Clean Energy and the Price Preemption Ceiling

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Since the New Deal, courts and federal energy regulators have applied a preemption ceiling to the setting of wholesale electric power prices. This price ceiling advances the statutory goal of protecting consumers from the ills of monopoly, including state regulation that increases an electric utility's wholesale prices to favor in-state consumers at the expense of out-of-state consumers. Contrary to the ceiling preemption approach that has predominated regulation of electric power, this Article argues that to the extent that modern energy law statutes advance a more diverse set of values, such as conservation and fuel diversity, federal energy law needs to reassess application of wholesale price ceiling preemption to regional, state, and local innovation in clean energy policy.

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Both appellate courts and the Federal Energy Regulatory Commission ("FERC")—the primary federal agency responsible for implementing clean energy policies in the electric power sector—have recently applied price preemption principles to clean energy policies. As states today consider how to encourage clean energy investments, they are increasingly bumping into limitations under federal law. Under the Supremacy Clause of the U.S. Constitution, some state incentives for renewable energy face potential limitations to the extent that they present obstacles to the pursuit of federal policies. The pro-preemption approach emphasizes a singular statutory goal and imposes a legal ceiling on the innovations of sub-national governments in setting prices to advance conservation goals.

Part I of this Article provides an illustration of the feed-in tariff—one clean energy innovation many state and municipal governments have enacted to encourage investment in renewable energy. In a nutshell, the feed-in tariff is a secure contract for renewable power at a set price over a term of years that provides a return to investors in these projects, such as a homeowner installing a solar panel or wind turbine. Part II of this Article describes preemption issues that have risen with feed-in tariffs under two federal statutes—the Public Utility Regulatory Policies Act of 1978, which requires utilities to purchase power from certain renewable sources, and the Federal Power Act (adopted in 1935), which requires just and reasonable rates. FERC's unequivocally pro-preemption position echoes judicial decisions that endorse consumer protection and wholesale market objectives over other goals in energy policy, allowing these to serve as a ceiling for state pricing of renewable power. Part II also highlights the impacts these decisions have on the efficacy of state feed-in tariffs and their inconsistency with subsidies that are not preempted.

In Part III, I argue that this pro-preemption position regarding feed-in tariffs may provide clear answers to federal-state power issues in this narrow context, but such clarity comes at a cost. A preemption analysis of state clean energy policies requires identification of the relevant federal law and its purposes, as well as an evaluation of whether state law advances or impedes these purposes. The history and purposes of federal energy statutes not only include consumer protection and competition in wholesale markets, but also include goals of conservation, efficiency, and fuel diversity, as well as goals related to energy independence and security. Recognizing a diversity of goals in energy law has important implications for both FERC and states as they forge policies such as feed-in tariffs to encourage renewable power and other clean energy issues, including cost recovery for high-voltage transmission lines and demand response measures aimed at conservation. Emphasis on a singular consumer protection goal favors treating federal law as a preemption ceiling, rather than a floor—a methodology that limits the ability of energy law to

incorporate conservation and efficiency goals. More consistent recognition of these diverse goals of energy laws would facilitate treating federal law as a statutory floor rather than a ceiling for setting prices, better allowing sub-national governments to innovate in their clean energy policies.

I. THE INNOVATION OF STATE AND MUNICIPAL FEED-IN TARIFFS

Given that there is no singular federal policy regarding renewable energy, much of the policy innovation in this context has occurred at the state and local level. Indeed, many praise the institutional ability of state and local governments to innovate, given the slow pace of development of federal climate change policies.[1] Most states, for example, have adopted renewable energy standards, requiring a defined amount of electricity generated or sold to come from renewable sources, such as solar panels, wind turbines, biomass, geothermal, or tidal power.[2] Many states also have adopted fairly aggressive subsidies and incentives for clean energy projects, including tax breaks[3] and other non-tax incentives.[4]

One particularly promising state approach to encouraging renewable power is the so-called feed-in tariff. Common in several European countries, the feed-in tariff is also sometimes called a "standard offer contract," an "advanced renewable tariff" or a "renewable energy payment." What all of these approaches share is a regulatory requirement that the incumbent utility purchase some or all of the power generated by a renewable technology at a set price per kilowatt-hour ("kWh"). The prices frequently vary depending on the location and kind of technology used, and sometimes the prices will change over time based on the duration of the tariff or the amount of power purchased. However,

1. *See* Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877 (2011); David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 866–69 (2008).

2. Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1370–75, 1382–84 (2010); *see* Joshua P. Fershee, *Renewable Mandates and Goals*, *in* THE LAW OF CLEAN ENERGY 77, 80 (Michael B. Gerrard ed., 2011) (noting that 30 states and the District of Columbia have adopted renewable portfolio standards).

3. *See* Roberta F. Mann & E. Margaret Rowe, *Taxation*, *in* THE LAW OF CLEAN ENERGY 145–46 (Michael B. Gerrard ed., 2011) (describing federal, state, and local tax incentives for renewable energy projects).

4. *See* John A. Herrick, *Government Nontax Incentives for Clean Energy*, in THE LAW OF CLEAN ENERGY 169 (Michael B. Gerrard ed., 2011) (describing carbon credits and other state incentive programs).

typically the price provided by a feed-in tariff exceeds the price of generating electricity using a fossil fuel, such as natural gas or coal, as well as the general price for power available in the wholesale market.[5]

Several state and local governments have implemented feed-in tariffs to encourage investment in renewable power by guaranteeing a price for its sale. The scope and applicability of these tariff programs vary, as does the pricing. Most of the programs limit participation to a certain number of projects or to a certain size of the total generation load. While the list below is not intended to be exhaustive, a few illustrations can give a flavor of how state and local governments are approaching this innovative instrument as a tool to enhance investment in clean energy:

California has approved a number of utility proposed feed-in tariffs. Unlike other California incentives, which give customers short-term, up-front incentives to install solar, wind, and biogas, feed-in tariffs give customers a long-term contract at a fixed price. California made feed-in tariffs available for facilities that generate 1.5 megawatts ("MW") or less, for a statewide total of up to 480 MW of renewable generating capacity. Rates are set for ten, fifteen, twenty, and twenty-five year contracts based on a "market price referent," which is the "predicted annual average cost of production for a combined-cycle natural gas fired base load proxy plant," along with a time-of-day adjustment.[6] For larger scale projects, up to 20 MW, California has considered a different pricing mechanism based on a renewable auction mechanism, which applies to a statewide total of up to 1,000 MW of procured power.[7]

Hawaii adopted a feed-in tariff in 2009 and set prices in 2010. Hawaii set tiered rates for different types of renewable sources depending on the project size. For example, photovoltaic solar projects that are less than or equal to 20 kilowatts ("kW") in size qualify for a rate of $.218 per kWh, while photovoltaic projects that are greater than 20 kW but less than or equal to 500 kW qualify for a price of $.189 per kWh. On-shore wind projects less than 20 kW qualifies for a rate of $.161 per kWh and those greater than 20 kW but less than or equal to 500 kW qualifies for a price of $.138 per kWh. The largest qualifying facilities are 5 MW and

5. *Compare infra* note 39 (noting 2010 wholesale prices) *with infra* notes 6–11 and accompanying text (summarizing prices in various feed-in tariff programs).

6. *See Feed-in Tariff Price*, CAL. PUB. UTILS. COMM'N (Nov. 17, 2010), http://www.cpuc.ca.gov/PUC/energy/Renewables/Feed-in+Tariff+Price.htm.

7. *See Renewable Auction Mechanism*, CAL. PUB. UTILS. COMM'N (Aug. 29, 2011), http://www.cpuc.ca.gov/PUC/energy/Renewables/hot/Renewable+Auction+Mechanism.htm; *see also* Mike Hall, Op-Ed., *Cali Gets It Right: Not Your Father's Feed-in Tariff*, PUB. UTILS. FORTNIGHTLY, July 2011, at 8.

the baseline feed-in tariff rate where technology prices are not specified is $.138 kWh.[8]

Vermont adopted a statewide feed-in tariff requirement in 2009. The legislation mandated the development of feed-in tariff rates for biomass, landfill methane, farm methane, hydroelectric, solar photovoltaic, and wind, with recalculation every two years. Based on the first phase of rates set under the legislation, twenty-five year contracts are issued for solar at $.24 per kWh. Most other resources are given twenty year contracts, with small wind at $.2083 per kWh and large wind at $.1125 per kWh. Landfill gas is priced at $.0869 per kWh on a fifteen year contract. No single technology can occupy more than 25% of the application queue. Participation in the tariff is limited to projects up to 2.2 MW in size, and total statewide participation in the project is limited to 50 MW.[9]

Gainesville, Florida was the first municipal government in the U.S. to adopt a feed-in tariff requirement. The tariff is limited to solar photovoltaics and bases its price on the cost of renewable energy alone, rather than some other pricing referent. Much like European feed-in tariffs, which use a fixed rate targeted at certain technologies, the program guarantees participants a rate of $.32 per kWh of electricity produced over twenty years.[10] Gainesville set a total installation cap of 4 MW per year, and it quickly met these targets.[11]

Although the details of these various feed-in tariff programs differ, their common goal is to provide a certain price for the sale of renewable power. Such predictability is essential to the long-term contracts that are typically used to finance renewable energy investments, especially given the precarious financing environment for high capital new technologies. To help secure financing, investors and developers of renewable power

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8. *See Hawaii Feed-in Tariff*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY (Oct. 7, 2011), http://www.dsireusa.org/incentives/incentive.cfm? Incentive_Code=HI29F&re=1&ee=1.

9. *See* Dave Lamont, *U.S. Feed-in Tariff Example: Vermont, THE REGULATORY ASSISTANCE PROJECT* (June 22, 2011), *available at* http://www.raponline.org/docs/RAP_Lamont_Feed-inTariffsVT_ADB_2011_06_22.pdf

10. *See Gainesville Solar Feed-in Tariff a Done Deal*, RENEWABLEENERGY WORLD.COM (Feb. 9, 2009), http://www.renewableenergyworld.com/rea/news/article/2009/02/gainesville-solar-feed-in-tariff-a-done-deal.

11. *See Lessons from the Gainesville Feed-in Tariff Program*, APOLLO ALLIANCE: CLEAN ENERGY & GOOD JOBS (Sept. 1, 2009), http://apolloalliance.org/rebuild-america/renewable-energy-rebuild-america/signature-stories-renewable-energy/lessons-from-the-gainesville-feed-in-tariff-program/.

projects depend on power purchase agreements.[12] The feed-in tariff gives the renewable project developer an off-the-shelf contract in the form of a tariff. An additional advantage to requiring the incumbent utility to purchase this power is that the utility can typically spread the costs associated with the renewable facility among all of the customers it serves. In this sense, the costs of renewable facilities financed through feed-in tariffs are more likely to be borne by customers of the utility whose system is using that source of electricity, rather than by the general tax base or a broader population, as occurs with other clean energy subsidies.

Given that a utility subject to a feed-in tariff requirement must pay the tariff rate for the power it purchases from participating projects, the price retail customers pay for electricity will likely increase. For example, almost all the feed-in tariff prices listed above exceed the levelized cost of production for natural gas, which is the cheapest alternative for marginal production of electricity in most areas of the U.S.[13] Yet most utilities rely heavily on fossil fuels and more pervasive deployment of renewable facilities can allow the utility to diversify its power generation portfolio, which will create benefits for that utility's customers and for others who operate with that utility as part of a larger electric power system. Some studies indicate that price increases associated with feed-in tariffs are, at some level, offset. Looked at on a system or larger network basis, large amounts of renewable power can have positive impacts on the operation of energy markets due to the merit-order effect, or the ability to allow operators of utility systems greater flexibility and network benefits in meeting load and peak demand.[14]

II. FERC'S PREEMPTION OF FEED-IN TARIFFS

Federal agencies have frequently preempted state innovations in the wholesale pricing of electricity in order to advance the consumer

12. For a survey of some of these financing challenges in the wake of the global economic downturn, see Christopher Dann, Sharez Ahmed & Owen Ward, *Renewables at a Crossroads: Investment Opportunities in an Evolving Environment*, PUB. UTILS. FORTNIGHTLY, June 2011, at 43.

13. *See* Steven Ferrey, *Sale of Electricity*, *in* THE LAW OF CLEAN ENERGY 217, 233 (Michael B. Gerrard ed., 2011) (power purchase agreements are the "essential legal documents[s] for all power projects not owned by the retail provider of power, as they link operation to a revenue stream for the power product produced and sold").

14. According to the U.S. Energy Information Administration, the 2009 average level cost of production from natural gas in a combined cycle generation facility is in the range of $.06–.07 per kilowatt-hour ("kwh"). *See* U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2011 (Dec. 2010).

protection goals of federal law.[15] The Federal Power Act of 1935 (FPA") precludes utilities under FERC's jurisdiction from charging wholesale rates that are not "just and reasonable" or that are "unduly discriminatory."[16] The very purpose of the FPA was to respond, in part, to the glaring inadequacies of state regulation in regulating the pricing of electric power in interstate markets[17] by giving the Federal Power Commission (FERC's predecessor) the authority to set rates for transactions that have an impact beyond a single state's borders.[18]

Although the FPA is the primary statute that established federal price regulation of electric power, it is not the only basis for FERC approving utility rates. In the Public Utilities Regulatory Policy Act of 1978 ("PURPA"),[19] Congress established a program to encourage competition, efficiency, and conservation in power generation. This program includes a series of interconnection and price benefits for non-utility developers of certain generation projects, including a program that exempts certain renewable facilities from regulation under the FPA and requires incumbent utilities to buy back surplus power at so-called FERC-approved "avoided cost" rates. PURPA explicitly states that no FERC rule requiring a utility to purchase power pursuant to such a program "shall provide for a rate that exceeds the incremental cost to the electric utility of alternative electric energy."[20]

Some see these statutes as presenting a legal obstacle to states establishing their own feed-in tariffs without some prior approval from FERC. One commentator draws a contrast between the constitutional fate of feed-in tariffs in the U.S. and Europe:

15. Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1642–44 (2003) (discussing how the "filed rate doctrine" can preempt state regulation where the terms of a tariff are approved by FERC).

16. 16 U.S.C. § 824d (2006).

17. *See* Pub. Utils. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927) (limiting the ability of a state to regulate sales to out-of-state customers under the Commerce Clause, but acknowledging this could leave interstate sales unregulated at some harm to in-state consumers).

18. The FPA, passed in part to address the so-called "*Attleboro* gap," gave the Federal Power Commission (FERC's predecessor agency) the power to regulate the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b) (2006).

19. 16 U.S.C. § 2601, Pub. L. No. 95-617 (1978).

20. 16 U.S.C. § 824a-3 (2006).

> Grafting onto American constitutional law a mandatory FiT [(feed-in tariff)] for renewable power, at above the typical wholesale market cost of all power or above a purchasing utility's avoided cost of alternative equivalent power resources, confronts existing legal precedent and provisions of the FPA. This renders the European option of wholesale FiT legally barred from state mandate under American's legal system.[21]

A study by the National Renewable Energy Laboratory observes that only very limited paths are available for feed-in tariffs.[22] That study concludes that "[d]etailed discussions involving FERC, renewable producers, utility buyers, and possibly Congress will be necessary to create a legal context in which states can enact or promulgate feed-in tariffs . . . ."[23]

In 2010, FERC issued two decisions that endorse a strong preemption position regarding the prices in feed-in tariffs, in response to a request for a declaratory order on the legal validity of a California Public Utilities Commission feed-in tariff proposal. A Summer 2010 order endorsed preemption of California's feed-in tariff policy under PURPA. According to FERC, the state was not precluded from adopting a feed-in tariff, but the agency concluded that any feed-in tariff must comply with PURPA's avoided cost standard.[24] Moreover, FERC determined that PURPA's avoided cost rates would serve as a cap on any state feed-in tariff prices, and that to the extent a facility was not a facility with a permit under PURPA, wholesale rates determined under the FPA would serve as a ceiling on feed-in tariff rates.[25] In Fall 2010, FERC issued an order on rehearing clarifying its preemption position and rejecting California's argument that there was no mandate under its rates requiring FERC approval of feed-in tariff buyback rates.[26]

The effect of these decisions is to bring feed-in tariff renewable pricing by states, as well as by municipal governments,[27] under the

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21. Steven Ferrey, Chad Laurent & Cameron Ferrey, *FIT in the USA: Constitutional Questions About State-Mandated Renewable Tariffs*, PUB. UTILS. FORTNIGHTLY, June 2010, at 60, 66.

22. Scott Hempling, Carolyn Elefant, Karlynn Cory & Kevin Porter, *Renewable Energy Prices in State-Level Feed-in Tariffs: Federal Law Constraints and Possible Solutions*, NAT'L RENEWABLE ENERGY LAB. v (Jan. 2010), *available at* http://www.nrel.gov/analysis/pdfs/47408.pdf.

23. *Id.*

24. California Public Utilities Commission, 132 FERC ¶ 61,047, at para. 67 (July 15, 2010) (Order on Petitions for Declaratory Order).

25. *Id.* at para. 69.

26. *See, e.g.*, California Public Utilities Commission, 133 FERC ¶ 61,059, at paras. 25–30 (October 21, 2010) (Order Granting Clarification and Dismissing Rehearing).

27. Although, as discussed below, municipal governments are exempt from wholesale price regulation under the FPA, PURPA creates a category called a "nonregulated utility" (which include a state-owned, municipal-owned, or cooperatively owned entity), subjecting this to PURPA, purchase and avoided cost mandate. 16 U.S.C. § 824a-3(f)(2) (2011).

regulation of FERC, which will not allow any prices set by sub-national regulators to exceed avoided cost rates. FERC may be flexible in the way it decides to regulate feed-in tariff terms. In fact, each state can advance its own avoided cost methodology, consistent with FERC's rules, and FERC's order on rehearing clarified that states have "a wide degree of latitude" with their methodology for setting avoided costs under PURPA.[28] For example, FERC clarified that states can calculate multiple-tiered avoided cost rates for different classes of power generators and also take into account differences in transmission costs for different kinds of generation.[29] States thus still have some options in adopting feed-in tariffs, even under FERC's orders. However, the orders are unequivocal in concluding that feed-in tariff pricing terms are not purely a matter of state law but are subject to approval by FERC and a price ceiling under PURPA. Given that FERC has not established any general criteria or rebuttable presumptions for renewable tariffs terms,[30] feed-in tariff programs survive the scrutiny of FERC on a case-by-case basis prior to implementation if they comply with the mandate of FERC's orders.

In support of its approach, FERC quoted a series of agency orders from the 1990s that found PURPA's avoided cost rates to be a ceiling on any state rate for PURPA licensed facilities, including renewable projects.[31] This approach echoes, and implicitly adopts, dictum from the Ninth Circuit that PURPA's avoided cost rates are the "statutory ceiling" (presumably based in the terms "that exceeds" in Section 210 of PURPA) a utility can be forced to pay when required to buy back power under PURPA.[32] In this case, the court concluded that a previous California avoided cost program "is preempted by PURPA insofar as it authorized the [u]tilities to determine that a [qualifying facility] is not in compliance with [FERC's] operating and efficiency standards and to impose a reduced avoided cost rate on that [qualifying facility]."[33]

28. 133 FERC ¶ 61,059, at para. 7.
29. *Id.* paras. 12, 14–16.
30. This approach was urged by the National Renewable Energy Laboratory. *See* Hempling, Elefant, Cory & Porter, *supra* note 22, at viii.
31. Southern Cal. Edison Co., 70 FERC ¶ 61,215 (1995), *reconsideration denied*, 71 FERC ¶ 61,269 (1995) (quoted in order denying hearing); *see also* Midwest Power Sys., Inc., 78 FERC ¶ 61,067 (1997); Conn. Power & Light Co., 70 FERC ¶ 61,012 (1995), *reconsideration denied*, 71 FERC ¶ 61,035 (1995).
32. *See* Independent Energy Producer Ass'n v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 852–53 (9th Cir. 1994).
33. *Id.* at 858.

While Ninth Circuit dictum did claim PURPA as a statutory ceiling, notably in applying PURPA to the fact before the court, it only treated PURPA as a floor—preempting California's efforts to undermine basic federal operational and efficiency criteria for new non-utility projects—not as a ceiling. It thus seems a bit of a stretch to conclude that FERC's ceiling preemption approach was mandated by PURPA or any appellate court.

A ceiling approach to preemption of state feed-in tariffs under PURPA is also not necessary from a practical perspective. A feed-in tariff is different from other kinds of projects that are issued permits by FERC to operate under PURPA. Feed-in tariffs are established under state law, and only attach if a project meets criteria set by the state. A renewable project does not need to obtain a PURPA permit from FERC, which would entitle it to avoided cost rates, in order to qualify for a state feed-in tariff rate. FERC's feed-in tariff decisions thus fail to distinguish how a state feed-in tariff operates independent of—and may even supplement—a request for the "avoided cost" benefit under PURPA. By treating the avoided cost rate as a ceiling, FERC ignored completely how the benefits that flow to renewable project developers depend on what the project developer asks for, and whether he selects to seek advantages for its project under state or federal law. Although set by states (subject to FERC approval), PURPA avoided cost rates only attach to projects that are licensed by FERC as "qualifying facilities." This makes PURPA an opt-in program, and qualification for the benefits of a feed-in tariff, including rates and interconnection for a renewable project, does not change or modify any of the benefits specified under federal law.

In addition to failing to recognize the opt-in nature of PURPA, FERC's approach to construing the statutory purposes behind PURPA in its feed-in tariff orders does not provide non-utility projects the same regulatory treatment as utility sponsored projects. It is well recognized that PURPA was designed to encourage not only the goal of consumer protection, but also goals of conservation, fuel diversity, and technological innovation. In order to encourage new entrants into the industry, Congress incorporated into PURPA's scheme a principle of purchaser indifference—that FERC's implementation of the statute should leave utilities indifferent between buying power from a non-utility project, including renewable projects, or the utility generating power itself.[34]

34. The U.S. Supreme Court endorsed this principle in *FERC v. Mississippi*, 456 U.S. 742, 750–51 (1982) (noting Congress's objective in enacting PURPA was to encourage the development of cogeneration and small power production—including renewable facilities—and to overcome utilities' traditional reluctance to purchase power from non-utility entities).

Yet FERC's reading of PURPA as a ceiling elevates consumer protection (and perhaps limited operational efficiency goals) over this purchaser indifference principle. The ironic effect is to severely limit a state's direct payments to purchases from non-utility developers of renewable projects, while states can continue to allow a utility to raise retail rates without regard to the avoided cost ceiling to subsidize that utility's own renewable projects.

FERC's approach to interpreting PURPA will impact state feed-in tariffs for smaller scale projects, given that large-scale (more than 20 MW) projects routinely are exempted from or exceed PURPA's size requirements.[35] But, given FERC's approach, any potential feed-in tariff pricing program for larger scale projects is also in serious peril. For these larger projects, the FPA's mandate that wholesale rates be set in a "just and reasonable" and not "unduly discriminatory" manner will undoubtedly preempt feed-in tariffs if FERC follows a similar approach to preemption.[36] The preemption analysis of these decisions consistently regards the wholesale price, whether approved by FERC or set by the market under FERC's competition policies, to serve as a ceiling on any state-set feed-in tariff rate.

The effect of such an approach is to entirely eviscerate state efforts to adopt non-market-based feed-in tariffs for larger scale renewable projects. According to the U.S. Energy Information Administration in 2010, average wholesale electric power prices ranged from $.036 per kWh in the Northwest to $.066 per kWh in New York, with an average California wholesale price of .047 per kWh.[37] All of these averages are

35. Under 2005 amendments to PURPA, FERC has allowed utilities to seek exemption from PURPA buyback obligations for qualifying facilities greater than 20 MW. *See* 16 U.S.C. § 824a-3(m)(1) (2005); *see also* 18 C.F.R. § 292.309 (2007) (FERC regulations implementing changes). FERC has created rebuttable presumptions to implement this exception and it appears that the exemption, while not guaranteed, has been granted fairly regularly. *See* Hempling, Elefant, Cory & Porter, *supra* note 22, at 12.

36. The FPA's rate mandate for utilities is more limited in its application than PURPA's. The FPA excludes publicly owned municipal utilities, public power districts, and irrigation districts, as well as cooperatively owned utilities from FERC's jurisdiction. *See* Federal Power Act § 201, 16 U.S.C. § 824(f) (1935). FERC also has no jurisdiction over the wholesale market in Hawaii and Alaska, because these states do not physically participate in interstate markets in electricity given their lack of contiguity with the other 48 states. FERC also has no jurisdiction over wholesale electric trades in much of Texas, which is regulated by the Electricity Reliability Council of Texas.

37. *See Average Wholesale Electric Power Prices Rose in 2010*, U.S. ENERGY INFO. ADMIN. (Mar. 4, 2011), http://www.eia.gov/todayinenergy/detail.cfm?id=370.

below the feed-in tariffs rates that states have set for that period.[38] Thus, with the exception of Hawaii (which is simply not subject to FERC jurisdiction under the FPA[39]), if extended to larger-scale projects, the state feed-in tariff fixed rates described above would likely be invalid. California's market price referent for larger scale projects,[40] which is based on the combined-cycled natural gas generation plant costs, could remain in operation so long as the market price does not exceed wholesale prices. This means that these projects will receive no tangible purchase subsidy at all, except to the extent that California builds into its approval decisions for new projects some neutral preference for renewable facilities (i.e., a preference that does not favor non-utility projects). Ironically, under FERC's approach, California could authorize its own utilities to increase their retail rates to subsidize their own large-scale renewable generation projects—including contracting with third-party developers to build renewable facilities—but price ceiling preemption precludes California from requiring a utility to provide a similar direct payment to non-utility renewable projects.

III. CEILING PREEMPTION AND CLEAN ENERGY POLICIES

In addressing the clean energy innovation of state and local feed-in tariffs, FERC has treated both PURPA and the FPA as containing price ceilings which potentially preempt the ability of sub-national regulators to set prices to encourage investment in clean energy. The origins of this ceiling preemption approach date to the pre-New Deal "filed rate doctrine," which was originally designed to protect interstate railroad consumers against monopolistic price discrimination.[41] Under the filed rate doctrine, since the FPA was adopted during the New Deal, FERC's traditional cost-based rate setting has been recognized by courts as preempting state regulators from setting prices that depart from a FERC-approved rate.[42] More recently, courts have also recognized that FERC's policy of favoring competitive wholesale markets can also preempt state

38. *See supra* Part I.
39. *See supra* text accompanying note 36.
40. *See supra* note 7 and accompanying text.
41. Rossi, *supra* note 15, at 1598–1602.
42. *See* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 953 (1986) (noting "Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority"). Interestingly, many circuit courts and FERC have recognized an exception to this doctrine that would allow a state to deny a utility the opportunity to recover costs incurred as the result of buying power at the FERC-established wholesale rate if the specific purchase, apart from the rate itself, is deemed imprudent by state regulators. *See* Rossi, *supra* note 15, at 1607.

pricing initiatives.[43] With the evolution of wholesale markets in electric power in the 1990s, FERC also began to consistently apply ceiling preemption to PURPA avoided costs,[44] for the purposes of advancing consumer protection goals. This approach has also emphasized efficiency to a degree, but only in the narrow sense of avoiding unfair advantages to new entrants that might harm consumers.[45] As I argue, recognition of the diverse values endorsed in modern energy statutes should lead to reassessment of this approach; in some instances, such as clean energy policy innovations by sub-national governments, a ceiling approach undermines other statutory goals and treating federal law as a preemption floor will better advance the goals of federal law.

A. Polyphonic Values and the Preemption Floor of Energy Law

FERC's ceiling preemption approach to feed-in tariffs highlights a longstanding debate surrounding the goals of PURPA. While consumer protection and the operational efficiency of new plants are relevant PURPA goals, the statute is widely understood to endorse a much broader set of values. Writing more than 15 years ago against the backdrop of a rise in FERC market-set wholesale prices, Judge Richard Cudahy warned courts and FERC against emphasizing any singular goal in PURPA's implementation, noting that "both fuel diversity and energy conservation might be completely ignored if the only emphasis in evaluating generation is on current market price."[46] He lamented how recent agency orders, including some of the main agency precedents relied on by FERC in its feed-in tariffs decisions,[47] emphasize competition

43. *See* Duke Energy Trading & Marketing v. Davis, 267 F.3d 1042, 1058–59 (9th Cir. 2001) (finding wholesale market set rates approved by FERC preempt the California Governor's effort to protect consumers against strategic manipulation of its deregulated power market). *See also* Norwood v. New Eng. Power Co., 202 F.3d 408, 416 (1st Cir. 2000) (treating market base-based rates approved by FERC under the filed rate doctrine)

44. *See supra* note 32 and accompanying text (discussing earlier FERC orders finding ceiling preemption).

45. Since PURPA is not limited to renewable facilities but also includes cogeneration, one of the problems with PURPA was a perception that FERC had favored non-utility cogeneration over utility-sponsored projects, and that PURPA had become a reverse subsidy for sometimes inefficient projects. This concern led to reform of PURPA in 2005 to exempt many of these larger cogeneration projects from avoided cost rates. *See supra* note 35 (describing PURPA's exemption process for projects exceeding 20 mw).

46. Richard D. Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16 ENERGY L.J. 419, 421 (1995).

47. *See* supra note 46 (referencing Southern California Edison orders).

and deregulated markets, while ignoring "the environment, diversity of generation, energy self-sufficiency and the like."[48]

Moreover, FERC's ceiling price preemption approach ignores PURPA's cooperative federalism origins. In contradiction to FERC's own feed-in tariffs orders, FERC's rules implementing Section 210 of PURPA explicitly envision avoided cost rates as a floor for state innovation, not a price ceiling:

> This Commission has set the rate for purchases at a level which it believes appropriate to encourage cogeneration and small power production, as required by section 210 of PURPA. While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, the States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies. However, State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement of these technologies, and must yield to federal law.[49]

This sort of cooperative federalism approach is consistent with what Congress envisioned in PURPA, and was endorsed by the U.S. Supreme Court in a case that also recognized that PURPA endorses the general principle of making an incumbent utility indifferent between making purchases from non-utility firms and generating power itself.[50] FERC's adoption of a ceiling approach regarding feed-in tariffs elevates consumer protection and efficiency in importance, but the approach inevitably hobbles sub-national governments from pursuing other conservation and fuel diversity goals that overlap with PURPA, contrary to both the statute's goals and the agency's rules implementing PURPA avoided cost rates.

PURPA is not the only energy statute that embraces a diverse range of values. The FPA's "just and reasonable" requirement historically has been interpreted in a narrow manner to focus on consumer protection goals under the traditional regulatory contract.[51] In recent years, however, it has become apparent that FERC's regulation of electric power is no longer solely concerned with protecting consumers—simply put, the regulatory contract has expanded beyond incumbent utilities and their customers.[52] FERC itself recognized this in the 1990s with its introduction of wholesale competition to the industry,[53] which allowed

48. *See supra* note 46, at 436 (referencing Southern California Edison orders).
49. 45 Fed. Reg. 12,214, 12,221 (Feb. 25, 1980).
50. *See supra* text accompanying note 35.
51. *See* Rossi, supra note 16, at 1598-1603.
52. An argument developed further in JIM ROSSI, REGULATORY BARGAINING AND PUBLIC LAW (2005).
53. Wholesale competition and regulation of the wholesale market became an official FERC policy in 1996 when the agency issued its landmark Order No. 888. *See Landmark Orders: Order No. 888*, FERC, http://www.ferc.gov/legal/maj-ord-reg/land-docs/order888.asp (last updated June 28, 2010).

new entrants in the industry to proliferate. At the state level, regulators apply similar "just and reasonable" rate language under their own statutes in setting retail rates. Over time, state regulators have endorsed the incorporation of broader values into the regulatory contract's "just and reasonable" standard, including environmental protection, efficiency, and conservation.[54] In the past 40 years, the FPA has also been amended on multiple occasions to address issues including energy security and conservation, and Congress has passed numerous generic statutes such as the National Environmental Policy Act[55] as well as more particular statutes such as PURPA that bring a broader range of goals into play.[56] With the addition of new statutes reflecting new values, the FPA's "just and reasonable" mandate has evolved beyond the narrow New Deal notion that regulators are solely concerned with protecting the customers of a utility from monopolistic abuses.

As a method of statutory interpretation, recognizing a diversity of statutory values, especially in contexts where institutional authority overlaps, is more consistent with preemption floors than ceilings, except in instances where there is a clear obstacle or where Congress has clearly expressed a preference to the contrary. If a statute only endorses goal *X*, any decision about an approach to preemption will focus on which institutional actors will best advance that specific goal. However, if a statute recognizes a range of policies—*X*, *Y*, and *Z*—and an agency or court applies a preemption ceiling for a singular policy—*X*—that singular goal will trump or constrain the pursuit of any other goals,

54. Fundamental shifts have occurred in the "utility consensus" behind price regulation at the state level, increasingly recognizing environmental and conservational values as well as traditional consumer protection goals in the implementation of state law, even where that law was not updated by the legislature. *See* RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 268 (1999).

55. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

56. PURPA is certainly not the only other statute of relevance to FERC in regulating wholesale electricity prices. Apart from procedural statutes, such as NEPA, other energy statutes with which the agency must comply (many of which have been incorporated into provisions of the FPA through amendments and new sections) include: Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (amending various provisions of the FPA); Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (amending various provisions of the FPA); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (amending and adding provisions of the FPA); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (amending and adding various provisions to the FPA); Power Plant and Industrial Fuel Use Act, 42 U.S.C. §§ 8301–8483 (2006).

limiting the ability of regulators to balance multiple goals in the pursuit of the statute's overall purposes. Thus, as a general matter, where a statute endorses a range of goals, without clearly favoring one, preemption ceilings are generally not an effective means of advancing the statute's values since they limit the ability of regulators to balance goals in implementing the statute.[57]

The role of preemption floors is well explored in the context of environmental statutes, where state regulators for purposes of meeting environmental protection and other goals can exceed federal standards. William Buzbee has explored the significance of preemption floors in contexts where Congress has manifested a preference for regulatory overlap and interaction. In addressing the implications of the choice of floors versus ceilings, his work highlights the advantages of floors over ceilings in encouraging innovation, especially in contexts where regulators face a diversity of goals and volatility.[58] Consistent with the approach of most courts interpreting environmental statutes, his work carefully assesses institutional incentives and the importance of preemption floors to environmental statutes such as the Clean Air Act and Clean Water Act.[59] Closer to the realm of energy law, and clean energy in particular, Alexandra Klass has questioned the federal ceiling preemption approach some courts have extended to appliance efficiency standards set by the U.S. Department of Energy ("DOE").[60] She concludes that "while there may be good reasons to create a single, federal standard in situations where there are concerns regarding economic protectionism, product innovation, conflicting standards or policy disputes among the states, those concerns do not appear to be present in the area of appliance efficiency."[61] Elevating uniformity as a singular goal in such a context

57. Although she argues against all agency preemption, including floor preemption, Nina Mendelson similarly emphasizes how multiple goal statutes require agencies to balance multiple goals rather than prioritize a single goal and constrain the pursuit of other values. *See* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 713 (2008) (observing that conflict preemption is especially problematic for multiple goal statutes because "[a]n agency can nearly always identify some statutory goal . . . with which the state law will conflict.").

58. *See* William W. Buzbee, *Federal Floors, Ceilings and the Benefits of Federalism's Institutional Diversity*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 98 (William W. Buzbee ed., 2009).

59. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145 (2007).

60. Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 HARV. ENVTL. L. REV. 335 (2010).

61. *Id.* at 367.

would trivialize other state objectives and disable institutional actors from pursuing them.

To the extent federal energy laws are similarly focused on simultaneously balancing multiple values, such as conservation and fuel diversity, FERC and courts have much to gain from reconsidering the traditional approach to treating federal law as a ceiling in setting prices. Recognizing the balance of values in federal statutes as setting a floor can help federal regulators carve out a space to encourage sub-national innovation in clean energy policy. Such an approach is particularly compelling in the context of a statute such as PURPA, where Congress clearly had a cooperative federalism model in mind. Yet even in the context of the FPA, where the statute is informed by other statutes and guides decisions in a context where institutional authority is overlapping, a floor approach to preemption helps us to imagine federal energy law's ability to promote clean energy in new ways.

Such an approach does not require courts and regulators to reject federal preemption entirely. Preemption can have a role where a state's pursuit of a goal presents an obstacle to the pursuit of a clearly identified federal goal, or where there are needs for federal regulation to manage economic protectionism or conflicting state standards. Where the goals of federal and sub-national policies align, treating federal standards as a floor allows sub-national governments to do more to assist federal regulators in pursuing their goals. If a state conservation program produces benefits for in-state consumers or producers by externalizing the costs to the citizens of other states, it can become a legitimate concern for federal regulators in setting prices if those benefits are inconsistent with federal goals. Preemption may be appropriate in such circumstances. However, where a state conservation program produces benefits and costs for that state's customers only, and does not have any tangible effect on out-of-state consumers or producers or has an effect that is consistent with federal goals, there is no concern about protectionism or conflicting state standards, and ceiling preemption is counterproductive.

B. Application of Preemption Floors to Transmission Siting and Demand Response

Despite FERC's narrow definition of PURPA's goals and its ceiling approach to preemption in addressing feed-in tariffs, the agency in other clean energy contexts has begun to recognize how the multiplicity of goals behind energy statutes favors preemption floors rather than

ceilings. Two recent examples—transmission line siting and cost allocation, and demand response policies—highlight how endorsing a broader understanding of the goals of federal statutes allows federal law to serve as a floor for innovation in clean energy policies, even where a cooperative federalism statute such as PURPA is not at issue.

First, consider the construction and location of high voltage transmission lines—one of the most significant barriers renewable energy projects in the U.S. face today given that so many renewable energy resources are located in rather remote geographic areas. One of the major impediments to the financing and location of transmission lines is the state regulatory process, which has tended to favor in-state interests over broader regional and national interests in building a new or expanding an existing line.[62] According to FERC Chairman Jon Wellinghoff, "We need a National policy commitment to develop the extra-high voltage (EHV) transmission infrastructure to bring renewable energy from remote areas where it is produced most efficiently into our large metropolitan areas where most of this Nation's power is consumed."[63]

For many years, FERC lacked any ability to site transmission lines over the objections of recalcitrant states, but Congress in 2005 amended the FPA to give FERC "backstop" authority to override state regulators who refuse to site lines that meet certain criteria in certain geographic areas designated as National Interest Electric Transmission Corridors by the DOE.[64] To put it lightly, the three appellate courts that have reviewed federal agency decisions under these statutory amendments have not looked kindly on federal regulators' implementation of these amendments, consistently reversing FERC and DOE decisions implementing the new transmission statutes enacted by Congress.[65] This chilly judicial reception leaves FERC little regulatory authority to help guide the construction and cost recovery for high-voltage transmission lines.[66]

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62. *See* Ashley Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the "Public Interest" in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705 (2010).

63. *Transmission Infrastructure: Hearing Before the S. Comm. on Energy and Natural Resources*, 111th Cong. 10 (2009).

64. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, § 1221 (2005) (codified at 16 U.S.C. § 824p(b)).

65. Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072 (9th Cir. 2011) (rejecting DOE's designation of critical congestion areas for purposes of FERC's exercise of backstop authority); Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 473, 478 (7th Cir. 2009) (rejecting FERC's approval of cost recover for a regional transmission entity); Piedmont Envtl. Council v. FERC, 558 F.3d 304, 325 (4th Cir. 2009) (rejecting FERC's interpretation of the statutory criteria that triggers its backstop authority).

66. After *Piedmont*, the first judicial blow to FERC's transmission line siting decisions, FERC Chairman Jon Wellinghoff testified before a Senate Committee, "[The *Piedmont*] court's ruling is a significant constraint on the Commission's already-limited ability to

One of these appellate decisions, from the Seventh Circuit, addresses the allocation of costs for new transmission lines under the FPA's "just and reasonable" standard.[67] Clear principles defining how costs for new transmission investments will be recovered is important to encouraging investment in such facilities, especially given the climate of regulatory uncertainty surrounding transmission line siting. Following a model for cost allocation that had been adopted among members of the PJM Interconnection—a regional transmission organization ("RTO")—FERC approved the RTO's pro rata allocation of the costs among members for new 500 kilovolt ("kV") and above transmission. Because the RTO's members span both concentrated and unconcentrated population areas, the direct benefit of transmission varied geographically across distinct customers groups within the PJM Interconnection region. At the same time, there were recognized benefits of new 500 kV transmission to network reliability for all PJM Interconnection customers. Consistent with its prior order approving the regionalization of the costs of transmission, FERC had not attempted to quantify these benefits across all of PJM's members.

In a serious blow to the efforts of sub-national entities to spread the costs of new transmission projects for clean energy, the Seventh Circuit reversed FERC's approval of the PJM Interconnection cost allocation formula. Writing for a majority of the panel, Judge Richard Posner concluded that "FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members."[68] While Judge Posner was careful to suggest that there is no need to calculate benefits "to the last penny,"[69] he also concluded that is insufficient for the agency to merely assert "some benefit" just because "a network *is* a network."[70] In Judge

approve appropriate projects to transmit energy in interstate commerce." *See Transmission Infrastructure: Hearing Before the S. Comm. on Energy and Natural Resources*, 111th Cong. 11 (2009) (statement of Jon Wellinghof, Acting Chairman, Federal Energy Regulatory Commission). Congress considered multiple proposals to enhance FERC's authority to site and allocate costs for transmission lines, but these largely have faded along with discussion of comprehensive national climate change legislation. *See* Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015 (2009).

67. *See* Ill. Commerce Comm'n v. FERC, 576 F.3d 470 (7th Cir. 2009) (rejecting FERC's approval of regional cost spreading in approving pricing for a transmission line).

68. *Id.* at 476.

69. *Id.* at 477.

70. *Id.*

Posner's view, to reflect the cost causation principle embedded in the FPA's "just and reasonable" requirement, an effort needs to be made to either quantify such benefits or to conclude that the benefits are "roughly commensurate" with a utility's share of sales in the entire PJM region.[71] Judge Posner's approach emphasizes a narrow consumer protection principle—that all FERC approved rates must reflect the costs actually caused by the customer who pays for them—and treats the "just and reasonable" language in the FPA as a ceiling on any sub-national pricing for transmission that deviates from this principle.

Judge Cudahy issued a strong dissent from this opinion, sketching out an entirely different vision for federal energy law. He observed:

> [I]t is not possible to realistically determine for each utility and with reference to each major project the likelihood that rate-simplification will reduce litigation, or to calculate the precise value of not having to cover the costs of power failures and of not paying costs associated with congestion, and all this over the next forty to fifty years. Concerns about the real value to individual utilities of the stability and efficiency provided by improvements to the backbone grid are answered by their voluntary participation in the power pool and its collaborative "RTEP" (or regional transmission expansion planning) process. Rate-making based on cost causation is assured by this process, since universal cost-sharing is recommended only when developments are found to benefit the integrated system as a whole.[72]

Judge Cudahy reasoned that imposing a precise quantification of benefits, or even rough proportionality, is inconsistent with past practice in regional grid pricing to address issues such as cascading outages, and is not required by any of FERC's rules or precedents or the statutory language of the FPA.[73] According to Judge Cudahy's vision of energy law, the just and reasonable standard incorporates a broader range of values, including goals related to reliability and protecting the integrity of the system-wide grid as a whole.[74] His approach arguably envisions the FPA's just and reasonable standard as a floor, designed to encourage sub-national experimentation in pricing approaches, rather than as a ceiling that limits pricing and cost allocation innovations.[75]

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71. *Id.*
72. *Id.* at 479.
73. *Id.* at 480–82.
74. *Id.* at 481 ("The big picture here is that FERC's proposal to spread the cost of very high voltage transmission [within the region] on a uniform basis seems to me in the interest of efficient, high-capacity transfer capability and of the closely linked improvement of reliability, which affects the system generally.").
75. This point is elaborated in Jim Rossi & Thomas Hutton, *Judge Cudahy's Energy Vision*, 29 YALE J. ON REG. (forthcoming 2012); *see also* Jim Rossi, *Transmission Siting in Deregulated Wholesale Markets: Re-Imagining the Role of Courts in Resolving Federal-State Siting Impasses*, 15 DUKE ENVTL. L. & POL'Y F. 315 (2005) (suggesting a preemption approach as a way of overcoming the resistance of certain state institutions to approving the siting of new transmission lines).

In comparison to the strict cost causation approach of Judge Posner, a notable advantage of the PJM approach is that it would have encouraged greater investment in transmission lines by allowing investors to spread the costs of new lines more broadly. Such an innovation would advance a federal goal by helping to overcome some of the obstacles to new transmission lines. Transmission pricing thus provides a nice illustration of how floor preemption is not inconsistent with overcoming state protectionism. In this context, a broader reading of the statute coupled along with treatment of the "just and reasonable" standard as a floor could help regional entities innovate to actually overcome state holdouts.[76]

Another important pricing issue on the horizon for national energy policy is so-called "demand response," or efforts by regulators to reduce the consumption of electricity. Recently, FERC has adopted an innovative set of new policies regarding demand response.[77] FERC's demand response rules are highly complex but at core they set out to create incentives in the pricing of electric power that actually reduce the consumption of electricity, including the possibility that firms could be compensated not to purchase electricity in wholesale markets. Much like a new transmission line, demand response can alleviate congestion and benefit the system as a whole, including reliability. It also can advance values associated with conservation and environmental protection, insofar as reductions in demand may make new power plants unnecessary or allow plants to operate at more efficient levels.[78] Given the enormous opportunity demand response presents to reduce demand and change investment decisions about new power plants and transmission lines, FERC Chairman Wellinghoff has described demand response as the "'killer application' of the smart grid."[79]

However, for FERC's new demand response approach to survive legal challenges, the agency will likely need to depend on an expansive

76. On the advantage of regional entities in addressing renewable energy challenges, see Hannah Wiseman, *Expanding Regional Renewable Governance*, 35 HARV. ENVTL. L. REV. (forthcoming 2011).

77. *See* Order No. 745, Demand Response Compensation in Organized Wholesale Energy Markets, 134 F.E.R.C. ¶ 61,187 (Mar. 1, 2011).

78. Although demand response has received little discussion, environmental law scholars have increasingly begun to recognize the significance of reducing demand and changing consumption patterns in advancing environmental goals. *See* John C. Dernbach, *Harnessing Individual Behavior to Address Climate Change: Options for Congress*, 26 VA. ENVTL. L.J. 107 (2008); Michael P. Vandenbergh & Anne C. Steinman, *The Carbon Neutral Individual*, 82 N.Y.U. L. REV. 1673 (2007).

79. Kate Galbraith, *Dimming the Lights to Meet Demand*, N.Y. TIMES (Apr. 17, 2009), http://green.blogs.nytimes.com/2009/04/17/dimming-the-lights-to-meet-demand/.

interpretation of the goals of the FPA as including not only consumer protection, but also reliability goals related to the system as a whole and conservation and environmental goals.[80] Moreover, if FERC's demand response pricing rules are interpreted as a ceiling under the FPA, state conservation approaches that require utilities to make conservation minded decisions in procuring wholesale power could be preempted if they require utilities to pay more than the rates FERC has approved. By contrast, treating FERC's demand response policies as a preemption floor would encourage state and other sub-national regulators to also innovate in conservation-minded approaches. For example, a state approving a plan to compensate utilities not to purchase power in the wholesale market, instead reducing its demand through conservation programs, especially where the costs exceed the proportional payment plan FERC has approved in its demand response—so long as it does not present a direct obstacle to federal goals.[81] An over eager ceiling preemption approach will limit states' ability to reward utilities for their conservation practices and to innovate in other conservation measures.[82]

There are, of course, some countervailing considerations that need to be assessed carefully as courts and regulators look to the diversity of values in federal energy law as embracing floor rather than ceiling preemption. If Congress is clear that a singular value is to serve as a ceiling in a regulatory program, it seems appropriate that the agency and courts give full effect to Congress's preference. Even where Congress has endorsed multiple values in a federal statute, there will sometimes be a need for federal regulation to step in for the purpose of resolving conflicts as sub-national governments implement federal goals. It also may be the case that uniformity of approach is necessary to advance a federal goal, but there is nothing in the history of federal power regulation that makes uniform pricing of wholesale markets a requirement.

Perhaps most significantly, federal preemption and ceilings still can be appropriate where state regulation facilitates protectionism or states are

80. Although to date many conservation policies related to pricing, such as demand-side management, have been adopted by state regulators, in fact there is a long standing foundation in federal statutes for conservation policies as well. *See* James W. Moeller, *Electric Demand-Side Management Under Federal Law*, 13 VA. ENVTL. L.J. 57 (1993).

81. Although it preceded FERC's actual adoption of demand-response rules, for an excellent discussion of the possible preemption challenges to demand response, see Hon. Jon Wellinghoff & David L. Morenoff, *Recognizing the Importance of Demand Response: The Second Half of the Wholesale Electric Market Equation*, 28 ENERGY L.J. 389, 412–19 (2007) (urging a coordinated federalism approach to demand response).

82. For example, FERC's pro-preemption position under PURPA also could impact net metering. The 2005 Energy Policy Act amended PURPA to require states to consider adopting net metering policies. To the extent that states refer to PURPA avoided-cost rates in net metering statutes or regulations, FERC potentially could extend its price ceiling under the feed-in tariff orders to these policies as well.

in conflict with each other. However, as I have suggested, the example of transmission pricing policy calls into question whether a risk of state protectionism requires ceiling preemption of prices, even in contexts where some individual states may historically have favored balkanized regulatory approaches and refused to site new lines. Even where a state is externalizing some of these costs, if they advance federal goals, there is no preemption problem. In the context of clean energy policy, it is certainly possible that protectionism and conflicts between the states could occur, and a need for federal resolution will sometimes be necessary. But with respect to most clean energy policies, where innovation is the rule and not the exception, it would be premature for courts and regulators to eagerly impose ceiling preemption on state innovations, especially where they are relatively small scale and are designed to advance goals that are co-extensive with the diverse values of federal energy law.

IV. CONCLUSION

The New Deal price regulation relic of ceiling preemption in setting prices has invited FERC and courts to emphasize the singular policy of consumer protection at the expense of the diversity of goals endorsed in federal energy statutes. A recognition of federal energy law's polyphonic goals would lead courts and regulators to more frequently adopt a floor preemption approach, allowing federal regulators to more effectively serve as a lever for investment and innovation at the regional, state, and local levels.

As with PURPA, often a single statute will embrace multiple goals, including competition, conservation, fuel diversity, and efficiency. Focus on a singular purpose or objective at the expense of other goals may have been sufficient to advance energy policy in the past, but a national clean energy policy requires regulators and courts to embrace a balance of multiple policies. In the case of FERC's preemption policy regarding feed-in tariffs, emphasizing a single purpose of market competition in preemption has hobbled the ability of states to further the other goals of PURPA, such as conservation and fuel diversity. Much energy policy is adopted against the backdrop of multiple statutes embracing multiple goals—a true polyphonic statutory interpretation scenario. Even statutes like the FPA that historically might have embraced a singular purpose, such as protecting consumers, today are implemented against a tapestry of laws that import a diversity of values into the statute's implementation. In the context of reviewing transmission

line siting and cost allocation decisions, courts have failed to recognize the diverse range of goals behind national energy law. If a similar approach is taken elsewhere, this also will limit the ability of federal agencies to implement policies designed to reduce the demand for electricity.

Finally, to the extent that regulators themselves read their statutes narrowly and impose price preemption ceilings, even where making narrow decisions, this circumstance also invites the judiciary's eagerness to project narrow goals and preemption ceilings onto federal energy law—hobbling the broader ability of the federal government to spur sub-national innovation to advance a clean energy agenda. If FERC's approach to statutory interpretation in assessing feed-in tariffs were widely applied by federal courts in evaluating FERC's other clean energy pricing policies, the agency's ability to adopt clean energy policies—including transmission pricing and demand response—will be in serious peril. A consistent approach that recognizes the diverse values of federal statutes, allowing courts and regulators to imagine federal law as a floor rather than a ceiling, would be more likely to give federal energy law the space it needs to encourage regional entities and state and local governments to innovate in clean energy policy.