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Empowering Federal Regulation for a Changing Electricity Sector

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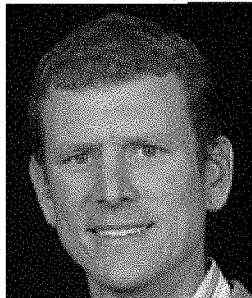
Felix Mormann, *Empowering Federal Regulation for a Changing Electricity Sector*, JOTWELL (July 4, 2016) (reviewing Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. Davis L. Rev. 1783 (2016)), <http://lex.jotwell.com/empowering-federal-regulation-for-a-changin2-electricity-sector/>.

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Empowering Federal Regulation for a Changing Electricity Sector

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Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 *U.C. Davis L. Rev.* 1783 (2016).



Felix Mormann

Today's electricity sector has little in common with the industry's humble origins in the late 1800s, when small power plants located every ten blocks or so served nearby customers through a local grid. Nor does it share many commonalities with the heavily regulated, largely monopolized electricity sector of the 1930s, whose interstate grid prompted passage of the 1935 Federal Power Act. And yet, this more than eighty-year-old statute continues to define the requirements and scope of federal and, indirectly, state regulatory authority over today's electricity sector. As deregulation and competitive markets, the rise of renewable energy, smart metering, and demand response transform the way electricity is generated, traded, transmitted, and used, regulators and courts are struggling to apply the Federal Power Act to a changing industry.

Earlier this year, the Supreme Court offered its views when, in *Federal Energy Regulatory Commission v. Electric Power Supply Association*, the Court recognized federal authority to regulate wholesale market operators' compensation of demand response—temporary reductions in electricity consumption by end-users at times of peak demand. In his thoughtful article *FERC's Expansive Authority to Transform the Electric Grid*, Professor Joel B. Eisen places *FERC v. EPSA* in historical context, proposes a set of principles to guide FERC's regulation of rules and practices that affect rates in wholesale power markets, and applies these principles to a hypothetical carbon price added to fossil-fueled electricity.

In *FERC v. EPSA*, a 6-2 majority of the Supreme Court reversed the D.C. Circuit's vacatur of FERC's Order No. 745 regarding demand response compensation in wholesale power markets, holding that the order was within FERC's authority under the Federal Power Act to ensure that rules and practices directly affecting wholesale rates are just and reasonable. EPSA and other critics had previously argued that the Federal Power Act could not be stretched to apply to wholesale market compensation for demand response—a concept clearly not contemplated during the Act's drafting over eighty years ago.

Professor Eisen's article offers an in-depth historical analysis that contextualizes and, ultimately, supports the Supreme Court's expansive reading of FERC's authority under the Federal Power Act. Starting with railroad regulation in the early 1900s—the origin of the Federal Power Act's "practices affecting rates" language—continuing with regulation of the electric utility industry from the Act's 1935 passage to the beginning of deregulation in the 1980s, and culminating with regulation of today's increasingly market-based electricity sector, Eisen examines the regulatory regime's evolution across two industries and one century. In the process, he identifies "a distinctive arc, featuring flexibility about conduct being regulated" that *FERC v. EPSA* continues.

But Professor Eisen's article offers more than historical context and validation for the Supreme Court's interpretation of the Federal Power Act. Policymakers, regulators, courts, and practitioners will appreciate the four-factor framework that Eisen proposes to guide future application of the Act's "practices affecting rates" standard for FERC authority. First, to be jurisdictional an activity must involve "FERC regulation of market rules or other aspects of direct participation by jurisdictional entities." Second, FERC may offer incentives to adjust inputs to markets under its supervision in order to maintain system reliability—even if these input adjustments impact the states. Third, the notion of practices under the Federal Power Act has evolved from firm-specific to market-wide practices, allowing (and, possibly, requiring) FERC to regulate the structure and operation of wholesale electricity markets. Fourth and finally, the activity in question must have "direct and significant impacts on wholesale rates," that is, "without the actions of an intervening decision maker." To illustrate the import of his proposed framework, Professor Eisen applies the above factors to a hypothetical FERC-mandated carbon adder for fossil-fueled electricity traded on wholesale power markets, which he suggests could be reconciled with *FERC v. EPSA*, assuming a proper finding of discrimination.

With *FERC's Expansive Authority to Transform the Electric Grid*, Professor Eisen adds to the growing literature on (clean) energy federalism an unprecedented historical analysis of FERC's authority under the 1935 Federal Power Act and a practical guide for its application to today's electricity industry. Demand response is but one of many drivers of the grid's ongoing transformation, with others, such as electricity storage, already waiting in the wings. *FERC v. EPSA* and Professor Eisen's fine article suggest that the Federal Power Act is still very much alive and up to the task of guiding the transition to a bright energy future.

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