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## Overcoming Jurisdictional Obstacles to Feed-In Tariffs in the United States

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## COMMENT

OVERCOMING JURISDICTIONAL  
OBSTACLES TO FEED-IN TARIFFS  
IN THE UNITED STATES

## I. INTRODUCTION

In the shadow of the established threat posed by climate change, the United States and other modernized nations require renewable energy resources both to satisfy an ever-increasing demand for energy and to combat energy-related environmental dangers.<sup>1</sup> Yet, in the United States, a time-tested solution for promoting renewable energy resources is threatened by out-of-date law. That solution is the Feed-In Tariff (FIT), and the threat consists of federal legislation and court decisions that effectively prohibit states from implementing FITs. A FIT is a mechanism for promoting renewable energy, such as that created by solar arrays and wind farms. A FIT helps create a stable, profitable market for renewable-energy investment by guaranteeing that renewable-energy generators have connectivity to the greater electrical grid and receive a price for their energy that makes their business profitable. Federal law, however, preempts states from implementing FITs.

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<sup>1</sup> See, e.g., Stephanie B. Ohshita, Ph.D., *The Scientific and International Context for Climate Change Initiatives*, 42 U.S.F. L. REV. 1, 1-10 (2007) (explaining the impacts and risks of global warming); see also Frank Princiotta, *The Role of Power Generation Technology in Mitigating Global Climate Change*, 18 DUKE ENVTL. L. & POL'Y F. 251, 273-75 (2008) (discussing renewable power generation that will mitigate global warming).

In the United States, the FIT's future is threatened by decades-old legislation, regulation, and court decisions that were appropriate for their time but have not kept pace with contemporary energy needs. Central to this threat is the concept of federal preemption of state jurisdiction over the transmission and sale of electrical energy. States, learning from the experiences of countries that have successfully implemented FITs, have begun to implement FITs of their own across the United States.<sup>2</sup> In the face of antiquated law, however, any FIT that a state creates will not withstand a challenge before the United States Supreme Court. This Comment proposes a jurisdictional carve-out that will grant states sufficient jurisdiction to reliably implement FITs.

Part II of this Comment provides a brief survey of the current rules that delineate federal and state jurisdiction over electrical energy in the United States. Part II also discusses three important exceptions to these jurisdictional rules. This Comment then examines the FIT in the scheme of federal versus state jurisdiction. Part III discusses the value of the FIT and then analyzes the development of current jurisdictional rules that make state-law FITs untenable in the current legal landscape. Finally, Part IV proposes a solution in the form of a jurisdictional carve-out modeled on the Rural Electrification Act, an initiative that the federal government launched to promote energy development.

## II. OVERVIEW: THE RULES OF JURISDICTION OVER THE TRANSMISSION AND SALE OF ELECTRICAL ENERGY IN THE UNITED STATES

In the United States, jurisdiction over the regulation of electrical energy defaults to the states, except where Congress expressly reserves jurisdiction for the Federal Energy Regulatory Commission (FERC).<sup>3</sup> FERC regulates the services and rates of facilities that enter electrical energy into

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<sup>2</sup> *E.g.*, Gainesville, Fla., Ordinance 080566 (Feb. 5, 2009), *available at* <http://www.gru.com/Pdf/AboutGRU/News/FIT/2009%20FIT%20Ordinance%20CLEAN.pdf> (introducing FIT legislation); *see also* U.S. DEPARTMENT OF ENERGY & THE STATE OF HAWAII, FEED-IN TARIFF CASE STUDIES: A WHITE PAPER IN SUPPORT OF THE HAWAII CLEAN ENERGY INITIATIVE 37-39, (Sept. 2008), *available at* [http://www.wind-works.org/FeedLaws/USA/hawaii\\_feedin\\_tariff\\_case\\_studies.pdf](http://www.wind-works.org/FeedLaws/USA/hawaii_feedin_tariff_case_studies.pdf).

<sup>3</sup> 16 U.S.C.A. § 824(b)(1) (Westlaw 2009).

interstate commerce.<sup>4</sup> This section first explains the circumstances that warrant federal jurisdiction under FERC. It then discusses remaining state jurisdiction over electrical energy. Lastly, this section examines key exceptions to the rules of federal and state jurisdiction to demonstrate that even established jurisdiction over electrical energy is not absolute.

#### A. FEDERAL JURISDICTION OVER ELECTRICAL ENERGY

The Public Utility Regulatory Policy Act (PURPA)<sup>5</sup> and the Federal Power Act (FPA)<sup>6</sup> determine federal jurisdiction over energy transmissions and transactions. These acts created FERC and authorized FERC to regulate those areas of the energy market that are subject to federal jurisdiction.<sup>7</sup> FERC has two jurisdictional “hooks,” or legal justifications, that it can invoke to assert jurisdiction over a legal matter.<sup>8</sup> One hook considers the transmission of energy, and the other considers the sale of energy.<sup>9</sup>

FERC has jurisdiction over all facilities that transmit electrical energy in interstate commerce.<sup>10</sup> A facility has transmitted electrical energy in interstate commerce if that energy has been subsequently consumed — meaning used and not resold — in another state.<sup>11</sup> This definition is significant because it does not require that a certain quantity or percentage of a facility’s energy be consumed in another state.<sup>12</sup> Under this language, if one facility transmits just a single electron to another state, where a retail customer consumes it, and a second facility transmits all of its energy production to another state for retail consumption, both facilities fall entirely under FERC jurisdiction.<sup>13</sup>

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<sup>4</sup> 16 U.S.C.A. § 813 (Westlaw 2009).

<sup>5</sup> 16 U.S.C.A. § 2601 et seq. (Westlaw 2009).

<sup>6</sup> 16 U.S.C.A. § 792 et seq. (Westlaw 2009).

<sup>7</sup> 16 U.S.C.A. §§ 792 et seq., 2601 et seq. (Westlaw 2009). Technically, the FPA created the Federal Power Commission (FPC), but the FPC was later abolished and its relevant powers transferred to FERC under the Department of Energy Organization Act. *See* 42 U.S.C.A. § 7101 et seq. (Westlaw 2009).

<sup>8</sup> 16 U.S.C.A. § 824(b)(1) (Westlaw 2009).

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

<sup>10</sup> *Id.*

<sup>11</sup> 16 U.S.C.A. § 824(c) (Westlaw 2009).

<sup>12</sup> *Id.*

<sup>13</sup> 16 U.S.C.A. § 813 (Westlaw 2009); *see also* 16 U.S.C.A. § 824(c) (Westlaw

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FERC also has jurisdiction over facilities that sell electricity, at wholesale, in interstate commerce.<sup>14</sup> A sale “at wholesale” occurs when one party sells electricity to any other party for the purpose of subsequent resale.<sup>15</sup> The definition of a sale of electricity in interstate commerce is more elusive, however, because though federal law defines the transmission of electrical energy in interstate commerce, the law neglects to expressly define the sale of electricity in interstate commerce.<sup>16</sup>

Whether a sale is “in interstate commerce” depends upon the generating facility’s connection to the greater electrical grid. Electrical energy is transmitted in interstate commerce when it is transmitted from a state and consumed outside the state.<sup>17</sup> This does not explain whether a sale from a generator to a reseller qualifies as “interstate” or “intrastate” because, in such a transaction, there is no immediately apparent consumer.<sup>18</sup> Without an identifiable consumer, regulators cannot determine if a transaction occurred intrastate or interstate.<sup>19</sup> Thus, FERC cannot assert jurisdiction until it makes this determination.<sup>20</sup>

Certain energy transactions, however, have already been evaluated for jurisdiction, resulting in a sweeping grant of jurisdiction to FERC.<sup>21</sup> A sale of electrical energy from a seller in one state to a buyer (whether reseller or consumer) in another state unquestionably triggers FERC jurisdiction.<sup>22</sup> FERC also has jurisdiction over a facility that sells electrical energy to another in-state company where that energy *definitely* arrives at a third party who is out of the state

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2009); *cf.* Fed. Power Comm’n v. Fla. Power & Light Co., 404 U.S. 453, 471 (1972) (Douglas, J., dissenting) (noting that mere interconnection to the grid invokes federal jurisdiction).

<sup>14</sup> 16 U.S.C.A. § 824(b)(1) (Westlaw 2009).

<sup>15</sup> 16 U.S.C.A. § 824(d) (Westlaw 2009).

<sup>16</sup> 16 U.S.C.A. § 824(c) (Westlaw 2009) (defining “in interstate commerce” with regard to the transmission of electrical energy but neglecting to expressly define “in interstate commerce” with regard to the wholesale sale of electrical energy).

<sup>17</sup> 16 U.S.C.A. § 824(c) (Westlaw 2009).

<sup>18</sup> *See* 16 U.S.C.A. § 824 (Westlaw 2009).

<sup>19</sup> *See id.*

<sup>20</sup> *See* 16 U.S.C.A. § 824(b) (Westlaw 2009).

<sup>21</sup> *See Fla. Power & Light Co.*, 404 U.S. at 458 (1972) (citing *United States v. Pub. Utils. Comm’n*, 345 U.S. 295, 311 (1953); *Conn. Light & Power Co. v. Fed. Power Comm’n*, 324 U.S. 515 (1945); *Pub. Utils. Comm’n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)).

<sup>22</sup> *Fla. Power & Light Co.*, 404 U.S. at 458.

(regardless of whether the energy is consumed by that third party).<sup>23</sup> Additionally, FERC can assert jurisdiction over a facility when evidence merely *supports* FERC's contention that the facility's energy is ultimately consumed in another state, even when FERC is unable to conclusively determine whether an out-of-state consumer does, indeed, consume that energy.<sup>24</sup> Under this rule, Seller X can sell electrical energy *intrastate* to Reseller Y, and as long as evidence indicates that some of this electrical energy *may* reach an out-of-state entity, Seller X is subject to FERC jurisdiction.<sup>25</sup>

## B. STATE JURISDICTION OVER ELECTRICAL ENERGY

Authority to regulate the energy industry defaults to the states if Congress has not granted regulation of a particular segment of the energy industry to FERC.<sup>26</sup> Since FERC has jurisdiction over interstate sale and transmission of electrical energy, states primarily regulate the *retail* sale of electrical energy to consumers.<sup>27</sup> To fulfill this role, states have jurisdiction over distribution systems, which are facilities that provide retail energy sales to consumers within the state.<sup>28</sup> State law, however, is not limited to regulation of retail-oriented distribution systems, but rather applies by default whenever FERC lacks jurisdiction.<sup>29</sup>

## C. EXCEPTIONS TO THE RULES OF FEDERAL AND STATE JURISDICTION OF ELECTRICAL ENERGY

Though the boundaries of FERC jurisdiction may seem simple, this simplicity is misleading. The division between federal and state jurisdiction over electrical energy is not as clear as the statutory language might imply, nor is it absolute. This section demonstrates some of the flexibility and

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<sup>23</sup> *Id.* at 458, 463.

<sup>24</sup> *Id.* at 469 (stating that the Court would not disturb the Commission's conclusions that were substantially supported by expert opinion, and adding that it was impossible for the Commission to prove that out-of-state energy reached wholesale customers).

<sup>25</sup> *See id.*

<sup>26</sup> 16 U.S.C.A. § 824(b)(1) (Westlaw 2009).

<sup>27</sup> *See* 16 U.S.C.A. § 796(15) (Westlaw 2009).

<sup>28</sup> 16 U.S.C.A. § 824(b)(1) (Westlaw 2009).

<sup>29</sup> *Id.*

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complexity of the rules of jurisdiction over electrical energy transactions.

### 1. *The “Dual Use” Exception*

Interconnections to distribution systems are usually subject to state jurisdiction, but FERC can assert jurisdiction over distribution systems when those systems are “dual use.”<sup>30</sup> An “interconnection” consists of a physical pathway for electrical energy plus the agreements between parties with regard to the flow of electricity over the pathway.<sup>31</sup> A distribution system is “dual use” when it engages in both interstate energy transactions and local distribution of energy.<sup>32</sup> FERC can assert jurisdiction over interconnections to a dual-use distribution facility only when the facility is included in a public utility’s open access transmission tariff (OATT).<sup>33</sup> When a public utility company falls under FERC jurisdiction because it transmits electrical energy in interstate commerce, FERC requires the public utility company to post an OATT.<sup>34</sup> This tariff is the rate<sup>35</sup> that the public utility company must charge all market participants that pay for access to and use of facilities that the public utility company owns or operates.<sup>36</sup> Without OATTs, a public utility company would be able to manipulate the market by charging favored participants a lower rate than other participants.<sup>37</sup> OATTs level the playing

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<sup>30</sup> See Standardization of Generator Interconnection Agreements and Procedures, 104 F.E.R.C. ¶ 61,103 at para. 804 (2003); see also *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 1282 (D.C. Cir. 2007).

<sup>31</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007).

<sup>32</sup> See Standardization of Generator Interconnection Agreements and Procedures, 104 F.E.R.C. ¶ 61,103 at para. 804 (2003); see also *Nat’l Ass’n of Regulatory Util. Comm’rs*, 475 F.3d at 1282.

<sup>33</sup> The National Association of Regulatory Commissioners argued that FERC violates its jurisdiction by exercising authority over dual-use facilities, but the D.C. Circuit rebuffed this argument, so federal jurisdiction of dual-use distribution systems is an inescapable consideration for power providers. *Nat’l Ass’n of Regulatory Util. Comm’rs*, 475 F.3d at 1281-82. If the court had held otherwise, public utility companies would now have an incentive to dodge federal jurisdiction simply by using dual-use facilities. *Id.* at 1282 (D.C. Cir. 2007).

<sup>34</sup> 18 C.F.R. § 35.28 (Westlaw 2009).

<sup>35</sup> The rate is in dollars per unit of energy, such as dollars per kW-month. See, e.g., *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 405 (D.C. Cir. 2000).

<sup>36</sup> 18 C.F.R. § 35.28 (Westlaw 2009).

<sup>37</sup> See *Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 822 (D.C. Cir. 2008); see also

field among energy-industry participants.<sup>38</sup> When a public utility company operates, even in part, a facility that is also a local distribution system, interconnections to that facility can be included in the public utility's OATT and thus can be regulated by FERC.<sup>39</sup> This is true even though the distribution system is normally subject to state jurisdiction.<sup>40</sup>

## 2. *The Qualifying Facility Exception: The "PURPA Sale"*

FERC can delegate its regulatory authority to the states in certain circumstances.<sup>41</sup> The FPA permits an energy-producing facility that meets certain criteria<sup>42</sup> to register as a "qualifying facility" (QF).<sup>43</sup> PURPA authorizes states, rather than FERC, to regulate sales of energy from QFs to utility companies when the QF sells *all* of its power to a utility company.<sup>44</sup> State regulation includes regulation of the price that the QF can ask for its energy.<sup>45</sup>

A sale of energy by a state-regulated QF is known as a "PURPA sale."<sup>46</sup> PURPA sales are by definition wholesale sales — that is, sales for resale — because PURPA explicitly denied FERC the authority to make rules that would authorize a QF to make a non-resale sale.<sup>47</sup> Congress initiated PURPA sales to foster the development of renewable-energy generators by

Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 680-81 (D.C. Cir. 2000); Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, 21,541 (May 10, 1996).

<sup>38</sup> See *Pac. Gas & Elec. Co.*, 533 F.3d at 822; see also *Transmission Access Policy Study Group*, 225 F.3d at 680-81; *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. at 21,541.

<sup>39</sup> *Nat'l Ass'n of Regulatory Util. Comm'rs*, 475 F.3d at 1282.

<sup>40</sup> *Id.*

<sup>41</sup> See 16 U.S.C.A. § 2601 et seq. (Westlaw 2009).

<sup>42</sup> A QF must (1) meet maximum-size criteria, (2) meet fuel-use criteria, and (3) file with FERC. 18 C.F.R. § 292.203 (Westlaw 2009).

<sup>43</sup> 40 C.F.R. § 72.2 (Westlaw 2009) ("Qualifying facility (QF) means a 'qualifying small power production facility' within the meaning of [16 U.S.C. § 796](17)(C) . . . or a 'qualifying cogeneration facility' within the meaning of [16 U.S.C. § 796] (18)(B)").

<sup>44</sup> 16 U.S.C.A. § 824a-3 (Westlaw 2009); 18 C.F.R. §§ 292.303(c), 292.306(a) (Westlaw 2009).

<sup>45</sup> 18 C.F.R. § 292.302(e)(1) (2009).

<sup>46</sup> Comments of the Transmission Access Policy Study Group, Docket No. RM05-36-000 (2005), available at [http://www.appanet.org/files/PDFs/APPA\\_Cmts\\_RM05-36\\_11-8-05%5Basfiled%5D.pdf](http://www.appanet.org/files/PDFs/APPA_Cmts_RM05-36_11-8-05%5Basfiled%5D.pdf); see also 16 U.S.C.A. § 824a-3 (Westlaw 2009).

<sup>47</sup> 16 U.S.C.A. § 824a-3(a) (Westlaw 2009).



requiring public utility companies to buy energy from and sell energy to renewable-energy generators at a price that was determined by the states but bounded by FERC.<sup>48</sup> PURPA sales are known as “avoided-cost”<sup>49</sup> sales because, by statute, the price that a QF charges a public utility to buy the QF’s energy cannot exceed the price that a public utility would pay to generate the energy itself.<sup>50</sup> Furthermore, a rate can be lower than the avoided-cost amount only if such a rate (1) would “[b]e just and reasonable to the electric consumer,” (2) would serve the interest of the public, and (3) would not discriminate against renewable facilities.<sup>51</sup>

### 3. *The On-Site Exception*

FERC has declined to assert jurisdiction when a retail customer installs a generator that produces energy that is consumed where it is generated, known as “on-site” consumption.<sup>52</sup> Jurisdiction in such an instance defaults to the state.<sup>53</sup> FERC declines to assert jurisdiction even if the on-site generator participates in net metering, so long as the site never generates more than it consumes.<sup>54</sup> “Net metering” permits a retail customer to send energy (created on the customer’s own site using a generator such as a solar array) back to the public utility company to which the customer connects, effectively rewinding the customer’s electric meter so that the customer only pays the public utility for a “net” amount of energy calculated as the amount consumed from the public utility minus the amount provided to the public utility.<sup>55</sup> This is significant because energy produced from a net-metered solar site can conceivably enter interstate commerce,<sup>56</sup> and as

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<sup>48</sup> *Id.*

<sup>49</sup> Conn. Light & Power Co., 71 F.E.R.C. ¶ 61,035, at 61,153 (1995) (noting that FERC concluded that states “may not impose rates that exceed avoided cost for sales by qualifying facilities . . . at wholesale”).

<sup>50</sup> 16 U.S.C.A. § 824a-3(b) (Westlaw 2009).

<sup>51</sup> 18 C.F.R. § 292.304(a) (Westlaw 2009).

<sup>52</sup> Standardization of Generator Interconnection Agreements and Procedures 104 F.E.R.C. ¶ 61,103 at para. 805 (2003).

<sup>53</sup> 16 U.S.C.A. § 824(b)(1) (Westlaw 2009).

<sup>54</sup> *See* MidAmerican Energy Co., 94 F.E.R.C. ¶ 61,340, at 62,263 (2001).

<sup>55</sup> 16 U.S.C.A. § 2621(d)(11) (Westlaw 2009); *see also* Cal. Pub. Util. Code §§ 2827.9(b)(4), 2827.10(a)(4) (Westlaw 2009).

<sup>56</sup> *See* MidAmerican Energy Co., 94 F.E.R.C. ¶ 61,340, at 62,262 (2001).

discussed, such a flow would otherwise justify FERC jurisdiction.<sup>57</sup>

### III. FEED-IN TARIFFS: EFFECTIVE BUT UNSUPPORTABLE UNDER U.S. LAW

The FIT is a measurably effective mechanism for promoting renewable energy, but a state's authority to implement this mechanism is painfully tenuous. This section first discusses the value of the FIT. Then, this section analyzes the case law that makes a state-implemented FIT so untenable.

#### A. FEED-IN TARIFFS ARE A PROVEN METHOD FOR PROMOTING RENEWABLE-ENERGY GENERATION

The FIT is a means of promoting renewable energy. The FIT is a mechanism for renewable-energy generators to sell power to a public utility at predefined terms and conditions, without contract negotiations.<sup>58</sup> The FIT is a designated price (sometimes coupled with a designated purchase requirement) that a public utility company must pay whenever it buys energy from a renewable-energy producer.<sup>59</sup> The purpose of these tariffs is to encourage renewable-energy production<sup>60</sup> by guaranteeing that renewable-energy generators have connectivity to the grid and receive a price for their energy that makes their business profitable.<sup>61</sup> FITs have the added advantage of stabilizing renewable-energy markets, thus lowering the risk to investors and, as a result, the cost of renewable energy.<sup>62</sup>

FITs have been a proven success, and their

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<sup>57</sup> *Fla. Power & Light Co.*, 404 U.S. at 458-69.

<sup>58</sup> See Dr. Jan Hamrin, *China's New Renewable Energy Law: The California Connection*, 36 GOLDEN GATE U.L. REV. 413, 430 n.4 (2006).

<sup>59</sup> See, e.g., Cal. Pub. Util. Code § 399.20(d) (Westlaw 2009); see also *Feed-in Tariffs' Potential Role in US Renewable Power Development* (Sept. 2, 2008), available at <http://www.cera.com/aspx/cda/client/report/reportpreview.aspx?CID=9707&KID=9>.

<sup>60</sup> See, e.g., Cal. Pub. Util. Code § 399.20(a) (Westlaw 2009); A.B. 1969, 2005-2006 Reg. Sess. (Cal. 2006) (adding section 399.20 to the Public Utilities Code).

<sup>61</sup> U.S. DEPARTMENT OF ENERGY AND THE STATE OF HAWAII, FEED-IN TARIFF CASE STUDIES: A WHITE PAPER IN SUPPORT OF THE HAWAII CLEAN ENERGY INITIATIVE 7 (Sept. 2008), available at [http://www.wind-works.org/FeedLaws/USA/hawaii\\_feedin\\_tariff\\_case\\_studies.pdf](http://www.wind-works.org/FeedLaws/USA/hawaii_feedin_tariff_case_studies.pdf).

<sup>62</sup> *Id.* at 9.

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implementation is spreading. In Germany, where FITs primarily originate, FITs have contributed to increasing the country's non-hydroelectric renewable-energy generation from about 1% of the country's generation in 1990 to about 14% in 2007.<sup>63</sup> Spain implemented FITs to successfully grow its wind-generated renewable-energy sector and has now updated its laws to promote other segments of the renewable-energy market.<sup>64</sup> FITs have also seen success in Portugal, France, Denmark, and Canada.<sup>65</sup> In the United States, Florida,<sup>66</sup> Minnesota, Rhode Island, Michigan, Hawaii, Illinois, California, and Vermont have introduced FIT legislation.<sup>67</sup> The success and continuing adoption of FITs indicate that, in the absence of a federal implementation, states must retain the regulatory authority to implement FITs in order to take advantage of this incentive for renewable-energy generation.

B. STATE ASSERTIONS OF THE JURISDICTION NECESSARY TO IMPLEMENT FEED-IN TARIFFS WILL NOT SURVIVE A CHALLENGE BEFORE THE UNITED STATES SUPREME COURT

Jurisdictional conflicts make FITs generally unenforceable by any regulatory body other than FERC. Based on current federal law regarding jurisdiction over energy facilities, states lack the authority to implement FITs because FERC regulates the price of wholesale sales of electrical energy in interstate commerce.<sup>68</sup> Under a FIT, a renewable-energy generator's sale is a sale at wholesale because the generator is selling the energy for subsequent resale. If that renewable-energy generator sells that energy in interstate commerce, then FERC jurisdiction applies and states lose the authority to designate

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<sup>63</sup> *Id.* at 12.

<sup>64</sup> *Id.* at 14.

<sup>65</sup> *Id.* at 15-23 (including an increased energy market in Portugal, a stronger photovoltaic industry in France, the highest percentage of renewable energy of any state in the European Union in Denmark, and a boost in wind and solar power in Canada).

<sup>66</sup> Gainesville, Fla., Ordinance 080566 (Feb. 5, 2009) available at <http://www.gru.com/Pdf/AboutGRU/News/FIT/2009%20FIT%20Ordinance%20CLEAN.pdf> (introducing FIT legislation).

<sup>67</sup> U.S. DEPARTMENT OF ENERGY AND THE STATE OF HAWAII, FEED-IN TARIFF CASE STUDIES: A WHITE PAPER IN SUPPORT OF THE HAWAII CLEAN ENERGY INITIATIVE 37-39, (Sept. 2008), available at [http://www.wind-works.org/FeedLaws/USA/hawaii\\_feedin\\_tariff\\_case\\_studies.pdf](http://www.wind-works.org/FeedLaws/USA/hawaii_feedin_tariff_case_studies.pdf).

<sup>68</sup> See 16 U.S.C.A. 824a-3(b) (Westlaw 2009).

FIT pricing, thus eliminating the FIT. Case law indicates that electrical energy from a renewable-energy generator is likely to be classified as participating in interstate commerce, thus subjecting the facility to FERC jurisdiction and rendering states incapable of enacting FITs.<sup>69</sup>

### 1. *Commingling Theory: FERC's Jurisdictional Sweep*

Case law establishes that FERC has jurisdiction over sales of energy from renewable generating facilities to in-state public utility companies.<sup>70</sup> The Supreme Court has held that when an entity generates electrical energy and that energy is transmitted — even indirectly — in interstate commerce, that entity is subject to the jurisdiction of the federal authority for energy regulation.<sup>71</sup> This ruling remains good law.<sup>72</sup> The reasoning, however, is out of date. FERC jurisdictional rules were largely established years before PURPA was written into law, and those pre-PURPA jurisdictional rules still apply, inhibiting modern FITs.<sup>73</sup>

In *Federal Power Commission v. Florida Power & Light Co.*, the Supreme Court provided a sweeping grant of jurisdiction to federal regulators, but the grant was both avoidable and unnecessary. The controversy that led to this grant of jurisdiction centered upon Florida Power & Light Co. (FP&L), a public utility company.<sup>74</sup> The Federal Power Commission, the predecessor of FERC, sought jurisdiction over FP&L.<sup>75</sup> FP&L did not connect to any out-of-state utility company and so did not conduct any direct transmissions of electrical energy to out-of-state buyers.<sup>76</sup> Such transmissions would certainly have subjected FP&L to federal regulation.<sup>77</sup> However, FP&L was also a member of the Interconnected Systems Group (ISG), a national network of utilities that automatically provided power across state lines in

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<sup>69</sup> See *Fla. Power & Light Co.*, 404 U.S. at 471 (Douglas, J., dissenting).

<sup>70</sup> See *id.* at 454-55 (majority opinion).

<sup>71</sup> *Id.* at 455-56.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 455-57.

<sup>75</sup> *Fla. Power & Light Co.*, 404 U.S. at 455.

<sup>76</sup> *Id.* at 456-57.

<sup>77</sup> *Id.* at 458.

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emergencies.<sup>78</sup> Federal regulators had evidence that FP&L sent power to an out-of-state utility through the ISG system<sup>79</sup> and could have used that evidence to justify federal jurisdiction over FP&L.<sup>80</sup>

Unfortunately, the Supreme Court took a different approach. Though FP&L did not directly transmit energy to an out-of-state entity, FP&L did connect to the Florida Power Corporation.<sup>81</sup> The Florida Power Corporation connected to a utility company in Georgia<sup>82</sup> and regularly exchanged power with that company.<sup>83</sup> The Court accepted the Federal Power Commission's theory that FP&L energy *commingled* with Florida Power Corporation energy and as a result was *probably* transmitted to Georgia, thus subjecting FP&L to federal jurisdiction.<sup>84</sup>

FP&L connected to the Florida Power Corporation over a three-strand power line, called a "bus."<sup>85</sup> The Federal Power Commission contended that the bus acted as a reservoir where energy commingled.<sup>86</sup> FP&L countered that a bus was not a pool of energy where electrons commingle, but rather a line that receives and loses energy at discrete, identifiable points.<sup>87</sup> FP&L contended that the nature of the line established that power from FP&L would be drawn off the line without ever crossing to Georgia.<sup>88</sup> The Court, however, accepted the commingling theory of the Federal Power Commission's expert — even though the expert admitted that commingling was *not* established as scientific fact<sup>89</sup> — by determining that expert testimony may qualify as substantial evidence.<sup>90</sup> Substantial evidence is conclusive in the judicial review of a FERC order,<sup>91</sup> and the Court expressly declined to apply a standard of

<sup>78</sup> *Id.* at 457.

<sup>79</sup> *Id.*

<sup>80</sup> *See* *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61, 70 (1943).

<sup>81</sup> *Fla. Power & Light Co.*, 404 U.S. at 456-57.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 457.

<sup>84</sup> *Id.* at 461-69.

<sup>85</sup> *Id.* at 462.

<sup>86</sup> *Id.* at 462-63.

<sup>87</sup> *Fla. Power & Light Co.*, 404 U.S. at 462.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 464 n.13.

<sup>90</sup> *Id.* at 462-68.

<sup>91</sup> 16 U.S.C.A. § 8251(b) (Westlaw 2009).

scientific certainty.<sup>92</sup> This interpretation by the Supreme Court of the substantial-evidence standard gave the Federal Power Commission a much greater likelihood of establishing jurisdiction over a facility, because theory would suffice where proof had not been obtained.

The dissenting Justices in *Florida Power & Light* presciently noted the ramifications of the majority's decision.<sup>93</sup> Keeping in mind that any interstate transmission of power, no matter how small, is sufficient for federal jurisdiction to attach,<sup>94</sup> the dissenting Justices noted that every non-isolated energy facility is subject to federal jurisdiction.<sup>95</sup> The Supreme Court effectively reversed the burden of proof in jurisdictional conflicts. Instead of requiring federal regulators to prove that a generator's energy actually flows in interstate commerce, regulators can assume the hypothetical flow based on commingling theory. As a result, power providers shoulder the burden of proving that their energy does not cross state lines. Under such a scheme, FERC effectively holds jurisdiction over any sale of energy at wholesale unless the generating facility can demonstrate that its power does not enter interstate commerce. Thus, states can only regulate the rates of renewable-energy generators that demonstrably avoid interstate transmission; therefore, states can apply FITs only to such facilities.

## 2. *Feed-In Tariffs Win a Battle but Lose the War: The Consequences of Consolidated Edison*

In *Consolidated Edison Co. v. Public Service Commission*, FITs won a state battle but lost a federal war. In 1984, the New York Court of Appeals examined whether PURPA preempted states from requiring electric utilities to purchase power from federal qualifying facilities at rates in excess of the PURPA avoided-cost limit.<sup>96</sup> The New York Court of Appeals held that PURPA permitted states to exceed PURPA limits,

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<sup>92</sup> *Fla. Power & Light Co.*, 404 U.S. at 467.

<sup>93</sup> *Id.* at 470-71 (Douglas, J., dissenting, joined by Burger, C.J.).

<sup>94</sup> *See id.* at 461 n.10 (majority opinion).

<sup>95</sup> *Id.* at 470-71 (Douglas, J., dissenting).

<sup>96</sup> *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 63 N.Y.2d 424 (1984), *appeal dismissed*, 470 U.S. 1075 (1985).

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and this ruling remains the law in New York State.<sup>97</sup> Subsequently, the United States Supreme Court denied review due to lack of a federal question, and FERC directly repudiated the position of the New York Court of Appeals by changing the regulatory language upon which New York's highest court based its decision.<sup>98</sup>

In *Consolidated Edison*, the state of New York passed a law requiring all utility companies to purchase energy from *state* qualifying facilities at a rate of not less than six cents per kW-hour, even though such a rate exceeded the avoided cost of the state utility companies.<sup>99</sup> Often, generators that qualified as state qualifying facilities also qualified as federal qualifying facilities under the FPA and, as a result, state law forced utility companies to pay more than avoided-cost rates to federal qualifying facilities.<sup>100</sup> Consolidated Edison, a public utility company, argued that New York's law was preempted by PURPA.<sup>101</sup> The New York Court of Appeals held that PURPA's avoided-cost rate provided a ceiling to rate-setting by *federal* regulations, but it did not prevent *state* law from increasing rates to further promote renewable energy.<sup>102</sup> The New York Court of Appeals based its decision on PURPA's legislative history and, more solidly, on the Preamble to FERC Rules.<sup>103</sup> The Preamble, from 1980, notes that "[s]tates are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of [renewable energy] technologies."<sup>104</sup>

The ruling was a valiant attempt on the part of the New York Court of Appeals to encourage states to promote alternative energy, but it was a strategy doomed to failure on a national scale. FERC has authority over wholesale sales of electrical energy in interstate commerce.<sup>105</sup> PURPA gave FERC the power to delegate ratemaking authority to states, but FERC applied an avoided-cost cap to that ratemaking

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<sup>97</sup> *Id.* at 433.

<sup>98</sup> Conn. Light & Power Co., 71 F.E.R.C. ¶ 61,035, at 61,052-53 (1995).

<sup>99</sup> *Consol. Edison Co. of N.Y.*, 63 N.Y.2d at 435 n.6.

<sup>100</sup> *Id.* at 432, 435 n.6.

<sup>101</sup> *Id.* at 433.

<sup>102</sup> *Id.* at 435-36.

<sup>103</sup> *Id.* at 436.

<sup>104</sup> *Id.* at 436 n.8.

<sup>105</sup> 16 U.S.C.A. § 824(b)(1), (d) (Westlaw 2009).

authority.<sup>106</sup> Neither PURPA nor FERC's regulations give states the authority to exceed FERC's avoided-cost cap on federal qualifying-facility rates. The New York Court of Appeals took advantage of the Preamble to FERC's regulation, but FERC took note and subsequently explained that FERC regulations and PURPA do *not* permit federal qualifying-facility rates, at wholesale, in excess of avoided cost.<sup>107</sup> Federal regulators then removed from the Preamble the language on which the New York Court of Appeals relied.<sup>108</sup> Today, *Consolidated Edison* continues to permit New York regulators to exceed PURPA's avoided-cost cap on federal qualifying-facility pricing, but the justification for the ruling in *Consolidated Edison* has vanished.

*Consolidated Edison* did not reach the Supreme Court, and subsequently the legal justification for the decision of the New York Court of Appeals has diminished, leaving states that followed New York's example in a precarious legal situation. The parties to *Consolidated Edison* sought Supreme Court review of the New York Court of Appeals' decision, and the Supreme Court dismissed the appeal for want of a federal question.<sup>109</sup> In a thoughtful dissent to the majority's dismissal, Justice White noted that state courts of last resort had reached conflicting decisions regarding state power under PURPA.<sup>110</sup> Some states other than New York had authorized rates that exceeded avoided costs, and other states had enforced avoided-cost limits.<sup>111</sup> This issue remains undecided by the Supreme Court even now as states have begun to implement FITs. More importantly, the strongest basis for the decision of the New York Court of Appeals — the statement in FERC's Preamble — has evaporated since the parties of *Consolidated Edison* sought review.<sup>112</sup> As a result, the issue remains open for Supreme Court review, but states lack a practicable argument for asserting jurisdiction.

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<sup>106</sup> 16 U.S.C.A. § 824a-3(b) (Westlaw 2009).

<sup>107</sup> 71 F.E.R.C. ¶ 61,035, at 61,153 (1995).

<sup>108</sup> *Id.*

<sup>109</sup> *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 470 U.S. 1075 (1985).

<sup>110</sup> *Id.* at 1077-78 (White, J., dissenting).

<sup>111</sup> *Id.*

<sup>112</sup> 71 F.E.R.C. ¶ 61,035, at 61,153 (1995).



IV. THE SOLUTION: A FEDERAL LEGISLATIVE CARVE-OUT  
GRANTING JURISDICTION OVER RENEWABLE-ENERGY  
RESOURCES TO THE STATES

To permit states to enforce FITs without the fear of federal preemption, Congress must grant jurisdiction over renewable-energy generators to the states. Neither the concept of state regulation of interstate energy transactions nor the idea of the FIT is alien to Congress. This section discusses a prior instance of state authority over electrical energy in interstate commerce that can serve as a model for a FIT carve-out. This section also addresses the potential for and ramifications of a federal FIT as a next step in the evolution of energy regulation in the United States, but notes that a failure to protect existing and potential state FITs in the meantime is a needless and counterproductive risk.

A. THE PRECURSOR TO A CARVE-OUT FOR FEED-IN TARIFFS

State jurisdiction over the wholesale sale of electrical energy in interstate commerce is not unprecedented. The wholesale rates charged by rural power cooperatives, as permitted under the Rural Electrification Act (REA) in order to bring electricity to rural regions, are not subject to federal regulation.<sup>113</sup> Federal regulators (at the time, the Federal Power Commission, the predecessor to FERC) determined that they had no jurisdiction over the wholesale sale of electrical energy in interstate commerce when that energy was generated by facilities that were subject to the authority of the Rural Electrification Administration<sup>114</sup> under the REA.<sup>115</sup> Federal regulators concluded that cooperatives operating under the REA qualified as instrumentalities of the United States<sup>116</sup> and thus were exempt from the FPA, which was intended to regulate private, for-profit enterprises.<sup>117</sup>

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<sup>113</sup> See *In re Dairyland Power Coop.*, 37 F.P.C. 12 (1967).

<sup>114</sup> *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 381-82 (1983).

<sup>115</sup> 7 U.S.C.A. § 901 et seq. (Westlaw 2009).

<sup>116</sup> *In re Dairyland Power Coop.*, 37 F.P.C. at 17 n.6 (citing the exception in the FPA).

<sup>117</sup> *Id.* at 15-16 (“The purpose of [the FPA] was most clear: it was designed to prevent the notorious investment and profit abuses which had developed in the industry under the domination of the holding companies. . . . We think that [the exemption provided by FPA § 201(f)] obviously discloses a congressional intent to

In the absence of federal authority, state jurisdiction applied.<sup>118</sup> In *Arkansas Electric Cooperative Corp. v. Arkansas Public Services Commission*, the Supreme Court determined that when federal regulators lacked jurisdiction over electricity-generating facilities, state regulators could assert jurisdiction over those facilities — and thus designate rates for those facilities — even though the facilities connected to an interstate grid and therefore ostensibly participated in interstate commerce.<sup>119</sup> The facilities in controversy when the Supreme Court made its ruling were run by the Arkansas Electric Cooperative Corporation (AECC), a rural power cooperative.<sup>120</sup> Though the AECC connected to the interstate grid, its basic operation consisted of supplying power from in-state generating facilities to in-state member cooperatives.<sup>121</sup> Those cooperatives then sold the power to consumers.<sup>122</sup> Because the AECC sold energy for resale, its sales were wholesale sales.<sup>123</sup> Because the AECC connected to the interstate grid, its sales took place in interstate commerce.<sup>124</sup> Such sales would normally be subject to federal regulation.<sup>125</sup> However, REA facilities such as the AECC were exempt from federal energy regulation.<sup>126</sup> The Rural Electrification Administration lacked power over in-state electricity rates, so it could not regulate the AECC's in-state sales to member cooperatives.<sup>127</sup> With neither federal regulators nor the Rural Electrification Administration able to regulate the rates of AECC's sales to member cooperatives, states held rate-making authority over the facilities even though the facilities conducted wholesale sales of electrical energy in interstate

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subject private enterprise alone to regulation by [federal regulators]." (citing *In re Neb. Power Co.*, 5 F.P.C. 8, 19 (1946)).

<sup>118</sup> See *Ark. Elec. Coop. Corp.*, 461 U.S. at 377, 381-82.

<sup>119</sup> *Id.* at 381.

<sup>120</sup> *Id.* at 380-81.

<sup>121</sup> *Id.* at 394.

<sup>122</sup> *Id.* at 381.

<sup>123</sup> 16 U.S.C.A. § 824(d) (Westlaw 2009).

<sup>124</sup> See *Fla. Power & Light Co.*, 404 U.S. at 470-71 (Douglas, J., dissenting).

<sup>125</sup> *Id.*; see also *Ark. Elec. Coop. Corp.*, 461 U.S. at 381 ("If AECC were not a rural power cooperative, the wholesale rates it charges to its members would . . . be subject exclusively to federal regulation.").

<sup>126</sup> *Ark. Elec. Coop. Corp.*, 461 U.S. at 381-82.

<sup>127</sup> *In re Dairyland Power Coop.*, 37 F.P.C. 12 (1967) (noting that the Rural Electrification Administrator was "absolutely without power in the matter of fixing rates within the boundaries of a state").

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commerce.<sup>128</sup>

In addition to determining jurisdiction, the Supreme Court also noted that state regulation of energy in interstate commerce did not violate the Dormant Commerce Clause<sup>129</sup> unless the burden imposed on interstate commerce was clearly excessive in relation to the local benefits of the regulation.<sup>130</sup> This is crucial because the Dormant Commerce Clause can prevent a state from regulating aspects of interstate commerce.<sup>131</sup> Because precedent has established that generators connected to a grid participate in interstate commerce,<sup>132</sup> the Supreme Court had to evaluate whether Arkansas' regulation of rates of electrical energy wholesale sales in interstate commerce violated the dormant Commerce Clause.<sup>133</sup> The Court reasoned that such regulation did not violate the dormant Commerce Clause because the regulation did not qualify as economic protectionism since the regulation did not bolster the state's economic interest at the expense of other states, and because regulating electricity is a legitimate local public interest.<sup>134</sup>

The Supreme Court's determination that states could regulate the energy rates of cooperatives in the absence of federal regulation without violating the dormant Commerce Clause would be equally applicable to the analogous circumstances of renewable-energy generators. Yes, such generators would be connected to the interstate grid, and thus under accepted reasoning they would be sending power into interstate commerce. Fundamentally, though, they would be selling the power that they generate to in-state public utility

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<sup>128</sup> *Ark. Elec. Coop. Corp.*, 461 U.S. at 377, 381-82.

<sup>129</sup> The Dormant Commerce Clause is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

<sup>130</sup> *Ark. Elec. Coop. Corp.*, 461 U.S. at 393-94.

<sup>131</sup> *See Pike*, 397 U.S. at 178 ("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." (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960))).

<sup>132</sup> *See Fla. Power & Light Co.*, 404 U.S. at 470-71 (Douglas, J., dissenting).

<sup>133</sup> *Ark. Elec. Coop. Corp.*, 461 U.S. at 389 ("Even in the absence of congressional legislation, 'the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce.'" (quoting *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 652 (1981))).

<sup>134</sup> *Id.* at 394.

companies, just the AECC sold primarily to in-state cooperatives. As with the AECC, the Dormant Commerce Clause would be no barrier to state regulation because energy regulation is a legitimate local interest. Furthermore, the implementation of a FIT does not qualify as economic protectionism because a FIT does not bolster one state's economic interests at the expense of one or more other states. The state, then, could regulate the renewable-energy generators' in-state rates just as Arkansas was able to regulate the AECC's in-state rates. All that states require is congressional permission. Congress created the REA "to establish a permanent and comprehensive national policy for rural electrification."<sup>135</sup> The REA effectively revoked federal jurisdiction over the in-state sale and transmission of electrical energy generated by select facilities, thereby granting regulatory authority to the states.<sup>136</sup> Congress must now enact a similar carve-out of federal jurisdiction in order to authorize states to implement FITs to promote renewable energy generation.

#### B. LOOKING FORWARD TO THE POSSIBILITY OF A FEDERAL FEED-IN TARIFF

This carve-out solution, however, is not without problems of its own. Among other choices, the United States must choose whether a federally mandated FIT is superior to various state implementations. FITs have already been proposed on the federal level in the form of the Renewable Energy Jobs and Security Act.<sup>137</sup> This proposed legislation would have implemented FITs, but would have granted rate-making authority to FERC instead of the states.<sup>138</sup> However, this legislation failed to reach a vote in the 110th Congress and has not been reintroduced.<sup>139</sup> As a result, state-instituted FITs have not been preempted by a federal FIT, but neither have state-instituted FITs been authorized by Congress. State-mandated FITs remain at risk of a jurisdictional challenge and

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<sup>135</sup> *In re Dairyland Power Coop.*, 37 F.P.C. at 19.

<sup>136</sup> *See Ark. Elec. Coop. Corp.*, 461 U.S. at 398-99.

<sup>137</sup> Renewable Energy Jobs and Security Act, H.R. 6401, 110th Cong. (2008).

<sup>138</sup> *Id.*

<sup>139</sup> *See* H.R. 6401: Renewable Energy Jobs and Security Act, <http://www.govtrack.us/congress/bill.xpd?bill=h110-6401> (last visited Nov. 18, 2009).

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thus still require protection in the form of a jurisdictional carve-out until such time as a more effective means of promoting renewable energy emerges.

As that time approaches, this proposed carve-out rule must necessarily evolve. However, existing jurisdictional law has not evolved with renewable-energy technology, and a bright-line rule granting jurisdiction to states will help the law catch up with reality for the present. That this rule may later give way to another, better rule is only appropriate as the renewable-energy industry develops. In fact, evolution is a cornerstone of successful FITs around the world.<sup>140</sup>

V. CONCLUSION

Congress has the opportunity to clear the path for the state-implemented FIT, a renewable-energy solution that has a demonstrated record of success. To succeed, FITs must overcome the obstacle of outdated law. Congress can eliminate this obstacle by creating an exception to federal jurisdiction akin to the exception that Congress created by passing the REA. A jurisdictional carve-out for the states would recreate a familiar jurisdictional scheme and would implement a time-tested mechanism for promoting renewable energy. Such a carve-out need not be permanent, but it would be a useful and productive next step to increase the adoption of renewable-energy generation in the United States.

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<sup>140</sup> U.S. DEPARTMENT OF ENERGY AND THE STATE OF HAWAII, FEED-IN TARIFF CASE STUDIES: A WHITE PAPER IN SUPPORT OF THE HAWAII CLEAN ENERGY INITIATIVE 10-14 (Sept. 2008), available at [http://www.wind-works.org/FeedLaws/USA/hawaii\\_feedin\\_tariff\\_case\\_studies.pdf](http://www.wind-works.org/FeedLaws/USA/hawaii_feedin_tariff_case_studies.pdf).

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