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Part II of the Federal Power Act (FPA) requires that all prices set for the sale of electricity affecting interstate commerce between electrical utilities be "just and reasonable."[1] Pursuant to this requirement, the FPA authorizes the Federal Energy Regulatory Commission (FERC) to suspend such electricity sales prices upon finding that they unduly disadvantage or discriminate between locations or types of power plants.[2] In assigning this limited jurisdiction to the federal government, and by explicitly reserving to the states the exclusive jurisdiction over the mix of power plants supplying electricity demand, the FPA mandates a cooperative federalism model of electricity sector regulation.[3]

A recent FERC ruling in *Calpine Corp. v. PJM Interconnection, LLC*[4] expansively interprets federal regulatory authority under the FPA, asserting that state subsidies for clean energy provide grounds for FERC to suspend electricity price-setting activity.[5] This Article argues that FERC's ruling in *Calpine* not only undermines the FPA's federalist structure, but also arbitrarily and capriciously penalizes state support for renewable and nuclear energy while permitting historic and ongoing state support for fossil-fuel based electricity. By rejecting states' legitimate preferences for low emissions electricity, FERC's *Calpine* ruling limits states' ability to mitigate climate change by reducing greenhouse gas emissions from the electricity sector. These efforts are particularly important at a time when federal leadership on climate change is conspicuously absent.[6]

I. The Federalist Balance in Electricity Sector Regulation

While founded as vertical monopolies, electric utilities today exist in a nationally interconnected market.[7] Utilities have dramatically improved service reliability and reduced operating costs by sharing power generation, transmission, and distribution infrastructure in regional electrical grids.[8] FERC has exercised its jurisdiction over the resulting interstate commerce by mandating the formation of regional transmission organizations (RTOs) to coordinate, control, and monitor regional electrical grids.[9] Among other roles, RTOs satisfy electricity demand across their grid by operating auctions in which electricity generation companies (GENCOs) compete to sell electricity to utilities at the lowest price.[10] RTOs set a flat "clearing" price received by all GENCOs at the lowest bidding price that satisfies the demand for the entire network.[11]

Exercising their concurrent jurisdiction over in-state power plants, the District of Columbia and ten of the thirteen states in the Mid-Atlantic region RTO, PJM, implemented Renewable Portfolio Standards (RPS).[12] RPS programs require that utilities serving the state source a specified percentage of their electricity supply from specified renewable and nuclear energy resources.[13] To meet RPS targets, state governments and utilities offer a combination of subsidies to renewable and nuclear energy GENCOs, including rebates, tax incentives, and credits.[14] In *Calpine*, a natural gas GENCO filed a complaint with FERC claiming PJM states' RPS subsidies "artificially suppress" PJM electricity prices by allowing "uncompetitive" renewable and nuclear energy GENCOs to submit bids that do not reflect their actual costs.[15] FERC commissioners subsequently ordered PJM to "mitigate" the effect of state renewable energy subsidies in the interstate electricity market.[16]

II. FERC's *Calpine* Ruling Undermines State Jurisdiction Over Intrastate Electricity Generation

In *Hughes v. Talen Energy Marketing, LLC*,[17] the Supreme Court emphasized that, given the interconnected nature of the modern electric grid, FERC's interstate regulations and states' intrastate regulations will inevitably affect each other.[18] These crossover impacts are not only permissible but intended under the FPA's federalist structure; the only limitation is that neither sovereign may intentionally target the other's jurisdiction.[19] The mere existence of crossover impacts is not sufficient to show intentional targeting; instead, to show that a state overreached its jurisdiction, a plaintiff GENCO must prove that the state directly conditioned or "tethered" the GENCO's subsidy eligibility on supplying electricity through an RTO.[20]

The RPS subsidies at issue in *Calpine* do not satisfy the *Hughes* intentional targeting test. The RPS subsidies are distinguished from other state energy policies rejected by FERC and courts because they neither required subsidized GENCOs to submit bids that clear PJM's capacity market auction nor guaranteed those GENCOs an electricity price distinct from the interstate wholesale clearing price set by the RTO.[21] In this regard, the RPS subsidies are neither intentionally targeted at RTO electricity markets under federal jurisdiction nor "tethered" to GENCO participation in PJM's capacity market, and thus fall squarely within state jurisdiction. In ruling that RTOs may frustrate state subsidies for in-state power plants not directly tied

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to RTO market participation, FERC's *Calpine* ruling implies an unlimited federal jurisdiction over GENCOs, which was not contemplated by FPA's statutory structure.

III. FERC's *Calpine* Ruling Arbitrarily Targets Renewable and Nuclear Energy.

Regardless of its exercise of jurisdiction, FERC's application of the FPA's "just and reasonable" provision in *Calpine* to overturn PJM states' RPS subsidies for renewable and nuclear energy is arbitrary and capricious.[22] FERC's mandate to ensure RTO electricity wholesale rates are "just and reasonable" is, in essence, an obligation to reflect the price that an efficient market would produce.[23] FERC's *Calpine* ruling emphasized that state RPS subsidies threaten the integrity of PJM's capacity market because they allow certain GENCOs to submit suppressed bids in PJM capacity market without competing on a comparable basis with "competitive" resources.[24] However, FERC's *Calpine* ruling arbitrarily ignores the market distorting effects of longstanding state and federal subsidies for fossil fuel-based electricity generation.[25] These subsidies have propped up uneconomical and aging fossil fuel power plants by allowing fossil fuel GENCOs to submit suppressed bids into RTO capacity markets.[26] A reasonable and historically consistent application of FERC's *Calpine* standard, therefore, would require PJM to mitigate states' longstanding subsidy support for fossil fuel-based electricity, not just its newer subsidy support for renewable and nuclear energy.

More fundamentally, however, FERC's *Calpine* ruling arbitrarily ignores that government subsidies reflecting the relative environmental benefits of low-emissions electricity generation are essential to reaching the efficient market outcome mandated by the FPA.[27] Without subsidy programs encouraging low-emissions electricity generation, RTO markets will continue to produce inefficient outcomes for the U.S. electrical grid and the public.[28] Furthermore, emissions credits for renewable and nuclear energy GENCOs, like those at issue in *Calpine*, are awarded based on the positive environmental attributes of the electricity eligible GENCOs produce, rather than based on the value of that electricity in a RTO market.[29] Since these credits are traded in secondary markets wholly separate from RTO electricity auctions and reflect the environmental, rather than economic, value of electricity generation, they are effectively untethered to wholesale electricity markets under federal jurisdiction.[30]

IV. Conclusion

Consistent with the federalist design of the FPA and its interpretation of "just and reasonable" electricity prices in RTO markets, FERC should permit PJM states' legitimate pursuit of a cleaner and more economically efficient electricity resource mix. By failing to do so, FERC's *Calpine* ruling curtails essential state leadership on climate change.

Endnotes

1 16 U.S.C. § 824d(a) (2012).

2 *See* 16 U.S.C. § 824d(b) (distinguishing federal jurisdiction over prices for electricity sales across state lines between utilities (*interstate wholesale* rates) from state jurisdiction over prices for electricity sales within a state between a utility and customer (*intrastate retail* rates)).

3 *See* 16 U.S.C. § 824(b)(1); Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 1299-1300 (2016) (Sotomayor, J. concurring) (emphasizing the importance of preserving states' regulatory role to meeting the Federal Power Act's goal of ensuring a sustainable supply of efficient and cost-effective electricity).

4 163 F.E.R.C. 61,236, 2018 WL 3360507 (2018).

5 *See id.* at *35-37 (holding that subsidies provided by states to support the entry and continued operation of renewable and nuclear energy generation facilities in the wholesale market threatens the integrity and effectiveness of the PJM interstate electricity capacity market).

6 Shortly after being inaugurated, President Trump initiated U.S. withdrawal from the Paris Climate Agreement and is in the process of rolling back federal rules key to its implementation, including the Obama administration's Clean Power Plan, a regulatory program targeting electricity sector greenhouse gas emissions. *USA Climate Action Tracker Assessment*, Climate Action Tracker (2017), https://climateactiontracker.org/media/documents/2018/4/CAT_2017-11-06_CountryAssessment_USA_8fXxIrP.pdf.

7 *See* Cong. Research Serv., R44783, *The Federal Power Act (FPA) and Electricity Markets* 3 (2017).

8 *Id.* at 5-6.

9 While FERC's power to regulate interstate transmission and sales of electricity derives from passage of the Public Utility Act in 1935, FERC neither comprehensively nor consistently exercised this power until it introduced RTOs in a series of issued orders starting in 1996. *Id.* at 2-5.

10 PJM, the RTO affected by the *Calpine* ruling, operates a capacity auction, where GENCOs submit bids to supply predicted electricity demand three years in advance. *PJM Markets Fact Sheet*, PJM Interconnection, 1 (2017), https://learn.pjm.com/-/media/about-pjm/newsroom/fact-sheets/pjms-markets-fact-sheet.ashx.

11 *Id.*

12 Miles Farmer, *Clean Energy Groups Urge FERC to Reconsider PJM Order*, Nat. Resources Def. Council (Aug. 2, 2018), https://www.nrdc.org/experts/miles-farmer/clean-energy-groups-urge-ferc-reconsider-pjm-order.

13 *State Renewable Portfolio Standards and Goals*, Nat'l Conference of State Legislatures (Feb. 1, 2019), http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx.

14 *Id.*

15 *See* Calpine Corp. v. PJM Interconnection, LLC, 163 F.E.R.C. ¶ 61,236, 2018 WL 3360507, at *5 (2018).

16 *Id.* at 36. FERC ordered PJM to use its Minimum Offer Price Rule (MOPR) to mitigate state RPS subsidies. MOPR places a price floor on GENCO's RTO auction bids and was originally developed by FERC to prevent holding companies owning distribution utilities and natural gas power plants from offering artificially low capacity bids (thereby suppressing prices) to secure contracts knowing they can recoup losses by buying cheap capacity. Farmer, *supra* note 12.

17 136 S. Ct. 1288 (2016).

18 *See id.* at 1298 (noting that states may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain).

19 *Id.*

20 *See id.* at 1299 (noting that state energy subsidy payments "untethered," or not conditioned on recipients clearing RTO market auctions, would fall outside federal jurisdiction); Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 776 (2016) (holding that FERC regulation does

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