Materials on Mechanisms for Joint State-Federal Decision Making in Electricity Policy

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1. Section 202 of Federal Power Act.
2. Section 209 of Federal Power Act.
3. Point-Counterpoint on Lawfulness of Regional Planning Bodies in *The Electricity Journal*, by William Massey and Charles Patrizia.
4. Excerpts from Felix Frankfurter and James landis law review article.

INTERCONNECTION AND COORDINATION OF FACILITIES; EMERGENCIES; TRANSMISSION TO FOREIGN COUNTRIES

SEC. 202. (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

USE OF JOINT BOARDS; COOPERATION WITH STATE COMMISSIONS

SEC. 209. (a) The Commission may refer any matter arising in the administration of this Part to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and affect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from the State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(16 U.S.C. 824h)

Can the Arkansas-Entergy-New Orleans Regional Planning Body Pass Muster?

This novel proposal for regional integrated resource planning comes from an unusual coalition of interests. It would change the established scheme of regulation in small but important ways. But is it lawful?

Editor's Note: *Entergy, the Arkansas Public Service Commission and the New Orleans City Council have agreed on a proposal (hereafter, the "Arkansas proposal") for developing a regional integrated resource plan which could apply to multistate registered holding companies, including Entergy. Such a plan would be binding on determinations of state and federal regulators as well. The proposal, which would require federal legislation, has three alternate means of adopting a plan: (1) by petition to the Federal Energy Regulatory Commission, (2) by consistent action of the respective jurisdictions, and (3) by action of a regional board. It is only the lawfulness of this latter approach that is the subject of the debate on the following pages. The participants in the debate are:*

Bill Massey *of the firm of Mitchell, Williams, Selig, Gates & Woodward (which represents Entergy), who argues the pro; and*

Charles Patrizia, **John Rice** *and* **Greg Wortham** *of the firm of Paul, Hastings, Janofsky & Walker (which represents the other registered companies in these matters), who argue the con.*

Yes

William L. Massey

The opponents' constitutional objections to the Arkansas proposal can be easily answered.

In the abstract, an attempt by an individual state or a group of states to engage in regional utility regulation could run afoul of a "dormant" Commerce Clause — that is, where Congress has taken no action to authorize such activities. Such regulation could constitute an impermissible burden on interstate commerce.

But "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."[1]. Delegation by Congress of the express regulatory authority called for by the proposed Arkansas legislation would clearly survive a constitu-

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No

Charles A. Patrizia, John J. Rice, Gregory L. Wortham

The Arkansas proposal would give appointed or elected state officials power directly to regulate commercial operations between states and within other states. This would constitute a direct burden on interstate commerce and is something an individual state commission would not be permitted to do.

The Constitution specifically grants to Congress the power to regulate interstate commerce.[1] State regulation of commerce is allowable so long as it does not impermissibly "affect" or "burden" interstate commerce,[2] but the Constitution prohibits an individual state from directly regulating commerce between or in other states.[3] The Supreme Court said in the landmark *Attleboro* case that states

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tional challenge on Commerce Clause grounds.

Compact Clause

Article I, sec. 10 of the Constitution states that "[n]o State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State ... ." Through the proposed Arkansas legislation, Congress would give its necessary consent. As the Supreme Court said in *Cuyler v. Adams*,

> [W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the states' agreement into federal law under the Compact Clause.[2]

A noted constitutional scholar sums it up this way: "*Cuyler* thus stands for the proposition that, if Congress enacts some kind of consent legislation, the Court will defer to Congress' political judgment that the compact is good for the nation ... ."[3]

There can be no serious argument that this legislation violates the Compact Clause.

Appointments Clause

In *Buckley v. Valeo*, the Supreme Court ruled that "any appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States and must, therefore, be appointed [by the President]."[4]

The opponents rely upon *Cuyler* to argue that if a compact is approved by Congress and becomes federal law, it must therefore be carried out by "officers" of the United States. Their argument rests on the proposition that states entering into a compact authorized by federal law necessarily exercise federal powers. There is no merit to this argument.

In a decision that is squarely on point, the U.S. Court of Appeals soundly rejected a similar attack on the constitutionality of the Pacific Northwest Electric Power and Conservation Planning Council, a regional planning body that was established by four Northwest states and authorized by federal law.[5] Addressing *Buckley*, the court found that the members of the planning council did not perform their duties pursuant to the laws of the United States, but under authority of the laws of their respective states.

Rejecting the same arguments raised by opponents of the Arkansas legislation, the court concluded that

> the council members performed their duties pursuant to a compact which requires both state legislation and congressional approval. Without substantive state legislation, there would be no Council and no Council members to appoint. While congressional consent gives an interstate compact some attributes of federal law, the council members' appointment, salaries and administrative operations are pursuant to the laws of the four individual states, within parameters set by the Act. More important, the states ultimately empower the Council members to carry out their duties.[6]

In short, the *Seattle* court found it controlling that, although consented to by Congress, the council was created under *state law*. It added that no court had ever held that the Appointments Clause prohibits creation of an interstate planning body such as the council with members appointed by the states.[7]

The court went on to say that, if upheld, the petitioners' Appointments Clause arguments would "outlaw virtually all compacts because all or most of them have members appointed by the participating states."[8]

The regional planning boards that would be authorized by the Arkansas legislation have characteristics like those relied on by the court in *Seattle*: (1) they depend on state law for their formation;[9] the congressional authorization expressly provides that they are not to be considered an agency of the United States for the purpose of any federal law;[10] and the salaries of members and the day-to-day administrative costs of running the boards would be determined essentially by the participating states.[11]

My opponents' reliance on *Cuyler* is misplaced. In *Cuyler*, a state court had interpreted an interstate agreement to which Congress had agreed. If the state court had been interpreting *state law*, a federal court would be bound by its interpretation; but there the Supreme Court held the

compact to be a "congressionally sanctioned interstate compact, interpretation of which presents a question of federal law."[12] *Cuyler* is irrelevant to the Appointments Clause issue.

Opponents can find no precedent to the effect that approval of an agreement by Congress, *ipso facto*, turns the members of a compact into federal officers for purposes of the Appointments Clause. Such a reading would destroy virtually all functioning compacts approved by Congress whose members exercise and are appointed under state authority.

In the final analysis, it may be most important that the type of regulatory authority envisioned by the Arkansas legislation is the type often exercised by state regulators. Each state in the compact will generally exercise authority over the one or more operating subsidiaries it has traditionally regulated.

Least-cost planning, which is the very essence of the legislation, has been within the province of state and not federal regulators. There is nothing inherently federal about the nature of such activity and no reason at all that federal officers should be required to exercise it.

Arguments against the Arkansas legislation are not well founded. The proposal clearly passes constitutional muster. ■

Footnotes:

1. Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985).

2. 449 U.S. 433, 440 (1981)

3. L. H. TRIBE, AM. CONST. LAW § 6-33, at 523 (2d ed. 1988).

4. Buckley v. Valeo, 424 U.S. 1, 126 (1976).

5. Seattle Master Builders v. Pacific Northwest Electric Power and Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986).

6. *Id.* at 1365.

7. *Id.*

8. *Id.*

9. Arkansas proposal, § 17102 (b)(1).

10. *Id.* at § 17102 (b)(2)(C).

11. *Id.* at § 17102 (b)(2).

12. Cuyler, *supra* note 2, 449 U.S. at 442.

The board would exercise authority in traditional state areas. There is nothing inherently federal about it.

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could not regulate interstate transactions, because that would impose a direct burden on interstate commerce of the sort prohibited under the Commerce Clause.[4]

In 1935 — in part to address the so-called "Attleboro gap" (transactions regulated by neither the states nor the federal government) — Congress enacted the Federal Power Act.[5] In subsequent decisions, the Supreme Court has consistently held that the FPA granted exclusive jurisdiction over wholesale transactions of electric power in interstate commerce to the federal government.[6]

Thus, authority for regional bodies to regulate sales of electric power between or among states can be permitted only by express congressional authorization, which functionally federalizes the regional regulatory bodies. As the Supreme Court has noted outside of the electric power industry, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."[7]

If Congress does not grant states the authority contemplated by the Arkansas plan, the states are prohibited by the Constitution and well-settled Supreme Court precedent from exercising those powers. If Congress chooses to delegate those powers, the delegation is one of federal law[8] and must be carried out by federal officers.

The fundamental premise of federal authority has been consistently accepted in *U.S. v. Public Utils. Comm'n of Cal.*,[8] *Nantahala Power & Light Co. v. Thornburg*,[9] *Mississippi Power & Light*,[10] and in many state cases.[11] The Arkansas plan seeks to alter fundamentally this long-standing division of authority, and to do so not by seeking a delegation of federal power (and accepting the due process and other obligations that come with that delegation), but by the *ipse dixit* that the power lies in the states after all.