

# Clean Energy Pricing and Federalism: Legal Obstacles and Options for Feed-in Tariffs

Michael Dorsi\*

*In the past couple years, despite growing evidence of the impacts of climate change and other environmental crises, actions at the federal level have disappointed many in the environmental community. While progress in Washington has been mixed, states, most notably California, have forged ahead with new policies. One area where state and local governments have acted as pioneers has been the development of feed-in tariffs. Feed-in tariffs, which offer renewable resources and other preferred energy sources a fixed purchase price, have been successful abroad and in small-scale use in the United States. However, feed-in tariffs are threatened by claims of preemption under the Federal Power Act and dormant Commerce Clause. The recent administrative process before the Federal Energy Regulatory Commission regarding California's feed-in tariff illustrates that the legal impediments to state implementation of feed-in tariffs due to federalism doctrines, though real, can be overcome. This Article analyzes, how, given those constraints, states can develop policies that can withstand judicial and regulatory scrutiny while maintaining the virtues that made feed-in tariffs successful abroad. Although states may not be permitted to choose optimal policy arrangements, current law permits sufficient room for policy innovation.*

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\* Fellow, Phillips & Cohen LLP; J.D. Harvard Law School, 2011; B.A. University of California, Berkeley, 2006. Special thanks to Ken Alex, Laura Bishop, Elizabeth Forsyth, Jody Freeman, Jason Harrow, Dan Mach, and the staff of the Manuscript Division at the Library of Congress.

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## I. INTRODUCTION

In the past couple years, despite growing evidence of the impacts of climate change and other environmental crises, actions at the federal level have disappointed many in the environmental community. While progress in Washington has been mixed, states, most notably California, have forged ahead with new policies.<sup>1</sup> The progress at the state level has even attracted international attention.<sup>2</sup> Despite recent progress, the American system of federalism stands as a potential barrier to policy innovation. In areas affecting interstate commerce, the federal system burdens states twice: first with the dormant Commerce Clause, and second, with federal preemption under existing statutes. Despite the large amount of international attention directed at state-level policies, little attention is paid to the obstacles created by the federal system. States cannot legislate away complications imposed by federal law; instead they must carefully navigate the challenge of making policy in accordance with federal law. A valuable illustration of this challenge arises in the implementation of feed-in tariffs.

A feed-in tariff, also known as a CLEAN contract,<sup>3</sup> is a type of contract offer that allows an energy producer, usually from a renewable or otherwise preferred energy source, to connect to the grid and be paid a pre-determined rate. The feed-in tariff works by requiring the local utility or other intermediary to purchase, or at least to offer to purchase, energy at a set price per unit from producers who meet certain criteria. This stability has proven valuable for investment in renewable energy by creating certainty with regard to return on investments.<sup>4</sup>

In Europe, several countries established feed-in tariffs, with some notable success in expanding investment in renewable energy. European feed-in tariffs have been established by national governments. In the United States, however, a handful of feed-in tariffs operate for states and cities but cover only a small

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<sup>1</sup> See, e.g., Ann Carlson, *California Adopts Landmark Cap-and-Trade Program*, LEGAL PLANET (Oct. 20, 2011), <http://legalplanet.wordpress.com/2011/10/20/california-adopts-landmark-cap-and-trade-program> (“Defying the trend in the rest of the country to ignore the perils of climate change, the California Air Resources Board voted today to establish the country’s first economy-wide cap-and-trade program covering greenhouse gas emissions.”).

<sup>2</sup> See, e.g., Rhead Enion, *California Cap-and-Trade a Topic of Interest at Durban*, LEGAL PLANET (Dec. 3, 2011), <http://legalplanet.wordpress.com/2011/12/03/california-cap-and-trade-a-topic-of-interest-at-durban>.

<sup>3</sup> CLEAN stands for Clean Local Energy Accessible Now. Richard W. Caperton et al., *CLEAN Contracts: Making Clean Local Energy Accessible Now*, CTR. FOR AM. PROGRESS (Jan. 18, 2011), [http://www.americanprogress.org/issues/2011/01/clean\\_contracts.html](http://www.americanprogress.org/issues/2011/01/clean_contracts.html). The term “CLEAN contracts” is a more recent invention which may or may not become common usage, so I use the term feed-in tariff throughout the Article.

<sup>4</sup> DAVID DE JAGER & MAX RATHMANN, *ECOFYS INT’L, POLICY INSTRUMENT DESIGN TO REDUCE FINANCING COSTS IN RENEWABLE ENERGY TECHNOLOGY PROJECTS* 27, 120 (Oct. 2008), available at [http://www.ecofys.com/files/files/retd\\_pid0810\\_main.pdf](http://www.ecofys.com/files/files/retd_pid0810_main.pdf).

share of electricity producers. The primary obstacle to implementing feed-in tariffs is the division between state and federal roles in energy regulation. Absent federal action, several states began the process of developing feed-in tariffs, and now face the obstacle of federal preemption lawsuits. This Article argues that these obstacles present risks to state policies, but if states adhere carefully to statutory requirements and effectively advocate for their role in the federal system, states can establish effective feed-in tariffs.

In the United States, the state-federal divide in energy regulation tracks the distinction between retail and wholesale electricity. States have authority over retail sales and procurement decisions by utilities, such as requiring that utilities purchase energy from a certain mix of resources. States also regulate rates, assuring that utilities can recover their costs. However, the federal government retains the authority to regulate interstate commerce,<sup>5</sup> and under this authority, the Federal Power Act establishes that prices paid by utilities to purchase power at wholesale are to be regulated by the Federal Energy Regulatory Commission (“FERC”).<sup>6</sup> This division of authority between state and federal regulators creates ambiguity regarding who holds the authority to establish a feed-in tariff.

A federally-operated feed-in tariff, though constitutionally permissible, would encounter problems with the varied electric markets and regulatory regimes in different states. Due to state control over retail electricity and state participation in centralized electricity management organizations, known as Independent System Operators (“ISOs”) and Regional Transmission Operators (“RTOs”), some states have electricity markets conducive to feed-in tariffs mandated on utilities, while others do not. Additionally, policies favoring cleaner energy have proliferated at the state level while such policy processes have largely faltered at the federal level.<sup>7</sup>

Presently, states are authorized to create a kind of standard contract for Qualifying Facilities (“QFs”) that provide power. The 1978 Public Utility Regulatory Policies Act<sup>8</sup> (“PURPA”) requires state utility commissions to carry out FERC regulations to permit non-utility generators meeting certain requirements to connect to the grid and it requires utilities to purchase that power at a rate defined as *avoided cost*.<sup>9</sup> However, avoided cost is often insufficient to fund renewable energy.<sup>10</sup> The claimed benefits of renewable

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<sup>5</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>6</sup> 16 U.S.C. § 824 (2006).

<sup>7</sup> See, e.g., Carlson, *supra* note 1.

<sup>8</sup> 16 U.S.C. §§ 2601–2645.

<sup>9</sup> *Id.* § 824a-3(f), (h). Avoided cost is defined as “the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.” *Id.* § 824a-3(d). For more detail on avoided cost calculation, see section III.B.

<sup>10</sup> SCOTT HEMPLING ET AL., RENEWABLE ENERGY PRICES IN STATE-LEVEL FEED-IN TARIFFS: FEDERAL LAW CONSTRAINTS AND POSSIBLE SOLUTIONS, at vi (Nat’l. Renewable Energy Lab.,

energy are not that it is cheaper to produce, but that it is a better deal once social costs are considered. When states attempted to include externality costs in their avoided cost rates, FERC ruled that only those costs which the utility faces may be considered in setting avoided cost.<sup>11</sup> As a result, PURPA, absent legislative or regulatory innovation, is insufficient to develop feed-in tariffs. A new, more precise interpretation of PURPA by FERC in a case regarding California's feed-in tariff may provide a window for the expansion of feed-in tariffs.

Alternatively, some have proposed that the federal government could require or permit states to establish feed-in tariffs. While permitting state action would be permissible, requiring state action may not be. Although the Supreme Court upheld PURPA's avoided cost requirements in *FERC v. Mississippi*,<sup>12</sup> the Court has since shifted its federalism doctrine and no longer permits federal commandeering of state regulatory agencies.<sup>13</sup> Moreover, in the current political situation, new energy legislation may be difficult if not impossible, suggesting that regulatory options should also be explored.

To analyze the legal and policy options and obstacles for feed-in tariffs, this Article will provide background on the policy rationale followed by an exploration of the legal obstacles to various policy options.

This Article argues that obstacles rooted in the federal system present risks to state feed-in tariff policies. However, current law provides opportunities for states to carefully craft policies that comport with statutory requirements by making use of prior federal authorization. Also, if states are faced with situations where Congress or the courts could reshape the relevant legal landscape, states will have the opportunity to raise arguments that, if successful, would result in greater autonomy in energy pricing policy.

This Article does not make the case that feed-in tariffs are the best policy, although a discussion of the merits is included to facilitate a discussion of how feed-in tariffs might be implemented in ways that capture those merits. Part II provides an account of the arguments for and against feed-in tariffs, explaining which actors want feed-in tariffs, how feed-in tariffs fit with other policies, and what policies might act as alternatives to feed-in tariffs. Part III surveys the current legal landscape, including present federal and state policies. Part IV discusses the major policy options, their feasibility, and their merits. Part V concludes.

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Technical Report NREL/TP-6A2-47408, Jan. 2010), available at <http://www.nrel.gov/docs/fy10osti/47408.pdf>.

<sup>11</sup> Southern California Edison, 70 FERC ¶ 61,215 (1995), *aff'd on rehearing*, 71 FERC ¶ 61,269 (1995).

<sup>12</sup> 456 U.S. 742 (1982).

<sup>13</sup> See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

## II. THE POLICY RATIONALE FOR FEED-IN TARIFFS: AN OVERVIEW

In the 1950s, Ray Kroc took over a few Southern California restaurants and turned them into the world's largest chain of restaurants: McDonalds. A key piece of his success was standardization; any customer at any store could purchase the same product for the same price, and know they were buying the same product.<sup>14</sup> This became convenient for the often-busy postwar family, having the certainty of price and quality in the food they purchased. The benefits of standardization are not limited to McDonalds, and have been replicated in a variety of settings. The gains from standardization can also be used in reverse: sellers can benefit greatly from knowing that they can always sell a standard product at a set price. In the world of renewable energy, the analogous product is known as the feed-in tariff.

The purpose of a feed-in tariff is to encourage development of the type of energy resources that qualify for the tariff. In short, the goal is to pick a basket of preferred technologies and then encourage their development. Feed-in tariffs are not the only policy that can reward certain technologies. States have authority over procurement, permitting states to set quotas for preferred sources such as Renewable Portfolio Standards ("RPS").<sup>15</sup> These quotas can be transformed into tradable permit systems with Renewable Energy Credits ("RECs"). In a variation on RPS, states may establish renewable energy auctions to guarantee purchases from certain resources.<sup>16</sup> States may also use direct financial incentives through taxes, subsidies, and penalties.<sup>17</sup> States, like the federal government, can also provide loans to developers of new technologies.<sup>18</sup>

None of these policies, however, provide developers with predictable returns on their investments. The certainty of a fixed price reduces risk because developers can be assured that they will be paid a given price. This in turn enables more investment because developers engaging in a less risky enterprise

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<sup>14</sup> DAVID HALBERSTAM, *THE FIFTIES* 163–64 (1993).

<sup>15</sup> See *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 512 (1989) (holding that federal gas regulations do not preempt state gas procurement requirements); *Ameren Energy Mktg. Co.*, 96 FERC ¶ 61,306, at 62,189 (2001) (noting, in an electricity case, that "the Commission has consistently recognized that wholesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen from among available supply options"). For a discussion of RPS policies, see RYAN WISER & GALEN BARBOSE, *RENEWABLE PORTFOLIO STANDARDS IN THE UNITED STATES* 1–4 (Lawrence Berkeley Nat'l Lab., LBNL-154E, 2008), available at <http://eetd.lbl.gov/ea/EMS/reports/lbnl-154e-revised.pdf>.

<sup>16</sup> Press Release, Cal. Pub. Utils. Comm'n, CPUC Establishes Plans for Renewable Energy Auctions (Aug. 18, 2011), available at [http://docs.cpuc.ca.gov/published/news\\_release/141590.htm](http://docs.cpuc.ca.gov/published/news_release/141590.htm).

<sup>17</sup> This analysis is premised on a discussion of the tools for environmental policy in JAMES SALZMAN & BARTON H. THOMPSON, JR., *ENVIRONMENTAL LAW AND POLICY* 43–51 (2d ed. 2007).

<sup>18</sup> See, e.g., Loan Programs Office, U.S. DEP'T. OF ENERGY, <https://lpo.energy.gov> (last visited Mar. 15, 2012).

can more easily find lenders willing to finance their projects. Financing capital projects including renewable energy usually involves some mix of debt and equity, with debt usually commanding a lower return. It is difficult to finance projects entirely through debt because banks do not want to take on that level of risk. Because of the lower risk due to price certainty from feed-in tariffs, banks are willing to issue debt that will constitute a larger part of the capital investment, bringing down the cost.<sup>19</sup> Also, bringing more certainty to investment in renewable energy can attract additional investors who would otherwise be too risk-averse for the industry, and lower the cost by eliminating risk premiums.<sup>20</sup> Investors who would have invested in renewable energy projects at higher levels of risk would, under conditions of greater certainty, be willing to invest for lower expected returns. As the return on equity drops and the share of capital financed by debt rises, the overall required rate of return falls, resulting in lower costs to be passed on to end-use customers. One study estimates that feed-in tariffs reduce the required return on equity for renewable energy investments by approximately thirty percent compared to subsidies or tradable green energy credits.<sup>21</sup> Bringing investment in renewable energy to a higher level of certainty can attract additional investors who would otherwise be too risk-averse for the industry, and lower the cost by eliminating risk premiums.

Two types of policy design can provide a stable price: first, the government can mandate a fixed price, or, second, the government can permit a market to set a purchase price and pay the difference to the supplier. The latter explains some United States agricultural policies — the government sets a target price, and if the actual price falls below the target price, the government will make up the difference.<sup>22</sup> Although these programs obtain a supply determined in part by the market forces and support the farmer regardless of price, they cost the government substantial sums of money, and would not be politically sustainable if the agricultural lobby were not particularly strong.<sup>23</sup> The alternative fixed price policy avoids the cost to government, but consumers will react by purchasing less of a product if it must be sold at a high price, and sellers will react by offering to sell less if they must offer at a low price.<sup>24</sup>

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<sup>19</sup> Richard W. Caperton, *A Properly Designed Feed-in Tariff Can Lower the Cost of Capital and Keep Electric Rates Down*, CLIMATE PROGRESS (Dec. 14, 2011), <http://thinkprogress.org/romm/2011/12/14/388988/feed-in-tariff-electric-rates/>.

<sup>20</sup> *Id.*

<sup>21</sup> JAGER & RATHMANN, *supra* note 4, at 27 (illustrating required returns in bar graph).

<sup>22</sup> See JIM MONKE, CONG. RESEARCH SERV., RL 34594, FARM COMMODITY PROGRAMS IN THE 2008 FARM BILL 9–10 (2008).

<sup>23</sup> See, e.g., Lauren Etter & Greg Hitt, *Farm Lobby Beats Back Assault on Subsidies*, WALL ST. J., Mar. 27, 2008, at A1.

<sup>24</sup> JACK HIRSHLEIFER ET AL., PRICE THEORY AND APPLICATIONS: DECISIONS, MARKETS, AND INFORMATION 48–49 (7th ed. 2005) (1976).

A variant of the former describes the price cap on gasoline established by the Nixon Administration in the 1970s, which resulted in shortages of gasoline and rationing on the basis of who arrived first, which in turn caused memorable long lines at gas stations. A feed-in tariff attempts to operate as a hybrid of these two approaches, taking advantage of the unique regulatory structure of the utility sector to establish a subsidy without the need for a particularly strong lobby.

#### A. *How a Feed-in Tariff Works*

A feed-in tariff looks like a fixed price to the seller, but because of the structure of utility regulation, operates like a subsidy. A traditional feed-in tariff requires the utility to purchase power from energy resources of specified types at a set price.<sup>25</sup> Unlike a subsidy to producers, the costs are not placed on the government. However, the costs do not fall as visibly on the consumer as costs do in other fixed-cost systems. Because electricity is a uniform product, the cost is socialized across ratepayers and mixed with the cost of other sources of energy. In cases where the purchasing utility is a regulated monopoly, the cost is passed on to consumers through regulated rates, averaged with the cost of other energy resources. Although the overall rate will be slightly higher so that the utility can recover purchase cost from the feed-in tariff, that cost will be a small increment, and electric use responds very little to price increases.<sup>26</sup> As a result, a feed-in tariff avoids substantial effects on consumption as well as the political complication of spending tax money, but has a similar overall effect as a price support.

#### B. *Who Wants (and Doesn't Want) a Feed-in Tariff and Why?*

Environmental advocates and renewable energy developers view feed-in tariffs as a way to create valuable and potentially necessary incentives to develop preferred sources of energy, particularly renewable resources and combined heat and power units. Their arguments for the necessity of feed-in tariffs are bolstered by the fact that, despite aggressive state mandates, renewable energy remains a small share of the resource mix.<sup>27</sup> Advocates argue that stable prices will attract more investment than quotas or other less certain

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<sup>25</sup> See HEMPLING ET AL., *supra* note 10, at v n.2 (discussing European feed-in tariffs).

<sup>26</sup> See James B. Bushnell & Erin T. Mansur, *Consumption Under Noisy Price Signals: A Study of Electricity Retail Rate Deregulation in San Diego*, 53 J. INDUS. ECON. 493, 510 (2005) (concluding that a doubling in the price of electricity resulted in only a six percent decrease in the quantity of electricity consumed).

<sup>27</sup> *Renewable Energy Consumption in the Nation's Energy Supply*, U.S. ENERGY INFO. ADMIN., [http://www.eia.doe.gov/cneaf/alternate/page/renew\\_energy\\_consump/figure1.html](http://www.eia.doe.gov/cneaf/alternate/page/renew_energy_consump/figure1.html) (last visited Mar. 15, 2012).



incentives.<sup>28</sup> They argue that renewable resource development should be expanded as a policy priority<sup>29</sup> because it creates good jobs, reduces greenhouse gas emissions,<sup>30</sup> and hedges against future shortages of fossil fuels.<sup>31</sup> Additionally, by identifying and promoting the development of the renewable energy industry, feed-in tariffs may establish a directed interest that will build support for additional policies favoring renewable energy. Advocates also support feed-in tariffs because they enable new clean resources to connect to the grid, helping to lift a nascent industry off the ground.<sup>32</sup>

A major alternative policy for promoting emerging technologies, government loan guarantees, has come under scrutiny as a result of solar company Solyndra's collapse.<sup>33</sup> Unlike loan guarantees, feed-in tariffs pay for delivered energy, so a commercial failure like the recent Solyndra bankruptcy would not cause the loss of public funds and avoid potential damage to public confidence in renewable energy policies. If a company that promised to deliver under a feed-in tariff fails, the company may cease to deliver energy, but at the same time the purchasing entity can stop paying for the undelivered power.

Opponents, particularly utilities, worry about inefficiency, costs passed on to other parties, and loss of their position in the energy sector. Feed-in tariffs pick eligible technologies, potentially excluding alternative technologies that may achieve the same policy results at a lower price.<sup>34</sup> Private businesses and other market advocates generally object to government picking winners. Although utilities can often pass costs on to their consumers, they tend to resist higher costs of inputs out of fear that they may not always be able to pass along costs,

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<sup>28</sup> JAGER & RATHMANN, *supra* note 4, at 27.

<sup>29</sup> This Article will not explore in any more depth the policy merits of renewable energy, as the subject has been explored extensively. For arguments regarding renewable energy, see sources cited *infra* notes 30–32.

<sup>30</sup> See generally VAN JONES, *THE GREEN COLLAR ECONOMY* (2009).

<sup>31</sup> See LORI A. BIRD ET AL., *RENEWABLE ENERGY PRICE-STABILITY BENEFITS IN UTILITY GREEN POWER PROGRAMS, AT v* (Nat'l. Renewable Energy Lab., Technical Report NREL/TP-670-43532, Aug. 2008), available at <http://apps3.eere.energy.gov/greenpower/resources/pdfs/43532.pdf>.

<sup>32</sup> See, e.g., Ken Alex, *A Rose Named Feed-in Tariff*, LEGAL PLANET (Sept. 2, 2009), <http://legalplanet.wordpress.com/2009/09/02/guest-blogger-ken-alex-a-rose-named-feed-in-tariff>. At the time of this post, Ken Alex was the Senior Assistant Attorney General in charge of the Environment Section of the California Department of Justice. *Id.*

<sup>33</sup> *D.O.E. Loan Guarantees Chief Resigns amid Solyndra Scandal*, ECOSEED (Oct. 7, 2011), <http://www.ecoseed.org/politics/feed-in-tariff/article/142-news-briefs-politics/11431-d-o-e-loan-guarantees-chief-resigns-amid-solyndra-scandal>.

<sup>34</sup> Although feed-in tariffs restrict their benefits to eligible resources, as a payment mechanism, they do retain some market qualities. When feed-in tariffs have the same rates for multiple technologies, market forces will create incentives for greater deployment of more cost-efficient technologies. Additionally, with renewable resources dependent on weather, locations will compete under a feed-in tariff because the generator is paid by energy, not capacity. For example, an installation of solar panels in Los Angeles will produce more power than a similarly sized installation in San Francisco because there are more sunny days in Los Angeles, resulting in more energy production despite equivalent capacity.

and because they do not want to lose customers.<sup>35</sup> Utilities also tend to prefer utility-owned generation because they receive a return for shareholders for their own generation investments, but only compensation for pass-through costs of energy purchases from other generating companies.<sup>36</sup> In states with retail choice for electricity, where customers are free to buy electricity from any one of several providers, a utility required to purchase at a high price through a feed-in tariff will have higher prices than competitors. Utilities argue it is unfair to require utility customers to subsidize policy choices while customers of nonutility suppliers do not subsidize the same policy choices.<sup>37</sup> Additionally, customers may begin to choose non-utility suppliers if utilities have high rates resulting from the costs of feed-in tariffs.<sup>38</sup> Lastly, utilities prefer to own generation themselves because they earn a return on equity for investments in their rate base.<sup>39</sup>

### C. Assumptions and Policy Choice

The purpose of this Article is not to argue for or against feed-in tariffs, but to explore the legal barriers to adoption. Complications and difficulties with the policy aspects of feed-in tariffs are explored to the extent they are relevant to the legal questions. For example, because of the concerns raised in retail competition settings, feed-in tariffs may require special features to operate in the most competitive market settings.<sup>40</sup> However, implementing a special arrangement whereby a participant in the wholesale market, such as a transmission operator, would administer the feed-in tariff may create a need for federal government involvement.<sup>41</sup> Additionally, such features would render the

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<sup>35</sup> See Stuart Hemphill, *Where do FiTs (Feed-in Tariffs) Fit? A Perspective from the Nation's Largest Renewable Energy Buyer 2-5* (Harvard Elec. Policy Grp., Sixtieth Plenary Session, Oct. 1, 2010) available at [http://www.hks.harvard.edu/hepg/Papers/2010/Stuart\\_HemphillHEPGSpet2010.pdf](http://www.hks.harvard.edu/hepg/Papers/2010/Stuart_HemphillHEPGSpet2010.pdf). Stuart Hemphill is the Senior Vice President for Power Procurement at Southern California Edison, a large regulated utility. *Id.* at 1.

<sup>36</sup> See FRED BOSSELMAN ET AL., *ENERGY, ECONOMICS, AND THE ENVIRONMENT: CASES AND MATERIALS* 149 (2d ed. 2006) (discussing utility incentive to generally overinvest in infrastructure).

<sup>37</sup> See *id.*

<sup>38</sup> The German feed-in tariff resolves this problem by requiring the transmission operators to charge pay the feed-in tariff and pass the costs along to electricity retailers. Matthias Lang, *EEG Reallocation Charge Estimate for 2012 and Medium Term Forecast Published*, GERMAN ENERGY BLOG, <http://www.germanenergyblog.de/?p=4571> (last visited Mar. 15, 2012) (in English).

<sup>39</sup> David B. Spence, *The Politics of Electricity Restructuring: Theory vs. Practice*, 40 WAKE FOREST L. REV. 417, 422 (2005).

<sup>40</sup> See Lang, *supra* note 38.

<sup>41</sup> Even if the transmission operator is entirely within a state, wholesale transactions are governed by federal law. *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453 (1972). Fifteen states and the District of Columbia allow some form of retail choice, and would need to explore this question prior to implementing a feed-in tariff. *Status of Electricity Restructuring by State*, U.S. ENERGY INFO. ADMIN., <http://www.eia.doe.gov/cneaf/electricity/page/restructuring/>

feed-in tariff more complex, and simplicity is one of the primary benefits of feed-in tariffs.<sup>42</sup> This also has implications for scale; a feed-in tariff uniformly applied on a large geographic scale may create complications for differing local regulatory and market structures. Other complications arise with regard to municipal utilities and tensions with other state policies. For the purposes of this Article, I generally proceed with an emphasis on feed-in tariffs in settings with private monopoly utilities regulated by state commissions, and I introduce exceptions as they are particularly relevant to legal challenges.

### III. CURRENT POLICY AND LEGAL LANDSCAPE

Current law includes neither a federal feed-in tariff nor an explicit federal authorization for state feed-in tariffs. Although FERC regulates wholesale power contracts, FERC lacks the authority to, by regulation, establish feed-in tariffs for preferred technologies. Moreover, a federal feed-in tariff would be difficult to administer because of different regulatory and market settings in various states and regions. Additionally, Supreme Court precedent indicates that even if granted statutory authorization, the federal government could not require states to establish feed-in tariffs. The federal government could permit a broad range state action through Congressional authorization, or a narrower range by regulation, but Congress has not acted and FERC's actions have been limited.

#### A. *Present State and Local Feed-In Tariff Policies*

States and localities in the United States already enacted and have begun implementing feed-in tariffs. These range from cities like Gainesville, Florida to the very large statewide market of California. Municipal utilities are free to establish their own policies to procure energy, and states may impose mandates on municipal utilities within the state so long as those mandates are in accordance with state law.<sup>43</sup> With a feed-in tariff in place for only three years,

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restructure\_elect.html (last visited Mar. 15, 2012). California, whose feed-in tariff is explored in this Article, suspended retail choice in 2001. Interim Opinion Suspending Direct Access, Decision No. 01-09-060 (Cal. Pub. Utils. Comm'n, Sept. 20, 2001), available at [http://docs.cpuc.ca.gov/word\\_pdf/final\\_decision/9812.pdf](http://docs.cpuc.ca.gov/word_pdf/final_decision/9812.pdf).

<sup>42</sup> The possibility of transmission operators managing feed-in tariffs would face additional complications in the United States where some transmission is operated by centralized grid operators, some is operated by local utilities, and some is operated by separately chartered corporations. Additionally, the Midwest Independent System Operator extends into Canada, limiting the power of both federal and state governments to impose a uniform scheme.

<sup>43</sup> See, e.g., Melanie Turner, *Four Utility-Scale Solar Projects Seek Approval*, SACRAMENTO BUS. J., June 24, 2011, available at <http://www.bizjournals.com/sacramento/print-edition/2011/06/24/four-solar-projects-see-approval.html> (describing California's mandate that the Sacramento Municipal Utility District (SMUD) offer feed-in tariff rates to at least 33.5 megawatts of generation, and how SMUD went beyond this requirement by offering feed-in tariff rates to 100 megawatts of generation).

Gainesville, Florida, served by a municipal utility, now has more solar capacity per capita than California, despite years of pro-solar policies in the Golden State.<sup>44</sup> While promising, feed-in tariffs by municipal utilities can only provide part of the solution. Municipal and other publicly-owned utilities serve roughly fifteen percent of electricity customers in the United States.<sup>45</sup> Additionally, municipal utilities often advertise their rates as below the rates of neighboring utilities. Therefore, taking on the burden of funding renewable energy may become less appealing when municipalities find their ability to keep rates low challenged by the costs of feed-in tariffs. As a result, many municipal utilities may be reluctant to offer feed-in tariffs unless neighboring private utilities are required to reach similar levels of procurement from renewable resources.

States may also establish voluntary feed-in tariffs, where utilities are not required to offer to purchase renewable energy at a fixed rate, but if utilities do, then the state commission will permit the utility to recover their cost through rates.<sup>46</sup> This arrangement, adopted in Wisconsin,<sup>47</sup> is most likely permissible because the state is not regulating wholesale transactions, but rather guaranteeing recovery through rates for a utility. In theory, utilities should be willing to adopt feed-in tariffs in these situations because they provide no cost to the utility shareholders but can provide good publicity. However, because these policies are voluntary, they may fail if for any reason utilities are dissuaded from adopting feed-in tariffs. For example, energy from feed-in tariffs could displace utility-owned generation, and utilities often prefer utility-owned generation because it generates return on equity that benefits shareholders.<sup>48</sup> Moreover, utilities may lack certainty that their costs will be covered in the long run, or may be concerned that other developments, such as opening of retail competition, may make their adoption of feed-in tariffs undesirable over time. In practice, voluntary feed-in tariffs have limited success, with only ten megawatts of installed capacity in Wisconsin.<sup>49</sup>

The most promising policy to promote substantial development of renewable energy is the statewide mandate for utilities to establish feed-in tariffs. However, many of these arrangements are at risk due to potential legal

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<sup>44</sup> Joe Romm, *Gainesville, Florida is a Bigger Per Capita Solar Producer Than California — Thanks to Feed-In Tariffs*, CLIMATE PROGRESS (Nov. 21, 2011), <http://thinkprogress.org/romm/2011/11/21/373478/gainesville-florida-solar-producer-german-style-feed>.

<sup>45</sup> *About APPA*, AM. PUB. POWER ASS'N, <http://www.publicpower.org/aboutappa/index.cfm?ItemNumber=9487&navItemNumber=20953> (last visited Mar. 15, 2012) (“Collectively, these [publicly-owned] utilities serve more than 46 million Americans.”).

<sup>46</sup> Paul Gipe, *Wisconsin Voluntary Tariffs — Success or Failure?*, ALLIANCE FOR RENEWABLE ENERGY (Jan. 27, 2011), <http://www.allianceforrenewableenergy.org/2011/01/wisconsin-voluntary-tariffs-success-or-failure.html>.

<sup>47</sup> *Id.*

<sup>48</sup> See BOSSELMAN ET AL., *supra* note 36, at 149.

<sup>49</sup> See Gipe, *supra* note 46.

challenges arguing that the Federal Power Act (“FPA”) preempts feed-in tariffs. Among statewide policies, the feed-in tariff in Hawaii, which along with Alaska and parts of Texas is outside the FPA, is not at risk of federal preemption.<sup>50</sup> In all other states, advocates must either distinguish the FPA or show that the state’s feed-in tariff fits within the limited opportunities provided for by existing legal structures, particularly within the Public Utility Regulatory Policies Act (“PURPA”).

### B. *The Public Utility Regulatory Policies Act*

In 1978, responding to rising energy prices and emerging green energy priorities, Congress enacted PURPA. Section 210 of PURPA established the requirement that utilities purchase energy from non-utility Qualifying Facilities (“QFs”), defined by the statute, at a price set by the utility’s avoided cost. Avoided cost is the cost that the utility would otherwise pay to obtain power through some other method, such as the construction of a new power plant under utility ownership, if the QF were not to provide power.<sup>51</sup> In this way, the requirement of avoided cost is very much like a feed-in tariff—QFs are paid a pre-determined rate and utilities are required to purchase the power.

However, setting the price level at avoided cost often results in a price too low to justify investments in renewable energy.<sup>52</sup> Among the primary justifications of renewable energy is that there are externality benefits, that is, the benefits accrue to society as a whole, or at least a large segment of society beyond the parties involved in the transaction. The most frequently cited externality is pollution; the whole society suffers the consequences while the polluter does not pay for the harm.<sup>53</sup> This can be characterized as either by positive externality to the renewable resource or un-priced negative externality from the conventional resource. One proposed solution was to consider externalities as part of avoided cost, permitting the price to be raised to a level that would create incentives for renewables. FERC, however, rejected this principle as inconsistent with Section 210 of PURPA.<sup>54</sup> In *Southern California Edison*, FERC explained that while avoiding costs established by regulation, such as providing Renewable Energy Credits (“RECs”) may be considered as part of avoided cost, states may not include externality costs that the utility

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<sup>50</sup> *New York v. FERC*, 535 U.S. 1, 7 (2002) (noting that Hawaii, Alaska, and the Texas Interconnect are not covered by the FPA).

<sup>51</sup> 16 U.S.C. § 824a-3(d) (2006).

<sup>52</sup> HEMPLING ET AL., *supra* note 10, at vi.

<sup>53</sup> See Severin Borenstein, *The Private and Public Economics of Renewable Electricity Generation*, J. ECON. PERSPECTIVES, Winter 2012, at 67 (citing ALFRED PIGOU, *THE ECONOMICS OF WELFARE* (1920)) (explaining pollution externalities).

<sup>54</sup> *Southern California Edison*, 70 FERC ¶ 61,215 (1995), *aff’d on rehearing*, 71 FERC ¶ 61,269 (1995).

would not face in its avoided power source.<sup>55</sup> At the time, FERC stressed the need to monetize benefits to be considered in avoided cost.<sup>56</sup> The possibility of establishing other policies regarding utility operations and then adding their costs to the feed-in tariff and justifying this action under PURPA provides a policy opportunity, which will be discussed in section III.D.

### C. Federal Preemption and the Dormant Commerce Clause

States are particularly constrained when dealing with energy policy. State policies that burden interstate commerce are limited by the dormant Commerce Clause doctrine.<sup>57</sup> State actions are also preempted by federal regulation, notably in the energy arena by the FPA.<sup>58</sup> Today's limitation on state activity in the energy sector results from this historical combination of these two doctrines, and precludes states from enacting their own feed-in tariffs on the European model.

In 1927, the Supreme Court identified a class of electricity transactions between utilities in neighboring states as wholesale, and indicating that state regulation of these transactions impermissibly burdens interstate commerce.<sup>59</sup> Congress responded by passing the Federal Power Act, authorizing the Federal Power Commission (now FERC) to regulate the "sale of electric energy at wholesale in interstate commerce," enshrining the *retail versus wholesale* distinction from *Attleboro* in a federal statute.<sup>60</sup> The FPA was designed to supplement state regulation, and as a result the FPA preserved state authority to regulate in areas not covered by *Attleboro* or otherwise preempted by specific provisions of the FPA.<sup>61</sup> By specifying the extent of federal regulation in statute, and thereby leaving other regulatory areas for state control, the FPA's displacement of the dormant Commerce Clause results in isolating much of electric regulation from evolving dormant Commerce Clause doctrine.<sup>62</sup> FERC

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<sup>55</sup> *Id.* at 62,080.

<sup>56</sup> *Id.* ("A state may, through state action, influence what costs are incurred by the utility."). For a discussion of the implementation of avoided cost pricing after *Southern California Edison* (1995) and before *California Public Utilities Commission* (2010), see BOSSELMAN ET AL., *supra* note 36, at 1045–49.

<sup>57</sup> See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824); *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829).

<sup>58</sup> See, e.g., *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 472 N.E.2d 981 (N.Y. 1984).

<sup>59</sup> *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Electric Co.*, 273 U.S. 88 (1927).

<sup>60</sup> 16 U.S.C. § 824 (2006).

<sup>61</sup> See Ari Peskoe, *A Challenge for Federalism: Achieving National Goals in the Electric Industry*, 18 MO. ENVTL. L. & POL'Y REV. 209, 219–21 (2011) (discussing *Attleboro*, the FPA, and cases interpreting the FPA to preserve a role for states while federal regulation fills the *Attleboro Gap*).

<sup>62</sup> For example, the Federal Power Act is understood to exclude Alaska, Hawaii, and the Texas Interconnection from federal regulation. *New York v. FERC*, 535 U.S. 1, 7 (2002). This

and the courts have held that transmission and wholesale transactions, even if they are within a state, are subject to preemption and regulation in accordance with the FPA.<sup>63</sup> In fact, during the 1990s, FERC twice ruled that state policies favoring specific energy resources, though permissible through subsidies and other methods, cannot operate by requiring a utility to purchase the preferred resource at a price set by the state.<sup>64</sup>

#### D. California Dreaming (and Litigating)

In 2008, California enacted AB 1613, requiring the California Public Utilities Commission (“CPUC”), in collaboration with other state agencies, to establish what amounts to a new variety of feed-in tariff for energy from combined heat and power facilities (“CHP”).<sup>65</sup> While California is not the only state to enact a feed-in tariff,<sup>66</sup> California was recently involved in the litigation that may determine the fate of most other feed-in tariffs in the United States.<sup>67</sup> AB 1613 requires the CPUC to set rates at which regulated utilities must *offer* to purchase from CHP generators under twenty megawatts.<sup>68</sup> The CPUC adopted a two-tier structure to implement the feed-in tariff, with a standard contract for units up to twenty megawatts and a simplified feed-in tariff for units under five megawatts.<sup>69</sup>

In May 2010, the CPUC sought a declaratory order from FERC stating that

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understanding perhaps would not survive if not enshrined by statute. Since *Attleboro* was decided, the Supreme Court greatly expanded the commerce power. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that a farmer growing crops to feed his own animals engaged in interstate commerce). Absent codification in statute to the contrary, a court might hold that a state restricting energy for delivery within the state might have burdened interstate commerce.

<sup>63</sup> *See, e.g.*, *Fed. Power Comm’n v. Fla. Power & Light Co.*, 404 U.S. 453 (1972); *Conn. Light & Power Co.*, 70 FERC ¶ 61,012, *reconsideration denied*, 71 FERC ¶ 61,035 (1995).

<sup>64</sup> *Conn. Light & Power*, 70 FERC ¶ 61,012 (state preference for resource recovery facility); *Midwest Power Systems*, 78 FERC ¶ 61,067 (1997) (state preference for statutorily defined class of alternative facilities).

<sup>65</sup> CAL. PUB. UTIL. CODE §§ 2840–2845 (West 2011). California also enacted a second feed-in tariff provision, albeit limited to 1.5 megawatt installations, with AB 1969 in 2006 and subsequent regulations in 2007. Press Release, Cal. Pub. Utils. Comm’n., CPUC Approves Feed-in Tariffs to Support Development of Onsite Renewable Generation, [http://docs.cpuc.ca.gov/word\\_pdf/news\\_release/78824.pdf](http://docs.cpuc.ca.gov/word_pdf/news_release/78824.pdf). However, the primary litigation concerned AB 1613.

<sup>66</sup> For a review of feed-in tariff policies in the United States, see USA, PV-TECH, [http://www.pv-tech.org/tariff\\_watch/usa](http://www.pv-tech.org/tariff_watch/usa) (last visited Mar. 15, 2012).

<sup>67</sup> The presently established feed-in tariff in Hawaii would not be subject to preemption under the FPA. Alaska and Texas could choose to adopt similar policies. Additionally, states may be able to compel municipal utilities to make purchases or offers. However, state law regarding the relationship between local government agencies and the state are often complex, and are beyond the scope of this Article.

<sup>68</sup> CAL. PUB. UTIL. CODE § 2841.

<sup>69</sup> Decision Adopting Policies and Procedures for Purchase of Excess Electricity Under Assembly Bill 1613, Decision No. 09-12-042 (Cal. Pub. Utils. Comm’n, Dec. 17, 2009), *available at* [http://docs.cpuc.ca.gov/published/final\\_decision/111494.htm](http://docs.cpuc.ca.gov/published/final_decision/111494.htm).

California's feed-in tariff was not preempted.<sup>70</sup> Days later, the state's three main private utility companies, Pacific Gas & Electric, Southern California Edison, and San Diego Gas & Electric (collectively "Joint Utilities"), sought the opposite order from FERC.<sup>71</sup> FERC consolidated the proceedings.<sup>72</sup> The Joint Utilities argued that AB 1613 is preempted by the FPA and impermissible under PURPA.<sup>73</sup> The CPUC argued that the policy goals of reducing greenhouse gas emissions suggest that FERC should read PURPA and relevant regulations in a way compatible with AB 1613.<sup>74</sup> The California Attorney General, filing separately, argued that the Federal Power Act only preempts regulations requiring a purchase of energy, not an *offer to purchase*, because it does not set a wholesale rate. The California Attorney General also argued, in the alternative, that even if such an offer was preempted, there is legal opportunity under PURPA and related FERC regulations for California to proceed with AB 1613.<sup>75</sup>

FERC, without explanation, rejected California's argument that an *offer to purchase* would not set a wholesale rate.<sup>76</sup> However, FERC suggested that California could go forward in accordance with PURPA.<sup>77</sup> After a request for clarification, FERC elaborated that tiered avoided cost rates for different types of QFs (such as a higher rate for CHPs than gas-fired generators) and adders for location-constrained areas may be permissible if they reflect actual costs that would be incurred by utilities given other state policies.<sup>78</sup> The resulting policy may enable a feed-in tariff at a level that would subsidize preferred energy sources because the utility is required by other legal obligations to procure a share of power from more expensive preferred resources. Although that subsidy

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<sup>70</sup> Cal. Pub. Utils. Comm'n, 133 FERC ¶ 61,059, at 1 (2010) (order granting clarification and dismissing rehearing), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12468341> (automatic .doc download).

<sup>71</sup> *Id.* at 2.

<sup>72</sup> Cal. Pub. Utils. Comm., 132 FERC ¶ 61,047 (2010) (order on petitions for declaratory order), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12389490> (automatic .doc download).

<sup>73</sup> *Id.* at 7–8.

<sup>74</sup> Petition of the Cal. Pub. Utils. Comm'n for Declaratory Order at 2–7, *Cal. Pub. Utils. Comm.*, 132 FERC ¶ 61,047 (Docket No. EL10-64) available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12338073> (automatic .pdf download).

<sup>75</sup> Motion to Intervene and Comments of the People of the State of California, ex rel., Edmund G. Brown Jr., Attorney General at 7–13, *Cal. Pub. Utils. Comm.*, 132 FERC ¶ 61,047 (Docket No. EL10-64), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12358996>.

<sup>76</sup> *Cal. Pub. Utils. Comm.*, 132 FERC ¶ 61,047 (order on petitions for declaratory order).

<sup>77</sup> *Id.*

<sup>78</sup> Cal. Pub. Utils. Comm'n, 133 FERC ¶ 61,059, at 14–16 (2010) (order granting clarification and dismissing rehearing), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12468341>. The precise contours of this calculation are complex and beyond the scope of this Article.



could only match the level required by other policies, the feed-in tariff could establish the benefit of price certainty. For example, if a state established efficiency standards for generation, then the long run avoided cost of meeting these efficiency standards would be above the standard avoided cost for a typical generator. The utility could satisfy this requirement by procuring power from a QF, and the state would be permitted to include an estimate of this cost of compliance with the energy efficiency policy in the feed-in tariff rate. Initially this may seem useless; if the state already mandated the efficiency standard, then there should be no need for a feed-in tariff. However, because other state policies often fail to meet targets,<sup>79</sup> and because price certainty reduces the risk premium demanded by investors,<sup>80</sup> permitting states to create predictable revenue streams for preferred energy sources may serve as a valuable policy tool.

The first round of feed-in tariff litigation ended in 2011. In January 2011, the Joint Utilities petitioned for enforcement of the FERC clarification.<sup>81</sup> FERC denied the petition,<sup>82</sup> clearing the way for a challenge in federal district court.<sup>83</sup> The time for a challenge expired with no filing. California opposed the enforcement order, and appears to be working within the confines of the FERC clarification.<sup>84</sup> However, the end of litigation at FERC may not produce the end of all litigation. Various situations could create new opportunities for legal challenges, and other potential challenges to PURPA also render California's position precarious.

#### E. Constitutional Limitations and PURPA

Although the federal government is free to regulate electricity,<sup>85</sup> much of the

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<sup>79</sup> See, e.g., Connie Zheng, *California Utilities All But Confirmed to Miss 2010 RPS Targets*, GETSOLAR.COM BLOG (Jan. 17, 2010), <http://www.getsolar.com/blog/california-utilities-all-but-confirmed-to-miss-2010-rps-target/3190>.

<sup>80</sup> JAGER & RATHMANN, *supra* note 4, at 27.

<sup>81</sup> Petition for Enforcement Pursuant to Section 210(h) of the Public Utility Regulatory Policies Act of 1978 at 2–5, *So. Cal. Edison*, 134 FERC ¶ 61,271 (2011) (Docket No. EL 11-19), *available at* <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12551156>.

<sup>82</sup> *S. Cal. Edison*, 134 FERC ¶ 61,271 (notice of intent to not act), *available at* <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12602814>.

<sup>83</sup> *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997) (explaining that FERC's order is "of no legal moment unless and until a district court adopts that interpretation when called upon to enforce PURPA").

<sup>84</sup> Ethan Elkind, *The Perks of FERC's Work*, LEGAL PLANET (Nov. 22, 2010), <http://legalplanet.wordpress.com/2010/11/22/the-perks-of-fercs-work>. Notably, by choosing not to pursue any sort of appeal, California declined to challenge FERC's unexplained rejection of the *offer to purchase* argument in federal court.

<sup>85</sup> *New York v. FERC*, 535 U.S. 1, 7 (2002) ("It is only in Hawaii and Alaska and on the 'Texas Interconnect' — which covers most of that State — that electricity is distributed entirely within a single State. In the rest of the country, any electricity that enters the grid immediately

regulatory infrastructure is located at the state level. Further, the Rehnquist Court curtailed the ability of the federal government to exercise power over this state regulatory infrastructure. Some sections of PURPA function with the compelled cooperation of state officials. After Congress passed PURPA in 1978 and a challenge reached federal courts in the early 1980s, the Supreme Court upheld PURPA, including requirements that states implement avoided cost rates for QFs.<sup>86</sup> While the Supreme Court upheld PURPA in *FERC v. Mississippi*,<sup>87</sup> the Court has since shifted its doctrine with regard to federal control over state officials, putting PURPA at risk.

Federal control of state officials, often characterized as commandeering, was first found unconstitutional in *Prigg v. Pennsylvania*,<sup>88</sup> holding in 1842 that the federal government may not require state officials to participate in the capture and rendition of fugitive slaves. Although anti-commandeering doctrine fell out of favor over time, in 1976 the Court applied a similar rule rejecting federal restrictions on labor standards for state employment in *National League of Cities v. Usery*.<sup>89</sup> Two years later Congress enacted PURPA, going a step further than *National League of Cities* by not only applying federal law to state government operations, but also seeking to “use state regulatory machinery to advance federal goals.”<sup>90</sup> The State of Mississippi and Mississippi Public Service Commission challenged PURPA as unconstitutional, arguing that PURPA exceeded Congress’ power under the Commerce Clause and the Tenth Amendment, as construed in *National League of Cities*.<sup>91</sup> In *FERC v. Mississippi*, however, the Court upheld PURPA requirements that states enforce federal regulations, consider specific ratemaking standards, and follow specific procedures.<sup>92</sup> Although all justices voted to reject Mississippi’s challenge specifically directed at Section 210 of PURPA, the Court upheld the statute as a whole by a close five to four vote.<sup>93</sup> Dissenting in part, Justice O’Connor wrote that PURPA “conscript[s] state utility commissions into the national bureaucratic army” creating a “result [that] is contrary to the principles of

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becomes a part of a vast pool of energy that is constantly moving in interstate commerce.”).

<sup>86</sup> *FERC v. Mississippi*, 456 U.S. 742, 751 (1982) (characterizing 16 U.S.C. § 824a-3(f) and (h) as requiring states to implement FERC regulations).

<sup>87</sup> *Id.* at 771.

<sup>88</sup> 41 U.S. (16 Pet.) 539 (1842) (upholding federal fugitive slave law but rejecting commandeering of state officials to enforce federal law).

<sup>89</sup> 426 U.S. 833, 855 (1976). As a necessary fifth vote, Justice Blackmun wrote separately in his concurrence arguing for a balancing test regarding the interest involved. *Id.* at 856.

<sup>90</sup> *FERC v. Mississippi*, 456 U.S. at 759.

<sup>91</sup> *Id.* at 752, 758–59.

<sup>92</sup> *Id.* at 759 (characterizing the three challenged components of PURPA).

<sup>93</sup> *Id.* at 742. Justices Brennan, White, Marshall, and Stevens joined Justice Blackmun’s opinion. Justice Powell wrote separately, concurring in part and dissenting in part. Justice O’Connor also wrote separately, concurring in part and dissenting in part. Chief Justice Burger and Justice Rehnquist joined Justice O’Connor’s opinion. *Id.*

*National League of Cities*, antithetical to the values of federalism, and inconsistent with our constitutional history.”<sup>94</sup>

The Mississippi parties challenged PURPA on the basis that it violated the Commerce Clause and the Tenth Amendment.<sup>95</sup> Writing for the Court, Justice Blackmun rejected both challenges.<sup>96</sup> Reversing the district court, Justice Blackmun wrote that energy regulation was unquestionably within interstate commerce subject to federal regulation.<sup>97</sup> Admitting that the Tenth Amendment question was more difficult, Justice Blackmun nonetheless concluded that PURPA is constitutionally permissible. The decision categorized PURPA into three segments to be evaluated separately: (1) Section 210 requires the States enforce standards promulgated by FERC; (2) Titles I and III direct the States to consider specified ratemaking standards; and (3) those Titles impose certain procedures on state commissions.”<sup>98</sup>

Section 210 authorized FERC to establish rules on avoided cost and required states to implement those rules.<sup>99</sup> Relying on FERC’s rules implementing Section 210, Justice Blackmun concluded that the Section 210’s implementation requirement could be as minimal as a requirement that states adjudicate disputes among parties in accordance with federal law, a requirement on states found permissible in *Testa v. Katt*.<sup>100</sup> The distinction drawn by the court is between legislative versus adjudicative functions. Under this framework, the Court categorized administrative agency action as more like the activity carried out by courts.

The requirements in Titles I and III for states to consider specified ratemaking standards posed a more difficult problem, but the majority also found these requirements permissible. Justice Blackmun wrote that in an area where Congress could preempt all state regulation, it may also restrict state regulation by requiring the state to consider certain policy goals.<sup>101</sup> This sort of regulation preserved one key choice for the state: the state could choose not to regulate the area at all, or it could follow the federally-established rules. The Court reasoned that the statute could not fail only for being more lenient toward states. Justice Blackmun concluded that the procedural requirements, identified as Part (3),

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<sup>94</sup> *Id.* at 775 (O’Connor, J., concurring in the judgment in part and dissenting in part).

<sup>95</sup> *Id.* at 752 (majority opinion).

<sup>96</sup> *Id.* at 771.

<sup>97</sup> *Id.* at 753–58. All nine justices joined Justice Blackmun’s opinion with regard to Part III, discussing the Commerce Clause. *Id.* at 771, 775. In a bench memo, Justice Blackmun’s clerk wrote that “the Commerce Clause argument is frivolous.” HARRY A. BLACKMUN COLLECTION, MANUSCRIPT DIVISION, U.S. LIBRARY OF CONGRESS, File No. 352-1.

<sup>98</sup> *FERC v. Mississippi*, 456 U.S. at 759.

<sup>99</sup> *Id.* at 759.

<sup>100</sup> *Id.* at 760 (citing *Testa v. Katt*, 330 U.S. 386 (1947)).

<sup>101</sup> *Id.* at 764–65.

survive for the same reasons as Titles I and III.<sup>102</sup>

In conference, Justice O'Connor initially indicated her intention to dissent in whole from the decision.<sup>103</sup> In his notes from conference, Justice Blackmun recorded that Justice O'Connor felt that Section 210 was questionable, while Titles I and III were impermissible because giving states only one choice—to regulate according to federal rules or not regulate at all—would “go too far.”<sup>104</sup> In the final draft, Justice O'Connor indicated her unwillingness to strike down Section 210 under a facial challenge, contrary to her rejection of Titles I and III.<sup>105</sup> However, Justice O'Connor refused to “foreclos[e] the possibility that particular applications of Section 210’s implementation provision might uncover hidden constitutional defects.”<sup>106</sup> She also noted that Section 210 was only justified because it required states to adjudicate claims based on federal law on the same basis with which it adjudicated state claims,<sup>107</sup> a narrow characterization of Section 210. Lastly, Justice O'Connor indicated that she would have remanded to the district court to consider the question of severability, leaving an open question as to the viability of Section 210 should Titles I and III be struck down.<sup>108</sup>

Although the Court affirmed similar commandeering-type power three years later in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>109</sup> the Court’s commitment to federal power was strongly challenged. Justice Blackmun, who wrote the decision in *FERC v. Mississippi* and *Garcia* initially voted to affirm the district court ruling that the federal government could not impose minimum wage and overtime provisions on public transit employees in San Antonio.<sup>110</sup> Although Blackmun reversed course at the urging of one of his clerks, the four dissenting justices indicated that they would continue to fight on this issue, with Justice O'Connor stating in dissent that “this Court will in time again assume its constitutional responsibility.”<sup>111</sup>

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<sup>102</sup> *Id.* at 771.

<sup>103</sup> HARRY A. BLACKMUN COLLECTION, *supra* note 97, at File No. 359-9.

<sup>104</sup> *Id.* at File No. 352-1. The page does not identify itself as notes from conference, however, the front and back page divided into four boxes on each side was characteristic of Justice Blackmun’s notes from conference. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 57–59* (2005).

<sup>105</sup> *FERC v. Mississippi*, 456 U.S. at 775 (O’Connor, J., concurring in the judgment in part and dissenting in part).

<sup>106</sup> *Id.* at 775 n.1.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 777 n.2.

<sup>109</sup> 469 U.S. 528 (1985). In *Garcia*, the Court explicitly reversed *National League of Cities*, and rejected its “traditional government function” test, by the same 5 to 4 lineup that affirmed PURPA in *FERC v. Mississippi*. GREENHOUSE, *supra* note 104, at 148–49.

<sup>110</sup> GREENHOUSE, *supra* note 104, at 148.

<sup>111</sup> *Id.* at 149 (citing *Garcia*, 469 U.S. at 589). Although Greenhouse does not provide a citation for the quotation, as of 2011 this was the only use of the quoted phrase in a federal court.

In the 1990s, dissenters made good on their promise, and the Court once again reversed course, ruling in *New York v. United States*<sup>112</sup> that the federal government cannot compel state legislatures to participate in a federal program. Congress directed states to either regulate or take title to low level radioactive waste; the Court found this to be impermissible commandeering because it required state legislative action.<sup>113</sup> The Court followed up with *Printz v. United States*,<sup>114</sup> holding that the federal government cannot require state executive officials to carry out federal law. The holdings in these cases suggest that *FERC v. Mississippi* may no longer be on stable doctrinal footing.<sup>115</sup> The treatment of *FERC v. Mississippi* in *Printz* is particularly illuminating. In *Printz*, the Court writes that *FERC v. Mississippi* dealt with adjudicative responsibilities similar to those carried out by a court, and if it had dealt with non-adjudicatory responsibilities, then FERC would have been decided differently.<sup>116</sup> This is not the position taken by Justice Blackmun's opinion in 1982, which focused on federal regulation in an area Congress was free to preempt. In fact, this position quite closely resembles Justice O'Connor's opinion, which would have struck down Titles I and III of PURPA, while considering as applied and non-severability challenges to Section 210. Additionally, when discussing *FERC v. Mississippi*, the *Printz* Court at times cites to Justice O'Connor's opinion as if it describes the outcome of the case.<sup>117</sup> Since *Printz* was decided, the Supreme Court has not once cited the majority opinion in *FERC v. Mississippi* for its holding.<sup>118</sup>

Due to the Supreme Court's doctrinal shift with regard to commandeering, new legal challenges may put PURPA at risk. Although the Supreme Court has not consistently continued the *federalism revolution* since the resignation of

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<sup>112</sup> 505 U.S. 144 (1992).

<sup>113</sup> *Id.* at 174–75.

<sup>114</sup> 521 U.S. 898 (1997).

<sup>115</sup> See RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 416 (6th ed. 2009) (suggesting *FERC v. Mississippi* may not be distinguishable from *Printz*); cf. Ellen D. Katz, *State Judges, State Officials, and Federal Commands After Seminole Tribe and Printz*, 1998 WISC. L. REV. 1465 (1998) (discussing the doctrinal challenge of the court exception to commandeering and the additional difficulty of applying that exception to agencies).

<sup>116</sup> *Printz*, 521 U.S. at 929 n.14. The ability to require state courts to carry out adjudicatory responsibilities under federal law was upheld in *Testa v. Katt*, 330 U.S. 386 (1947).

<sup>117</sup> *Printz*, 521 U.S. at 910–11.

<sup>118</sup> The Supreme Court has cited to *FERC v. Mississippi* only five times since *Printz*. In *Haywood v. Drown*, 129 S. Ct. 2108, 2138 (2009), and *Johnson v. Fankell*, 520 U.S. 911, 919 (1997), the Court cites to Justice Powell's opinion for a statement about the role of state courts. In *Rapanos v. United States*, 547 U.S. 715, 738 (2006), the Court cites to a footnote for the proposition that land use regulation has a local character. In *New York v. FERC*, 535 U.S. 1, 9 (2002), the Court refers to *FERC v. Mississippi* for a historical account of energy policy. *Jones v. United States*, 529 U.S. 848, 857 (2000), draws on *FERC v. Mississippi* to support the claim that interstate commerce is broad. None of these cases discuss the holding of *FERC v. Mississippi* with regard to commandeering.

Justice O'Connor and the death of Chief Justice Rehnquist in 2005,<sup>119</sup> there also is no indication that the change in the composition of the court would lead to different outcomes. Additionally, should the Court find itself facing a circuit split, or even simply a circuit court striking down PURPA,<sup>120</sup> it may become likely that the Court will hear the case.

A challenge to the constitutionality of PURPA and the holding of *FERC v. Mississippi* could take one of four categories of cases. First, if Congress enacted a new statute expanding Section 210 to require state establishment of feed-in tariffs, the provision would be at risk of being struck down in response to a facial challenge. Such legislation, however, is unlikely to pass Congress, therefore a facial challenge will almost certainly not materialize. As discussed in section III.D, PURPA in its current form may provide authorization to establish feed-in tariffs under current federal law. The validity of such an authorization would depend on the constitutional status of PURPA, which may be questioned by a challenge to the existing statute.

A second type of challenge to PURPA could arise from a state or another stakeholder, challenging Title I or III of PURPA, either by properly raised affirmative litigation or by refusal to comply with FERC rules and raising a constitutional defense against federal enforcement. Such a challenge would force a court to resolve the conflict between *FERC v. Mississippi* and subsequent cases. While Title I and III are suspect under current doctrine, that does not mean such a challenge would necessarily imperil Section 210. If a court found Title I or III unconstitutional, that court would then have to address whether Section 210 is severable from Title I or III of PURPA, or if Section 210

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<sup>119</sup> Beginning in the early 1990s and accelerating after the decision in *United States v. Lopez*, 514 U.S. 549 (1995), the Rehnquist Court handed down numerous decisions “immunizing states from lawsuits seeking money, holding that states need not assist federal enforcement efforts, and further limiting the commerce power.” BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 331 (2009). In the first two years after Chief Justice Roberts joined “the certiorari process, the Supreme Court [did] not agree[] to hear a single case involving the constitutional federalism issues that formed the heart of the Rehnquist Court’s federalism revolution.” Dan Schweitzer, *Federalism in the Roberts Court*, NAA GAZETTE, Nov. 6, 2007, available at [http://www.naag.org/federalism\\_in\\_the\\_roberts\\_court.php](http://www.naag.org/federalism_in_the_roberts_court.php). In more recent years, this trend continued in environmental issues, with the Court’s denial of certiorari in *San Luis & Delta-Mendota Water Authority v. Salazar*, the most recent commerce clause challenge to the Endangered Species Act. Holly Doremus, *Nice to Know I’m Sober*, LEGAL PLANET (Oct. 31, 2011), <http://legalplanet.wordpress.com/2011/10/31/nice-to-know-im-sober>. However, the Court has granted certiorari on other federalism cases, particularly in the 2011–2012 term. Barry Friedman & Dahlia Lithwick, *Not Your Gingrich’s Supreme Court*, SLATE (Dec. 14, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/the\\_supreme\\_court\\_rediscovers\\_federalism\\_just\\_in\\_time\\_for\\_2012\\_election\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/the_supreme_court_rediscovers_federalism_just_in_time_for_2012_election_.html).

<sup>120</sup> The decisions of lower federal courts are unpredictable and do from time to time strike down long-standing federal statutes. *See, e.g.*, *Am. Trucking Ass’ns v. U.S. Envtl. Prot. Agency*, 175 F.3d 1027 (D.C. Cir. 1999) (striking down sections of the Clean Air Act under the non-delegation doctrine), *rev’d sub nom.* *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001); *see also infra* section IV.B.

must be struck down alongside Titles I and III. In cases regarding statutes without explicit severability (or non-severability) clauses, severability is a difficult inquiry that leads to unpredictable outcomes. All of this may happen in one or more cases, but it cannot happen from a case dealing with feed-in tariffs promulgated subject to the avoided cost requirements of Section 210. Such a challenge would not bear on Title I or III, and therefore could not challenge the constitutionality of PURPA on that basis.<sup>121</sup> The import of the possibility of such a challenge is that state reliance on PURPA is not an entirely safe proposition, States' feed-in tariff policies cannot spur this type of litigation because feed-in tariffs are not based on Title I or III of PURPA, and states adopting feed-in tariffs cannot do much to avoid this sort of challenge. Lastly, since no such challenge has been raised in the fourteen years since *Printz*, it is unlikely a challenge of this type will occur soon.

A third type of challenge would involve a litigant state either raising a proper challenge to Section 210 or refusing to continue implementing Section 210 and properly raising a commandeering defense to federal enforcement. Such a case would avoid the greater vulnerability of Titles I and III of PURPA, but would also circumvent questions of severability. Such a challenge would require the courts to squarely address whether Section 210, as applied, commandeers state regulatory agencies. Given the practical necessity for state regulations, not just adjudicative hearings, to implement avoided cost provisions, this could be a difficult case.

The fourth and final type of challenge would involve a private party arguing that a state cannot act pursuant to PURPA because (1) PURPA is unconstitutional, and (2) absent PURPA, the state would not be authorized to act. In the case of a feed-in tariff, under FERC's present interpretation of PURPA, Section 210 is necessary to allow feed-in tariffs.<sup>122</sup> With regard to part (1) of the argument, the challenge would probably fail on standing grounds.<sup>123</sup> PURPA's arguably unconstitutional commandeering of states did not cause harm to a plaintiff regulated by a California program enacted pursuant to a California statute; the California statute avoids preemption because of a federal

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<sup>121</sup> See ERWIN CHEMERINKSY, FEDERAL JURISDICTION 105 (5th ed. 2007) (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 446 (3d ed. 2000)) (explaining that although a *zone of interests* test is not applicable in constitutional cases, a similar effect occurs because constitutional challenges based on the rights of others generally fail for lack of standing).

<sup>122</sup> See *supra* section III.D.

<sup>123</sup> The best case supporting standing for a party regulated by a feed-in tariff to challenge PURPA may be *Bond v. United States*, 131 S. Ct. 2355 (2011). In *Bond*, the Court held that an individual may raise a Tenth Amendment challenge on the grounds that a federal measure interferes with powers reserved to the states. However, in *Bond*, the plaintiff was directly subject to the federal action due to a federal indictment. *Id.* at 2360. In a potential PURPA challenge, the challenging party will be subject to state regulation adopted freely by the state that avoids preemption under another statute because of a federal statute arguably commandeering the state.

statute that may elsewhere commandeer one of the state's agencies. Moreover, the state action in question is not required by federal action—no state must adopt a feed-in tariff in order to satisfy avoided cost requirements—rather, this is an optional activity that federal legislation permits. It would be quite a stretch for a court to find such an injury *fairly traceable* to the constitutionality of avoided cost requirements under PURPA.<sup>124</sup>

#### IV. AVAILABLE AVENUES FOR POLICY

##### A. *Potential Federal Legislation*

Although potentially challenging in the current Congress, establishing legislative authorization for a feed-in tariff could resolve most of the issues presented in this Article. A federally regulated feed-in tariff may be politically infeasible, and would be undesirable because of the variety of state and regional systems where it would need to apply. The need to take into account regional differences within a federal feed-in tariff scheme only adds to the political challenge. Additionally, since state commissions control the administrative infrastructure that implemented avoided cost rates for QFs under PURPA, state commissions could serve well again for feed-in tariffs. A simple legislative option to authorize feed-in tariffs would be to amend PURPA to permit states to set rates above avoided cost for particular units. Federal permission for state regulation carries the strongest defenses against court challenges because it waives the dormant Commerce Clause while displacing any federal preemption. Additionally, because the activity ultimately rests with the state, it does not risk a commandeering challenge. Such legislation would also render moot any utility's opportunity to challenge FERC's decision.

If the federal government sought to direct state policy rather than to simply permit states to act, the federal government is limited, but has two primary options. First, the federal government could condition the grant of reasonably related funds to states on implementation of feed-in tariffs. The Court upheld this type of fiscal federalism with regard to highway funds and drinking age laws in *South Dakota v. Dole*.<sup>125</sup> Given current political conditions, such a policy seems politically challenging. A second option would be a cooperative federalism arrangement similar to the Clean Air Act.<sup>126</sup> Such an arrangement escapes the commandeering challenge by providing a backstop of federal

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<sup>124</sup> Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992) (Blackmun, J., dissenting) (“Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) ‘fairly traceable to the defendant’s allegedly unlawful conduct’ and that is (3) ‘likely to be redressed by the requested relief.’” (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984))).

<sup>125</sup> 483 U.S. 203 (1987).

<sup>126</sup> 42 U.S.C. §§ 7401, 7402 (2006).



implementation should a state elect to not act.<sup>127</sup> Cooperative federalism in the model of the Clean Air Act, which codifies state plans in federal statutes, would also provide the opportunity to seek enforcement in federal courts.<sup>128</sup> However, in those instances where a state does not act, this policy would have the same faults as a federal feed-in tariff. What the federal government cannot do is require states to adopt feed-in tariffs. Given the recent treatment of *FERC v. Mississippi*, it is unlikely that the Supreme Court would even permit Congress to require that states consider establishing feed-in tariffs.

Advocates should not pin their hopes for renewable energy policy on the federal government. Congress, rather than exploring these policies, has recently discussed the possible relaxation or abolition of efficiency standards in order to ensure that customers can continue to purchase incandescent light bulbs.<sup>129</sup> At the same time, states have expanded their support for renewable energy. For example, in April 2011, California Governor Jerry Brown signed new legislation requiring California utilities to obtain a third of their energy from renewable sources.<sup>130</sup> Given the greater promise of state-level commitment to environmental policy, it is worth exploring the options for states to act if the federal government stands still.

### B. Federal Court Strategy

If federal legislation is unavailable, feed-in tariff advocates may turn to federal courts to seek authority for states. Present FERC rulings offer a limited space for feed-in tariffs under a broad reading of PURPA's avoided cost requirements. A challenge in federal court could open a larger space for state activity if federal courts adopt the theory that a state mandate for a utility to *offer to buy* at a set price is not preempted.<sup>131</sup> For federal courts, this would be a

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<sup>127</sup> See *Virginia v. EPA*, 108 F.3d 1397, 1406–11 (D.C. Cir. 1997).

<sup>128</sup> Lawsuits against states for failure to comply with state law may not be brought in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). As a result, even if a state statute is enacted pursuant to a cooperative federalism arrangement, if the state fails to comply with its own statute, and the state rules are not codified in federal regulation, the state may only be sued in state court. See *Bragg v. W. Va. Coal Ass'n.*, 248 F.3d 275, 297–98 (4th Cir. 2001). For a discussion of the limitations of citizen suits in cooperative federalism arrangements, see Hope Babcock, *The Effect of the Supreme Court's Eleventh Amendment Jurisprudence on Clean Water Act Citizen's Suits*, 83 OR. L. REV. 47 (2004).

<sup>129</sup> Stephen Lacey, *Republicans Set To Repeal Light Bulb Efficiency Standard That Would Save Consumers \$12 Billion a Year*, THINK PROGRESS (July 8, 2011) [www.thinkprogress.org/romm/2011/07/08/263535/light-bulb-efficiency-standard-will-lower-energy-bills%E2%80%9D](http://www.thinkprogress.org/romm/2011/07/08/263535/light-bulb-efficiency-standard-will-lower-energy-bills%E2%80%9D).

<sup>130</sup> Patrick McGreevy, *Gov. Brown Signs Law Requiring 33% of Energy be Renewable by 2020*, L.A. TIMES, Apr. 13, 2011, available at <http://articles.latimes.com/2011/apr/13/local/la-me-renewable-energy-20110413>.

<sup>131</sup> This argument appeared in a NREL paper prior to the California litigation. HEMPLING ET AL., *supra* note 10, at 23 (arguing that FERC could adopt this interpretation). FERC rejected this argument after presentation by the California Attorney General. Cal. Pub. Utils. Comm., 132 FERC

case of first impression. However, litigating feed-in tariffs in federal court also creates the opportunity for federal courts to revisit FERC's decision in *California Public Utilities Commission (CPUC)* and possibly the constitutionality of PURPA. Although they declined to appeal FERC's ruling, the California utilities were unhappy with FERC's broad interpretation of avoided cost. Should another state attempt to mimic California's policies, their utilities may take the challenge to a federal court. Additionally, most utilities were never content with PURPA,<sup>132</sup> and may seek opportunities to challenge *FERC v. Mississippi* under post-*Printz* precedent. In fact, utilities may at some point push this route regardless of the choices by advocates of feed-in tariffs — a more conventional challenge to Section 210's avoided cost requirements may permit utilities to first challenge PURPA, then later apply the results to feed-in tariffs.

Forecasting results from federal litigation in this area is extremely difficult. Because FERC is the relevant agency and has already spoken on the issue, both utilities and feed-in tariff advocates will be fighting against *Chevron* deference, meaning FERC need only prove that there is ambiguity in the statute and that their interpretation is reasonable.<sup>133</sup> However, *Chevron* deference has not been sufficient to uphold FERC's interpretations in recent cases.<sup>134</sup> Additionally, federal appellate courts can be unpredictable and may strike down substantial portions of long-standing federal statutes.<sup>135</sup> Although the Supreme Court may deny certiorari on many FERC cases,<sup>136</sup> the Court would be hard pressed to deny certiorari if the appellate court struck down substantial segments of PURPA. Given the Court's unwillingness to cite *FERC v. Mississippi*, and the recent willingness of the Court to invalidate long-standing statutes,<sup>137</sup> there is a possibility that an appeal to the Supreme Court could jeopardize Section 210 of PURPA.

A milder risk from federal litigation would be a rejection of FERC's current broad reading of avoided cost, requiring FERC to adopt the utilities'

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¶ 61,047, at 26 (2010), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12389490> (order on petitions for declaratory order); Motion to Intervene, *supra* note 75, at 26.

<sup>132</sup> SHARON BEDER, *POWER PLAY: THE FIGHT TO CONTROL THE WORLD'S ELECTRICITY* 78 (2003).

<sup>133</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>134</sup> See, e.g., *Cal. Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072 (9th Cir. 2011); *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

<sup>135</sup> See, e.g., *Am. Trucking Ass'ns, Inc. v. U.S. Envtl. Prot. Agency*, 175 F.3d 1027 (D.C. Cir. 1999) (striking down sections of the Clean Air Act under the non-delegation doctrine), *rev'd sub nom. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

<sup>136</sup> See, e.g., *Piedmont*, 558 F.3d 304. For a summary of the petitions for certiorari in *Piedmont*, see Michael Dorsi, Case Comment, *Piedmont Envtl. Council v. FERC*, 34 HARV. ENVTL. L. REV. 593, 597–99 (2010).

<sup>137</sup> See, e.g., *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (invalidating campaign finance laws).

understanding of avoided cost, based on their reading of FERC's 1995 *Southern California Edison* decision. Given how contested the FERC proceeding was, and the inherent unpredictability of courts in FERC cases, this is a distinct possibility. This could arise if another state attempts to mirror California's feed-in tariff policy and the private utilities in that state push their efforts to federal court. If a court adopted this position, states would lose the *half a loaf* they obtained in *CPUC* in 2011.<sup>138</sup>

Given the low probability but high magnitude risk of the Court invalidating PURPA and the higher probability but lower magnitude risk of a court invalidating *CPUC*, initiating the federal court strategy is not advisable for advocates of feed-in tariffs. However, if an opposing party, most likely a utility, pursues this strategy, then advocates of feed-in tariffs should advocate the *offer to purchase* argument.<sup>139</sup> With the case already in federal court, the risk to PURPA and *CPUC* is already established. The *offer to purchase* argument suggests that, because the feed-in tariff only sets an offer price, that the entire project is not preempted by the FPA.<sup>140</sup> Such an argument would render all questions about PURPA moot, and give states broad discretion in establishing feed-in tariffs. Feed-in tariff advocates may find a more receptive audience in a federal court than at FERC because the argument is, by its nature, a restriction of FERC authority. This opportunity is not likely worth the risk to bring the litigation, but if the litigation is initiated by another party, the *offer to purchase* argument is a worthwhile argument to present.

### C. Operating Under FERC's Framework

The FERC clarification provides an opportunity for states to implement some feed-in tariff policies in the absence of new legislation. California indicated an interest in applying energy efficiency standards as part of a feed-in tariff regime, and FERC accepted this as possible.<sup>141</sup> Although the exact contours are not yet defined, FERC indicated a willingness to accept other key components of California's design, namely different rates for different resources and a broader

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<sup>138</sup> For a discussion of the *half a loaf*, see *supra* section III.D.

<sup>139</sup> This potential challenge by utilities requires some legal gymnastics, arguing that a state may not act because their proposed action is preempted by the federal government, and that the law the state seeks to act under must be struck down because the law the state seeks to invoke infringes too far on the state's sovereignty. Although this may seem counter-intuitive, such a challenge can likely be brought as a Tenth Amendment challenge because the Supreme Court characterizes the Tenth Amendment as a right held not only by state governments but also by individuals. *Bond v. United States*, 131 S. Ct. 2355 (2011).

<sup>140</sup> *HEMPLING ET AL.*, *supra* note 10, at 23.

<sup>141</sup> Cal. Pub. Utils. Comm'n, 133 FERC ¶ 61,059, at 9–16 (2010) (order granting clarification and dismissing rehearing), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12468341>.

definition of avoided cost.<sup>142</sup> The authorization for the California feed-in tariff has a 20 megawatt cap, matching the FERC rule.<sup>143</sup> Given the time necessary for policy development and implementation, states ought to focus on working within FERC's clarification rather than fighting FERC in court.

#### D. Interaction With Retail Choice Policies

Even where state establishment of feed-in tariffs may be permissible, there is a need for caution when considering feed-in tariffs in conjunction with other policies. Feed-in tariffs work best where all customers purchase from a single regulated utility.<sup>144</sup> In those cases, captive customers cannot choose their electric provider, and therefore cannot choose to avoid the additional cost of renewable resources connected by feed-in tariffs. Therefore, just like those customers who ordinarily have no choice to buy more energy from renewable resources, under a mandatory feed-in tariff the same customers would have no choice but to pay for more energy from renewable resources.<sup>145</sup>

However, some states now employ retail competition, permitting customers to choose their electricity provider.<sup>146</sup> The transmission and distribution lines remain under a monopoly — customers are still connected to the grid by a single electrical wire. Even though the lines remain monopolized and all electrons are the same, retail competition permits alternate financial arrangements so that customers may shop around among providers. Providers, in turn, may shop around for energy from less expensive sources, or may choose to purchase from only sources that meet standards for environmental or other qualities. In some states, the original utility serves as a provider of last resort; customers who choose another provider and then find their provider closing up shop will automatically be enrolled with the utility.

In states where the utility is one of several providers, feed-in tariffs can be a dangerous and self-defeating policy choice. If the utility bears additional costs from the feed-in tariff, customers may quickly switch to cheaper alternatives. This situation can arise not only where feed-in tariffs are established where retail competition exists, but also if retail competition is opened in a state that already has feed-in tariffs. Moreover, the possibility of future retail competition may make utilities afraid to agree to long-term feed-in tariff arrangements — the

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<sup>142</sup> *Id.* at 9.

<sup>143</sup> *Id.* at 7.

<sup>144</sup> See Hemphill, *supra* note 35, at 1.

<sup>145</sup> Customers of regulated utilities, on average, have lower rates than customers in states with competition. See KENNETH ROSE & KARL MEEUSEN, 2006 PERFORMANCE REVIEW OF ELECTRIC POWER MARKETS 3 (Aug. 27, 2006) (report commissioned by and prepared for Virginia General Assembly), available at [http://www.kenrose.us/sitebuildercontent/sitebuilderfiles/2006\\_Performance\\_Review.pdf](http://www.kenrose.us/sitebuildercontent/sitebuilderfiles/2006_Performance_Review.pdf).

<sup>146</sup> For a discussion of retail competition in California, see BEDER, *supra* note 132, at 93–94.

exact arrangements that would be most beneficial for renewable energy development. Advocates of feed-in tariffs may respond that few customers actually take advantage of opportunities to change. While this is true for households — only two percent switched to alternate providers in California's retail competition experiment — it is not true for large industrial customers.<sup>147</sup> Even in the early California market, thirteen percent of electricity-intensive industrial customers switched their provider.<sup>148</sup> This is a serious concern for states such as California that are presently considering the possibility of reopening retail competition. If California advances retail choice, it could complicate future feed-in tariffs. A choice to develop more expansive feed-in tariffs could imperil future efforts to expand retail choice.

A potential solution to this problem would be for the transmission operator to manage the feed-in tariff, as the German government did.<sup>149</sup> However, most states with retail choice also fall within an ISO or RTO as their transmission operator, and these organizations are federally regulated. States may choose to participate or not participate in ISOs and RTOs, and in some cases state officials may select the membership of ISO or RTO boards, but states may not require RTOs to act as middlemen in renewable energy sales. Such a mandate would run afoul of federal preemption by mandating wholesale purchases and wholesale sales of electricity. Even if states are successful in litigation in advancing their right to order utilities to offer to buy energy, a requirement that an ISO or RTO not only buy but also sell would be blatant interference with federal regulation of wholesale electric transactions.

This concern does not apply to states with only wholesale competition. Wholesale competition without retail competition either allows or requires the utility, before selling to customers, to procure energy from a market. If a utility is required to buy some energy at a higher price through feed-in tariffs, this will not impair the utility as a market participant because the utility is not competing with the wholesale sellers. The utility can buy some power through feed-in tariffs and some power through markets, just as today utilities have separate long-term contracts with renewable resources while also buying power through organized markets. As a result, states need not make decisions regarding wholesale competition on the basis of compatibility with feed-in tariffs.

## V. CONCLUSION

States have often been laboratories of democracy, yet in many areas, the federal system does not permit this opportunity to be explored to the fullest. Feed-in tariffs are a case at the periphery of policy discussion in the United

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<sup>147</sup> *Id.* at 93.

<sup>148</sup> *Id.*

<sup>149</sup> *See* Lang, *supra* note 38.

States — there are ways to make them permissible, but it will require careful work by policymakers and legal advocates.

This difficulty shows how feed-in tariffs may be more burdened than other experiments in standardization. Although standardization has brought success in a variety of industries, underlying conditions also play a major role in success or failure. When Ray Kroc expanded McDonalds, he had the benefit of changing family lifestyles and suburban growth, both of which fit nicely with of his model family restaurant.<sup>150</sup> As people moved from cities to suburbs, they didn't have the familiarity of old neighborhoods guiding their culinary choices, so having a recognizable brand in many places was particularly well-suited to the time and places of McDonald's expansion.

Like McDonalds, the feed-in tariff may capture many benefits of standardization. However, the feed-in tariff sits in a much less advantageous situation. Rather than a society shaping to fit the new business, the feed-in tariff finds itself in mixed company. With regard to the current statutory regime, the authority for feed-in tariffs is unclear and limited at best. One agent's potential ability to act is complicated by federal preemption of state policies and anti-commandeering doctrines that limit federal policy opportunities. Even where authority exists, policymakers run into the challenge of other policies that may undermine the goals of feed-in tariffs. These challenges can be navigated, preferably with legislation, though possibly under current law.

The ideal policy would avoid federal preemption, and utilize the advantages of electric service monopolies to capture the entire market. However, given both statutory and federalism complications, American feed-in tariffs will likely lag behind their counterparts in Europe and elsewhere. America's global leadership may occasionally benefit from innovations at the state level, but such leadership ultimately requires federal action. Until such action occurs, however, states should carefully chart a course between preemption and commandeering, and though the path is fraught with risks, it may be the best way to forward an American renewable energy policy.

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<sup>150</sup> HALBERSTAM, *supra* note 14, at 163–64.