectors are the exclusive domain of the states, making jurisdictional limitations especially important.
[334] Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).
[335] *See supra* notes 97-159 and accompanying text.
[336] *See supra* notes 134-141 and accompanying text.
[337] The Congress that passed the 1935 version of the FPA considered imposing common carrier obligations, but eventually declined to do so. *See supra* notes 263-265 and accompanying text.

argument that Congress had declined to give FERC the authority to issue precisely that type of generic wheeling order.[338]

Nonetheless, unlike the tobacco regulation at issue in *Brown & Williamson*, Order 888 regulated an aspect of the industry—transmission standards—that had long been within FERC's jurisdiction. Indeed, FERC's primary legal argument in support of Order 888 was that the D.C. Circuit had already held that a substantively identical action was permitted by the analogous provisions of the Natural Gas Act—a decision of which Congress was aware when it passed EPAct 92 amendments.[339] FERC changed the rules governing transmission access; it did not change the scope of its rules. As a result, the Commission's actions did not present the type of jurisdictional expansion concerns articulated in *Brown & Williamson*.

C. The Commission's Regard for Congressional Purpose

The previous two Sections explained how FERC remained within two important constraints on its authority. First, the Commission remained within the broad substantive authority conveyed by the FPA's broad standards. Second, the Commission respected the jurisdictional limits of the FPA—a point that is particularly important given the sweeping powers delegated by that Act. Yet FERC's change to its regulatory paradigm was in some respects more significant than that proposed by the Federal Communications Commission in *MCI*, and perhaps on par with that of the Food and Drug Administration in *Brown & Williamson*.[340] Even if FERC did not overstep its substantive or jurisdictional limits,

[338] Recall that the EPAct 92 amendments to section 210 provided FERC the authority to issue a wheeling order, but *only* in response to a petition requesting intervention by the Commission. *See supra* notes 198-202 and accompanying text.
[339] *See supra* notes 246-247 and accompanying text.
[340] In *MCI v. AT&T*, the FCC proposed to drop certain tariff-filing requirements for non-dominate carriers; it did not propose a wholesale change of regulatory method. 512 U.S. 218, 221-23 (1994). In Brown &

surely the Commission could not legitimately enact *any* program of reforms that it deemed would promote "just and reasonable" rates and prevent "undue discrimination" or "undue preference"—especially given how broadly those standards had been construed.[341] The fact that the courts have largely foresworn the non-delegation doctrine[342] does not suggest that an unelected, politically insulated organ of the executive branch *should* be able to revolutionize unilaterally the tenets of the regulatory paradigm in one of the most important sectors of the economy.

The next two Sections argue that the authority upon which FERC relied and the way in which it implemented its reforms mitigated concerns about the political legitimacy of restructuring. This first Section explains that the Commissions actions were not as unilateral as a cursory examination might suggest. Although the Commission began its market-based regulation and open access initiatives on its own, Congress nonetheless played an important role. Congress's intent behind the FPA amendments and the Commission's interaction with Congress—including through testimony and oversight hearings—helped shape the course of restructuring.

FERC's attentiveness to the enacting Congress's intent behind the FPA and the contemporary Congress's preferences preferences for the electricity sector imbued the Congress-Commission dynamic with many of the characteristics of a principal-agent

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Williamson, the FDA sought to expand its jurisdiction to an enormously important part of the economy, but again it did seek to alter its regulatory method. Thus many fewer regulated entities would have been affected under the FDA's regulation of tobacco than by FERC's restructuring of the electricity sector.

[341] Of course they could not. Prior to restructuring, lower federal courts had recognized limits on both the Commission's use of market-based regulation, for example, Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 397 (1974), and the scope of its wheeling authority, for example, Florida Power & Light Co. v. FERC, 660 F.2d 668 (5th Cir. 1981 Unit B).

[342] STEPHEN G. BREYER ET AL, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 49-50 (2011); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1038 (2007).

relationship.[343] Congressional intent provided the Commission with broad principles to implement. Those principles, in turn, guided FERC's major policy shifts. For example, the introduction of market competition and the open access regime relied heavily on PURPA and EPAct 92, respectively, to justify the innovation in regulation. The first subsection explores how the Commission relied on congressional intent as represented in enacted statutes. This is the familiar sort of "congressional intent" to which courts and litigants refer in interpreting a statute.[344] The second subsection explores how the Commission relied partly on indicia of contemporary congressional preferences when determining how to apply the FPA. Those signals demonstrated to Commission that Congress either supported the Commission's restructuring reforms or, at the least, confirmed that Congress was comfortable delegating the decision to the Commission.

1. Guidance from Congress's Statutory Purpose

Electricity restructuring was a classic case of dynamic statutory interpretation, in which the Commission applied basic congressional intent to changed circumstances. During the initial Southwestern Experiment, the Commission justified the introduction of competition as (1) the fulfillment of the FPA's overriding purpose of promoting electricity competition and (2) an effort to implement PURPA's focus on efficiency as a new criterion guiding federal electricity policy.[345] The Commission then articulated the same rationale during the Western Experiment—if anything focusing more on the FPA's

[343] The analogy between an agent interpreting a principal's instructions and the interpretation of statutes by the executive and judicial branches has been explained at length by William N. Eskridge. William N. Eskridge Jr., *"Fetch Some Soupmeat"*, 16 CARDOZO L. REV. 2209 (1995).
[344] *See* LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATIONS 83-119 (2010) (discussing the problem of congressional intent in statutory interpretation).
[345] *See* notes 108-114 *supra* and accompanying text.

original pro-competitive purpose.[346] The Commission's principle finding was that "[d]evelopments in the electric utility industry indicate that perhaps a more competitive structure is both possible and desirable."[347] It also asserted that the Experiments comported with its "mandate under PURPA [the most recent indicator of Congressional intent] to promote greater efficiency in electric generation through encouraging greater coordination."[348]

The Commission acted similarly in the early cases that permitted market-based rates. For example, it based its decision in *Ocean State*, the first market-based ratemaking case, partly on the fact that market-based rates would effectuate Congress's intent behind section 210 of PURPA.[349] As with the Experiments, the Commission justified its departure from settled practice by direct reference to (1) the general intent of the FPA and (2) specific intent behind the most recent amendments to that Act.

Evidence of congressional intent also pervaded Order 888. The NOPR and the final rule both focused on EPAct 92's strong endorsement of competition. The final rule in particular noted that the open access requirement was needed to realize the benefits of the exempt wholesale generators provisions, the core electricity policy innovation in EPAct 92.[350] The Commission argued that without requiring open access, the competitive wholesale power markets that were the main goal of EPAct 92 could not materialize.[351]

[346] Pac. Gas & Elec. Co., 38 F.E.R.C. ¶¶ 61789-90 (1987).
[347] *Id.* at 61790.
[348] *Id.* at 61805.
[349] Ocean State Power, 44 F.E.R.C. ¶ 61261, 61977 (Aug. 19, 1988). To refuse to adopt a similar pricing approach here could force investors to continue to develop contrived thermal uses to obtain QF status under PURPA for projects that are fundamentally stand-alone power plants.
[350] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities; Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 60 FR 17662, 17663 (April 10, 1995)
[351] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Util., FERC Order No. 888, 61 Fed. Reg. 21540, 21546 (May 10, 1996).

And policymakers involved with Order 888 have noted that the congressional intent behind PURPA and EPAct 92 played an important role in the decision to require open access.[352] In each major step of restructuring, the Commission relied on multiple forms of congressional intent to justify its actions. These examples show that—at the very least—FERC believed that consistency with the original congressional purpose was an important factor in shaping its policies.

2. Guidance from Contemporary Congressional Preferences

The Commission also looked beyond the traditional forms of legislative history for indicia of the contemporary Congress's preferences for electricity regulation. This evidence of congressional preferences came through diverse channels including oversight hearings and hearings on proposed amendments, and from Congress's role in the evolution of other regulated industries, such as transportation, telecommunications, and the natural gas sector.

This is not to suggest that restructuring can be explained as nothing more than the Commission implementing Congress's feedback. Like organization, FERC had its own distinct preferences and agenda. Nonetheless, the focus on Congress's contemporary preferences illustrates how FERC engaged in a deliberative exchange with the most democratically accountable branch of government and incorporated evidence from those exchanges into its policymaking. This deliberative exchange and the reliance on contemporary congressional preferences helps to mitigate concerns about the legitimacy of FERC's role as the primary actor behind restructuring.

[352] Interview of James J. Hoecker, Chairman, Federal Energy Regulatory Comm'n, by Harold D. Wallace, Jr. and Bernard S. Finn, (June 2000), *transcript available at* http://americanhistory.si.edu/powering/ohi/hoecker/hoecker1.htm

This section briefly outlines two examples of how contemporary congressional preferences guided the Commission's actions. Before doing so, however, it is worth noting the parallels between how FERC considered these signals and how a court might consider "subsequent legislative history." The focus on contemporary congressional preferences has similarities with the well-trod debate about courts' use of subsequent legislative history. When interpreting a statute, courts are justifiably skeptical about whether and how post-enactment legislative history should influence their construction of the statute.[353] Concerns about reliability and probative value animate courts' hesitance toward subsequent legislative history as an interpretive tool.[354] Although there are some instances where courts will use subsequent history to make an inference about congressional preferences, they are largely the exception that proves the rule.[355]

Those concerns, however, do not apply to congressional made signals to agencies rather than courts. Rather than leading agencies astray, contemporary preferences provide data about public concerns and increase the likelihood that decisions will reflect democratic preferences. Attentiveness to those signals also promotes inter-branch deliberation—a result that should mitigate concerns about unilateral agency action. The

[353] United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in judgment); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) ("The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment . . . . Such history does not bear strong indicia of reliability ... because as time passes memories fade and a person's perception of his earlier intention may change."); *Continental Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 466-68 (1988) (listing the arguments for not relying on subsequent legislative history); Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 661 (2002) ("The Supreme Court's ordinary rule of interpretation is that subsequent legislative history is a poor guide . . ."). *But see* Eskridge, *supra* note 16, at 151-52 (discussing the "arguably promajoritarian" benefits of considering legislative history in *Bob Jones*).

[354] Farber & Frickey, *supra* note 353, at 466-68.

[355] *See, e.g.*, Bob Jones University v. United States, 461 U.S. 574, 599-602 (1983).

following Subsections discuss how contemporary preferences influenced the initial Experiments and Order 888.

(1) Southwestern and Western Experiments.

The Southwestern Experiment "[wa]s [a rate filing] that the Commission, its staff and Congress have encouraged for a considerable period of time."[356] Although FERC Chairman C.M. Butler had mentioned the idea of a coordination transaction experiment before, his proposal gained momentum after a set of hearings before the House Subcommittee on Energy Conservation and Power.[357] In response to questions from the Subcommittee, Chairman Butler presented FERC's policy options for encouraging energy conservation and minimizing the electricity costs borne by consumers.[358] The options included voluntary experiments that might ultimately "suggest that more fundamental changes in our regulation and in the industry are warranted."[359] At the same time, he acknowledged that a FERC Commissioner's "beliefs and questions are not, however a sufficient basis for Commission action to restructure the electric utility industry or the way that we regulate it."[360] Notably, Chairman Butler also mentioned to the success of the Civil Aeronautics Board in promoting price competition in the aviation sector as an example of the potential for reform.[361]

The Commission spent several months soliciting input from industry and

[356] Pub. Serv. Co. of New Mexico, 25 F.E.R.C. ¶ 61469, 62029 (Dec. 30, 1983).
[357] *FERC As a Least-Cost Regulator*, *supra* note 101.
[358] *Id.*
[359] *Id*. at 32. The testimony also noted how the Commission was restrained from using the most effective lever—retail rate structure—by the jurisdictional limits in the Federal Power Act. *Id*. at 10.
[360] *Id*. at 32.
[361] *FERC As a Least-Cost Regulator*, *supra* note 101, at 31-32.

deliberating on how best to structure the experiments.[362] Meanwhile, Congress provided explicit support for Chairman Butler's proposal. As the Commission noted in the order approving the experiment, Congress repeatedly "encouraged" the Commission to explore strategies for improving efficiency of coordination transactions.[363] In the two years following Chairman Butler's congressional testimony, the House Appropriations Committee's annual reports for the legislation that funded FERC explicitly encouraged the Commission to develop experiments along the lines of what became the Southwestern Experiment.[364] Those reports are convincing evidence of congressional support for FERC's Experiments. By allotting FERC funds and encouraging FERC to use those funds to pursue the Experiments, Congress provided the Commission with a clear signal to explore increased use of competition in wholesale electricity markets.

Although we cannot know whether the Commission would have acted without congressional support, the feedback it received in the hearings and reports discussed above demonstrate that the Commission knew that Congress wanted it to experiment with competition. The fact that the Commission described this support prominently in the order suggests that, at the least, it thought it was important to have Congressional backing for the initiative.[365] This understanding is important to evaluating the political legitimacy of FERC's actions. It shows that the Commission was not unilaterally altering the fundamentals of the regulatory paradigm. It was testing ideas with Congress and considering Congress's reaction to its proposals to update the statute incrementally.

[362] Pub. Serv. Co. of New Mexico, 25 F.E.R.C. ¶ 62031 and nn. 17 & 18 (listing steps the Commission took to explore the experiment after initially presenting the idea to Congress).
[363] *Id.* at 60231. (citing H.R. Rep. No. 98-217, at 132-133 (1983) ("The Committee [on Appropriations] encourages FERC to continue the Bulk Power Market Experiments project announced by Chairman Butler in April 1982") and H.R. Rep. No. 97-850, at 94 (1982))
[364] H.R. Rep. No. 98-217, at 132-133; H.R. Rep. No. 97-850, at 94.
[365] H.R. Rep. No. 98-217, at 132-133; H.R. Rep. No. 97-850, at 94.

Congress and the Commission consensus on the future of electricity regulation greatly reduces concerns about the legitimacy of the Commission's action.[366]

(2) Order 888

Congress's affirmative role in Order 888 was subtler than in the Experiments. Rather than exhorting a particular change, Congress consciously refrained from curtailing FERC's authority to require generic open access. Recall that section 211 of EPAct 92 enlarged the Commission's authority to order wheeling in response to a petition from a regulated entity.[367] Although that provision appeared to be the main source of wheeling authority, a closer examination of the dynamic between the Commission and Congress suggests a more complicated picture—one in which Congress's inclusion of the savings clause explicitly did not displace the Commission's authority under sections 205 and 206.

The Commission addressed its wheeling authority in detail during its testimony in support of EPAct 92. In response to a question from Congress about whether the Commission had authority to mandate "open access,"[368] FERC surveyed the wheeling case law under both the Natural Gas Act (NGA) and the FPA. The NGA and the FPA were drafted at the same time and courts frequently regarded a decision on a section of the NGA as binding on the analogous section of the FPA.[369] The analysis that the

[366] This understanding parallels the understanding in Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Company v. Sawyer*—although this does not involve *constitutional* authority. 343 U.S. 579, 635-36 (1952).("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.[2] In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty.") Instead, we might be less concerned about the Commission's reinterpretation of a statute when it is doing so with the express encouragement of Congress.

[367] *See supra* note 193 and accompanying text.

[368] National Energy Strategy Hearings, *supra* note 154, at 53.

[369] A long line of cases had established this pattern for the sections on "just and reasonable rates" and "undue discrimination." *See, e.g.*, FPC v. Sierra Pacific Power Company, 350 U.S. 348, 353 (1956); Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571, 577 n.7 (1981); and Kentucky Utilities Company v. FERC, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985); Santa & Sikora, *supra* note 225, at 285 ("the federal

Commission provided Congress included a thorough assessment of *Associated Gas Distributers* (*AGD*), the case in which the D.C. Circuit upheld FERC's authority under the NGA to order open access as a remedy for undue discrimination. The Commission witnesses observed that "the [*AGD*] court's analysis of the NGA Sections 4 and 5 is equally applicable to FPA Sections 205 and 206."[370] Thus, the Commission argued, the case law suggested that it had the authority to issue address wheeling under sections 205 and 205. Although the Commission expressed no intent to use that authority, it suggested that it could do so if faced with appropriate circumstances in the future.

Furthermore, on April 8, 1992—a few months before both chambers of Congress passed the bills that became EPAct 92—the Commission issued Order 636, which required open access and the functional unbundling of the natural gas industry.[371] Order 636 was in many respects the template for Order 888.[372] The combination of Order 636, its predecessor, Order 436 (the predecessor to Order 636),[373] courts' history of treating the FPA and NGA analogously, and FERC's statement that it might be able to use sections 205 and 206 of the FPA to require open access transmission put Congress on notice that FERC could require open access to remedy undue discrimination in the electricity sector. Had Congress responded to this evidence by doing nothing to restrict the Commission's authority under sections 205 and 206, it would have arguably created a strong inference that EPAct 92 acquiesced to FERC's interpretation of the undue

courts have held in some cases that precedent developed under one of the statutes [FPA or NGA] was applicable to the parallel provision of the other statute.).

[370] National Energy Strategy Hearings, *supra* note 154, at 69.

[371] Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol under Part 284 of the Commission's Regulations, III F.E.R.C. Stats. & Regs. P 30,939, 57 Fed. Reg. 13,267 (1992).

[372] Santa & Sikora, *supra* note 225, at 134-39.

[373] Order 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42408 (1985).

discrimination and undue preference sections. Congress was aware of Orders 436 and 636, and, through the hearings, of the fact that the Commission believed it had similar authority under the FPA's analogous provisions.

Congress, however, did not just stand pat. The sections providing the additional wheeling authority in EPAct 92 contained a savings clause that provided that the amendments "shall not be construed as limiting or impairing any authority of the Commission under any other provision of law."[374] Thus Congress established that any changes it made to the Commission's wheeling authority did not displace any prior authority it had under the FPA. The D.C. Circuit's *AGD* decision, Order 636, and FERC's testimony made clear that the Commission believed it could require generic open access as a remedy for undue discrimination. That Congress explicitly did not disturb that interpretation strongly suggests Congressional acceptance of FERC's authority.

Unsurprisingly, the Commission's discussion of its authority to issue Order 888 closely paralleled the discussion submitted to Congress during the EPAct 92 hearings.[375] Congress's decision not to alter FERC's wheeling authority under sections 205 and 206 in light of (1) FERC's interpretation that it likely had the power to order open access under those provisions and (2) actually used the analogous NGA provisions, helps to mitigate concerns about FERC's unilateral action. Congress knew the path FERC might take on transmission and consciously elected not to forestall that path.

Ordinarily, even when statutes have identical language, a decision on one statute is not binding precedent for courts' interpretation of another statute that was passed before the new decision. Nor does an agency's statement that it *might* interpret a statute a

[374] 16 U.S.C. § 824k(e)(1) (1994).
[375] *Compare* Order 888, *supra* note 206, at 21560-62 *with* National Energy Strategy Hearings, *supra* note 154, at 53-70.

certain way suggest that Congress ratified that interpretation by not explicitly rejecting it. But those ordinary presumptions do not apply here. First, Congress knew that courts interpreted the analogous provisions of the FPA and NGA so that a decision on one was generally a precedent for the other.[376] Second, Orders 436 and 636 were two of the most significant actions in the Commission's history of natural gas regulation.[377] Congress was certainly aware of their scope and potential significance for electricity regulation. Third, the Commission stated that sections 205 and 206 gave it the same authority to remedy undue discrimination that it had relied on to issue the natural gas orders. The combination of these factors strongly suggests that Congress was aware of the effect the savings clause might have. This is also consistent with the D.C. Circuit's reading in upholding Order 888, where it held that the *AGD* precedent resolved the statutory question. Indeed when viewed together the savings clause, section 211's authority to issue case-by-case wheeling orders might be best viewed as an avenue to permit the Commission to move forward incrementally on transmission access.

In the context of the "great transformation of regulated industries,"[378] and public utilities in particular, this acquiescence is telling. Although it fell short of the affirmative exhortations that Congress gave the Commission before the Southwestern and Western experiments, it strongly suggests that Congress was content with the deregulatory project in which the Commission was engaged. FERC thus had good reason to believe that Congress would support an interpretation of sections 205 and 206 that gave it the same authority under the FPA that it had exercised under the NGA.

On a more general level, this attention to congressional preferences should be an

[376] *See* sources cited *supra* note 369.
[377] As a result, it is unlikely that Congress was not acutely aware of the stakes for the FPA.
[378] Kearney & Merrill, *supra* note 77.

important element of how agencies develop and advance policies. Although Congress can defund agency action, that is significant step and not one that Congress can use effectively when attempting to guide, rather than simply reject, an agency's decisions. When agencies respond to the type of signals described above they can create a more effective partnership between Congress and the Executive, which should help ensure that the agency is responsive to popular concerns. Similarly, this interaction may also prevent statutory ossification. When FERC responds to Congress's concerns or when it incorporates Congress's responses to Commission testimony, it helps mold the FPA to meet contemporary problems. In this case, for example, it was appreciation of those concerns that helped bring electricity policy in line with the great transformation in regulation industries.

D. The Commission's Deliberation-Forcing Incrementalism

The previous Section explained how FERC's attention to Congress's statutory intent and its contemporary preferences mitigates concerns that might otherwise attend sweeping regulatory reforms by an unelected and politically insulated Commission. But even with all those factors present, one might still be justifiably hesitant to endorse restructuring had FERC proceeded in one fell swoop. FERC, however, proceeded gradually. It tested potential reforms on a case-by-case basis before implementing them. It often proceeded only after receiving positive feedback from Congress, and frequently also from the companies it regulated. This gradualism served two important purposes. First, it promoted deliberation between the Commission, regulated entities, and Congress. Second, it capitalized on the Commission's institutional advantages by allowing it to use

its expertise, experience, and flexibility to design solutions to the complex problems of the evolving electricity industry.

FERC's introduction of market-based ratemaking provides a perfect example of this dynamic. After the initial coordination experiments, the Commission sought to implement competitive principles through rulemaking. It elected never to finalize those rules, however, after encountering significant resistance from industry, states, and elements of Congress.[379] The failure to promulgate final rules was one of the factors that led George H.W. Bush's Administration to undertake a comprehensive review of electricity policy as part of the Administration's National Energy Strategy.[380] A former FERC Commissioner described this review as "truly comprehensive" in its inclusion of affected parties.[381] This process helped generate consensus on the role competition should play in ratemaking.[382] The National Energy Strategy paved the way for the bipartisan EPAct 92, which ratified and strongly endorsed the Commission's efforts to increase competition in wholesale electricity markets.[383] It was only after this ratification and the unambiguously pro-competitive intent in EPAct 92, that the Commission began adopting broad presumptions in favor of market-based ratemaking.[384]

Similarly, the Commission spent multiple years addressing wheeling issues on a case-by-case basis after EPAct 92 and prior to the NOPR that led to Order 888. In doing so, the Commission first used section 211. After that section proved insufficient to meet the growing need for transmission access, the Commission began gradually

[379] *See supra* notes 134-139 and accompanying text.
[380] *See supra* notes 163-165 and accompanying text.
[381] Interview with Charles Trabandt, Former Commissioner, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 11, 2012).
[382] *Id.*
[383] For a discussion of how EPAct 92 ratified FERC's actions, see *supra* notes 190-202.
[384] *See supra* notes 238-241 and accompanying text.

experimenting with wheeling as a remedy for undue discrimination under FPA sections 205 and 206.[385] As the separate opinions of Commissioners Santa and Hoecker made clear, it was apparent that ordering wheeling under those sections might lead to the sort of generic open access requirement that the Commission had imposed on the natural gas industry just a few years earlier.[386] Recall, for example, that Commissioner Hoecker described FERC's undue discrimination analysis in one such case as a "harbinger" whose "significance is part of a longer evolutionary process."[387] By the time FERC issued the NOPR in 1995 and the final rule a year later, Congress and regulated entities had debated and weighed in on the structure of the eventual open access requirement.[388] This input and the Commission's experience helped produce regulations that considered popular concerns. Indeed the Commission's decision to allow utilities to recover the full value of their stranded costs reflected its experience with open access in the natural gas sector and the steps needed to secure a smooth transition to open access in electricity.[389]

Electricity restructuring was an immense task. In part because of industry's complexity, Congress, the Commission, and regulated entities were understandably concerned about the effects that reforms might have on firms' ability to provide reliable electricity and on the long-term health of the sector.[390] In a way that a legislature could not, the Commission took small steps—experiments—that allowed it to test the effect of

[385] *See supra* notes 210-244 and accompanying text.
[386] *See supra* notes 226-232 and accompanying text.
[387] Am. Elec. Power Serv. Corp., 67 F.E.R.C. ¶ 61168, 61491 (May 11, 1994).
[388] Interview with Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 17, 2012).
[389] Santa & Sikora, *supra* note 225, at 134-39; *see* Interview with Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 17, 2012).
[390] Interview with Charles Trabandt, Former Commissioner, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 16, 2012); Interview with Cynthia Marlette, Former General Counsel, Federal Energy Regulatory Commission, conducted by Matthew R. Christiansen (conducted April 17, 2012).

competition. Through this process FERC could test reforms and critically evaluate their effect before implementing them on a large scale.[391]

Importantly, the Commission created opportunities both for decreasing costs to consumers and for increasing the profits to firms that could compete effectively.[392] Demonstrating that competition could expand both consumer and producer surplus created a constituency for increased market-based ratemaking and helped to drive the deliberative process that ultimately produced EPAct 92. The Commission's incremental approach promoted deliberation in two ways: (1) it fostered a debate about how the Commission should reform its implementation of the FPA and (2) it created pressure for Congress and interested parties to consider how to reform the FPA through legislation such as EPAct 92. The resulting political participation by affected groups should also help mitigate concerns about unilateral action by the Commission.

The technical complexity of the electricity sector is also relevant to the legitimacy of the Commission's actions. As an institution, the Commission was much better placed than Congress to assess where competition would be most effective and to conduct a gradual implementation of market-based rates. It was similarly better placed to evaluate the transmission requirements of the emerging wholesale power market. Just as courts are more likely to defer to agencies on statutory questions on complex subjects,[393] Congress

[391] This included the initial experiments with coordination transaction, *supra* notes 97-159 and accompanying text, the introduction of market-based ratemaking in *Ocean State* and its progeny, *supra* notes 97-159 and accompanying text, and the early wheeling cases under sections 205 and 206, *supra* notes 210-244 and accompanying text..

[392] For example, the Commission set a formula for sharing the surplus generated in the Southwestern and Western experiments between customers and the utility shareholders. *See supra* note 106 and accompanying text. Similarly the Commission initially approved market-based ratemaking only after finding that there were factors that would keep the rates within a "zone of reasonableness." *See supra* notes 107, 147, 152-153, and accompanying text.

[393] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083, 1144-46 (2008)

may, quite reasonably, prefer that an experienced agency use its expertise to plan and execute the initial reforms, communicating this preference through the type signals discussed earlier in this Article. Indeed that seems to be exactly what happened during early parts of restructuring.

FERC acted incrementally with respect to Order 888 as well. As discussed above, Congress was on notice, based on the natural gas experience and the Commission's testimony during the EPAct 92 hearings, that the Commission might at some point consider requiring open access. Recognizing the significance of this change, Congress might well have left it to the Commission to determine when such a change was needed. As the Commission explained in Order 888, it first experimented with limited use of its authority to remedy undue discrimination in individual proceedings, electing to impose generic open access by rulemaking only when it determined that a rule was necessary to further Congress's larger project of promoting wholesale market competition.[394]

*** * ***

The Commission's success in revolutionizing electricity regulation under the FPA was partially a reflection of its unique circumstances: FERC's broad substantive authority, the rapidly changing, technically complex industry, and the "great transformation" in which restructuring took place all militated for Commission leadership. Nonetheless, aspects of restructuring are important to a broader study of Administrative constitutionalism. The deliberative benefits of moving incrementally and the legitimating attention that the Commission paid to Congress's original intent and

[394] Order 888, *supra* note 206, at 21547.

contemporary preferences are factors an agency should consider when reinterpreting a statute to address changed circumstances.

FERC's respect for the intent of the enacting Congress and the preferences of the contemporary Congress mitigate concerns about unelected agency officials pursuing this type of dramatic reform. Throughout restructuring, FERC pursued the overarching principles in the FPA statute. Then, at the critical points when it significantly changed its regulatory approach, FERC pointed to persuasive evidence that Congress supported its reforms. Thus while electricity restructuring may have been unique in the degree to which it was led by the executive branch, Congress nonetheless played an important—albeit informal—role in shaping restructuring.

Moreover, FERC's incremental advancement of reforms fostered deliberation about how to revise its implementation of the FPA and how Congress should reform the FPA itself. This deliberation elicited the views and participation of a broad range of stakeholders, including Congress. Although this participation cannot replace a congressional mandate, it helps to assuage concerns about the legitimacy of such sweeping administrative reform. This incremental approach allowed the Commission to deploy its expertise and experience to shape its reforms in a way that reflected the rapidly changing structure of the industry. Indeed, the Commission's experience with restructuring the Natural Gas sector,[395] and its ability to experiment with reform, no doubt contributed to the relatively smooth transition from the traditional model of regulation to the new restructured industry.

[395] Unlike restructuring in the natural gas sector, Order 888 permitted transmission owners to recover the full value of their stranded costs—i.e., the diminution in value of their transmission investments due to the change in regulation. *See* Jim Chen, *The Nature of the Public Utility: Infrastructure, the Market, and the Law*, 98 NW. U. L. REV. 1617, 1701-05 (2004)