Electricity Markets 201

September 14, 2021

NATIONAL GOVERNORS ASSOCIATION

Electricity Markets Plan

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Speakers

- Larry Greenfield, Associate General Counsel, FERC
- Ted Davis, Associate General Counsel, Maryland Public Service Commission

An Overview of the Federal Energy Regulatory Commission

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September 14, 2021

Note: The views expressed herein are the author's, and do not necessarily reflect the views of the Commission, individual Commissioners, or other Commission staff members.

FERC's Jurisdiction under Federal Power Act

Transmission of electric energy in interstate commerce by public utilities, i.e., the rates, terms & conditions of interstate electric transmission by public utilities

- What is "interstate:" "Traveling electrons" – which cross state lines
- What is "interstate:" "Commingled electrons" – which join the stream of commerce

Sales of electric energy at wholesale in interstate commerce by public utilities, i.e., the rates, terms & conditions of wholesale electric sales by public utilities

- Includes a sale to "any person. . . for resale"

Does not extend to:

- "Local" distribution of electric energy, and the rates, terms and conditions of such distribution
- Sales of electric energy to end users (i.e., sales at retail), and the rates, terms and conditions of such sales

Significant FERC Orders

- **Order No. 888** – mandated open access transmission
- **Order No. 890** – mandated coordinated, open and transparent transmission planning
- **Order No. 1000** – required participation in a regional transmission planning process that produces a regional transmission plan
- **Order No. 2000** – regional transmission organizations

Recent Developments of Interest

- Advance Notice of Proposed Rulemaking (ANOPR)
- State voluntary agreements to plan transmission
- Joint Federal-State task force on transmission
- Minimum Offer Price Rule
- New Office of Public Participation and the Commission's Senior Counsel for Environmental Justice and Equity

Thank you!

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Appendix Part I

An Overview of the Federal Energy Regulatory Commission

Who is FERC?

FERC is a Federal Agency

Created in 1977 by the Department of Energy Organization Act, see 42 USC 7134, 7171(a), inheriting most (but not all – *see* 42 USC 7172) of the responsibilities of the Federal Power Commission (which dates back to 1920). Much of what it did not inherit went to DOE, but was subsequently delegated from DOE back to FERC (Dept. of Energy Delegation Order No. 00-004-00A (May 16, 2006))

FERC is an "Independent" Agency

- Independent by statute, 42 USC 7171(a)
- Paraphrasing John Donne, no Federal agency "is an island, entire of itself."

Nevertheless. . .

- Independent from direct political party influence: because no more than 3 Commissioners may come from one political party
- Independent from direct Presidential/Congressional oversight: because FERC decisions are reviewed by a court
- Independent from improper private party influence: because private parties in contested case-specific proceedings are prohibited from having private discussions with the Commissioners and the staff by FERC's "ex parte" regulation (18 CFR 385.2201)

Who are the Commissioners?

- Statutorily, five Commissioners (a quorum requires at least three)
  - Chairman Richard Glick–D (term expires June 30, 2022)
    - Chairman is appointed "Chairman" by the President – no separate Senate confirmation of "Chairman-ship" is necessary
  - Commissioner James Danly–R (term expires June 30, 2023)
  - Commissioner Allison Clements–D (term expires June 30, 2024)
  - Commissioner Mark Christie–R (term expires June 30, 2025)
  - Nominated – DC Public Service Commission Chairman Willie Phillips
- Nominated by the President and confirmed by the Senate
- Serve staggered, up-to-5-year terms, but pursuant to the Department of Energy Organization Act, 42 USC 7171(b), their terms can extend for a limited period beyond their nominal June 30 end date
- As just noted, no more than 3 Commissioners may be from the same political party
- But Staff has so-called "delegated" authority to handle many types of largely uncontested matters on its own (18 CFR 375.301-.315)

How is FERC organized?

Commissioners – Each Commissioner, including the Chairman, has 1 vote

- FERC action requires a quorum of three, and a majority vote of that quorum

Chairman – Designated by the President; separate Senate confirmation is not required to be designated as the Chairman

- FERC's administrative leader

Staff – approximately 1465 employees (requested for FY 2021)

- By program:
  - Electric – 823; Gas & Oil – 315; Hydroelectric - 327
- By profession:
  - Lawyers; Engineers; Economists; Accountants; Ecologists; Geologists; Biologists; Etc.
- As noted above, staff has so-called "delegated" authority to handle many types of largely uncontested matters on its own (18 CFR 375.301-.315); in expectation of the absence of a quorum, Commission can grant "new" delegated authority (Agency Operations in the Absence of a Quorum, 158 FERC ¶ 61,135 (2017))

Budget – approximately $404 million (requested for FY 2021):

- FERC receives an annual appropriation from Congress
- But funds equal to FERC's budget are reimbursed through: filing fees for individual filings assessed to the filing entity; and annual charges assessed generally to the regulated industries - so that FERC has a "0" effect on the overall Federal budget
- Delaware Riverkeeper Network v. FERC, 895 F.3d 102, 111-12 (D.C. Cir. 2018) (rejecting due process challenge to FERC decisions, which challenge was based on fact that FERC's Congressional appropriation is repaid by industries regulated by FERC through fees and charges)

Overview of Participation in FERC Proceedings

Rulemaking proceedings

- Participation by filing comments by FERC-specified comment date
- FERC's "ex parte" regulations do not apply in rulemaking proceedings (18 CFR 385.2201(a), (b), (c)(1)(ii))

Case-specific, adjudicatory proceedings

- Participation by intervening (18 CFR 385.214)
  - Intervention is necessary for "party" status, and "party" status is necessary, not only in order to receive copies of other parties' pleadings and FERC's orders, but also to participate in the proceeding – including the right to ask FERC to grant rehearing/reconsideration of its decision and the right to seek subsequent judicial review (16 USC 825*l*)
- Participation by protesting (18 CFR 385.211) – which does not, by itself, make the protestor a party
- Participation by filing a complaint (18 CFR 385.206) – which does make the complainant a pary
- FERC's "ex parte" regulations do apply in case-specific, contested proceedings (18 CFR 385.2201(a), (b), (c)(1)(i))

What does FERC regulate, writ large?

- Rates and terms & conditions for electric transmission and electric wholesale power sales – Under Parts II and III of the Federal Power Act
- Rates and terms & conditions for natural gas pipeline transportation, certification of new facilities, and abandonment of existing facilities – Under the Natural Gas Act
- Rates and services for oil pipeline transportation – Under the Interstate Commerce Act
- Hydroelectric dam licensing and safety – Under Part I of the Federal Power Act
- Certification and decertification of "Qualifying Facilities" or "QFs," and oversight of QF-utility dealings – Under the Public Utility Regulatory Policies Act of 1978
- But FERC is a creature of statute, and FERC can only do what a statute allows it do. *E.g.*, *California Independent System Operator Corporation v. FERC*, 372 F.3d 395, 398-99 (D.C. Cir. 2004).

What is within FERC's "public utility"-related statutory authority (i.e., FPA Parts II and III)?

FERC's "bread-and-butter" – regulation of public utility transmission in interstate commerce and public utility sales for resale in interstate commerce:

- Transmission of electric energy in interstate commerce by public utilities, i.e., the rates, terms & conditions of interstate electric transmission by public utilities – FPA 201, 205, 206 (16 USC 824, 824d, 824e)
  - What is "interstate:" "Traveling electrons" – which cross state lines
  - What is "interstate:" "Commingled electrons" – which join the stream of commerce
- Sales of electric energy at wholesale in interstate commerce by public utilities, i.e., the rates, terms & conditions of wholesale electric sales by public utilities – FPA 201, 205, 206 (16 USC 824, 824d, 824e)
  - Includes a sale to "any person. . . for resale"
- That is, FERC has exclusive jurisdiction over the "transmission of electric energy in interstate commerce," and over the "sale of electric energy at wholesale in interstate commerce," and over "all facilities for such transmission or sale of electric energy." FPA 201(b) (16 USC 824(b))
  - Does not include "foreign commerce," but, per a delegation from DOE, FERC does have authority over such transmission

The Standard by which FERC Judges Rates/Terms/Conditions

- Rates, terms and conditions must be "just and reasonable" (sometimes described by the shorthand "J&R") and must be "not unduly discriminatory or preferential"
- Phrased differently: rates, terms and conditions cannot be "unjust or unreasonable" and cannot be "unduly discriminatory or preferential"
- What is a "just and reasonable" rate?
  - Cost-justified – using a traditional cost-of-service analysis
  - Market-justified – considering whether the seller does or does not have market-power
- What is a "not unduly discriminatory or preferential" rate?
  - Similarly-situated customers must be treated similarly
    - Discrimination without a reason is prohibited:
      - E.g., a difference in rates that is not cost-justified
    - Discrimination with a reason is allowed
      - E.g., a difference in rates that is cost-justified
  - Differences in treatment are not inherently prohibited
- Note: The same standard governs both FPA 205/NGA 4 proceedings, i.e., utility/pipeline-initiated proceedings, and FPA 206/NGA5 proceedings, i.e., complaint/FERC-initiated proceedings

An important limitation on who is subject to FERC regulation: "public utilities"

- Most sections found in Parts II and III of the FPA provide for FERC authority over the actions of a "public utility"
  - "Public utility" is defined by the FPA as "any person who owns *or* operates facilities subject to the jurisdiction of the Commission," i.e., "any person who owns *or* operates" facilities for "the transmission of electric energy in interstate commerce and [for] the sale of electric energy at wholesale in interstate commerce" (16 USC 824(e) (emphasis added))
  - Includes not only traditional investor-owned utilities, but also power marketers, regional transmission organizations, and independent system operators
  - Facilities can be "paper facilities," e.g., contracts, books & records, etc.
  - But some entities may be statutorily "exempt," as discussed below
- FYI - "Public utilities" (16 USC 824(e)) are not the same as "electric utilities" (16 USC 796(22)) and are not the same as "transmitting utilities (16 USC 796(23))
- FYI - "Exempt Wholesale Generators" or "EWGs" and "Foreign Utility Companies" or "FUCOs," which only have relevance in the context of the Public Utility Holding Company Act of 2005, are also different (18 CFR 366.1)

What is not within FERC's public utility-related statutory authority (i.e., FPA Parts II and III)?

- "Local" distribution of electric energy, and the rates, terms and conditions of such distribution
  - What is "local" distribution? It's a Federal Power Act-focused analysis and not purely engineering-focused, and thus focuses on the functional use of the facilities
  - In the context of Order No. 888, FERC adopted a so-called "7-factor" test:
    - (1) local distribution facilities are normally close in proximity to retail customers
    - (2) local distribution facilities are primarily radial in character
    - (3) power flows into local distribution systems; it rarely, if ever, flows out
    - (4) when power enters a local distribution system, it is not re-consigned or transported on to some other market
    - (5) power entering a local distribution system is consumed in a comparatively restricted geographic area
    - (6) meters are based at the transmission/local distribution interface to measure flows into the local distribution system
    - (7) local distribution systems will be of reduced voltage
- Sales of electric energy to end users (i.e., sales at retail), and the rates, terms and conditions of such sales
- What generation gets built, including the choice, siting and construction of generation (other than hydroelectric generation, which is subject to FERC jurisdiction under Part I of the FPA).
  - But wholesale rate recovery of generation costs, as with wholesale rate recovery of any other cost, is subject to FERC review
- What transmission gets built, including the choice, siting and construction of transmission facilities (with the exception of so-called "backstop" siting authority under FPA 216 (16 USC 824p))
  - But wholesale rate recovery of transmission costs, as with wholesale rate recovery of any other cost, is subject to FERC review

What is not within FERC's public utility-related statutory authority (i.e., FPA Parts II and III)? . . . continued

- Environmental matters (with the exception of hydroelectric generation-related environmental matters, which are subject to FERC jurisdiction under Part I of the FPA)
    - But wholesale rate recovery of environmental costs, as with wholesale rate recovery of any other cost, is subject to FERC review
- Safety matters (with the exception of hydroelectric generation-related safety matters, which are subject to FERC jurisdiction under Part I of the FPA)
- United States government and its agencies and instrumentalities, and States and their agencies and instrumentalities (including municipal utilities) - with certain limited exceptions, e.g., FPA 206(e), 222 (16 USC 824e(e), 824w)
- RUS-financed cooperatives and smaller cooperatives
- *Inter*state v. *Intra*state: Alaska and Hawaii (where, given their electrical isolation, there is no interstate . . .); Electric Reliability Council of Texas (for the same reason, but with certain limited exceptions); Puerto Rico and US Virgin Islands (for the same reason).
- That sellers and buyers may be located within a single state, and that there may be lines between them located within that same state, does not divest FERC of jurisdiction given the interconnected nature of the electric grid: "interstate commerce" has been interpreted to give FERC jurisdiction when the transmission system "is interconnected and capable of transmitting [electric] energy across the State boundary, even though the contracting parties and the electrical pathway between them are within one State," i.e., if the transaction is made over the "interconnected interstate transmission grid."
- One further thought to bear in mind: sales v. purchases – FPA 205 and 206 (16 USC 824d, 824e) are written from the perspective of the seller; that is, FERC has the exclusive authority to review the rates, terms and conditions of "sales" but not of "purchases" ("purchases" are the province of state commissions)

Order Nos. 888, 888-A, 888-B

Issue: Undue discrimination in the provision of transmission service. . . .

– which impedes competitive power markets

Goal: Non-discriminatory open access transmission service. . . .

– which promotes competitive power markets

Means: "Functional" (Not Corporate) Unbundling

Means: Comparable Treatment

Means: Pro Forma Open Access Transmission Tariff

18 CFR 35.28

Order Nos. 890 and 890-A: Improvements in Open Access Transmission, e.g., Transmission Planning

- Order No. 888 (and 888-A) pro forma open access transmission tariff, in section 28.2, required simply that the transmission provider plan and construct additional transmission facilities so as to be able to serve network customers "on a basis comparable to the Transmission Provider's delivery of its own generating and purchased resources to its Native Load Customers."
  - While FERC encouraged joint planning with customers and other utilities, and also regional planning, FERC did not mandate such planning.
- Order No. 890 (and 890-A) sought to make improvements to its pro forma open access transmission tariff, and better achieve the goal of eliminating undue discrimination/preference – mandating coordinated, open and transparent transmission planning on a local and regional level.
  - FERC explained that, in light of, among other things, a decline in investment relative to load growth resulting in increased congestion and a reduced access to alternative sources of energy, reform of the Order No. 888 (and 888-A) pro forma tariff was needed.

Order Nos. 1000, 1000-A, and 1000-B: Regional Transmission Planning

- Order No. 1000 (and 1000-A and 1000-B) builds on Order No. 890 (and 890-A) – Order No. 1000 (and 1000-A and 1000-B) are largely process-focused, and don't dictate particular transmission planning results
- Requires each public utility transmission provider to:
  - Participate in a regional transmission planning process that produces a regional transmission plan
    - FERC supports active state participation in the regional planning process, as well
  - In addition to identifying reliability and economic transmission needs, such processes must provide an opportunity, with stakeholder input, to identify transmission needs that are driven by public policy requirements established by local, state, or federal statutes or regulations, and then to evaluate potential solutions to those needs
    - FERC is not seeking to preempt state authority over siting, permitting, or construction
    - FERC is not making any statutes or regulations part of the regional plan, but rather requires that they be considered in evaluating transmission needs just as reliability and economic concerns are considered when identifying transmission needs
  - Coordinate between neighboring transmission planning regions with respect to interregional transmission facilities
  - Remove from FERC-jurisdictional tariffs and agreements any federal "right of first refusal" (essentially, an incumbency preference) to build new transmission facilities selected in a regional transmission planning process
    - FERC is not seeking to preempt state authority over siting, permitting, or construction
    - And, in compliance orders, FERC has clarified that state/local "rights of first refusal" can be recognized in the planning process, and early in that process

Order Nos. 1000, 1000-A, and 1000-B: Regional Transmission Planning (continued)

- Each public utility transmission provider must participate in a regional transmission planning process that has:
  - An ex-ante regional cost allocation method to allocate the cost of new transmission facilities selected by the region
  - An ex-ante interregional cost allocation method to allocate the cost of new interregional transmission facilities
  - The cost allocation methods must satisfy 6 (4 discussed here) principles:
    - Allocation of costs roughly commensurate with benefits
    - Method for determining benefits and beneficiaries must be transparent
    - No involuntary allocation of costs to non-beneficiaries
    - Cost allocation should be within (across) the region(s) unless there is a geographically broader voluntary assumption of costs
  - Transmission project is eligible for regional cost allocation only if "selected in the regional transmission plan for purposes of cost allocation"
- Non-public utility transmission providers may participate, but are not required to participate (but participation would be a necessary part of a reciprocity tariff)

Order Nos. 1000, 1000-A, and 1000-B: Regional Transmission Planning (continued)

But, more recently, in Congressional testimony this past summer, Chairman Glick highlighted the Commission's just-voted Advance Notice of Proposed Rulemaking, or ANOPR, that invited public comment on potential reforms to improve transmission planning as the nation transitions to cleaner generation

ISOs and, per Order No. 2000, RTOs, writ large

- As noted above, under the FPA, ISOs and RTOs are FERC-jurisdictional public utilities, and their rates and terms & conditions of service are equally FERC jurisdictional
- Provide independent operation of multiple, adjacent interconnected transmission systems
- Provide a single, region-wide transmission-reservation system - OASIS
- Eliminate “pancaked” transmission rates across multiple, adjacent interconnected transmission systems
- Provide congestion management across multiple, adjacent interconnected transmission systems

Advance Notice of Proposed Rulemaking: Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection

- This past summer, the Commission voted out its ANOPR, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 176 FERC ¶ 61,024 (2021)
  - Noting the transition of the electricity industry to resources, particularly renewables, that, e.g., may often be located far from load and may have different characteristics compared to traditional resources, which was placing new demands on the transmission system, FERC concluded that it was time to consider possible changes in regional transmission planning processes and what those changes might be
  - FERC is seeking comments on a range of issues, including issues that go to the planning process – as relevant here, including consideration of public policy requirements – and thus the future of the transmission grid

State Voluntary Agreements to Plan and Pay for Transmission Facilities

- This past summer, the Commission voted out a policy statement, *State Voluntary Agreements to Plan and Pay for Transmission Facilities*, 175 FERC ¶ 61, 225 (2021)
  - To eliminate confusion that may be deterring new transmission facilities, FERC clarified that voluntary agreements to plan and pay for transmission facilities are not categorically prohibited; such agreements may provide states with a way to plan and pay for transmission facilities that, for whatever reason, are not being developed
  - Such agreements can be:
    - Between 2 or more states
    - Between 1 or more states and 1 or more public utility transmission providers
    - Between 2 or more public utility transmission providers

Joint Federal-State Task Force on Electric Transmission

- This past summer, the Commission voted out *Joint Federal-State Task Force on Electric Transmission*, 175 FERC ¶ 61,224 (2021)
  - Noting that the area "is ripe for greater federal-state coordination and cooperation," established a joint Federal-State task force to conduct joint hearings on certain transmission-related topics
  - Focused on "topics related to efficiently and fairly planning and paying for transmission," the more specific topics to be considered include:
    - Identifying barriers that inhibit planning and development of optimal transmission, and identifying potential solutions
    - Identifying barriers to efficient and expeditious interconnection of new resources, and identifying potential solutions;
    - Discussing mechanisms to ensure that transmission investment is cost effective;
    - Improving oversight of transmission investment through, e.g., enhanced federal-state coordination; and
    - Reviewing FERC regulations, and identifying recommendations for reform
  - The first meeting of this federal-state task force is planned for November 10, 2021

Minimum Offer Price Rules in the eastern RTO capacity markets

- As there is a pending, contested proceeding involving the Minimum Offer Price Rule (MOPR) in the PJM Interconnection RTO, the Commission's ex parte regulation puts the MOPR off-limits today. But I would note that the Chairman's Congressional testimony this past summer recognized the tension that can arise between state energy policies and the Commission's pricing rules. I can say no more beyond that, though.

Other Electric-Related Authority: Federal Power Act Section 215 – "Reliability"

- Energy Policy Act of 2005 amended FPA to include new section 215, 16 USC 824o, establishing a mandatory electric reliability regime
- FPA 215 provides for an independent "electric reliability organization" (ERO), certified by the Commission, to develop and enforce mandatory reliability standards for "reliable operation" of the nation's bulk-power system
- FERC's role: certify an entity as the ERO (FERC, in fact, certified NERC as the ERO); approve proposed standards; and, with respect to enforcement of the standards, both review of NERC-imposed penalties and exercise of independent enforcement authority

Appendix Part II

An Overview of the Federal Energy Regulatory Commission

QFs - Cogeneration and Small Power Production, writ large

- Relevant here are PURPA sections 201, 16 USC 796(17) & (18), and 210, 16 USC 824a-3
- Congress' directive: "encourage" QFs, i.e., cogenerators and small renewable generators
  - Who is encouraged – cogenerators and small power producers – 16 USC 796(17) & (18), 824a-3(a); 18 CFR 292.101(b)(1), 292.203-.207
  - How are they encouraged – among other ways, through a "mandatory purchase obligation" placed on the purchasing utility – 16 USC 824a-3(a); 18 CFR 292.303(a)
  - How are they encouraged - among other ways, through "avoided cost" rates (based, not on the seller's costs of providing service, but rather on the purchaser's "avoided" costs) – 16 USC 824a-3(b), (d); 18 CFR 292.101(b)(6), 292.304
    - FERC sets the relevant considerations; but states set the actual rates – 18 CFR 292.304
    - Enforcement through judicial oversight, FERC litigation, private party litigation – 16 USC 824a-3(g) & (h)
  - Relief is available to purchasing utilities from the mandatory purchase obligation and avoided cost rates if QFs have access to robust markets – 16 USC 824a-3(m)

Rates for Utility Purchases from QFs

- By statute, 16 USC 824a-3(b), (d), rates for utility purchases from QFs must:
  - Be just and reasonable to the electric consumers of the utility and in the public interest;
  - Not discriminate against QFs; and
  - Not exceed the incremental costs to the utility of alternative electric energy – that is, not exceed the cost to the utility of the electric energy which, but for the purchase from the QF, such utility would generate or purchase from another source
- FERC's regulations, 18 CFR 292.304, provide that the states, for state rate-regulated electric utilities,1/ establish the actual rates that such utilities must pay for purchases of QF electric energy – taking into account a range of FERC-identified factors
- But FERC's regulations, 18 CFR 292.301(b), also provide that a utility and a QF may mutually agree to a different rate

1/ While the regulations also discuss nonregulated electric utilities, for ease of readability they're not otherwise referred to in this presentation.

As-Available Energy Rates

- In an organized wholesale power market such as an ISO/RTO market, there is a rebuttable presumption that states may rely on that market's locational marginal price (known as "LMP") as the price for QF as-available energy sales. 18 CFR 292.304(b)(6).
- Outside such a market, states may rely on a "Competitive Price" as the price for QF as-available energy sales, 18 CFR 292.304(b)(7), which could be either the
  - "Market Hub Price" – price at a liquid market hub to which the state determines the utility has reasonable access, 18 CFR 292.304(b)(7)(i); or
  - "Combined Cycle Price" – price determined pursuant to a state-set formula based on published natural gas price indices and a proxy heat rate for an efficient natural gas combined-cycle generating facility. 18 CFR 292.304(b)(7)(ii).
  - However, unlike for LMP in RTO/ISO markets, the state must find that one of these two "Competitive Price" options is an accurate measure of the purchasing utility's avoided cost before it can use that option.
- But states also have the flexibility to not take advantage of any of these options in determining as-available energy prices.

Contract/LEO Energy Rates

- Instead of selling its electric energy as the QF determines such energy to be available (i.e., “as-available”), a QF may sell pursuant to a contract or a legally enforceable obligation (i.e., a “LEO”)
- States have the flexibility to require that energy rates (but not capacity rates) in contracts and LEOs must vary over the life of the contract or LEO to reflect the purchasing electric utility’s avoided costs at the time of delivery. 18 CFR 292.304(d)(2).
- But states also have the flexibility to not require variable energy pricing.

Competitive Solicitations

- States may also use prices determined pursuant to a competitive solicitation process, if conducted pursuant to procedures ensuring that such solicitation is transparent and non-discriminatory, including:
  - Open and transparent process that provides equally to all potential bidders substantial and meaningful information regarding transmission constraints, congestion levels, and interconnections, subject to appropriate confidentiality safeguards;
  - Open to all sources to satisfy electric utility's capacity needs, taking into account required operating characteristics of needed capacity;
  - Conducted at regular intervals;
  - Overseen by independent administrator; and
  - Certified as fulfilling above criteria through post-solicitation report. 18 CFR 292.304(b)(8)(i)(A)-(E).
- Solicitations must also satisfy factors in *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082, at P 18 (2004).

MARYLAND
Public Service Commission

An Overview of the Maryland Public Service Commission

Ted Davis, Associate General Counsel

September 14, 2021

Note: *Any views expressed herein are the author's alone, and do not necessarily reflect the views of the MPSC, its Commissioners, or staff.*

Summary of Presentation

- MD Public Service Commission (Statutory Authority)
- Restructured vs. Fully Regulated States
- MD 1999 Customer Choice and Competition Act
- Maryland Policy Goals
- Landmark FERC Orders
  - PURPA
  - FERC Order 888
  - FERC Order 2000 (RTOs)
  - FERC MOPR Orders
  - FERC Order 1000
  - FERC Orders 719 and 745 (DR)

MARYLAND
Public Service Commission

Maryland Public Service Commission

- Established in 1910 and based in Baltimore City.
- Powers provided through Public Utilities Article, Annotated Code of Maryland, and COMAR Title 20.
- Five Commissioners appointed by the Governor and confirmed by the Senate to staggered 5-year terms.
- Divisions include:
  - Electricity, Energy Analysis, Engineering, Transportation, Telecommunication, Gas and Water, Accounting, Staff Counsel, Consumer Affairs, OPC, OGC
- Regulates
  - Electric, natural gas, water, sewer and telephone companies, certain taxis, common carriers and toll authorities.

MARYLAND
Public Service Commission

Maryland Public Service Commission

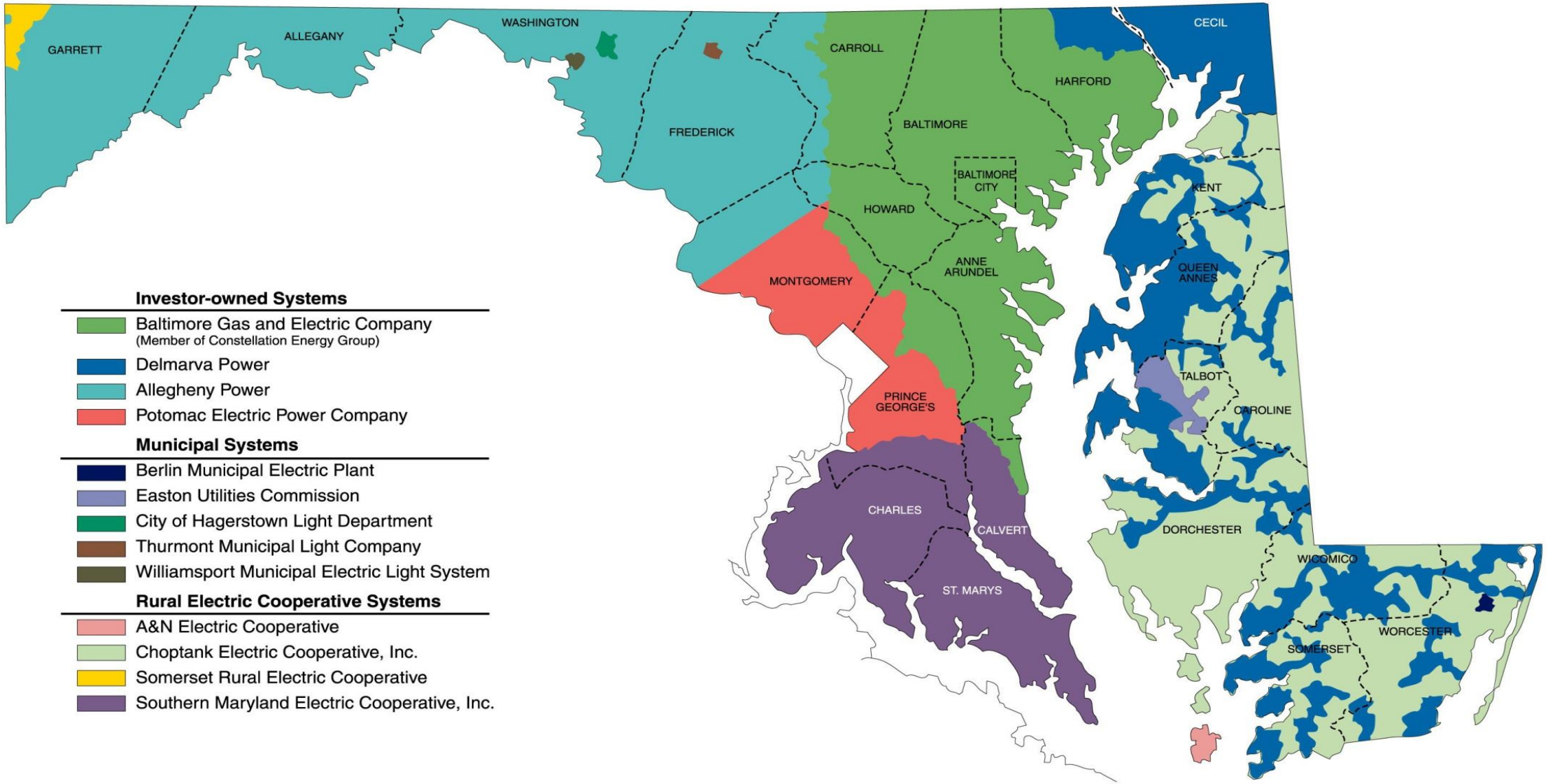
- CPCN Proceedings:
  - Comprehensive, multi-agency review of companies seeking to build electric generating stations and high voltage transmission lines.
- Sets public utility company rates and decide all issues regarding the exercise, expansion and abandonment of public utility franchises.
- Quasi judicial function in many proceedings with full evidentiary hearings, testimony, cross examination, etc.
- Decisions may be reviewed by the Maryland courts
  - Appeals to Circuit Court, Court of Special Appeals and Court of Appeals.

MARYLAND
Public Service Commission

Statutory Duties of the Maryland PSC

- PUA § 2-112 (Jurisdiction)
  - "…the Commission has jurisdiction over each public service company that engages in or operates a utility business in the State…"
- PUA § 2-113 (Duties of Commission)
  - "The Commission shall supervise and regulate the public service companies … to (1) ensure their operation in the interest of the public; and (2) promote adequate, economical and efficient delivery of utility services in the State without unjust discrimination"
  - "In regulating public service companies, the Commission shall consider the public safety, the economy of the State, the conservation of natural resources, and the preservation of the environment."

Maryland Service Territories



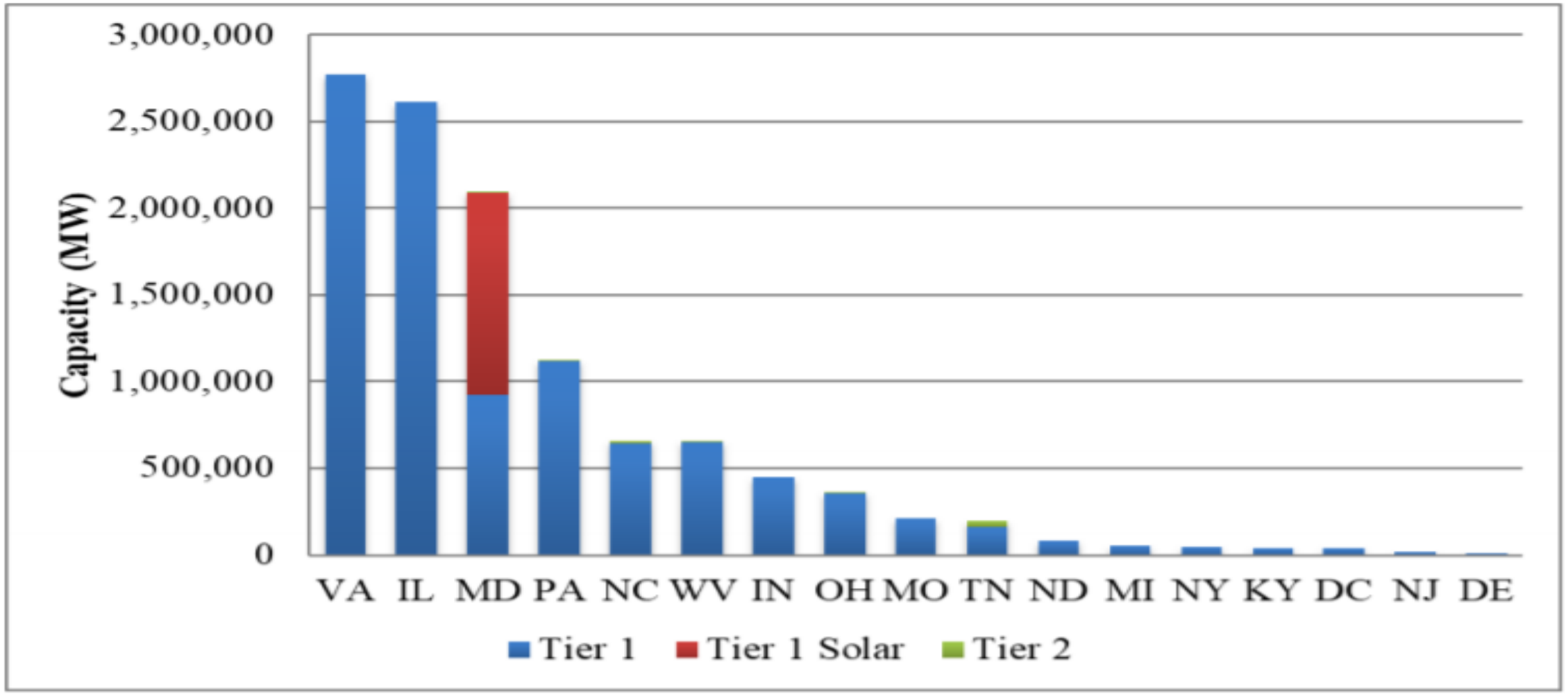
Maryland Policy Goals

Maryland Renewable Portfolio Standard
Clean Energy Jobs Act

- **Maryland Clean Energy Jobs Act of 2019: (SB516)**
  - Increase in RPS requirements from 25% by 2020 to 50% by 2030
  - PPRP to issue study on 100% renewable by 2040.
  - Carve Outs:
    - 14.5% of renewables must come from Solar (in State)
    - 1.2 GW of energy must come from OSW (cannot exceed 88 cents/month residential impact)
  - RECs (definition changed)
    - May be generated (i) within PJM region, (ii) control area adjacent to PJM, or (iii) on the outer continental shelf of the Atlantic Ocean in an area between 10 and 80 miles off the coast of MD.
    - Solar energy must be generated in-State.
    - Consider balancing of State interests and interstate commerce.

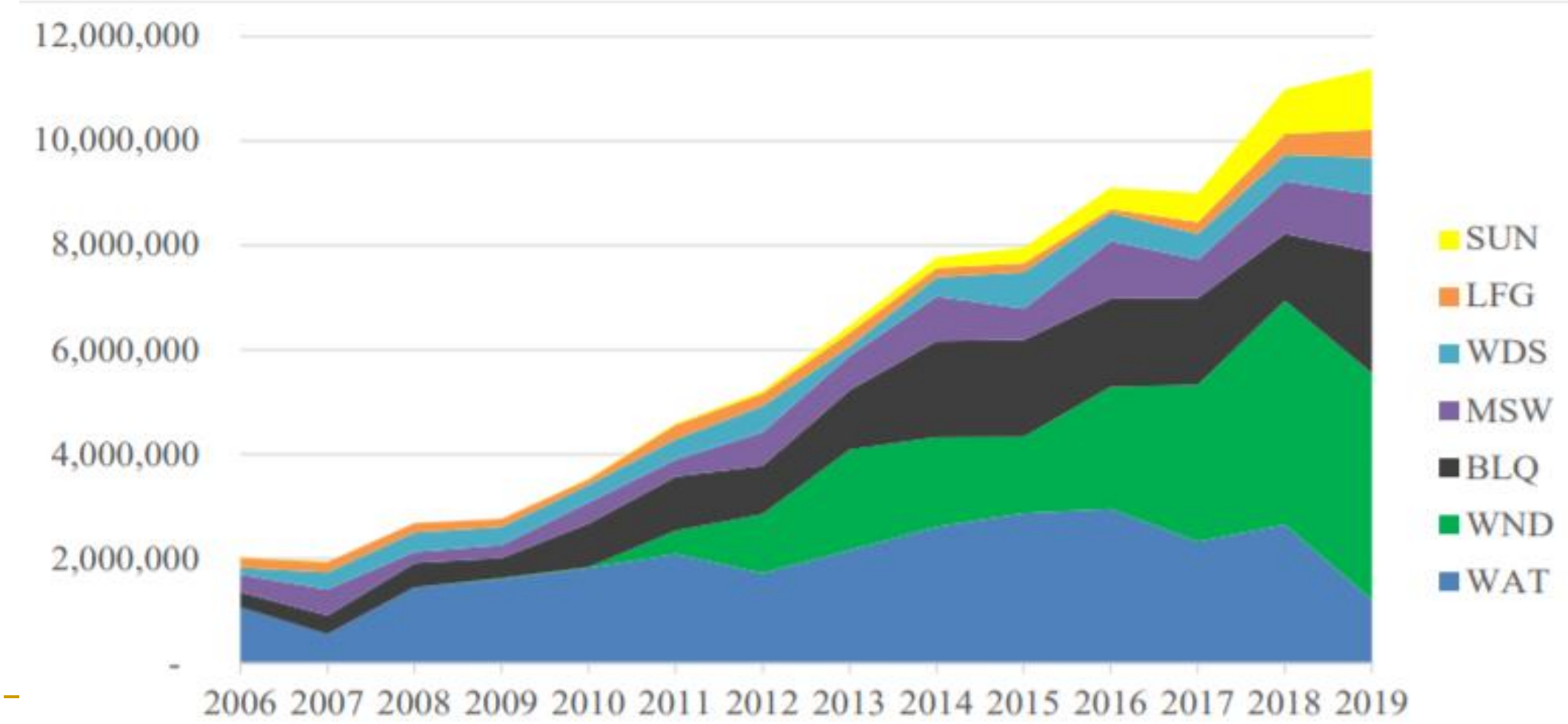
Maryland Renewable Portfolio Standard

Figure 4 Number of RECs Retired by Facility Location (2019)



Maryland Renewable Portfolio Standard

Figure 5 RECs Retired by Fuel Type (2006 – 2019)



Wind in Maryland – Offshore Wind

- **Maryland Offshore Wind Energy Act of 2013**
  - Passed to encourage the development of up to 500 MW of offshore wind capacity
  - Act authorized ORECs for a 20-year period to subsidize Maryland offshore wind development.
  - An area of 94 square nautical miles (79,706 acres) approximately 10-30 miles off the Maryland coast identified as suitable for offshore wind development.
- Area auctioned by Bureau of Ocean Energy Management (BOEM) on August 19, 2014.
- US Wind and Skipjack each obtained a lease.
- On May 11, 2017, MPSC issued an order approving OREC applications filed by US Wind and Skipjack.
  - MPSC approved 368 MW of offshore wind capacity, yielding in the aggregate over $1.8 billion of in-State expenditures and spurring the creation of almost 9,700 new Maryland jobs.
  - Projects projected to reduce 19,000 tons of carbon dioxide per year
  - The net ratepayer bill impacts are projected to be less than $1.40 per month for residential customers and less than a 1.4 percent bill impact for commercial and industrial customers
  - No OREC money will be dispersed until electricity is actually generated by the projects.
  - Significant opposition from Ocean City due to viewshed impacts.

MPSC Community Solar Program

- Maryland PSC recently promulgated regulations to establish a three-year pilot community solar program.
  - Residential consumers who do not own their rooftops may participate in the State's net metering program.
  - Encourages community solar development utilizing brownfield sites, parking lots and industrial areas.
  - Sets aside program capacity for each area of the state with a statewide cap at about 193 MW.
    - About 60 MW is set aside for projects focused on low and moderate income customers

MPSC Policy Goals

- EmPower Maryland
- Regional Greenhouse Gas Initiative

Moving from Regulated to Competitive Rates

Maryland's Restructuring Law

The Rationale for Regulating Public Utilities

- **Regulatory Compact:**
  - Grant of monopoly franchise
    - The regulator (State/municipality) grants the company a protected monopoly in a defined service territory.
    - Exclusive franchise
    - Competition is thereby prevented by law / regulation.
  - Obligation to serve:
    - In return for the exclusive franchise, the utility commits to supply the full quantities demanded by customers.
  - Price Regulation:
    - The utility may not charge any price the market would bear, as a private company could.
    - Instead, prices must be just, reasonable, and non-discriminatory.
    - The utility subjects itself to price regulation, including the right of regulators to look inside its books.

Public Utility Ratemaking

- Utility must charge "***just and reasonable rates***" for its regulated service.
  - Under Cost of Service ratemaking principles, the price of electricity or gas is calculated to cover:
    - *Prudently incurred costs;* plus
    - A "*reasonable" return* on the capital invested.
- What is a just and reasonable rate?
  - Sufficient revenue for utility to operate. Must meet revenue requirement.
  - Consumer interests
  - Environmental concerns
  - Reliability and resiliency
  - Social and distributional issues

Goals of Restructuring in Maryland

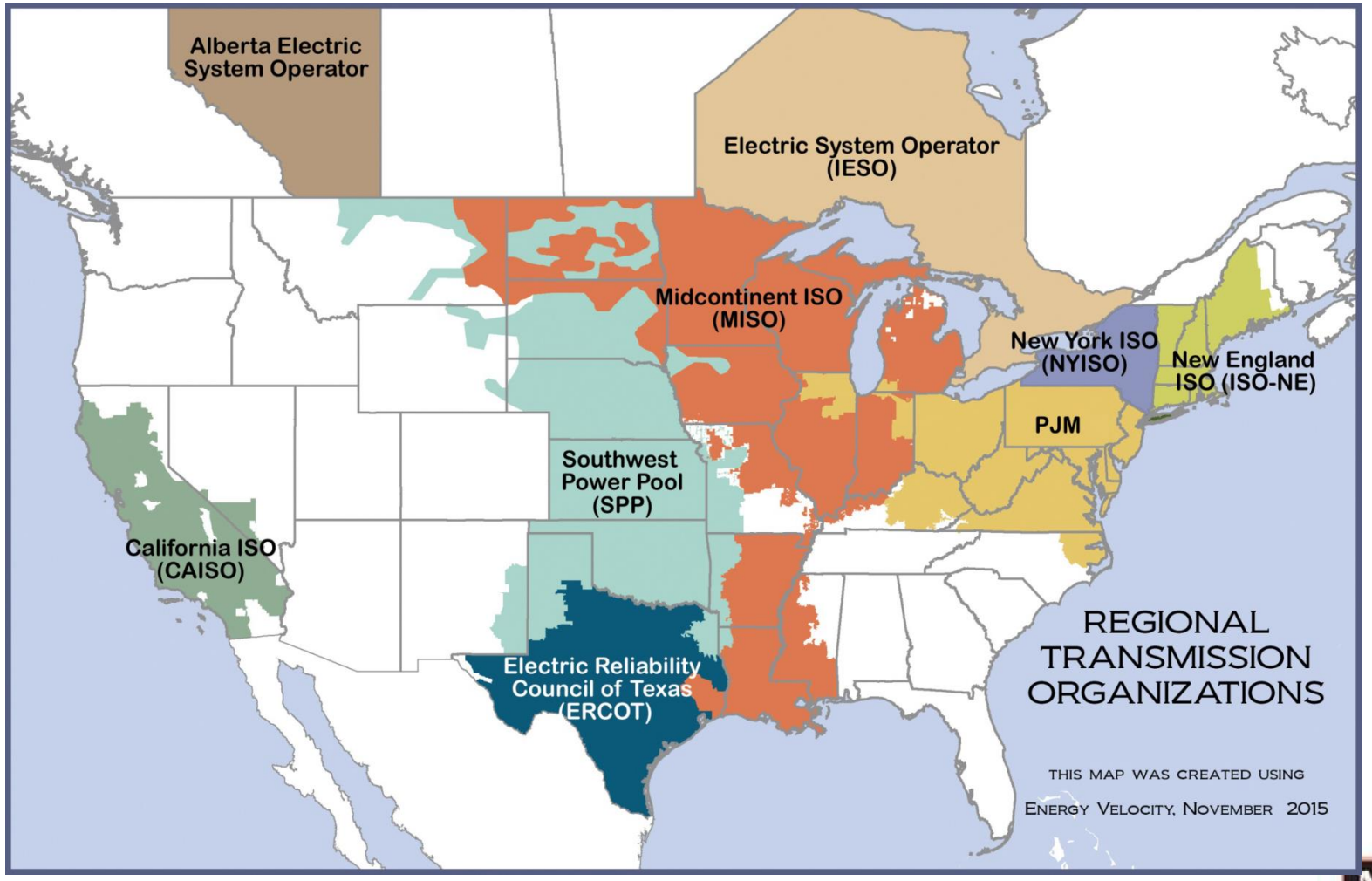
- Lower prices to consumers
- Increase efficiencies through competition
- Increased diversity of firms
- Additional choices for consumers
- Technological innovation
- Shifting of risk from consumers retail suppliers and independent power producers

MARYLAND
Public Service Commission

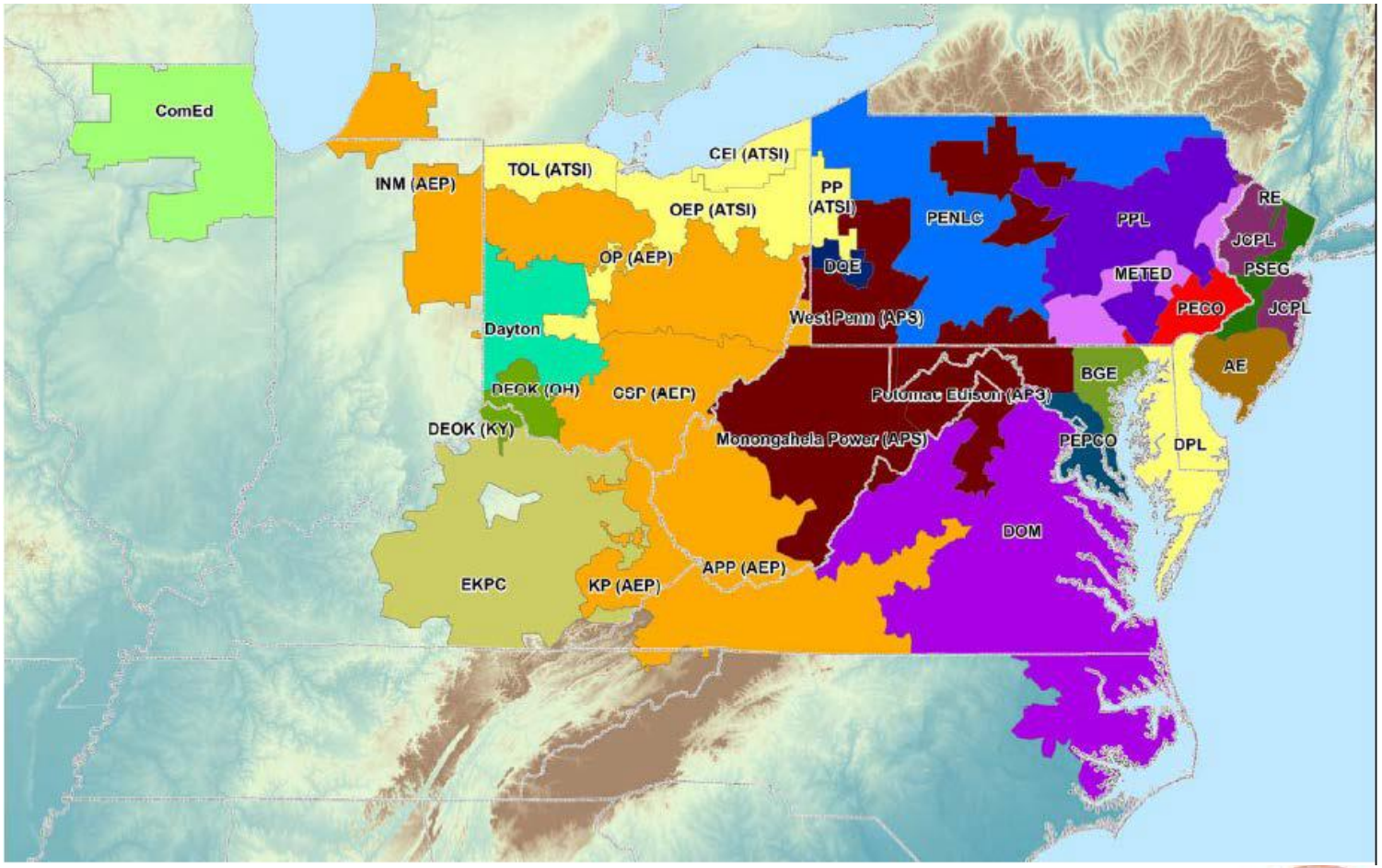
Landmark FERC Orders

- PURPA
- FERC Order 888
- FERC Order 2000 (RTOs)
- FERC MOPR Orders
- FERC Order 1000
- FERC Orders 719 and 745 (DR)

Regional Transmission Organizations



PJM



MARYLAND
Public Service Commission

Landmark FERC Orders – Demand Response

FERC defines DR as:

"Changes in electric usage by end-use customers from their normal consumption patterns in response to changes in the price of electricity over time, or to incentive payments designed to induce lower electricity use at times of high wholesale market prices or when system reliability is jeopardized."

Landmark FERC Orders – Demand Response

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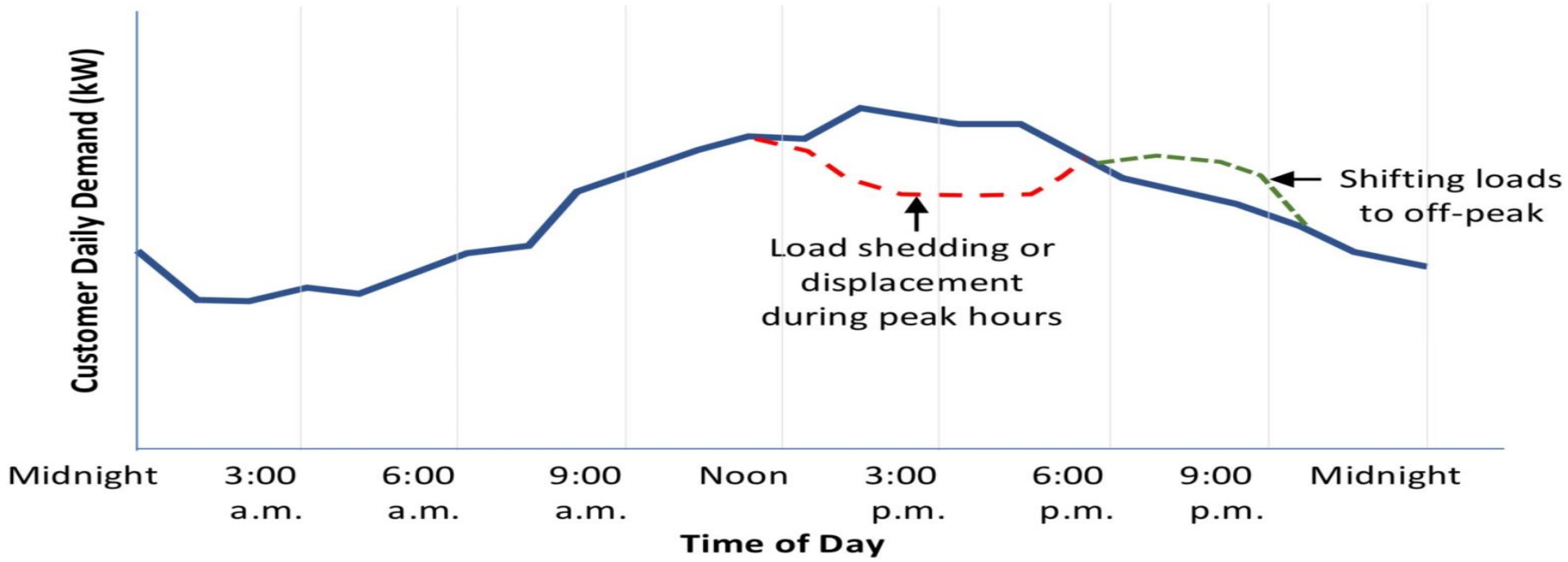
Demand Response

- DR programs focus on reducing consumption of electricity when demand is at its peak (when marginal prices are high), through:
  - Load shedding or load displacement



Landmark FERC Orders – Demand Response

- FERC issued a series of orders acknowledging benefits of DR and encouraging its expansion. Benefits include:
  - RTOs utilize DR as a dispatchable resource equivalent to generation.
  - DR can reduce system stress by reducing peak demand.
    - Peak prices sometimes 5 to 10 times non-peak price.
    - Building new PPs to meet peaks that may only occur a few hours per year highly inefficient.
    - DR may eliminate the need to build some new generation.
    - DR largely free of environmental harm, unlike actual PPs.

Landmark FERC Orders – Demand Response

- FERC Order 719:
  - RTOs required to permit CSPs to bid DR into auctions on behalf of customers (*unless state law prevents it*).
- FERC Order 745:
  - DR must be paid the *same* market clearing price as generation resources.
  - FERC: "DR is a complex matter that lies at the confluence of state and federal jurisdiction."

Landmark FERC Orders – Demand Response

- Issue: Whether FERC Order 745 encroaches impermissibly into state jurisdiction over retail rates.
- Holding by D.C. Court of Appeals:
  - "Under FPA § 201, DR is not a wholesale sale of electricity. In fact, it is not a sale at all."
  - "DR resources 'participate' only by declining to act."
  - "States retain the exclusive authority to regulate the retail market."
    - In "luring . . . retail customers" into the wholesale market, and causing them to decrease "levels of retail electricity consumption," Order 745 engages in "direct regulation of the retail market."

Landmark FERC Orders – Demand Response

- MD, CA, and PA argued that FERC possesses authority under FPA §§ 205 and 206 to regulate wholesale DR as a practice *affecting* wholesale rates.
  - Section 206 provides that FERC may find "any rule, regulation, practice, or contract affecting" a FERC-jurisdictional rate is not J&R and act to fix it.
- Order 745 does not directly regulate retail sales.
  - Wholesale DR bids into FERC's wholesale markets.
  - Order 745 allows states to *opt out*. State law controls CSP operation in-state.
  - DR cannot be effectively regulated by either the states or FERC alone.
    - DC Circuit decision created a *regulatory gap*.
    - Cooperative federalism

Landmark FERC Orders – Demand Response

- S.Ct. (Justice Kagan) reversed the D.C. Circuit and upheld FERC Order 745.
  - DR *directly affects* wholesale rates.
  - In addressing DR practices in wholesale markets, FERC has not regulated retail sales, even though retail markets are affected.
    - *Regulatory Gap*.
      - "If neither FERC nor the States can regulate wholesale DR, then by definition no one can. But under the FPA, no electricity transaction can proceed unless it is regulable by someone….Congress passed the FPA precisely to eliminate vacuums of authority over the electricity markets."
    - Opt-out: "Wholesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word. That feature of the Rule removes any conceivable doubt."

For more information…

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Thank You!