STATE ELECTRIC RESTRUCTURING: ARE RETAIL WHEELING AND RECIPROCITY PROVISIONS CONSTITUTIONAL?

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INTRODUCTION

> *"It is one of the happy incidents of the federal system that a single courageous state, may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."*[1]

These words by Justice Brandeis hold true today as states experiment on issues ranging from public welfare reform to tort reform, resisting federal mandates. So too, every state in the union is thinking about, talking about, and implementing changes in the way its citizens will receive electric service.[2] To date, twenty-four states have taken final action on "experimental" legislation or regulation that restructures the retail electric industry.[3]

This Note discusses the constitutional problems states are facing as they try to insert competition into the retail electric industry. In particular, the federal preemption and dormant commerce clause challenges that may be made to four states' electric restructuring plans are examined.[4] Illinois,[5] Michigan,[6] Montana,[7] and Oklahoma[8] have electric restructuring plans that require the retail wheeling of electricity and retail reciprocity from out-of-state utilities.

Retail wheeling occurs when electricity produced by one utility is wheeled to a customer in a second utility's service area across the power lines of the

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1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. *See* Edison Electric Institute, *Retail Wheeling & Restructuring Report: State Profiles* (1998) (visited Jan. 31, 2000) <http://www.eei.org/7online/online/rwrr/profiles/_states.htm> (listing retail electric restructuring actions taken by all 50 states) [hereinafter *States Profiles*].

3. *See id.*

4. There are constitutional challenges on both sides of many state electric restructuring plans. There may be further constitutional challenges to these four states' retail wheeling and reciprocity clauses including equal protection challenges and possibly privilege and immunity clause challenges, however, those are beyond the scope of this Note.

5. *See* Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILL. COMP. STAT. 5/16-101-5/17-600 (West 1997).

6. *See In re* Restructuring of the Electric Utility Industry, 177 Pub. Util. Rep. (PUR4th) 201 (Mich. Pub. Serv. Comm'n 1997).

7. *See* Electric Utility Industry Restructuring Act and Customer Choice, MONT. CODE ANN. § 69-8-101 (1997).

8. *See* Electric Restructuring Act of 1997, OKLA. STAT. tit. 17, § 190.1 (1997), and amendments at 1997 Okla. Sess. Laws 888.

second utility and any intermediate utilities.[9] Allowing or requiring retail wheeling at a fair and nondiscriminatory transmission price encourages competition in electric supply and generation.[10] The four states' electric restructuring plans require retail wheeling because without it there can be no customer choice of electric supplier. States must require utilities who own distribution and transmission systems to allow nondiscriminatory open access to their systems. Still, some argue that only the federal government has the power to order utilities to wheel electricity in this way and that states are preempted by the Supremacy Clause.[11] This Note concludes that the federal government has not preempted the states in the area of retail wheeling of electricity.

Even more controversial are the four states' reciprocity provisions. Essentially, if an out-of-state utility wants to serve retail customers in one of these four states, the out-of-state utility must allow reciprocal access to its own distribution lines. Thus, the in-state utility whose customers the out-of-state utility is taking away, will have an opportunity to serve customers in the out-of-state utility's territory. In other words, "you can't sell electricity in my territory unless I have an opportunity to sell in yours." The reason for this requirement is fairly obvious. For example, if Illinois is an open access state and Indiana is not, then Indiana utilities could enter Illinois and supply electricity to the major Illinois customers, leaving the Illinois utilities with less revenue and no access to new customers.

Because traditional dormant Commerce Clause analysis prohibits discrimination against out-of-staters,[12] these states' reciprocity clauses are subject to Commerce Clause[13] challenges.

Part I of this Note gives a brief history of electricity regulation and the move from monopoly to competition. Part II discusses the claimed federal preemption of retail electric wheeling. In Part III, after a brief history of the dormant Commerce Clause, the four states' reciprocity requirements are examined under traditional dormant Commerce Clause analysis. Then, Part III drafts a reciprocity clause that will pass dormant Commerce Clause scrutiny. Additionally, an argument that the unique nature of the electric industry requires deviation from traditional dormant Commerce Clause analysis is suggested. Part IV examines possible federal solutions to the problem, including an analysis of the policy considerations involved.

This Note concludes that as states experiment with different policies and structures for the retail electric industry, the federal government should step to the side, monitor the experiments, and, when necessary, give states the power needed to ensure that the transition from monopoly to competition will be fair.

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9. *See* MASAYUKI YAJIMA, DEREGULATORY REFORMS OF THE ELECTRIC SUPPLY INDUSTRY 12 (1997).

10. *See id.*

11. U.S. CONST. art. VI.

12. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 307-08 (1997).

13. U.S. CONST. art I, § 8.

I. THE MOVE FROM MONOPOLY TO COMPETITION

The electric industry is changing from a highly regulated monopoly structure to a combination of monopoly and competitive market. Traditionally, all three functions of the industry—generation, transmission, and distribution—were thought to be natural monopolies.[14] However, slowly and consistently competition has entered the electric industry. The current consensus is that the generation or supply of electricity can be competitive, while the transmission and distribution functions must remain monopolies.[15] William Massey, the Commissioner of the Federal Energy Regulatory Commission (the "FERC"), declared in a recent speech that the only way for the electric industry to proceed is to aggressively move forward toward a competitive but fair electricity generation market.[16]

Competition in electricity generation began in the wholesale energy markets which, because of its interstate commerce implications, is governed by federal laws enforced by the FERC.[17] The retail sale of electricity, which has remained highly monopolistic until recently, is regulated by individual state laws enforced by a public utility commission.[18]

Competition was inadvertently inserted into the wholesale electric generation market with the passage of Title II of the Public Utility Regulatory Policy Act of 1978 ("PURPA").[19] Congress passed PURPA in the midst of a national energy crisis; its intent was to promote efficient energy generation and the conservation of resources.[20] The law required electric utilities to buy wholesale power produced from new production methods—cogeneration and renewable energy—from certain qualifying facilities ("QFs").[21] The electric utilities must also allow the QFs to use the electric utilities own transmission lines.[22]

Competition in the wholesale electric market was further increased through the passage of the Energy Policy Act of 1992 ("EPAct").[23] The EPAct gave the Federal Energy Regulatory Commission (the "FERC") more power to order

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14. *See* YAJIMA, *supra* note 9, at 1.

15. *See id.*

16. *See* William L. Massey, *FERC at the Crossroads: Move Backward, Tread Water, or Move Forward*, POINTCAST, ENERGY NEWS, ¶ 25 (last modified Nov. 5, 1998) <http:127.0.0.1:15841/v1? catid=20054275&md5+falc4104fef602222c43878c21ad0ff5>.

17. *See* The Federal Power Act of 1935, 16 U.S.C. § 791a (1994).

18. *See id.*

19. 16 U.S.C. § 824a-3 (1994).

20. *See* YAJIMA, *supra* note 9, at 73.

21. *See* Jon R. Mostel, *Overview of Electric Industry Bypass Issues*, 37 NAT. RESOURCES J. 141, 149 (1997).

22. *See id.*

23. Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified in scattered titles of U.S.C., 16 U.S.C. § 824k (1994)).

wholesale electric wheeling.[24] The FERC took this new authority and issued Orders 888 and 889, which required electric public utilities to set wholesale open access transmission tariffs and established an electronic information sharing system to encourage the competitive sale of wholesale electricity, respectively.[25] Electric utilities have met the challenge, and a vibrant wholesale power market has developed.

With the success of wholesale electric generation and supply competition, states began to consider inserting competition into the retail sale of electricity.[26] The hope is that electricity prices will decrease due to competitive innovations and efficiencies. Yet, with these state-by-state initiatives come several constitutional questions, some of which are discussed below.

II. Federal Preemption of Retail Wheeling

States that desire retail electric competition have mandated the retail wheeling of electricity to allow alternative electricity suppliers access to retail customers in areas where the supplier does not own any transmission or distribution lines.[27] A local utility must provide access to its transmission and distribution system to other electric suppliers so that a retail electric customer will have a choice of suppliers.[28] However, if the alternative electric supplier is from out-of-state, then interstate commerce is implicated, and the issue of federal preemption must be addressed.

The question then is whether the area of retail wheeling has been preempted by the federal government, or whether states retain the authority to compel retail wheeling. Because no federal statute expressly prohibits states from ordering retail wheeling, this Note examines whether implied federal preemption exists in the area of retail wheeling.

A. Federal/State Jurisdiction in the Electric Industry

Initially, all electricity regulation was done by the states. However, the watershed case of *Public Utilities Commission v. Attleboro Steam & Electric Co.*[29] severely limited a state utility commission's power over electricity that flowed interstate. In *Attleboro*, Narragansett Company, a Rhode Island electric utility, had a twenty-year full-requirements contract to sell electricity to Attleboro Company, a Massachusetts electric utility.[30] Seven years into the contract, Narragansett Company filed a petition with the Public Utilities Commission of Rhode Island to increase the electric rates that it charged Attleboro Company. After a hearing, the rate increase was approved as in the

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24. *See* 16 U.S.C. § 824k (1994).
25. *See* Yajima, *supra* note 9, at 81.
26. *See id.*
27. *See id.*
28. *See id.* at 12.
29. 273 U.S. 83 (1927).
30. *See id.* at 84.

public interest of the people of Rhode Island.[31] However, on appeal the Court held that the sale of electricity across state lines was a direct burden on interstate commerce, and thus the Public Utilities Commission of Rhode Island could not impose the rate increase.[32]

Thus, the *Attleboro* gap was created. States could only regulate the electric rates of intrastate sales, not those sales that occurred in interstate commerce and were national in character.[33] With the growth of technology, the sale of electricity in interstate commerce increased, with no regulatory supervision.

Congress stepped in to fill the regulatory gap with the Federal Power Act of 1935 ("FPA").[34] The FPA created the Federal Power Commission (now the "FERC")[35] to regulate "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce. . . ."[36] The FPA was enacted to codify the bright-line test set out in *Attleboro*; the federal government would regulate interstate wholesale sales of electricity, while the individual states would continue to regulate the retail sale of electricity.[37] Specifically, the FPA limited federal regulation to areas that were not subject to state regulation.[38]

However, over the years, the federal regulation of electricity (through the FERC) primarily has increased by expanding the meaning of *interstate* transmission of electricity. In *Federal Power Commission v. Southern California Edison Co.*[39] the Supreme Court found that a sale of electricity from one utility in California to another utility in California was a sale in interstate commerce for resale, and as such the sale was under federal jurisdiction.[40] The electricity sold included some electricity that was generated out-of-state; thus, even though the sale took place entirely within California, interstate commerce was involved, and the FERC had jurisdiction.[41]

Later, the Court upheld federal jurisdiction when a Florida utility was only indirectly connected to an out-of-state utility's power lines through the power lines of another Florida utility.[42] The Court found that once power enters a transmission grid that is interconnected to facilities outside of the state, the

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31. *See id.* at 86.

32. *See id.* at 90.

33. *See id.*

34. 16 U.S.C. § 791a (1994).

35. In 1950 the Federal Power Commission was terminated and its functions were transferred to the FERC. Reorg. Plan No. 9 of 1950, 16 U.S.C. § 792, set out as noted under this section (1950). For clarity sake, all references in this Note will be to the FERC.

36. 16 U.S.C. § 824(a).

37. *See* Peter C. Lesch et al., *Preemption*, 5 ENERGY L. & TRANSACTIONS (MB) § 144.02[1] (1998).

38. *See* 16 U.S.C. § 824(a).

39. 376 U.S. 205 (1964).

40. *See id.* at 210.

41. *See id.* at 208.

42. *See* Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453 (1972).

power is transmitted in interstate commerce.[43]

Today, virtually all electric utilities are connected to out-of-state power lines in an interconnected grid. So, most of the power that is generated in the United States crosses state borders at one time or another.[44] Thus, unless the utility can prove that no out-of-state power was commingled with the power sold at wholesale, then the FERC has jurisdiction over the sale.

However, the bright-line distinction between wholesale and retail sales—the FERC controlling wholesale sales and state commissions' controlling retail sales—did not endure unscathed. In *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*,[45] the Supreme Court allowed the Arkansas Public Service Commission to regulate the wholesale electric rates that the Arkansas Electric Cooperative Corporation ("AECC") charged to its member cooperatives. AECC was a member-owned cooperative, funded by the federal Rural Electrification Administration ("REA"), which generated and sold electricity to distributor cooperatives, which, in turn, sold it at retail to ultimate customers.[46] However, the FERC held that it did not have jurisdiction over such cooperatives under the supervision of the REA.[47] The question remained, whether a state commission could then regulate the electric cooperative's wholesale rates or whether the state was preempted by the Federal Power Act or the Rural Electrification Act.[48]

The Court concluded that nothing in the Federal Power Act indicated that this was an area best left unregulated.[49] "Congress's purpose in 1935 was to fill a regulatory gap, not to perpetuate one."[50] Thus, because neither the FERC nor the REA regulated the electric cooperative's rates, the state could do so, even though the sale of electricity was at wholesale.

B. Current Jurisdiction over Retail Wheeling

There is considerable disagreement about whether the states have jurisdiction over retail wheeling initiatives. An examination of the FERC decisions, federal electric legislation, and court decisions illuminate the matter. In *Florida Power & Light Co.*,[51] the FERC determined that it, and not the state commission, had jurisdiction over the terms, conditions, and rates for wheeling power produced by cogenerators or small power producers even when the sender and receiver of power were located within the same state.[52]

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43. *See id.* at 461.
44. *See id.* at 471 (Douglas, J., dissenting).
45. 461 U.S. 375 (1983).
46. *See id.* at 380-81.
47. *See id.* at 381-82.
48. *See id.* at 383-84.
49. *See id.* at 384.
50. *Id.*
51. 40 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,045, ¶61,121 (1987).
52. *See id.*

With this expansive reading of what "transmission of electricity in interstate commerce" meant, it would seem that the FERC would have control over all transmission within or without a particular state, and thus, over retail wheeling. However, in 1992, Congress limited the FERC's jurisdiction over retail wheeling with the passage of the Energy Policy Act ("EPAct").[53] Section 212(h) of the FPA as amended by the EPAct provides:

> Prohibition on mandatory retail wheeling and sham wholesale transactions.
> No order issued under this chapter shall be conditioned upon or require the transmission of electric energy: (1) directly to an ultimate customer, or (2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate customer. . . . Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.[54]

Thus, only under certain limited circumstances, not relevant here, can the FERC order direct retail wheeling. The EPAct contains no comparable provision for the states and, in fact, adds a provision protecting the authority of the states over the transmission of electric energy to ultimate customers.[55]

The FERC's Order 888, which set the stage for electric wholesale competition, addressed the FERC's wheeling authority.[56] The FERC claimed authority over the rates, terms, and conditions of unbundled transmission service in interstate commerce.[57] However, pursuant to the FPA the states retained authority over local distribution service.[58] Some utilities argued that the states have jurisdiction over all aspects of retail sales, including unbundled retail transmission service.[59] Some states argued that the FERC and state commissions had concurrent jurisdiction over unbundled transmission service.[60] However, the FERC asserted jurisdiction over the transmission component of retail wheeling transactions while recognizing that it had no authority to order retail wheeling under the EPAct.[61] Yet, the FERC did not address whether states had the

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53. 16 U.S.C. § 824k (1994).

54. *Id.*

55. *See id.*

56. Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Stats. & Regs. (CCH) ¶31,036 at 31,770, 61 Fed. Reg. 21,540 (1996) (codified at 18 C.F.R. §§ 35, 385 (1999)) [hereinafter *Order 888*].

57. *See id.* Unbundled transmission service means transmission service that is separated from the supply of electricity and the distribution of electricity. Thus, the transmission charge only includes charges for the transmission function, not the electric generation or distribution functions.

58. *See id.* at 31,770-71.

59. *See id.* at 31,772.

60. *See id.* at 31,775.

61. *See id.* at 31,780-81.

authority to order retail wheeling but stated that, "if unbundled retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail access program, [the FERC] has exclusive jurisdiction. . . ."[62]

Furthermore, in Order 888's rehearing, the FERC clarified that it could order *indirect* unbundled retail transmission service while recognizing that it could not order retail wheeling directly to an ultimate customer or sham wholesale transactions.[63] Yet, the FERC implied that states may order retail wheeling, noting that when the FERC was prohibited by section 212(h) of the EPAct from ordering retail wheeling, then "entities are eligible for such service under the tariff only if it is provided pursuant to a *state requirement* or is provided voluntarily."[64] Furthermore, the FERC stated that retail customers taking unbundled transmission service under a state requirement are only eligible for transmission service from those providers that the state *orders* to provide service.[65]

Thus, despite the FERC's assertion of jurisdiction over unbundled retail transmission service, even it recognized the limits to its authority, namely section 212 (h) of the EPAct, and implied that states may be able to order direct retail wheeling.[66] The FERC recognized that states retain jurisdiction over local distribution to ultimate customers under the FPA and even stated that when no local distribution facilities are identified, states still retain jurisdiction over "the service of delivering electric energy to end users."[67]

C. Analysis of Federal Preemption of Retail Wheeling

A federal law or regulation may preempt state laws by implication in three ways: (1) The federal government could have preempted the entire field of regulation, leaving no room for state regulation; (2) there may be a conflict between federal and state law, where compliance with both is impossible; or (3)

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62. *Id.* at 31,781.

63. *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888-A (Rehearing), 78 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,220, 1997 FERC LEXIS 463, *16 (Mar. 4, 1997).

64. *Id.* at *17 (emphasis added).

65. *See id.*

66. 16 U.S.C. § 824k (1994). The FERC's authority under Order 888 has been challenged in other ways. In *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), the court found that the FERC could not require a utility to curtail its retail bundled load on a nondiscriminatory basis with its wholesale load because the FERC did not have jurisdiction over bundled retail electric sales. Also, an omnibus appeal of the FERC's Order 888 is pending. *See id.* at 1096.

67. *Order 888*, *supra* note 56, at 31,783; *see also* Barbara S. Jost, *Leveling the Playing Field—Can Retail Reciprocity Work?*, 11 NAT. RESOURCES & ENV'T 55, 57 (Spring 1997).

the state law may impede the achievement of a federal objective.[68] In any case, federal preemption is a matter of congressional intent, which can be found in the language, structure, and purpose of federal legislation or regulations.[69]

The jurisdictional dispute over electricity is clear. The FPA gave the federal government jurisdiction over electric transmission in interstate commerce and the sale of energy at wholesale in interstate commerce.[70] Interstate commerce has been expanded to include virtually all transmission of electricity.[71] Yet, the states retain jurisdiction over generation, local distribution, and transmission of electric energy in intrastate commerce.[72] The FERC is prohibited from ordering retail wheeling to a direct customer, while the states are not expressly prohibited from or expressly authorized to do so.[73] In addition, the EPAct provides that states retain the authority over transmission of electric energy directly to an ultimate customer.[74]

Many, particularly the states, argue that retail wheeling is an area of state concern because the FERC is banned from ordering it and states are not. However, there could be a federal legislative decision that retail wheeling should not be ordered at all, by anyone. That argument is relatively weak considering the addition of the saving clause in the EPAct, which leaves intact state authority over transmission to ultimate customers.[75] Yet, the saving clause could be read to preserve for states only the jurisdiction they had over transmission before the 1992 EPAct revisions.[76] This would not include jurisdiction over retail wheeling. While it is true that Congress did not declare that "States shall have authority over all transmission to ultimate consumers,"[77] it is also true that Congress did not say "States are prohibited from ordering retail wheeling transactions." Either statement could have easily been made. Neither statement being made by Congress may imply a legislative decision to allow FERC and the states to work together to determine the best result.[78]

The only court or utility commission decisions on the federal preemption matter have determined that states are not preempted from ordering retail wheeling.[79] In *Detroit Edison Co. v. Michigan Public Service*

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68. *See* CHEMERINSKY, *supra* note 12, at 286.

69. *See id.* at 285.

70. *See* 16 U.S.C. § 824 (1994).

71. *See supra* notes 39-44, 51-52 and accompanying text.

72. *See* 16 U.S.C. § 824 (b) (1).

73. *See id.* § 824k (h).

74. *See id.*

75. *See id.*

76. *See* Kyle Chadwick, *Crossed Wires: Federal Preemption of States' Authority over Retail Wheeling of Electricity*, 48 ADMIN. L. REV. 191, 195 (1996).

77. *Id.*

78. By limiting the FERC's jurisdiction, Congress ensured room for the states to take an active part in retail wheeling.

79. *See* Detroit Edison Co. v. Michigan Public Serv. Comm'n, 575 N.W.2d 808 (Mich. Ct. App. 1998), *rev'd on other grounds*, 596 N.W.2d 126 (Mich. 1999); Energy Assoc. v. Public Serv.

Commission,[80] the state's retail wheeling pilot program was not preempted. The court found that the EPAct saving clause, along with evidence that the FERC itself was willing to cooperate with states that implemented retail wheeling experiments, proved that states retained the authority to order retail wheeling.[81]

Further evidence that states can order retail wheeling is found in *Consumers Energy Co.*[82] The FERC dismissed an application for a direct retail tariff because the facilities involved were in local distribution, an area over which the FERC had no jurisdiction.[83] Thus, states should be free to implement retail wheeling programs due to states' jurisdiction over local distribution.

Also, in *Energy Ass'n of New York v. Public Service Commission of New York*,[84] the court found that the New York Public Service Commission was not preempted by federal law from effectuating retail wheeling. Again the court relied on the savings clauses contained in the EPAct.[85]

The Connecticut Department of Public Utility Control ("DPUC") also agreed that it was not preempted by federal law from ordering retail wheeling. In *DPUC Investigation into Retail Electric Transmission Service*,[86] the DPUC argued that even though some of the electricity used by an in-state utility came from out-of-state, that is "true of most retail utilities, and the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States."[87] The DPUC claimed that legislative intent was to give states authority over the sale of electricity to an ultimate customer, and thus, the states have authority over retail wheeling to such ultimate customers.[88]

Based on these decisions, the states believe that they have the authority to order retail wheeling and have done so. The FERC seems to accept this to a certain extent, though the FERC is quick to assure its authority over transmission in interstate commerce, be it retail or wholesale. While the federal government through the FERC is heavily involved in the electric regulation field, the FPA as amended by PURPA and the EPAct, explicitly leaves areas of regulation for the

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Comm'n, 653 N.Y.S.2d 502 (N.Y. Sup. Ct. 1996); DPUC Investigation into Retail Electric Transmission Service, Docket No. 93-09-29, 1994 Conn. PUC LEXIS 1(Connecticut Department of Public Utility Control 1994).

80. *Detroit Edison Co.*, 575 N.W.2d at 813 (stating that the Michigan utility commission does not have the statutory authority to order retail wheeling. The Court did not decide the issue of whether the state was preempted by the federal government by ordering retail wheeling.).

81. *See id.* at 814.

82. 80 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,121 (1997).

83. *See id.*

84. 653 N.Y.S.2d 502 (1996).

85. *See id.* at 511. The court relies on the saving clause contained in section 212 (h) and on section 212 (g) which provides: "No order may be issued under this chapter which is inconsistent with any State law which governs the retail marketing areas of electric utilities." 16 U.S.C. § 824k (g) (1994).

86. No. 93-09-29, 1994 WL 454686, at *1 (Conn. D.P.U.C.).

87. *Id.* at *11.

88. *See id.* at *9.

states alone. Thus, states clearly are not preempted by field preemption. Also, there is no federal objective that is harmed by states ordering retail wheeling, precluding federal objective preemption. In fact, retail wheeling encourages electricity competition, an avowed purpose of the EPAct.

Thus, the only way a state may be preempted by federal law in the retail wheeling area is through conflict preemption. As long as a state is willing to cooperate with the FERC on such areas as transmission rates, terms, and conditions, then a state would not be preempted.[89] However, if the state and the FERC disagree on a transmission tariff, then it appears that the FERC would trump due to its jurisdiction over the interstate transmission of electricity. The best route is for states and the FERC to work together with states ordering retail wheeling and controlling the sale to the ultimate customer, and the FERC controlling the transmission rates.[90]

III. Dormant Commerce Clause and Retail Wheeling Reciprocity

Some states face an additional constitutional challenge to their electric retail competition plans. To date, four states (Illinois, Michigan, Montana, and Oklahoma) have retail open access plans that require reciprocal access to out-of-state electric utilities' service territories.[91] The reciprocity requirements of each state are similar, so for brevity sake only the Illinois plan will be considered.

The Illinois Electric Service Customer Choice and Rate Relief Law of 1997 (the "Act")[92] calls for a phase-in of retail competition until 2002 when most retail customers will have a choice of electric supplier. The Act provides for two forms of reciprocity—one for in-state municipal and rural cooperative electric suppliers and one for out-of-state alternative retail electric suppliers ("ARES"). Rural cooperatives and municipal utilities are not covered by the Act unless they elect to be.[93] If one so elects, then the utility must provide open access to its service territory if it desires to serve customers in another utility's territory.[94]

ARES, on the other hand, are covered by the Act. If an ARES, its affiliate,

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89. This, in fact, is the road states are taking. *See, e.g.*, *In re* Commission's Own Motion to Consider the Restructuring of the Electric Utility Industry, 182 Pub. Util. Rep.4th (PUR4th) 416 (Mich. Pub. Serv. Comm'n 1998) (finding FERC's approved transmission tariff should be used in retail electricity direct access plan).

90. Perhaps the best way to describe the cooperation would be subsequent jurisdiction, as opposed to concurrent jurisdiction. First states order retail wheeling, and then the transmission rates, terms, and conditions are determined in cooperation with the FERC.

91. *See supra* notes 5-8. Even though the Michigan Supreme Court has found that the Michigan Public Service Commission does not have the statutory authority to order retail wheeling, Consumers Energy and Detroit Edison, which together control 90% of Michigan's electricity, have stated that they will voluntarily comply with the commission's plan. *See Michigan Utilities Volunteer to Deregulate*, The Energy Daily, July 6, 1999, at 3.

92. 220 Ill. Comp. Stat. 5/16-101 (West 1997).

93. *See* 220 Ill. Comp. Stat. 5/17-200, 5/17-300 (West 1997).

94. *See id.*

or its principal source of electricity owns or controls facilities for the distribution and transmission of electricity in its own defined service territory, then that ARES must provide reasonably comparable delivery service to the electric utility in whose service area the proposed service will be provided by the ARES.[95]

This reciprocity provision may be seen as an impermissible burden on interstate commerce. While there is no express constitutional provision that prohibits states from burdening interstate commerce, courts have inferred this power from the Commerce Clause.[96] The Commerce Clause states Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States. . . ."[97] The dormant or negative Commerce Clause prevents states from erecting trade barriers or discriminating against out-of-staters even in the absence of federal regulation.[98]

Dormant Commerce Clause challenges generally fall into two categories—laws that discriminate against out-of-staters and laws that treat out-of-staters and in-staters alike.[99] The former law is subject to a much stricter test, whereas the latter law is given more deference and will only be found unconstitutional if the burden on interstate commerce outweighs the law's benefits.[100]

A. Reciprocity Laws Under the Strict Scrutiny Dormant Commerce Clause Test

If a state law is found to discriminate on its face or in its effect on out-of-staters, there is a presumption that the law violates the dormant Commerce Clause.[101] However, such laws are not per se unconstitutional. If the state can prove that the law is necessary and is the least restrictive way to achieve an important governmental purpose, then the law may stand.[102]

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95. *See id.* 5/16-115. The Act provides:

> [I]f the applicant, its corporate affiliates or the applicant's principal source of electricity (to the extent such source is known at the time of the application) owns or controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area to which electric power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered, the applicant, its corporate affiliates or principal source of electricity, as the case may be, provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by the electric utility. . . .

Id.

96. *See* CHEMERINSKY, *supra* note 12, at 307.
97. U.S. CONST. art. I, § 8, cl. 3.
98. *See* CHEMERINSKY, *supra* note 12, at 315.
99. *See id.*
100. *See id.*
101. *See id.*
102. *See id.* at 329.

When the Supreme Court has dealt with reciprocity laws, in all but one instance, it has found them unconstitutional.[103] Even though reciprocity laws do not completely ban out-of-staters from entry into the market, this fact does not save reciprocal laws that discriminate against out-of-staters.[104]

In *Sporhase v. Nebraska*,[105] a Nebraska statue prohibited the removal of ground water for use in another state unless the other state granted reciprocal rights to withdraw and transport its ground water for use in Nebraska. Finding that the law discriminated against out-of-staters, the Court applied the strict scrutiny standard and found the law unconstitutional.[106] The Court emphasized that a legitimate local purpose would be conservation and preservation, a health and safety regulation at the core of a state's police power, but not economic protectionism.[107] While Nebraska did have a legitimate local interest in the conservation of water, the reciprocal law used was not closely tailored to that purpose; therefore, the Court held that law was an unconstitutional burden on interstate commerce.[108]

Similarly, in *Great Atlantic & Pacific Tea Co. v. Cottrell*,[109] the Court found that a Mississippi regulation impermissibly burdened interstate commerce. The regulation stated that milk from another state could be sold in Mississippi if the other state's regulatory agency accepted Grade A milk produced in Mississippi on a reciprocal basis.[110] The regulation required a signed reciprocity agreement with each state. The Court concluded that the means used to protect the health of its citizens was not rationally related to that purpose.[111] Furthermore, there were less restrictive means to achieve the state purpose, such as inspecting milk brought in from other states.[112]

Mississippi also argued that the provision was a free trade provision, encouraging rather than discouraging trade in milk products.[113] The Court concluded that Mississippi cannot "use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement."[114] Furthermore, Mississippi could sue Louisiana, or any other state, if it believed that Louisiana law limiting the importation of milk violated the

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103. *See* Northeast Bancorp, Inc. v. Board of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985) (finding state reciprocal banking privileges law not violative of the Commerce Clause because Congress authorized such laws).

104. *See* New Energy Co. v. Limbach, 486 U.S. 269, 275 (1988).

105. 458 U.S. 941 (1982).

106. *See id.* at 958.

107. *See id.* at 956.

108. *See id.* at 957-58.

109. 424 U.S. 366 (1976).

110. *See id.* at 367.

111. *See id.* at 375-76.

112. *See id.* at 377.

113. *See id.* at 378.

114. *Id.* at 379.

Commerce Clause.[115]

Thus, even if the avowed purpose of a reciprocity requirement is to encourage trade, the Court will invalidate it, unless there is an important governmental purpose that cannot be achieved through nondiscriminatory means.

In *New Energy Co. v. Limbach*,[116] Ohio offered a tax credit for in-state producers of ethanol and for out-of-state producers only if that state provided for similar tax treatment of Ohio-produced ethanol. The Court found the tax credit violated the dormant Commerce Clause because the only true state purpose was merely economic protectionism for in-state ethanol producers.[117] The reciprocity clause did not save the discriminatory provision. The substantial commercial disadvantage placed upon out-of-state ethanol producers was just as discriminatory as if Ohio had completely excluded the out-of-state goods.[118] Even though the reciprocity clause may promote trade in ethanol by encouraging other states to give ethanol tax credits, the tax credit was still facially discriminatory and thus, unconstitutional.[119] Furthermore, the means used were not the least restrictive to promote the ends of reducing harmful exhaust emissions or increasing trade in ethanol.[120]

The Illinois retail electric reciprocity provision is not necessarily facially discriminatory against out-of-staters. All electric utilities in the state must also open their service territories to other electric utilities in-state and provide delivery service for such utilities.[121] So too, ARES must provide reciprocal access to their territories in order to serve retail customers in Illinois.[122] Yet, in-state municipal and rural cooperatives do not need to allow access to their territory, unless they elect to serve customers in another Illinois utility's territory.[123] Thus, out-of-state electric providers are treated the same as in-state electric cooperatives and municipal utilities if either wants to serve customers outside its territory, it must provide reciprocal access to its territory.

However, electric utilities in Illinois are treated somewhat differently. They are *required* to open their territory to other electric suppliers and are required to provide delivery service for the electricity supplied by those other suppliers. Thus, an Illinois electric utility is assured access to other Illinois territories, whereas an out-of-state utility must first provide access to its own territory.

Regardless of whether the Illinois Act discriminates against out-of-staters on its face, it almost certainly does discriminate in its effect. If the impact of a law is discriminatory, this is often enough to bring the case under the strict scrutiny

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115. *See id.*
116. 486 U.S. 269 (1988).
117. *See id.* at 279.
118. *See id.* at 275.
119. *See id.* at 274.
120. *See id.* at 279.
121. *See* 220 ILL. COMP. STAT. 5/16-116 (West 1997).
122. *See id.* 5/16-115.
123. *See id.* 5/17-200, 5/17-300.

dormant Commerce Clause test.[124] In *C & A Carbone, Inc. v. Town of Clarkstown*,[125] a facially neutral law requiring all hazardous waste to be deposited at a transfer station was found to discriminate against out-of-staters in its impact. Under the strict scrutiny test, the Court found that even though the law applied to in-staters as well as out-of-staters, the effect on out-of-staters was enough to deem the law discriminatory.[126]

However, in *Exxon Corp. v. Governor of Maryland*,[127] a state law was found not to be discriminatory even though it had a severely disproportionate effect on out-of-staters. A producer of petroleum was prohibited from operating a retail station in Maryland.[128] Because almost all petroleum products used in Maryland were produced out-of-state, local businesses were advantaged, while out-of-state companies were disadvantaged. Even though the burden of the statute fell solely on out-of-state companies, this did not lead to the conclusion that Maryland was discriminating against interstate commerce.[129] Because the statute did not impede the flow of petroleum in interstate commerce, did not place added costs upon interstate dealers, or distinguish between in-state and out-of-state companies, the majority found no discrimination.[130] While the majority did not rely on it in its holding, it is noteworthy that the purpose of the Maryland statute was to "correct the inequities in the distribution and pricing of gasoline" reflected by a survey the State had done.[131] It is possible that the noble purpose of eliminating discrimination may have influenced the Court in its holding that discrimination in effect alone was not enough to bring the statute under the strict scrutiny test.

While the Illinois reciprocity provision affects utilities in-state as well as out-of-state, it clearly affects out-of-state utilities disproportionately. All in-state utilities are required or have a choice of free competition in the retail electric market. However, depending on the other state's laws, almost all out-of-state utilities do not have a choice. A utility simply is not free to open its territory to new electric suppliers, unless retail electric competition has begun. This, along with the arguably protectionist nature of the statute, would most likely make the Illinois reciprocity provision a discriminatory one, subject to the strict scrutiny test.

Therefore, only if the reciprocity requirement achieves an important state purpose that cannot be achieved with nondiscriminatory or less burdensome means will it be found constitutional. The purpose of the Illinois Act is to open up the retail electric market to competition. Surely, this is a legitimate and even

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124. *See* CHEMERINSKY, *supra* note 12, at 319.
125. 511 U.S. 383 (1994).
126. *See id.*
127. 437 U.S. 117 (1978).
128. *See id.* at 137.
129. *See id.* at 125.
130. *See id.* at 126.
131. *Id.* at 121.

important state interest.[132]

However, when the reciprocity requirement is considered separately, the state purpose needs more examination. There must be a state interest beyond simple economic protectionism that is important enough to justify the discrimination evident in the reciprocity clause. Reciprocity is designed to ensure fair play in the newly opened market. Its purpose is not entirely to protect local business interests. The health, welfare, and safety of the state's citizens could be adversely affected if retail competition were to occur without a reciprocity requirement.[133]

Out-of-state utilities could come into Illinois markets and "cherry pick" all the incumbent utility's major commercial and industrial customers. Because that utility's state does not have an open market, this would leave the Illinois utility no way to recover this lost revenue. The reduction in revenue would increase rates for the essentially captive residential customers who may remain captive because it would not be economical for other utilities to come in and serve the residential loads. Even if the residential customers were picked up by another electric supplier, they would still be dependent on the incumbent utility for transmission and distribution service.[134] Conceivably, the local incumbent utility could be forced into bankruptcy or not have enough revenue to adequately maintain the transmission and distribution lines in its territory, potentially disrupting the flow of electricity to customers in the state.[135] Even after retail competition in electric supply arrives, the delivery function of electricity will remain a monopoly highly regulated by the state.[136] Therefore, the state will continue to have a strong interest in the provision of electricity to its citizens. Obviously, electricity is necessary for the health, safety, and welfare of the states' citizens.[137]

Yet, even if a court found the above situation plausible and found an important state purpose in the reciprocity requirement, the purpose must not be achievable through an alternative nondiscriminatory or less restrictive way. The reciprocity provision may not withstand this strictest of scrutiny. Traditionally, the states are given great latitude in the manner of their regulation in the retail electric industry.[138] A state could regulate the industry during the transition from

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132. This is evidenced by the fact that every state and the U.S. Congress has considered retail competition plans. *See State Profiles*, *supra* note 2.

133. See *infra* notes 197-217 and accompanying text for a more detailed explanation of the state interest in the reciprocity provision.

134. *See* YAJIMA, *supra* note 9, at 1.

135. *See* Indianapolis Power & Light Co. v. Pennsylvania Pub. Util. Comm'n, 711 A.2d 1071 (Pa. Commw. Ct. 1998) (recognizing the state's interest in maintaining the transmission and distribution networks located within the state).

136. *See* YAJIMA, *supra* note 9, at 1.

137. *See* Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983) (noting that the regulation of electric utilities is one of the most important functions associated with the police powers of the states).

138. *See id.*

monopoly to competition in various, less restrictive, ways. A state could require licensing and other limitations on out-of-state utilities, just as it does for in-state utilities, without completely banning out-of state utilities which do not provide reciprocal access. Thus, even if there is a legitimate and important state interest in reciprocity, the Act's reciprocity requirement is not the least burdensome means of achieving the state's health, safety, and welfare goals.[139]

B. Exceptions to the Dormant Commerce Clause: Market Participant

Even if a state law would violate the dormant Commerce Clause, the courts have fashioned two situations where the law may still be upheld—where the state is a market participant and where Congress has authorized the activity.[140] When the state is not acting as a regulator, but rather as a participant in an economic market, then the state may favor its own citizens.[141]

This doctrine was first recognized in *Hughes v. Alexandria Scrap Corp.*[142] In this case, Maryland established a program to reduce the number of junked cars in the state, imposing more stringent standards on out-of-state scrap processors than on in-state processors. The Court finding no dormant Commerce Clause violation, stated "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[143]

However, the state is only exempted from the dormant Commerce Clause strictures while acting as a participant in a particular market. In *South-Central Timber Development Inc. v. Wunnicke*,[144] the dormant Commerce Clause was violated when a state law required logs taken from state lands to be processed within the state. Although, the state could sell to whomever it desired as a market participant, it could not attach conditions to the sale that discriminated against out-of-staters.[145] The state could discriminate only in the market in which it participated. In *Wunnicke*, the state attempted to dictate what a purchaser did with the logs after the state sold the logs to the purchaser. Thus, the market participant exception did not save the law from unconstitutionality.[146]

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139. *See also* Jusitn M. Nesbit, Note, *Commerce Clause Implications of Massachusetts' Attempt to Limit Importation of "Dirty" Power in the Looming Competitive Retail Market for Electric Generation*, 38 B.C. L. REV. 811, 842-843 (1997) (finding that the State's attempted legislation limiting the importation of dirty power would violate the dormant Commerce Clause because less restrictive means existed to attain the State's environmental purposes).

140. *See* CHEMERINSKY, *supra* note 12, at 333.

141. *See id.*

142. 426 U.S. 794 (1976).

143. *Id.* at 810.

144. 467 U.S. 82 (1984).

145. *See id.* at 97.

146. *See id.* at 99.

In *Automated Salvage Transport v. Wheelabrator Environmental Systems*,[147] the state owned several trash-to-energy processing plants. The state allowed a private trash-to-energy plant to open pursuant to a settlement agreement that the private plant would turn away certain municipal waste that was already contracted to go to the state plants.[148] The state was found to be a market participant trying to enforce its contracts with the municipalities; therefore, the settlement did not violate the dormant Commerce Clause.[149]

The states with electric retail reciprocity clauses likely would not be considered market participants. The doctrine is very specifically and sparsely applied.[150] It is true that electric utilities have been found to be state actors for antitrust purposes in some instances.[151] However, even though electric utilities are highly regulated entities, they do not reach the point where the state is actually participating in the market. In *New England Power Co. v. New Hampshire*,[152] the Court found that electricity was manufactured by private corporations using privately owned facilities. Thus, New Hampshire was not a market participant when it sought to restrict the sale of hydroelectric power out of the state.[153] The state is truly acting as a regulator, not a market participant, when it enacts and carries out laws aimed at the state's electric utility industry as a whole.

However, if a state did own an electric company, then it is conceivable that the state could prohibit out-of-state retail electric suppliers from selling electricity to end-users in its own service territory unless the utility allowed the state-owned electric company to sell retail electricity in its service territory. In that case, the state, as a seller of electricity, would truly be operating as a market participant and not merely as a regulator of the retail electric market.

Similarly, a municipal utility could claim market participant status. Municipal utilities (and sometimes rural cooperatively owned utilities) are normally exempted from pervasive state regulation because these utilities are, in essence, owned by the customers. It is possible that a municipal utility could impose a reciprocity requirement of its own and be exempt from a Commerce Clause attack as a market participant.

However, that is not the case here because the states are enacting legislation and regulations to regulate the retail electric market. The state is acting as regulator and not a market participant.

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147. 155 F.3d 59 (2d Cir. 1998).

148. *See id.* at 62.

149. *See id.* at 79.

150. *See, e.g.*, *South-Central Timber Dev., Inc.*, 467 U.S. at 93 (noting the market participant doctrine had only been applied in three cases to date.)

151. *See* Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260 (3d Cir. 1994) (holding an electric utility to be state actor for antitrust purposes). *But see* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (finding electric utility was not state actor for antitrust purposes).

152. 455 U.S. 331 (1982).

153. *See id.*

C. Exceptions to the Dormant Commerce Clause: Congressional Authorization

Another way a state law can be exempted from the dormant Commerce Clause is if Congress has authorized the state to act. This is a long accepted practice[154] and one of the few times when Congress has authority to overrule a Supreme Court decision.[155] If the Court finds that a certain state law violates the dormant Commerce Clause, then Congress can pass a law specifically authorizing the state law and Congress' decision will stand.[156]

For instance, in *Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System*,[157] the Court upheld Massachusetts and Connecticut laws that only allowed out-of-state holding companies to acquire in-state banks if the company's state provided for reciprocal and equivalent banking privileges for Massachusetts or Connecticut companies. The laws would have violated the dormant Commerce Clause except that Congress authorized them in the Bank Holding Company Act.[158]

There have been claims that the Federal Power Act ("FPA") has given states certain immunity from dormant Commerce Clause attack. Recall that when the FPA gave the federal government power over energy regulation it reserved to the states certain powers.[159] In *New England Power Co. v. New Hampshire*,[160] a New Hampshire statute prohibited the exportation of hydroelectric energy when the New Hampshire Public Utilities Commission deemed the public interest would be served by using the power in-state. New Hampshire claimed that the statute was protected from the dormant Commerce Clause because Congress had authorized the statute in the FPA.[161] Section 201(b) of the FPA provided that nothing in the Act should "deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."[162] However, the Court found that this was not "an affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.'"[163] The saving clause merely saved the then existing state laws from federal preemption.[164] Neither the legislative history nor the language of the FPA indicated congressional intent to immunize states from Commerce Clause challenges.[165] In fact, the Court noted,

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154. *See, e.g.*, *In re* Rahrer, 140 U.S. 545 (1891).
155. *See* CHEMERINSKY, *supra* note 12, at 334.
156. *See id.*
157. 472 U.S. 159 (1985).
158. *See id.* at 174.
159. *See* 16 U.S.C. § 824 (1994).
160. 455 U.S. 331 (1982).
161. *See id.* at 339-40.
162. *Id.* at 341.
163. *Id.* (quoting Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945)).
164. *See id.*
165. *See id.*

that even if some legislative history indicated that Congress meant to protect states from Commerce Clause challenge, unless Congress has *expressly* stated that policy and intent, the Court cannot find congressional authorization.[166]

In *Wyoming v. Oklahoma*,[167] Oklahoma claimed that the saving clause in the FPA gave congressional authorization to an Oklahoma state law that required electric utilities to use at least ten percent Oklahoma coal. Oklahoma believed that the saving clause that reserved to the states the regulation of retail electric rates permitted Oklahoma to discriminate in favor of its own citizens.[168] However, the Court found that even if the law was a legitimate part of the state's retail rate making authority, it was not exempt from dormant Commerce Clause scrutiny.[169] Relying on *New England Power Co. v. New Hampshire*, the Court noted that Congress must present an unambiguous intent to authorize states to burden interstate commerce and that intent was not found in the FPA.[170] Furthermore, the Court stated that its past decisions have uniformly subjected electric energy law cases to Commerce Clause scrutiny on the merits.[171]

Two more cases illuminate, or perhaps cloud, how explicit the congressional authorization must be in order to immunize states from Commerce Clause challenges. In *United Egg Producers v. Puerto Rico Department of Agriculture*,[172] a federal egg labeling statute provided "no State or local jurisdiction other than those in noncontiguous areas of the United States may require labeling to show the State or other geographical area of production or origin."[173] Puerto Rico, being a noncontiguous area of the United States, passed a law requiring eggs imported into the Commonwealth to be stamped with the state of origin.[174]

However, the court found that the alleged congressional authorization did not meet the high standard of explicitness necessary to exempt the law from the dormant Commerce Clause.[175] The court concluded that Congress could have, but did not, affirmatively give Puerto Rico authorization to require egg labeling.[176] So, if the language of the statute was read literally, it exempted Puerto Rico from this specific egg labeling prohibition.[177] However, it did not

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166. *See id.* at 343.

167. 502 U.S. 437 (1992).

168. *See id.* at 457. Oklahoma argued that using in-state coal, which was higher in sulfur, combined with Wyoming coal would reduce local electric rates for consumers and conserve low-sulfur coal for future use. *See id.* at 457-58.

169. *See id.* at 458.

170. *See id.*

171. *See id.* (citing Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)).

172. 77 F.3d 567 (1st Cir. 1996).

173. *Id.* at 569.

174. *See id.*

175. *See id.* at 570.

176. *See id.*

177. *See id.*

mean that any regulation Puerto Rico required would be acceptable. Puerto Rico was still constrained by the strictures of the dormant Commerce Clause.[178]

Yet, in *Shamrock Farms Co. v. Veneman*,[179] the court found congressional authorization for California milk standards. The federal Farm Bill stated that no provision of the Farm Bill or any other provision of law "shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding . . . milk products. . . ."[180] The court argued that the statement "any other provision of law" and "otherwise limit" indicated congressional intent to exclude California from the dormant Commerce Clause, not merely from federal laws or regulations.[181]

The state retail electric reciprocity laws could claim congressional authorization by the FPA and its EPAct amendments. The case for FPA authorization is relatively weak as the two precedent cases prove.[182] However, the EPAct contains additional saving clauses that arguably could be congressional authorization for states in the areas of retail marketing[183] and the transmission of electric energy directly to an ultimate consumer.[184]

First, the states would need to prove that the reciprocity clauses fall within the authority that Congress has reserved for the states in these two saving clauses. While the reciprocity clauses do involve the retail marketing areas and transmission of energy to an ultimate customer, the saving clauses certainly do not specifically mention state reciprocity clauses. Yet, even assuming reciprocity clauses are covered by these clauses, congressional authorization would not be found.

The saving clauses do not explicitly exempt states from the Commerce Clause in these two areas. The first clause states that "[n]o order may be issued *under this chapter* which is inconsistent with any State law which governs the retail marketing areas of electric utilities."[185] Applying the above precedential decisions, the clause merely saves state laws from preemption or interference from the EPAct, not from the strictures of the dormant Commerce Clause.

A second saving clause states that "[n]othing *in this subsection* shall affect any authority of any State or local government under State law concerning the

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178. *See id.* While the egg labeling statute could be read as a congressional authorization for noncontiguous states to make any egg labeling regulations they so desired, the court found that this more extreme reading was not necessary because Congress' intent was not unmistakably clear. *See id.* at 571.

179. 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 872 (1999).

180. *Id.* at 1180.

181. *Id.* at 1181.

182. *See* Wyoming v. Oklahoma, 502 U.S. 437 (1992); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982); *see also supra* notes 159-71 and accompanying text.

183. *See* 16 U.S.C. § 824k(g) (1994).

184. *See id.* § 824k(h).

185. *Id.* § 824k(g) (emphasis added).

transmission of electric energy directly to an ultimate consumer."[186] Thus, the federal law is only saving the states' authority from preemption under this subsection. It is not exempting all state action in the area from dormant Commerce Clause analysis. As *Shamrock Farms Co. v. Veneman*,[187] explained, Congress does not need to explicitly claim it is shielding the state from the dormant Commerce Clause; however, Congress must at least claim that the state law shall not be preempted by the current law or "*any other provisions of law*."[188] Nothing in the EPAct provisions or the legislative history shows unmistakably clear congressional intent to exempt states from dormant Commerce Clause analysis.

D. Reciprocity Laws Under the Balancing Commerce Clause Test

As explained above, the four states reciprocity laws, as currently written, would most likely fall under the strict scrutiny Commerce Clause test that is reserved for discriminatory state laws.[189] However, it may be possible to write a state retail electric restructuring law that does not discriminate and instead would be subject to the less strict balancing test. If the state restructuring law treated all electric utilities in the state and outside of the state the same, the law would not discriminate on its face. Such a law could make all opening up of defined service territories optional on the part of the electric utility. However, if a utility choose to serve customers in an area that was not its own, then that utility would be required to allow the other electric utility to serve customers within its own service territory. In other words, all in-state electric utilities would be subject to a reciprocity requirement; the same requirement that all out-of-state and municipal and rural cooperatives are subject to under the Illinois Act. Thus, all electric utilities would be treated alike; Illinois electric utilities would no longer have the automatic advantage of knowing they could serve in any other Illinois electric utility's area.

However, such a law may be subject to claims of discriminatory impact. Case law seems inconsistent about when a discriminatory impact or purpose reaches a level that brings a state law under the strict scrutiny Commerce Clause test.[190] Some state laws that had a discriminatory purpose and effect were not considered discriminatory.[191] The proposed reciprocity law does not have a discriminatory intent or purpose. Its purpose it to allow electric utilities the

186. *Id.* § 824k(h) (emphasis added).

187. 146 F.3d 1177 (9th Cir. 1998).

188. *Id.* at 1181 (emphasis added).

189. *See supra* text accompanying notes 124-39.

190. *See* CHEMERINSKY, *supra* note 12, at 319.

191. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (holding that a law prohibiting milk sold in plastic containers that disproportionately benefitted in-state paper producers was not discriminatory); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (finding state law not to be discriminatory even though the law had a severely disproportionate effect on out-of-staters).

freedom to be competitive, while ensuring fair play. Yet, the impact of the law may fall disproportionately on out-of-state utilities.[192] However, that may not be enough to make the law discriminatory. Like *Exxon Corp.*,[193] the purpose of the electric restructuring laws is to eliminate the discrimination that already exists in the electric industry by opening up service territories to competition.[194] Thus, consistent with *Exxon Corp.*, a court could find that the discriminatory impact of the reciprocity laws is not enough to bring the law under the strict scrutiny test. Therefore, the traditional balancing test would apply.

The balancing test for dormant Commerce Clause analysis was described in *Pike v. Bruce Church, Inc.*:[195] "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[196] Thus, the reciprocity clause only needs to have a legitimate state purpose, not an important one. And, the burden on interstate commerce does not need to be the least restrictive burden possible, but only needs to be less than the local benefits of the law.

Proof of a legitimate state interest in the provision of electric service is not hard to find. It is accepted that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."[197] When determining whether a state electric utility law violates the Commerce Clause, the courts had traditionally relied on a bright line distinction—wholesale sales and transmission in interstate commerce were for the federal government and retail sales, intrastate transmission, and distribution of electricity were subjects of state authority.[198] However, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, the Court determined that the modern Commerce Clause test was a better method.[199] Thus, electric utilities are subject to the *Pike v. Bruce Church* test, just as all other industries are. Furthermore, the Court noted that the balancing test usually gives *more latitude* to the state regulation.[200]

Thus, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, the Court allowed Arkansas to regulate a wholesale electric

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192. The surrounding states may not have open retail electricity markets. Thus, out-of-state utilities may not have a true choice to join the open state's retail market, because they could not provide reciprocal access.

193. 511 U.S. 383.

194. See text accompanying *supra* notes 127-31 for a more detailed examination of *Exxon Corp.*, 437 U.S. at 121.

195. 397 U.S. 137 (1970).

196. *Id.* at 142 (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

197. Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983).

198. *See id.* at 379.

199. *See id.* at 390.

200. *See id.*

transaction that was traditionally the FERC's role. However, because the wholesale transaction concerned a rural cooperative funded by the Rural Electrification Administration ("REA"), the FERC had disclaimed jurisdiction.[201] The state was found to have a legitimate state interest in the wholesale rates charged by the rural cooperative because its operation occurred within the state and the wholesale rates affected the retail rates of consumers.[202] Furthermore, the effect on interstate commerce was found to be incidental. The Court concluded that even though some of the electricity came from out-of-state, that was true for most retail utilities and the states have always regulated retail utilities.[203]

In *General Motors Corp. v. Tracy*,[204] the Court concluded a state's legitimate interest in utility regulation outweighed the incidental burden on interstate commerce of a tax law.[205] A natural gas marketer challenged the law which gave sales and use tax exemptions to Local Distribution Companies ("LDCs") and not to natural gas marketers.[206] Because all LDCs were located in Ohio, General Motors claimed the statute was discriminatory. The Court held it was not because the LDCs and gas marketers served different markets.[207] The health and safety interests of the state in delivery to natural gas customers was an obviously legitimate state concern.[208] The Court, relying on *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*,[209] noted:

> In view of the economic threat that competition for large industrial consumers posed to gas service to small captive users, the Court again reaffirmed its longstanding doctrine upholding the States' power to regulate all direct in-state sales to consumers, even if such regulation resulted in an outright prohibition of competition for even the largest end users.[210]

Thus, the Court concluded that there was no discrimination or burden on interstate commerce imposed by the preferential tax law.[211]

The electric retail reciprocity laws can claim a legitimate state interest in the health, safety, and welfare of its citizens. Even after retail competition begins,

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201. See *id.* at 381-82; *supra* text accompanying notes 45-50 for a discussion of the federal preemption issue in *Arkansas Electric Cooperative Corp.*

202. *See Arkansas Elec. Coop. Corp.*, 461 U.S. at 394.

203. *See id.* at 395.

204. 519 U.S. 278 (1997).

205. While *General Motors Corp. v. Tracy* is a natural gas case, the similarities in the Natural Gas Act and Federal Power Act are sufficient to assert its relevance. *See, e.g.*, *Arkansas Elec. Coop. Corp.*, 461 U.S. at 378-79 (noting that Congress created the FERC to oversee the wholesale transaction of both the electric and the natural gas industries).

206. *See General Motors Corp.*, 519 U.S. at 286-89.

207. *See id.* at 303-04.

208. *See id.* at 304-06.

209. 341 U.S. 329 (1951).

210. *General Motors Corp.*, 519 U.S. at 305-06.

211. *See id.* at 303-04.

in-state utilities will be responsible for the delivery of electricity to in-state consumers. Thus, the state will continue to have a legitimate interest in the viability and profitability of in-state electric utility distributors. As the Court noted in *General Motors Corp. v. Tracy*, the economic threat that competition for large industrial customers poses to retail customers justifies a state's regulation of retail electric sales to ultimate customers, even to the extent of prohibiting competition.[212] The reciprocity requirements do not go that far; they simply require reciprocal access as a condition of competition. The reciprocity requirement ensures that in-state utilities will remain viable and the health, safety, and welfare of the state's citizens are protected by consistent and affordable electric service.

The state retail electric competition plans and their reciprocity requirements are legitimate areas of state regulation because the retail electric industry is a highly regulated field, imbued with the public interest.[213]

The FERC has not taken on retail competition and, in fact, is prohibited by the EPAct from ordering retail wheeling, a necessary aspect of retail competition. Just as the FERC disclaimed jurisdiction over the rural cooperatives funded by the REA, the FERC has disclaimed or been prohibited from exercising jurisdiction over retail competition. There is nothing in the FPA that shows a federal intent to leave the area of retail electric energy unregulated because the FPA was created to fill a regulatory gap and not to create one.[214] Thus, the states should be able to make laws affecting retail electric competition.

If, in making those laws, the state incidentally affects interstate commerce through a reciprocity requirement, the law should not be found to violate the dormant Commerce Clause. The putative local benefits of retail competition, and reciprocity in particular, outweigh any incidental affect on interstate commerce. In fact, the burden on interstate commerce is actually less under the Illinois electric restructuring Act then it was under traditional retail electric regulation. In a closed, monopolistic retail electric market, out-of-state utilities are completely banned from supplying electricity to in-state customers.[215] Yet, the states are authorized by the FPA, as amended, to keep the market closed and prohibit out-of-state suppliers of electricity.[216]

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212. *See id.* at 304-06.

213. *Cf.* Bennett Elec. Co. v. Village of Miami Shores, 11 F. Supp. 2d 1348 (S.D. Fla. 1998) (noting that because garbage collection was traditionally a governmental or highly regulated function, a city law controlling garbage collection was not discriminatory and passed the balancing test).

214. *See* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983).

215. *See* George Sawyer Springsteen, *Government Regulation and Monopoly Power in the Electric Utility Industry*, 33 CASE W. RES. L. REV. 240, 251-52 (1983) (explaining that territorial restrictions imposed by state electric utility regulators have the effect of excluding all but a single electric supplier from a specific territory).

216. *See* 16 U.S.C. § 824(a) (1994) (leaving the regulation of retail electric matters to the states' sole authority); *id.* § 824k(g) (leaving the regulation of retail marketing areas (or service

It is possible that once the retail market is opened-up to out-of-state electricity, the market becomes an interstate one and thus, any trade barriers are prohibited by the Commerce Clause. However, even in a closed electric market, almost all electricity that is supplied to customers has some out-of-state power intermingled.[217] Thus, strictly speaking, even a closed retail market is an interstate market, yet absolute prohibition of out-of-state electric suppliers is still permitted.

Thus, the burden on interstate commerce the reciprocity requirement promotes is minimal in relation to the local benefits the reciprocity requirement creates. As such, the reciprocity laws would pass the less strict dormant Commerce Clause balancing test.

E. The Unique Nature of Electric Utilities

While the current construction of the reciprocity requirement may not pass the traditional dormant Commerce Clause challenge, there is strong reason for a court to consider the unique nature of the electric utilities when examining retail electric restructuring laws. Arguably, traditional Commerce Clause analysis simply does not apply to this industry. There are three justifications for the dormant Commerce Clause—historical, economic, and political.[218] Historically, the Commerce Clause was intended to prevent a state from erecting trade barriers that interfered with interstate commerce.[219] Economically, the country is better off if there are no laws that impede the free flow of goods in interstate commerce.[220] The political justification is that citizens in one state should not be harmed by laws of another state where they lacked political representation.[221]

Retail electric restructuring laws, particularly the reciprocity requirement, do not violate these justifications. The retail electric industry is controlled by state law. Traditionally, electric service has been a monopoly service with the state assigning specific service territories for electric utilities in exchange for the electric utility's duty to serve the public.[222] The ability of states to restrict competition in the area is not challenged, as confirmed by the FPA and police powers of the states.[223]

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territories) to the states' exclusive authority).

217. *See Arkansas Elec. Coop. Corp.*, 461 U.S. at 395.

218. *See* CHEMERINSKY, *supra* note 12, at 309.

219. *See id.*

220. *See id.*

221. *See id.*

222. *See, e.g.*, 220 ILL. COMP. STAT. 30/2 (West 1998) (declaring exclusive service territories as in the public interest to avoid duplication of facilities and increase efficiency of the State's retail electric system).

223. *See* Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983) (noting that the regulation of electric utilities is one of the most important functions associated with the police powers of the states); Springsteen, *supra* note 215.

Even though the electricity that comes into most homes and businesses is commingled with out-of-state electricity, thus affecting interstate commerce, currently, the states still retain the power to limit competition in the industry—erecting trade barriers.[224]

The purpose of state retail electric restructuring laws is to encourage competition in an industry that has always been a monopoly. These laws should be encouraged because they are eliminating trade barriers and not establishing them. The historical justification and the economic justification for the dormant Commerce Clause—to prohibit trade barriers and encourage the free flow of goods in interstate commerce—are actually promoted by retail electric open access laws. Also, the political justification for the dormant Commerce Clause—that citizens of one state should not be harmed by laws of another state where they lacked political representation—is not found in these reciprocity laws. The laws do not harm out-of-state citizens any more than the current anti-competitive laws that are within a state's authority to enact. States should be able to add a reciprocity requirement so that the transition from monopoly to competition can occur safely and with minimal risk to the electric infrastructure and the safety and welfare of the state's citizens.

The other reciprocity cases that were found to violate the dormant Commerce Clause were trying to prohibit the introduction or exportation of products from their states or were attempting to give local business a benefit.[225] The reciprocity laws are doing neither. They are an attempt to encourage other states to open their retail electric markets, so that an otherwise closed market can be competitive. The only recourse a state has to safely open its retail electric market is to require reciprocal access to other markets. The in-state electric utilities are not being specifically benefitted by the reciprocity laws; they are only prevented from harm by unfair competition.

A court made this argument when the Pennsylvania retail electric restructuring plan was challenged as violating the dormant Commerce Clause.[226] In *Indianapolis Power & Light Co. v. Pennsylvania Public Utility Commission*, IP&L challenged the plan's stranded cost[227] provision as a violation of the Commerce Clause. IP&L claimed that allowing the recovery of stranded costs gave in-state electric utilities an advantage over out-of-state electric utilities.[228] The court found that the law did not violate the Commerce Clause because it did not discriminate against interstate commerce and was strikingly unlike the laws invalidated by previous Supreme Court Commerce Clause decisions.[229] The

224. *See* Springsteen, *supra* note 215, at 251-52.

225. *See supra* text accompanying notes 103-20.

226. *See* Indianapolis Power & Light Co. v. Pennsylvania Pub. Util. Comm'n, 711 A.2d 1071, 1079 (Pa. Commw. Ct. 1998).

227. Stranded costs are the costs electric utilities put into new generation and power supply contracts in reliance on a monopoly market. When the monopoly status is taken away, most retail electric restructuring plans allow utilities to recover at least some of these costs from ratepayers.

228. *See Indianapolis Power & Light Co.*, 711 A.2d at 1075.

229. *See id.* at 1077.

court noted:

> [T]he statutes that were struck down by the Supreme Court involved the stifling of interstate commerce through local favoritism in then currently competitive markets. The Competition Act, read in whole, invites competition into an industry that has been historically limited to state-regulated monopolies, and as such, it is so distinct from Commerce Clause precedent that we must find that it does not involve the Commerce Clause. To hold otherwise would expand Supreme Court precedent . . . .[230]

The court claimed that the stranded cost provision was merely one element of a planned move toward competition in an Act that is the antithesis of a statute that discriminates against interstate commerce.[231] Finally, the court argued that the Commerce Clause should not be used to hinder states in their attempt to bring competition into the electric industry, noting that the move to competition is a national trend and states should be encouraged to experiment.[232]

These arguments easily apply to retail electric reciprocity clauses. While the courts have addressed the issue of state's attempting to encourage other states to enact certain laws or policies and found those arguments unpersuasive,[233] the courts have never dealt with a situation where a complete trade barrier existed and a single state was attempting to withdraw that barrier.

For example, in *Great Atlantic & Pacific Tea Co. v. Cottrell*, the Court argued that the Commerce Clause itself provided the necessary reciprocity and that if Mississippi thought Louisiana's laws discriminated against interstate commerce, Mississippi could sue.[234] However, that option is not available to a state with a retail electric reciprocity law. Other states may completely bar out-of-state utilities from supplying retail electric service and because of the FPA as amended, the other states are not violating the Commerce Clause.[235]

So, the Commerce Clause itself does not provide reciprocity in this situation. Furthermore, reciprocity is abundant in the electric and natural gas industries. Transmission reciprocity is required by the FERC for electric sales at wholesale.[236] True and fair competition cannot occur in the electric generation industry without it. Eventually, the retail electric market in every state will be open and reciprocity requirements will not be necessary. However, in the transition, reciprocal access is necessary and fair.

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230. *Id.* at 1076 n.7.

231. *See id.* at 1077.

232. *See id.* at 1082.

233. *See* New Energy Co. v. Limbach, 486 U.S. 269 (1988); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976); *see also supra* notes 109-20 and accompanying text.

234. *See Great Atlantic & Pacific Tea Co.*, 424 U.S. at 379.

235. *See supra* notes 215-16, 223.

236. *See Order 888*, *supra* note 56, at 31,635.

IV. POSSIBLE FEDERAL SOLUTIONS, OTHER OPTIONS

Clearly there are many hurdles facing the states as they attempt to open their retail electric markets to competition. An obvious solution to the constitutional challenges states may face is some form of federal action. The federal government could enact legislation that makes it clear who has jurisdiction to order retail wheeling and whether states have the power to require reciprocity. While the 105th Congress introduced fourteen electric restructuring bills, none of them were considered.[237] Yet, many in the industry are hopeful that the 106th Congress will finish the job.[238] Following are several options awaiting congressional action.

A. Date-Certain Retail Open Access and Distribution Reciprocity

Federal legislation could mandate states to open their retail electric markets to competition by a certain date.[239] Congress would need to clarify the FERC's role, perhaps by allowing it to order retail wheeling. Reciprocity could be allowed in the transition period, but would not be necessary once the date arrives when all states have open access.

Another Senate bill would write legislation that used the Commerce Clause to keep states from discriminating against consumers who purchase electricity in interstate commerce.[240] Senator Nickles' bill does not impose a federal mandate on the states, but the legislation has the same effect; all states must allow for open access to retail customers or be faced with a Commerce Clause challenge.[241] The bill takes away the state's authority under the FPA to create and maintain utility monopoly franchises. However, the bill still allows states to require reciprocity.[242]

While such legislation could answer the constitutional questions raised by this Note, there are political problems with mandating competition. Consumer groups complain a mandated deadline for states to open up retail markets could harm consumers.[243] States need flexibility so that consumers do not get stuck

237. *See* Victoria K. Green, *Congress Looks to Next Session to Work on Plugging in Electricity Restructuring*, THE OIL DAILY, Nov. 4, 1998, *available in* 1998 WL 9212080, at *1.

238. *See id.*; *see also Richardson Predicts Mandate Bill in '99*, RESTRUCTURING TODAY, Oct. 29, 1998, at 3 (Energy Secretary confident that electric restructuring bill will pass in 1999).

239. U.S. Representatives Largent and Paxon proposed a draft bill similar to this approach in 1998 and are expected to renew the bill in the 106th Congress. *See Recent Legislative Activity Indicates Push Is Still On to Restructure Electric Utility Industry During This Congress*, FOSTER ELECTRIC REPORT, July 1, 1998, Report No. 142, at 1, *available in* 1998 WL 7902285 [hereinafter *Push Is Still On*].

240. *See* Electric Consumer Choice Act, S. 2187, 105th Cong. (1998).

241. *See Nickles Introduces Restructuring Bill That Relies on Commerce Clause*, ELECTRIC UTILITY WEEK, June 22, 1998, at 6, *available in* 1998 WL 10046671.

242. *See Push Is Still On*, *supra* note 239, at 2.

243. *See Federal Mandates on Retail Access Would Harm Consumers, Report Says*, INSIDE F.E.R.C., Apr. 14, 1997, at 4, *available in* 1997 WL 9127275.

with paying for unreasonable stranded costs. If the open access date bargaining chip is taken away from states, utilities will be in a better bargaining position and retail customers could get stuck with an unfavorable plan.[244]

Another political consideration that Congress will need to recognize is that retail electric service is the state utility commissions' historical turf.[245] Federal mandates may not be politically popular in all states, particularly cheap electricity states.[246] In fact, regulators from twenty-three low cost electricity states have asked Congress not to mandate restructuring for the electric industry.[247] The states claim that they are in the best position to decide when and how the retail electric market should be opened.[248] The National Association of Regulatory Utility Commissioners ("NARUC") agrees, claiming that states should have exclusive jurisdiction over retail electric competition.[249]

B. Clarifying States' Authority While Not Requiring Open Retail Electric Markets

A better option for Congress seems to be legislation that clarifies what states can and cannot do to open their electric retail markets, while not requiring states to open their electric markets. Several bills were introduced in the 105th Congress and are expected to be reintroduced in 1999 that take this approach.[250] The Clinton administration bill is an apt example.[251] The bill would allow electric consumers to choose their electric supplier by 2003. However, the bill would allow states to opt-out and keep the status quo or an alternative state-crafted plan.[252] The bill, along with many others, would also allow states to require reciprocity.[253]

Many in the industry see this as an important function of federal legislation—ensuring that states can constitutionally require reciprocity.[254] Elizabeth Moler, Department of Energy Deputy Secretary, noted that "[t]he best

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244. *See id.*

245. *See* Jost, *supra* note 67, at 58.

246. *See Low-Cost States Say Feds Should Not Order Dereg*, MEGAWATT DAILY, Dec. 14, 1998, at 1.

247. The low-cost states include: Alabama, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin. *See id.* at 2.

248. *See id.* at 1.

249. *See id.* at 2.

250. *See* Green, *supra* note 237, at *1-2.

251. *See* Comprehensive Electricity Competition Act, S. 2287, 105th Cong. (1998).

252. *See Push Is Still On*, *supra* note 239, at 1.

253. *See, e.g.*, S. 2187, 105th Cong. (1998); S. 722, 105th Cong. (1997); S. 1276, 105th Cong. (1997); S. 1401, 105th Cong. (1997); H.R. 4715, 105th Cong. (1998).

254. *See Restructuring Bill or Statement of Principles? White House Is Unsure*, INSIDE ENERGY/ WITH FEDERAL LANDS, Dec. 15, 1997, at 5, *available in* 1997 WL 9131516.

we can do may be to recognize the authority of the state to decide . . . whether they want to limit the participation of utilities from outside their borders in their state programs if those utilities are not open."[255]

Another practical solution Congress could pursue to ensure that states have the authority to require reciprocity, if they so desire, is a reciprocity provision that contains a federal certification system.[256] Utilities could be certified by their home states as a utility that allows alternative electric suppliers into its territory. Then, that certification would serve as a ticket for that utility to serve in other states who have open access.[257] This approach allows states flexibility and can be done without drastically changing the federal/state jurisdictional roles, thereby making it politically appealing.[258] Any of the above federal alternatives that allow states flexibility is more politically likely to win congressional approval.

C. An Expanded Role for the FERC

Another possible solution to the jurisdictional and constitutional problems facing retail competition is for the FERC to expand its role now and have Congress follow with appropriate legislation. Of course, the FERC as an administrative agency is limited by the federal energy statutes.[259] However, there may be ways for the FERC to increase its involvement in retail competition while, technically, staying within those limits. The FERC's Commissioner Massey claimed that the FERC should consider extending Order 888 to cover retail service.[260] Cooperation between the FERC and the states could lead to grid regionalization through Independent System Operators or Regional Transmission Companies.[261] Dialogue with the states is needed in the transition to competition, but Massey believes that "[i]f FERC does not lead . . . the transition could spur inefficiency."[262] With fifty states enacting various retail restructuring programs, the FERC argues that gaps will occur. The FERC's Chairperson Hoecker suggested that perhaps the FERC is in the best position "to address these gaps and to harmonize the power marketplace both vertically (state/federal) and horizontally (state-to-state)."[263]

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255. *Id.*

256. *See* M. Bryan Little, *Wheeling Reciprocity; By Checklist or Certification?*, PUBLIC UTILITIES FORTNIGHTLY, June 15, 1998, at 46.

257. *See id.*

258. *See id.*

259. *See* PETER L. STRAUSS, ADMINISTRATIVE LAW; CASES AND COMMENTS 10 (9th ed.) (1995).

260. *See Massey: FERC Should Consider Extending 888 to Retail*, MEGAWATT DAILY, Nov. 10, 1998, at 3.

261. *See id.*

262. *Id.*

263. *See Hoecker Creates Ombudsman Position to Coordinate State/Federal Policies*, FOSTER ELECTRIC REPORT, Dec. 17, 1997, Report No. 128, at 2, *available in* 1997 WL 10339976, at *6.

However, any action by the FERC, absent congressional approval, may be seen by the states as a co-opting of state authority. The same political problems that exist with a congressional mandate, exist with the FERC taking over.

D. Interstate Compacts as a Solution

Another option for Congress is to authorize the states to create interstate compacts in the retail electric area. This option has the advantage of leaving the tough policy decisions of when and whether to open up retail markets to the states. Several states in one region could consent to retail electric reciprocity through a compact. In fact, states may not even need congressional approval to create interstate compacts. In *United States Steel Corp. v. Multistate Tax Commission*,[264] a multistate compact did not violate the Constitution's Compact Clause[265] even though it was not expressly authorized by Congress. The Court concluded that if an agreement did not diminish federal power or enhance state power at the expense of federal power, then congressional approval was not necessary.[266]

Thus, an examination of the particular interstate compact would be necessary to determine if federal power was being diminished. This would lead right back to the jurisdictional questions this Note examines. Another difficulty with such an option would be gaining cooperation with states within a region. It makes sense for states in close proximity to create an interstate reciprocity agreement, but these are the same states that are competing with each other for industrial loads, making common ground hard to find.

E. The Hold-Out Approach

A final option for states as they consider drafting retail electric restructuring legislation is simply to install a long transition period. That way states can act now to restructure the retail electric industry, but the constitutional issues involved will not be immediately ripe for judicial review.[267] By the time true retail electric choice occurs within the state, Congress will have acted, either to give the state the authority needed to proceed, or to mandate open access.

F. Should Retail Electric Reciprocity Be Required?

Now that the question of "can states do it?" has been considered, it is worth examining the question of "should states do it?" A National Association of Regulatory Utility Commissioners ("NARUC") resolution states that Congress

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264. 434 U.S. 452 (1978).

265. U.S. CONST. art. I, § 10, cl. 3.

266. *See United States Steel Corp.*, 434 U.S. at 471.

267. *See, e.g.*, American Energy Solutions v. Alabama Power Co., 16 F. Supp. 2d 1346 (M.D.Ala. 1998) (challenge of stranded cost surcharge provision in electric restructuring law not ripe for review until someone is charged the surcharge).

should *not* require or even allow states to voluntarily require reciprocity.[268] The resolution claims that retail electric reciprocity may reduce the choice of electric suppliers. Thus, consumers will be harmed by the unavailability of the cheapest source of electricity.[269] Furthermore, with a reciprocity requirement states may have to become reciprocity police, presenting enforcement problems.[270]

However, states will require certification of electric suppliers regardless, and the process of deciding if a certain supplier meets the reciprocity provision could be streamlined with the certification process.[271] Also, reciprocity has an air of fairness to it. It provides a safe means for states to open their markets with the assurance that in-state utilities will remain viable. That closed state utilities could increase revenues by supplying electricity in open states, while maintaining their monopoly status in their home state, just does not seem fair.

CONCLUSION

States should have the power to order retail wheeling under the current federal energy laws. The federal government has not preempted such authority, although as a practical matter, federal/state cooperation may be needed to make retail wheeling a reality. However, the four states' retail electric reciprocity clauses probably do violate the dormant Commerce Clause using traditional strict scrutiny Commerce Clause analysis. Yet, if a reciprocity clause was drawn so as not to facially or effectually discriminate against interstate commerce, then such a clause would pass the traditional Commerce Clause balancing test.

Furthermore, there are real reasons that a unique form of analysis should be used for examining the electric industry. Retail electric open access laws promote rather than impede interstate commerce in electric energy. As such, courts need to take the unique characteristics of the industry into account when examining retail electric restructuring laws. Perhaps, traditional Commerce Clause analysis just doesn't make sense in this newly competitive industry.

Finally, while there are many possible federal solutions to the issues this Note raises, the best course is for the federal government to allow the states to perform their novel experiments in the retail electric industry. When necessary, the federal government should step in only to give states the authority needed to ensure a fair transition to retail electric competition.

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268. *See State Utility Regulators Do Not Believe Electricity Legislation*, INSIDE ENERGY/WITH FEDERAL LANDS, Aug. 18, 1997, at 5, *available in* 1997 WL 9131107.

269. *See id.*

270. *See* Craig S. Cano, *Stranded-Costs Securitization, Reciprocity Draw State Regulators' Eye*, INSIDE F.E.R.C., July 28, 1997, at 9.

271. *See In re* the Restructuring of the Electric Utility Industry, 177 Pub. Util. Rep. 4th 201, at 220 (Mich. Pub. Serv. Comm'n June 5, 1997).