Opting In to Regionalization: Why the Risks for Western States Are Low

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In the West, the benefits of electricity market regionalization appear more attractive than ever. "Regionalization" refers to efforts to expand coordination between Western states to buy and sell wholesale electricity through centralized federal power markets. Increased coordination made possible through regional transmission organizations (RTOs) has the potential to enhance grid reliability while reducing costs and emissions. RTOs are independent non-profit organizations that operate the grid and oversee the operation of centralized energy markets). The California Independent System Operator (CAISO), the only RTO in the West, is expanding the geographic territory of its existing federal power markets from most of California and parts of Nevada into additional Western states. In the long term, Western states have started collaborating on a vision to form a new multi-state RTO in the West.

However, while regionalization offers many benefits, it also comes with legal and policy risks for states. CAISO and all RTOs, including a potential future Western RTO, fall under the jurisdiction of the Federal Energy Regulatory Commission (FERC) and are subject to federal jurisdiction related to electricity markets and other RTO operations. A survey of over four hundred recent FERC and federal circuit court cases dealing with jurisdictional concerns, conducted during research for this Article, illuminates three key risks to state authority that

DOI: https://doi.org/10.15779/Z38JM23J4B

* I would like to express my sincere gratitude to several key individuals who generously lent their time and expertise in helping me conduct this research and pull together this final paper: Professor Sharon Jacobs at UC Berkeley School of Law, who guided my process and the final result with unmatched energy regulatory acumen; Ted Lamm at the Center for Law, Energy, & the Environment, who dedicated an incredible amount of time to discussing every aspect of my research with me and helped me stay enthusiastic while in the depths of FERC dockets; Cliff Rechtschaffen, Commissioner on the California Public Utilities Commission 2017-2022, who provided critical state perspective on the potential of expanding energy markets; Andrew Campbell at the Energy Institute at Berkeley Haas, who offered a practitioner's point of view on the Western electricity markets; and Daniel Shonkwiler and Burton Gross at the California Independent System Operator, who gave me invaluable insight from within the RTO machine. This research was made much richer thanks to your contributions. I currently work at Wilson Sonsini Goodrich & Rosati as an associate in the firm's energy and climate solutions practice. The analysis included in this article reflects my views alone and does not reflect the perspective of my current employer or the UC Berkeley School of Law.

could arise from regionalization: federal jurisdiction may interfere with state clean energy policy, restrict states' control over in-state energy resources, and preempt state law. The Article analyzes each of these risks in the context of Western regionalization and concludes that none pose a significant threat to state authority. Based on these findings, this Article concludes that Western states do not face a significant risk of losing their authority over state electricity decisions if in-state utilities join one of the CAISO markets or take part in a future multi-state RTO. While each state must conduct a case-by-case analysis of the risks of regionalization, this analysis indicates that the risks likely do not outweigh the potential benefits to grid reliability, ratepayers, and the climate.

INTRODUCTION

In the West, the benefits of electricity regionalization appear more attractive than ever. "Regionalization," also called "regional cooperation," refers to efforts to expand coordination between Western states[1] to buy and sell electricity through centralized federal markets. Increased coordination, made possible through regional transmission organizations (RTOs), has the potential to enhance grid reliability while reducing costs and emissions.[2] Currently, although RTOs are common in the Northeast and Midwest, the California Independent System Operator (CAISO) is the only RTO in the West, spanning most of California and part of Nevada.[3]

In the spirit of regionalization, CAISO is expanding the historic territory of its federal wholesale electricity markets into additional Western states.[4] In the long term, there are also discussions of forming a new multi-state Western RTO.[5] This effort is known as the "West-Wide Governance Pathways Initiative."[6]

Studies indicate that expanding the territory of the wholesale electricity markets can yield numerous benefits in terms of improved access to clean energy technologies, reduced costs for consumers, and enhanced grid reliability.[7] A new multi-state RTO would amplify the benefits of expanded markets, as well as create new benefits through centralized grid operation and regional transmission planning.[8] In the face of ambitious clean energy and electrification goals, these advantages are attractive—if not essential—to many Western states.

In addition to yielding benefits, regionalizing the Western electricity markets also comes with legal and policy risks for states. CAISO, like all RTOs, including a potential future RTO, falls under federal jurisdiction. Therefore, the expanded markets CAISO oversees must follow federal rules and are subject to

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1. Herein, references to "Western states" and "the West" includes Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming.

2. *See infra* Part II.B.

3. Sidra Aghababian, *Understanding RTOs: the West*, NAT'L CAUCUS OF ENVT'L LEGISLATORS, https://www.ncelenviro.org/articles/understanding-rtos-the-west/.

4. In 2014, CAISO expanded the territory of this real-time market, called the Western Energy Imbalance Market (WEIM), through which utilities can buy small amounts of electricity to correct real-time fluctuations in customer demand and electricity dispatched by generators. *See* CAL. INDEP. SYS. OPERATOR, WESTERN ENERGY IMBALANCE MARKET FACT SHEET 1 (2024), https://www.caiso.com/Documents/western-energy-imbalance-market-fact-sheet.pdf. CAISO has recently initiated efforts to also expand the territory of its day-ahead energy market, which provides utilities with power to serve a portion of their forecasted customer demand for the following day. This market is expected to begin operating in 2026. *See* CAL. INDEP. SYS. OPERATOR, EXTENDED DAY-AHEAD MARKET FACT SHEET 1 (2025), https://www.caiso.com/Documents/extended-day-ahead-market-edam-fact-sheet.pdf [hereinafter EDAM FACT SHEET].

5. An RTO is an independent non-profit organization that operates the grid and oversees the operation of centralized energy markets. CAISO is an RTO that operates mostly in a single state. Many RTOs operate across multiple states. *See RTOs and ISOs*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/power-sales-and-markets/rtos-and-isos (last updated Jan. 17, 2024).

6. *West-Wide Governance Pathways Initiative*, W. INTERSTATE ENERGY BD., https://www.westernenergyboard.org/wwgpi/ (last visited Aug. 20, 2025).

7. *See infra* Part II.B.

8. *Infra* Part II.B.

federal oversight. States with utilities participating in these markets or a future RTO would be subject to federal jurisdiction related to the electricity markets and other RTO operations.[9]

Some Western states must decide whether to permit in-state utilities to join the expanding CAISO markets as well as a potential future RTO. As part of these decisions, states must determine whether their authority over the electricity sector would suffer due to utility participation in these federal markets, as well as whether any potential reduction in state authority would be outweighed by the benefits of regionalization. For example, participation in federal markets may reduce states' autonomy over electricity sector policy or expose them to preemption risks, the risk that federal law would override state laws.

A survey of jurisdictional cases in recent years illuminates the scope of states' federalism risk.[10] A trio of cases in 2015 and 2016 offers the latest word from the Supreme Court on how federal-state jurisdictional boundaries are drawn under the Federal Power Act (FPA).[11] Since 2016, over four hundred cases in the lower federal courts and at the Federal Energy Regulatory Commission (FERC) have applied the principles from these cases.[12] An analysis of this intervening case law helps answer the question of how expanding federal markets, as part of regionalization efforts, may impact the authority of Western states.

While the case survey reveals that federal authority over the electricity sector has expanded in recent years, federalism risks for Western states remain minimal in the face of regionalization. Such risks include the following:

(1) Policy Risk: Federal jurisdiction over electricity markets may interfere with the effectiveness of state clean energy policy;

(2) Autonomy Risk: Federal jurisdiction may restrict state autonomy over behavior of in-state energy resources; and

(3) Preemption Risk: Federal rules may preempt state law.

This Article analyzes each of these federalism risks in the context of Western regionalization and concludes that none poses a significant threat to state authority. While preemption is often a focus of jurisdictional analyses, policy risk and autonomy risk present the biggest federalism risks for states considering utility participation in an RTO or federal electricity market.

Policy risk poses the biggest risk to states. Numerous federal market rules in recent years have reduced the effectiveness of state clean energy policies, including financial incentives for preferred generation resources (e.g., renewables). While this raises significant concerns, such rules have been confined to only certain types of electricity markets: capacity markets (in which

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9. *See infra* Part I.B.

10. This Article uses the term "federalism risk" to refer to the risk that expanded federal authority may limit state authority.

11. The three cases, by chronology, are: Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015); Fed. Energy Regul. Comm'n v. Electric Power Supply Ass'n, 577 U.S. 260 (2016) [hereinafter *EPSA*]; and Hughes v. Talen Energy Mktg, 578 U.S. 150 (2016) [hereinafter *Hughes*].

12. *See infra* Part III.A.

generators commit generating capacity for future years) rather than energy markets (in which generators commit to supply electricity to the grid the next day or hour).[13] CAISO does not operate a centralized capacity market and Western states have historically not supported developing one as part of an RTO.[14] Thus, the risk of federal jurisdiction interfering with Western state clean energy policies through capacity market rules is low.

Autonomy risk may present limited risk for some states. Recent federal rules require that certain electricity resources—including storage resources (i.e., batteries) and aggregations of distributed energy resources—be able to access the federal power markets, even if they must use state distribution systems to do so.[15] While states with utilities participating in federal electricity markets cannot bar these resources from accessing the federal markets, they remain free to incentivize preferred generation resources in many ways, such as resource procurement programs, permitting and land use decisions, and financial incentives for preferred resources.[16] Accordingly, the risk associated with these rules is also low.

Preemption risk presents the lowest risk for states. The federal government's exclusive jurisdiction over regional electricity markets may expose states with participating utilities to increased risk of preemption, but the likelihood that this will happen is low. For example, state policies that set the terms of wholesale market transactions or otherwise touch market operations may run afoul of federal jurisdiction and be preempted.[17] Expanding the territory of the federal markets, which increases the volume of federal electricity transactions taking place, may create more opportunities for federal preemption. However, states without utilities currently participating in federal markets likely do not have policies touching wholesale markets. Those that do have participating utilities are likely already monitoring these risks. And importantly, the case survey does not indicate that the risk of federal preemption has increased, as courts have seldom struck down state programs on preemption grounds. Accordingly, this Article concludes general preemption risks are low.[18] However, individual states considering utility decisions to join Western regional markets should still audit their state policies to ensure they would not infringe on the federal markets in order to avoid federal preemption.

Based on these findings, this Article concludes that Western states do not face a significant risk of losing their authority over state electricity decisions by permitting in-state utilities to either join one of the CAISO markets or take part in a future multi-state RTO. While each state must conduct a case-specific analysis of the risks of regionalization, this analysis indicates that the potential

13. *See infra* Part III.C.1.
14. *See infra* Part IV.A.1.
15. *See infra* Part III.C.2.
16. *See infra* Part IV.B.
17. *See infra* Part III.C.3.
18. *See infra* Part IV.C.

benefits to grid reliability, ratepayers, and the climate likely outweigh the risks to state autonomy.

This Article proceeds as follows. Part I provides legal background about the basic jurisdictional framework between states and the federal government in the electricity sector. Part II provides an overview of energy markets and regionalization efforts in the West. Part III describes the survey of recent case law on jurisdictional issues in the electricity sector, basic trends from the survey, and key risks to states whose utilities choose to participate in RTOs or wholesale electricity markets. Finally, Part IV applies the results of the case survey to the West to assess potential jurisdictional risks Western states face from regionalization.

I. LEGAL BACKGROUND: THE JURISDICTIONAL FRAMEWORK OF THE FEDERAL POWER ACT

A. Basic Framework: The Federal Power Act

In the electricity sector, the federal and state governments operate within particular, defined zones of authority. Congress provided this basic structure when it enacted the Federal Power Act (FPA) in 1935 to regulate the flow of electricity between states, including electricity transmission and sales.[19] The Act created the Federal Energy Regulatory Commission (FERC)[20] and empowered it with the authority to manage certain elements of the electricity system, while reserving other elements of the system to state control.[21] By delineating authority between the federal government, through FERC, and the states, the Act established the blueprint for "dual regulation" of the electricity sector still used today.[22]

Since the FPA's passage, technological and operational changes in the electricity sector have challenged the basic jurisdictional framework that Congress laid out. Where the electricity grid used to consist of fragmented islands, there is now a vast network of interconnected wires and infrastructure. And where individual utilities, regulated by states, used to control many operational decisions, the federal government now oversees much more of the operation of the electricity sector than when Congress first drafted the FPA.[23]

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19. *See generally* Federal Power Act, 16 U.S.C. §§ 791-825r (1940). Congress passed the Natural Gas Act (NGA), which regulates the natural gas industry using a similar framework, shortly thereafter. When analyzing jurisdictional questions, courts generally apply analysis under the FPA to NGA issues and vice versa. *See e.g. Hughes*, 578 U.S. at 164 n.10 (2016) ("Although *Oneok* . . . involved the NGA rather than the FPA, the relevant provisions of the two statutes are analogous. This Court has routinely relied on NGA cases in determining the scope of the FPA, and vice versa.").

20. The 1935 Federal Power Act gave this authority to FERC's predecessor, the Federal Power Commission. For ease, this has been simplified to FERC.

21. Federal Power Act § 201(b)(1).

22. ANN E. CARLSON ET AL., EVALUATION OF JURISDICTIONAL AND CONSTITUTIONAL ISSUES ARISING FROM CAISO EXPANSION TO INCLUDE PACIFICORP ASSETS 5 (2016), https://www.caiso.com/documents/legalevaluationofisoexpansion.pdf.

23. *See generally Hughes*, 578 U.S. 150 (2016).

The FPA's basic statutory framework, and the ways its application has changed due to these technological shifts, provides a backdrop for the ways federal jurisdiction over the electricity sector has expanded in recent years.

1. Federal Jurisdiction Under the FPA

The federal government's authority over the electricity sector is limited to what Congress laid out in the FPA.[24] FPA section 201 provides that FERC has exclusive authority over (1) all wholesale (i.e., sales for resale) electricity sold in interstate commerce, (2) all interstate transmission of electricity, and (3) all facilities used for such sales or transmission.[25]

Because of the interconnected nature of the electricity grid, wholesale sales and transmission are considered to be in "interstate commerce" if they use any portion of an interstate grid.[26] The Supreme Court has recognized that "electricity that enters the grid immediately becomes part of a vast pool of energy that is constantly moving in interstate commerce."[27] In fact, there are only three electricity grids in the continental United States: the interstate Western Interconnection, interstate Eastern Interconnection, and the intrastate Texas grid.[28] FERC has exclusive jurisdiction over all wholesale sales and transmission that occurring anywhere in the Eastern or Western Interconnections. CAISO connects to the Western Interconnection, which spans "from California to the Great Plains, and from Western Canada to Northern Baja California, Mexico."[29]

FPA sections 205 and 206 define how FERC determines rates for wholesale electricity and transmission. Under section 205, FERC has a duty to ensure that "[a]ll rates and charges made. . . for or in connection with the transmission or sale of electric energy," as well as "all rules and regulations affecting. . . such rates" are "just and reasonable."[30] If a rate, or any rule or practice "affecting" such rate is determined to be "unjust, unreasonable, unduly discriminatory or preferential," section 206 requires FERC to determine the just and reasonable rate.[31]

2. State Jurisdiction Under the FPA

While the FPA assigns FERC exclusive jurisdiction over several aspects of the interstate electricity market, it also reserves several roles for the states.

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24. Cal. Indep. Sys. Operator Corp. v. Fed. Energy Regul. Comm'n, 372 F.3d 395, 398-99 (D.C. Cir. 2004).

25. Federal Power Act § 201(b)(1).

26. *See* New York v. FERC, 535 U.S. 1, 7 (2002).

27. *Id.*; *see also* Federal Power Comm'n v. Fla. Power & Light, 404 U.S. 453, 460-63 (1972).

28. *See Learn More About Interconnections*, U.S. DEP'T OF ENERGY, https://www.energy.gov/oe/learn-more-about-interconnections (last visited Apr. 18, 2025).

29. JULIANA BRINT ET AL., ENHANCED WESTERN GRID INTEGRATION: A LEGAL AND POLICY ANALYSIS OF THE EFFECTS ON CALIFORNIA'S CLEAN ENERGY LAWS 4 (2017), https://law.yale.edu/sites/default/files/area/clinic/document/yaleepc_enhanced_western_grid_integration_may_2017.pdf.

30. Federal Power Act § 205, 16 U.S.C. § 824d.

31. Federal Power Act § 206, 16 U.S.C. § 824e.

Section 201 expressly reserves for states the authority over electricity generation facilities, retail electricity sales,[32] facilities used for local electricity distribution, and intrastate electricity sales and transmission.[33]

Under this framework, states retain broad authority over the procurement of energy resources and the siting and permitting for in-state construction of generation facilities, transmission lines or other components of the electricity system. Federal courts have recognized, for example, that "[s]tates have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction."[34]

The primary bar to state action under the FPA is potential interference with those matters subject to exclusive federal jurisdiction. Under a scheme of exclusive federal jurisdiction, "if FERC has jurisdiction over a subject, the states cannot have jurisdiction over the same subject."[35] Accordingly, it is important to understand the boundaries of federal jurisdiction to evaluate the validity of any particular state action. According to one FERC Commissioner, the jurisdictional lines of the FPA leave states with the authority to "enact a wide range of policy choices that can affect the wholesale market" without infringing on FERC jurisdiction, including incentivizing infrastructure development, deploying innovative technologies, establishing Renewable Portfolio Standards to ensure utilities procure preferred energy resources, ensuring efficient siting and favorable zoning for favored generation, or requiring that non-favored generation facilities retire.[36]

3. FPA Exclusivity

As noted above, FERC's jurisdiction under the FPA is exclusive.[37] This means that in the areas over which FERC has exclusive jurisdiction there is "no room" for states to supplement.[38] If they do, FERC can invalidate the laws through the doctrine of preemption. The Supremacy Clause of the U.S.

32. Under FPA § 201, the language "any other sale" refers to any sales besides wholesale sales for resale, which includes retail sales as well as intrastate wholesale sales of electricity in Alaska, Hawaii, and Texas. Federal Power Act § 201, 16 U.S.C. § 824.

33. *Id*. This is primarily relevant in Hawaii, Alaska, and Texas, though there can be intrastate lines in other states as well. For example, in California, intrastate transmission is used to transport electricity north/south or bring electricity inland from offshore facilities. *See generally* GRID LAB, TRANSMISSION IN CALIFORNIA (2023), https://gridlab.org/wp-content/uploads/2023/03/Transmission-in-California.pdf.

34. *See, e.g.*, Entergy Nuclear Vt. Yankee, L.L.C. v. Shumlin, 733 F.3d 393, 417 (2d Cir. 2013).

35. Miss. Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 377 (1988).

36. ISO New England Inc. & New England Power Pool Participants Comm., 158 F.E.R.C. ¶ 61, 138 at 33 (2017); CARLSON ET AL., *supra* note 22, at 8.

37. *See, e.g.*, Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) (confirming "the exclusive jurisdiction vested by Congress in FERC over the regulation of interstate wholesale utility rates").

38. *See id*.

Constitution provides that federal law is the "supreme Law of the Land."[39] Under this provision, federal law can invalidate conflicting state laws.[40]

There are two key implications of FERC's jurisdiction under the FPA being exclusive. First, FERC "occup[ies] the entire field" given to it by the FPA.[41] FERC's exclusive "field" under the FPA extends to all interstate sales and transmission, except for those which Congress has explicitly subjected to regulation by the states.[42] Once a practice becomes part of FERC's exclusive field, states are limited in what they can do. Second, "[w]hile the FPA creates two separate zones of jurisdiction, the Supremacy Clause creates uneven playing fields." [43] The jurisdictional structure of the FPA favors the federal government. In disputes over technologies or operations that may affect both state and federal authority—like regional wholesale electricity markets or distributed energy resources (DERs) (small generation and storage resources typically producing less than 10 MW of power)[44]—FERC has a jurisdictional leg up. If state law interferes with FERC's exclusive jurisdictional field, that law is at risk of federal preemption.

B. A Changing Electricity System

As noted above, the FPA aimed to establish dual zones of authority between federal and state governments in the electricity sector. The goal was to confine each entity to a particular sphere of electricity regulation. Historically, the separation between these two spheres has been referred to as the FPA's "bright line."[45]

However, since the FPA's passage in 1935, the electricity system in the United States has evolved significantly. The FPA's cooperative jurisdictional

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39. U.S. CONST. art. IV, cl. 2.

40. *See, e.g.*, *Hughes*, 578 U.S. 150, 162 (2016). ("Put simply, federal law preempts contrary state law."). Preemption can be express or implied. Express preemption occurs when the text of a federal statute demonstrates Congress' intent to preempt related state laws. *See, e.g.*, Cal. Rest. Ass'n v. City of Berkeley, 65 F.4th 1045, 1056 (9th Cir. 2023) (holding that the plain meaning of the Energy Policy and Conservation Act preempts Berkeley's Ordinance banning natural gas piping within new buildings). Implied preemption comes in the form of "conflict preemption" or "field preemption." Conflict preemption occurs when either it is impossible to comply with both federal and state law, or the state law hinders realization of federal objectives. *See* Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 377 (2015); *see also, e.g.*, Winding Creek Solar LLC v. Peterman, 932 F.3d 861, 865 (9th Cir. 2019) (holding that California's pricing scheme for small generators is preempted by the pricing requirements under the Public Utility Regulatory Policies Act of 1978). Finally, field preemption occurs when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Hughes*, 578 U.S. at 163. In this instance, Congress has intended to "foreclose any state regulation in the area," regardless of its harmony with federal law. *See Oneok*, 575 U.S. at 377. In each of these instances, federal law invalidates preempted state law.

41. *See Hughes*, 578 U.S. at 163.

42. Federal Power Act § 201, 16 U.S.C. § 824.

43. Nat'l Ass'n of Regul. Util. Comm'rs v. FERC, 964 F.3d 1177, 1187 (D.C. Cir. 2020).

44. U.S. DEP'T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY, USING DISTRIBUTED ENERGY RESOURCES 1 (2002), https://www.nrel.gov/docs/fy02osti/31570.pdf.

45. *See, e.g.*, Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215-16 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. . .").

system has evolved with it. For one, as noted above, the grid itself affects this jurisdiction. Whereas utilities used to generate and deliver electricity to customers within "confined geographic areas," the vast majority of electricity in the United States is now transmitted through one of two interconnected grids spanning the continental United States (except for Texas).[46] This subjects almost all wholesale sales and transmission occurring in the United States to FERC jurisdiction.

The way utilities manage and deliver electricity has changed as well. Several decades ago, most utilities operated as "vertically integrated monopolies" that controlled the entire supply and delivery chain: generation facilities, transmission, and distribution to end-customers.[47] However, in an effort to encourage competition and free market activity in the electricity sector, FERC pushed the creation of RTOs.[48] RTOs are non-profit organizations created for the purpose of operating the grid, ensuring electrical reliability, and overseeing centralized energy markets for wholesale sales.[49] There are now seven RTOs across the country, which serve roughly two-thirds of the electricity demand in the United States.[50] CAISO is one such RTO, created in 1996.

FERC has broad legal authority over RTOs. FERC regulates RTOs as "public utilities" subject to federal FPA jurisdiction since they manage interstate transmission and oversee markets for wholesale sales subject to FERC jurisdiction.[51] Pursuant to this authority, FERC must ensure that RTO practices are "just and reasonable."[52] This includes overseeing RTOs' approved rates for transmission and wholesale markets and reviewing all rules, terms, and conditions for RTO wholesale electricity markets. The emerging reliance on RTOs to operate the grid and facilitate wholesale transactions has centralized FERC's jurisdiction over interstate sales and transmission, as well as expanded the manners by which it can exercise that jurisdiction.

While RTOs legally fall under FERC's jurisdiction, practically, RTOs represent a hybrid between federal and state interests. For one, RTO governance often involves both federal and state decision makers.[53] Typically, an RTO will

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46. *See EPSA*, 577 U.S. 260, 267 (2016).

47. *Id.*

48. The creation of RTOs was secondary to FERC's primary restructuring objective, which was to secure open and fair access to transmission for all electricity sellers as a means to encourage competition in the generation market. *See RTOs and ISOs*, *supra* note 5.

49. The terms "regional transmission organization" (RTO) and "independent system operator" (ISO) are operationally the same. In some cases, RTO is used to describe an ISO that covers multiple states. In this Article, both ISOs and RTOs, including CAISO, are referred to as "RTOs." *See* DAVID HURLBUT ET AL., THE IMPACTS ON CALIFORNIA OF EXPANDED REGIONAL COOPERATION TO OPERATE THE WESTERN GRID (FINAL REPORT) 9 n.19 (2023), https://www.nrel.gov/docs/fy23osti/84848.pdf.

50. *See* FED. ENERGY REGUL. COMM'N, OFFICE OF ENERGY POL'Y AND INNOVATION, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 66 (2024).

51. *See* Order No. 888, 18 C.F.R. §§ 35, 385 (1996).

52. Federal Power Act § 205, 16 U.S.C. § 824d.

53. *See* Jennifer Gardner, Senior Att'y, W. Res. Advocs., Presentation to the EIM Body of State Regulators: RTO Governance Models: The Role of States (April 17, 2019).

have a governing board with decision-making authority over federal RTO matters, as well as one or more advisory bodies. These advisory bodies may be composed of state representatives or individual market participants and provide input to the governing board on matters like rates, market rules, and other RTO decisions.[54] While states are often involved in the governance of RTOs, FERC has the final say on all RTO operations affecting interstate transmission and wholesale sales.[55]

In addition to the changed grid and the rise of RTOs, the introduction of new energy technologies continues to challenge the division of labor between FERC and the states. For technologies such as DERs, which include batteries, solar panels, and energy efficiency measures, both FERC and the states must be responsible for managing pieces of the development and deployment process.[56] With the increasing presence of technologies that cross federal and state boundaries, there is significant technological and operational overlap between areas under federal and state jurisdiction.[57]

These changes to the electricity sector—the expanded grid, the emergence of RTOs, and entry of new energy technologies—have transformed how the jurisdictional boundaries are drawn under the FPA. Many of these technical changes to the electricity sector have favored FERC's jurisdiction under the FPA by increasing interstate connectivity and implicating areas statutorily designated as within exclusive federal control.

II. OVERVIEW OF ENERGY MARKETS AND REGIONAL COOPERATION EFFORTS IN THE WEST

A. Basics of Electricity Markets

The market for electricity generation operates similarly to markets for other consumer goods: a significant volume of electricity generation is not sold directly by generators to end-users, but instead, generators sell their electricity at

https://westernenergyboard.org/wp-content/uploads/2019/04/04-17-19-eim-bosr-gardner-rto-governance-models-role-of-states.pdf.

54. *See* HURLBUT ET AL., *supra* note 49, at 12.

55. *Id*. at 10 ("Buying and selling power across the transmission system is interstate commerce and therefore exclusively under federal jurisdiction; accordingly, terms and conditions of market rules must be approved by [FERC].").

56. Order No. 2222, *Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 172 F.E.R.C. ¶ 61,247 at PP 40-41 (2020) [hereinafter Order No. 2222] (finding that FERC has jurisdiction over "sales of electric energy by distributed energy resource aggregators for purposes of participating in an RTO/ISO market" as well as the market rules governing such wholesale sales, but not over individual distributed energy resources).

57. *See, e.g.*, *id.* at P 33 (describing Connecticut state regulators' argument that "while the management of the impacts of new generation on the distribution system remains with the states, the comprehensive and effective integration of these emerging technologies into the wholesale markets rests with [FERC]").

wholesale prices into a market. Utilities that will transmit this power to end-users purchase the wholesale electricity and then sell it to consumers at retail prices.[58]

Most wholesale electricity is sold through centralized wholesale energy auctions.[59] There are seven regional organized auctions throughout the United States and each runs similarly.[60] To illustrate using a simplified example, an auction aiming to deliver electricity the following day works as follows. First, generators willing to sell power into the electricity grid the next day offer "bids" to the market operators that represent the price they are willing to accept to generate power the following day. Typically, these bids represent the cost for the generator to do business.[61] The market operator then calculates expected customer demand for electricity the following day. The generators' bids are then ordered from lowest cost to highest cost. The operator accepts the bids in order of lowest to highest until the anticipated customer demand for electricity is met. All generators will receive the same price for their electricity, which represents the value of the last bid the market operator accepts. The value of this final bid is called the marketing clearing price.[62]

Typical electricity generators bidding into the auction include natural gas-fired power plants, coal-fired power plants, nuclear power plants, and renewables like solar, wind, and hydropower.[63] In general, nuclear and renewable power generation have the lowest marginal costs and are able to offer the cheapest bids, natural gas is the most expensive, and coal is in the middle.[64] Due to the order in which these resources are dispatched by market operators, nuclear and renewables tend to be first in line for dispatch if there is room on the grid.[65]

B. Benefits of Regional Cooperation in the Western Energy Markets

CAISO, the only RTO in the West, is responsible for managing the only such energy auctions that currently exist in the Western United States. CAISO

58. *See* JOEL EISEN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS, 683-791 (6th ed.) (discussing the electric power markets).

59. This Part provides a very basic contextual introduction to wholesale electricity markets. For a more detailed discussion of how these markets function in the United States, see *Electric Power Markets*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/electric-power-markets (last updated Mar. 27, 2025).

60. *See* Kathryne Cleary & Karen Palmer, *US Electricity Markets 101*, RES. FOR THE FUTURE, https://www.rff.org/publications/explainers/us-electricity-markets-101(last updated Mar. 17, 2022).

61. This is typically the value of marginal cost, which is the cost for generators to produce a single unit of electricity. By bidding at least this value, generators whose bids are accepted are guaranteed to be able to recoup their production costs.

62. For more information and some helpful visuals are available, see *How Resources Are Selected and Prices Are Set in the Wholesale Energy Markets*, ISO NEW ENGLAND, https://www.iso-ne.com/about/what-we-do/in-depth/how-resources-are-selected-and-prices-are-set (last visited Aug. 20, 2025).

63. *See How PJM Schedules Generation to Meet Demand*, PJM, https://learn.pjm.com/three-priorities/keeping-the-lights-on/how-pjm-schedules-generation-to-meet-demand (last visited Aug. 20, 2025).

64. *See id*.

65. *See, e.g.*, *id*.

oversees the centralized energy market for wholesale sales[66] and operates the transmission grid for about 80 percent of electricity customers in California and some parts of Nevada.[67] It is currently governed by a five-member Board of Governors, each of whom is appointed by the California Governor and confirmed by the California State Senate.[68]

In regions where utilities do not participate in RTOs—like the territories shown in gray on the map below and the majority of Western states—most wholesale energy transactions occur through bilateral trading in which a particular buyer and a particular seller of electricity enter into an individual contract rather than transacting through a centralized market.[69]

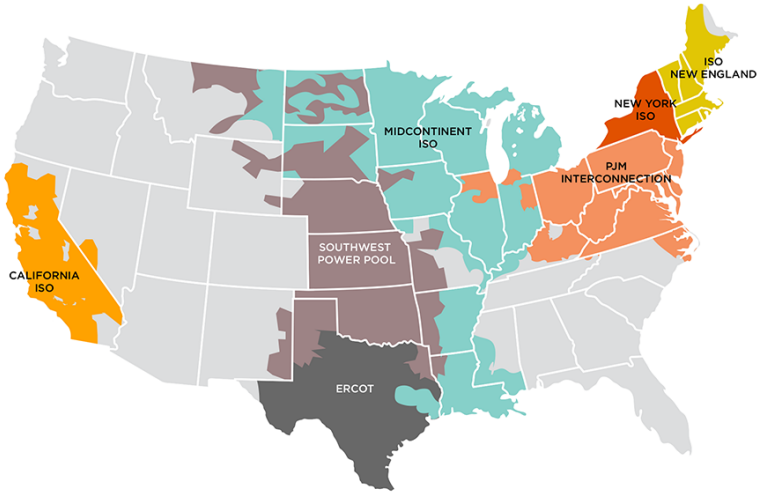
66. *See Electric Power Markets*, *supra* note 59; *CAISO*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/industries-data/electric/electric-power-markets/caiso (last updated June 25, 2025).

67. *See* A.C.R. 188,2022 Cal. Leg. 2021–2022 Sess. (Cal. 2022), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220ACR188 (ACR 188).

68. *See* CAL. INDEP. SYS. OPERATOR, BOARD SELECTION POLICY 1 (2024), http://www.caiso.com/Documents/Board-Selection-Policy.pdf.

69. *Energy Markets in the West*, W. ELEC. COORDINATING COUNCIL, https://feature.wecc.org/soti/topic-sections/markets/index.html (last visited Aug. 20, 2025) (explaining that most energy transactions in the West occur via the "traditional bilateral trading process").

Figure 1.



Source: Sustainable FERC Project.
https://sustainableferc.org/rto-backgrounders-2/.

For several years, Western energy experts have been collaborating on a vision for increased regional cooperation in Western energy markets. "Regionalization," also called "regional cooperation," refers to efforts to expand coordination between Western states to buy and sell electricity through centralized markets, operate the grid, and to consider forming a multi-state Western RTO.[70] Recent studies of Western regionalization efforts show that having access to the energy resources of a larger geographic region would result in lower greenhouse gas emissions, better grid reliability, and lower costs for end-use customers.[71] A larger geographic footprint means a more diverse set of

70. *See generally* A.C.R. 188, *supra* note 67.
71. *See* HURLBUT ET AL., *supra* note 49, at 37.

generation resources to pull electricity from across the West.[72] This enables grid operators to better manage electrical reliability during emergency conditions or extreme weather events.[73] It also increases the likelihood that when excess renewable energy production occurs in one state, it can be transmitted easily to another state rather than curtailed.[74] Finally, because the centralized auction would dispatch the lowest-cost resources first, it would result in lower wholesale energy prices.[75] In short, these benefits point to improved grid reliability and lower consumer costs across territories participating in a centralized electricity market.

Ambitious clean energy and electrification goals have made these benefits especially attractive for many Western states, particularly those that have established climate and clean energy targets in state law. For example, in 2018, California enacted SB 100, which establishes the goal that at least 60 percent of the state's electricity be renewably generated by 2030, and 100 percent by 2045.[76] A recent report on the status of meeting SB 100's targets revealed the need for a significant increase in renewable generation in California to meet these targets as well as an increased reliance on out-of-state imports.[77] Likewise, Washington and New Mexico have both established goals of 100 percent clean energy by 2045.[78] Oregon has set targets for greenhouse gas emissions reductions of 100 percent below a baseline by 2040.[79] Other states, including Nevada and Colorado, have set Renewable Portfolio Standards requiring utilities to procure a certain percentage of their electricity from renewable sources.[80] Expanded regional cooperation in the wholesale electricity markets can help states achieve these goals due to a centralized market's ability to reduce renewable energy curtailment across various states.[81]

Regional cooperation can take many forms. In the short term, CAISO is expanding the geographic territory of its energy markets into additional states.[82]

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72. *See, e.g.*, EDAM FACT SHEET, *supra* note 4, at 2 (discussing benefits of the CAISO Extended Day-Ahead Market).

73. *Id*.

74. *Id*. Curtailment refers to the practice of deliberately reducing a power plant's output, which often occurs to assist with grid imbalances occurring when there is a surplus of electricity on the grid. *See* LORI BIRD ET AL., WIND AND SOLAR ENERGY CURTAILMENT: EXPERIENCE AND PRACTICES IN THE UNITED STATES iv (2014), https://www.nrel.gov/docs/fy14osti/60983.pdf.

75. *See* EDAM FACT SHEET, *supra* note 4, at 2 (noting that EDAM would result in economic benefits due to "optimized commitment of the least-cost resources to meet demand").

76. S.B. 100, Cal. Leg. 2017–2018 Sess. (Cal. 2018).

77. *See* HURLBUT ET AL., *supra* note 49, at 83-84.

78. *See Clean Energy Transformation Act (CETA)*, WASH. STATE DEP'T OF COM., https://www.commerce.wa.gov/growing-the-economy/energy/ceta/ (last updated Aug. 5, 2025); *see also Energy Facts: Impact of the Investing in America Agenda on New Mexico*, U.S. DEP'T OF ENERGY (Aug 9, 2023), https://www.energy.gov/articles/energy-facts-impact-investing-america-agenda-new-mexico.

79. *See Oregon, State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/state/analysis.php?sid=OR (last updated May 15, 2025).

80. *See* HURLBUT ET AL., *supra* note 49, at 106.

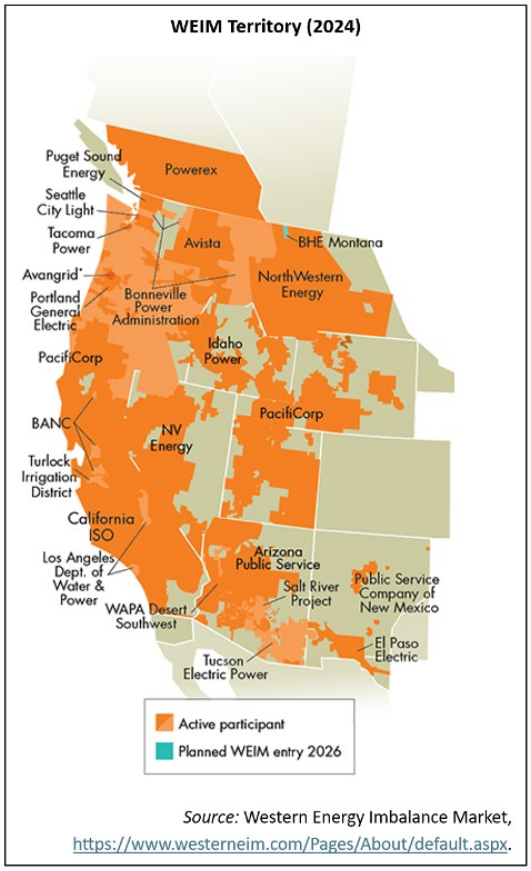
81. *See id.* at 37.

82. *See infra* notes 84-89 and accompanying text.

In the long term, there are discussions of forming a multi-state western RTO.[83] An overview of current efforts and the potential of a full multi-state RTO are below.

CAISO is currently undertaking efforts to expand the territory of two of its energy markets: the real-time and day-ahead energy markets. In 2014, CAISO expanded the territory of this real-time market, called the Western Energy Imbalance Market (WEIM), through which utilities can buy small amounts of electricity to correct real-time fluctuations in customer demand and electricity dispatched by generators.[84] These "imbalances" account for roughly 5 percent of a customer's daily electricity demand.[85] Now that WEIM is expanded into the West, utilities outside of CAISO territory can participate in WEIM on a voluntary basis. As of 2023, WEIM balances real-time electricity demand for 79 percent of total customer demand across the Western states.[86] Figure 2 shows the WEIM territory.

Figure 2.



83. *Id.*

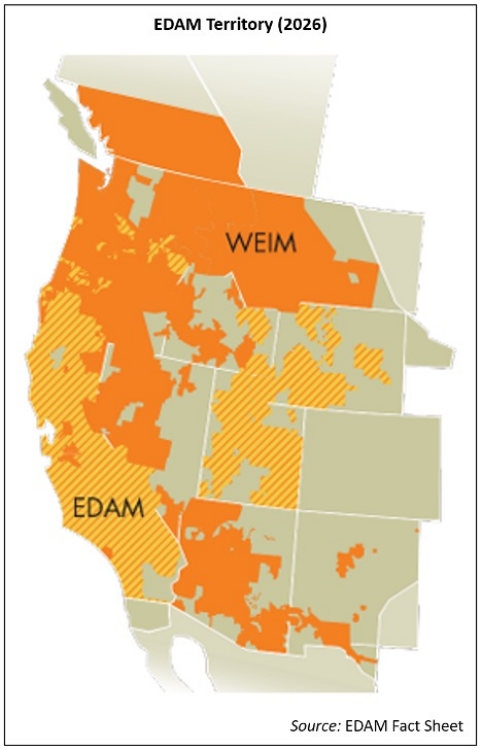
84. To do this, market operators update projections on customer demand every fifteen minutes and adjust generation dispatched every five minutes.

85. *See* HURLBUT ET AL., *supra* note 49, at 109.

86. Because of electricity's unique operational properties, which make it difficult to manipulate, move, and store, grid operators must ensure the electricity entering the grid from generators precisely matches electricity demanded by consumers at all times. To assist with this, CAISO grid operators manage a real-time energy market for the purpose of balancing fluctuations in customer demand and electricity dispatched by generators. Because this operates as an energy auction, it automatically identifies the lowest-cost energy to solve real-time imbalances between actual generation and actual demand. *See id.*

CAISO has also recently initiated efforts to expand the territory of its existing day-ahead energy market, which provides utilities with power to serve a portion of their forecasted customer demand for the following day. This market, called the Extended Day-Ahead Market (EDAM), was approved in December 2023,[87] and is expected to begin operating in 2026.[88] Whereas the real-time market balances the final 5 percent of customer demand, the day-ahead market provides roughly 95 percent of customer demand based on expectations for the following day.[89] Figure 3 depicts the EDAM territory.

Figure 3.



The benefits of expanding the territory of these markets are enormous. WEIM alone has created over $6 billion in benefits across the West since its creation in 2014.[90] Current estimates for EDAM predict that it could create up to $1.2 billion in annual savings.[91] Further, expanding EDAM across the Western states would reduce carbon dioxide emissions by an estimated 2.92 million metric tons a year, the equivalent to removing over six hundred thousand vehicles from the roads.[92] These are benefits that could be realized without building new generating capacity; they accrue simply through optimization of how resources are dispatched via the centralized market, resulting in greater efficiency.

To amplify these benefits and promote decarbonization goals, there is discussion about taking regional cooperation even further by creating a multi-state RTO in the West. This could involve expanding the territory of CAISO to

87. The market was approved by the Federal Energy Regulatory Commission (FERC), the primary federal regulator in the electricity sector. More information about FERC and why it must approve markets like EDAM is included below.

88. EDAM FACT SHEET, *supra* note 4, at 1.

89. *See* HURLBUT ET AL., *supra* note 49, at 109.

90. *Benefits*, W. ENERGY MKTS., https://www.westerneim.com/Pages/About/QuarterlyBenefits. (last updated Jan. 30, 2025).

91. EDAM FACT SHEET, *supra* note 4, at 2.

92. *Id.*

encompass multiple states or creating a new entity altogether.[93] A multi-state RTO would aggregate a series of functions into one. Not only would it operate the Western day-ahead and real-time markets currently operated by CAISO, it would also coordinate centralized transmission planning, and possibly other functions like resource adequacy.[94] Discussions about a multi-state Western RTO, called the "West-Wide Governance Pathways Initiative," began in earnest in July 2023.[95] The goal is to create a "new entity with an independent governance structure capable of offering an expansive suite of West-wide wholesale electricity market functions across the largest possible footprint."[96] This entity would be subject to FERC jurisdiction and all of FERC's existing rules for RTOs. Unlike CAISO, which is governed exclusively by California decision makers, the Pathways Initiative emphasizes multi-state governance. Currently, eleven states are participating in the discussions: Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming.[97] The benefits of an RTO would be greater than expanding CAISO markets alone. For example, one study estimated that the production cost savings realized in a single West-wide RTO would be almost eight times greater than a West-wide day ahead market alone.[98] This is due not only to improved market function but also coordinated transmission planning and the increased likelihood of utilities joining under a multi-state governance structure.[99]

Decision processes to participate in each of these market constructs (WEIM, EDAM, and a potential future RTO) vary by state. Initially, decisions to join wholesale electricity markets are made by individual utilities.[100] In some states, state public utilities commissions must also approve the utility's federal market participation before it becomes official.[101] As of 2025, twenty-two utilities have decided to join WEIM.[102] Utilities are currently contemplating whether to join

93. Some options that have been analyzed include a single West-side RTO that includes the CAISO territory, or two or more sub-regional RTOs that include other Western states. *See* HURLBUT ET AL., *supra* note 49, at 78.

94. *See id.* at 77-78.

95. *West-Wide Governance Pathways Initiative*, *supra* note 6.

96. WEST-WIDE GOVERNANCE PATHWAYS INITIATIVE, FREQUENTLY ASKED QUESTIONS 1 (2024), https://www.westernenergyboard.org/wp-content/uploads/Pathways-FAQ-02.02.2024.docx.pdf.

97. *Id*.

98. *See* ENERGY STRATEGIES, THE STATE-LED MARKET STUDY ROADMAP: MARKET AND REGULATORY REVIEW REPORT 39 (2021), https://www.energystrat.com/s/Final-Roadmap-Technical-Report-210730.pdf [hereinafter ENERGY STRATEGIES TECHNICAL REPORT].

99. *See* CAL. INDEP. SYS. OPERATOR, WEST-WIDE GOVERNANCE PATHWAY INITIATIVE OVERVIEW AND QUESTIONS FOR STAKEHOLDERS 1 (2023), https://www.caiso.com/Documents/West-Wide-Governance-Pathway-Initiative-Overview.pdf.

100. While technically entities called "balancing authorities" make these decisions, "utilities" has been used throughout this Article for simplification. *See* HURLBUT ET AL., *supra* note 49, at 19.

101. For example, utilities desiring to join WEIM required state approval in Nevada, Oregon, and New Mexico. *See* ENERGY STRATEGIES TECHNICAL REPORT, *supra* note 98, at 66-67.

102. CAL. INDEP. SYS. OPERATOR, WESTERN ENERGY IMBALANCE MARKET BENEFITS REPORT SECOND QUARTER 2025 4 (2025), https://www.westerneim.com/Documents/iso-western-energy-imbalance-market-benefits-report-q2-2025.pdf#page=3.

EDAM, which will onboard participants in 2026.[103] Decisions to join a new multi-state RTO would likely require additional state approval. For instance, typically the state public utilities commission must approve the transfer of operational control of the grid from an in-state utility to the RTO before such a transfer can become effective.[104] Individual Western states will have their own variations on these requirements to join a market or RTO.

C. Legal Risks of Increased Regional Cooperation

CAISO recently issued a report on regional cooperation efforts that noted, while the "literature has abundant discussion of potential benefits and options" related to regional cooperation in the Western electricity markets, there is "much less discussion of risks."[105] However, some have suggested that expanding regional electricity markets to encompass territory in multiple states may expose those states to increased legal risk related to their state clean energy policies.[106] For example, a 2021 multi-state study of different types of centralized wholesale electricity examined how various market constructs impacted the retention of state regulatory authority.[107] This study found that, while RTOs were the "superior construct" for increasing the prevalence of clean energy technologies—improving grid reliability and reducing costs for end-consumers—RTOs rated weaker on several indicators of state regulatory authority.[108] The study found that RTOs had the potential to reduce state authority and control over resource adequacy, retail electricity prices, transmission planning, and the generation mix for regulated utilities.[109]

This Article attempts to inform the dialogue regarding risks to state authority resulting from the expansion of regional cooperation efforts in the West. Western states must determine whether to approve or deny participation in WEIM, EDAM, or a future multi-state RTO. As part of these decisions, states must evaluate whether their authority over the electricity sector would suffer by opting in. States may be concerned with retaining authority vis-à-vis the federal government and with respect to other states. This Article focuses specifically on the balance of authority between states and the federal government.[110] For

103. EDAM FACT SHEET, *supra* note 4, at 1.

104. *See* ENERGY STRATEGIES TECHNICAL REPORT, *supra* note 97, at 71.

105. *See* HURLBUT ET AL., *supra* note 48, at 3.

106. *See* ENERGY STRATEGIES TECHNICAL REPORT, *supra* note 98, at 4 ("[R]etaining state regulatory authority. . . has the potential to impact a state's ability to implement its other energy policy priorities.").

107. This study came about due to a grant from the U.S. Department of Energy to several states to assess options for organized electricity markets. Representatives from Colorado, Idaho, Montana, and Utah led the study. Other states that participated in its development included Arizona, California, New Mexico, Nevada, Oregon, Washington, and Wyoming. *Id*. at 4 n.2.

108. *See* HURLBUT ET AL., *supra* note 49, at 37.

109. *Id.*

110. This Article does not focus on risks to state authority resulting from actions by other states. Examples of these risks include Dormant Commerce Clause challenges and governance structures. "Independent" governance has been a major topic of the West-Wide Governance Pathways Initiative. *See* Letter from David Danner, Chair, Wash. Utils. & Transp. Comm'n et al., to Chair Megan Decker, Or.

example, states must evaluate the extent to which they will be subject to federal rules and whether they would be exposed to a larger risk of federal preemption of state policies by participating in these federal institutions. To distinguish risks arising out of the federal-state balance of authority from risks that may arise as a result of actions by other states, this Article uses the term "federalism risk" to refer to the risk that expanded federal authority may limit state authority, including preemption, as well as other risks to state authority resulting from expanded federal authority.

To help inform Western states concerned about their authority in the context of Western regionalization, this Article explores how and to what extent permitting in-state utilities to join these markets or a multi-state RTO would expose states to federalism risk.

III. JURISDICTIONAL CASE SURVEY: FINDINGS

A survey of jurisdictional cases in recent years illuminates how FERC and the federal courts view the current divide between state and federal authority under the FPA. This landscape analysis helps answer the question of how Western regionalization efforts may impact Western states' authority over their energy policy. For example, it offers insight into the extent to which Western states may face risks to their authority by joining a federal wholesale electricity market or a multi-state RTO. This Part provides an overview of the case survey, high-level trends, and some of the key federalism risks that could emerge for states participating in an RTO or a federal wholesale electricity market. Part IV details how these risks apply specifically to Western regionalization efforts.

A. Description of Case Survey

This case survey examined the more than four hundred opinions in federal courts and at FERC since 2016 applying the principles from *Oneok v. Learjet*,[111] *FERC v. EPSA*,[112] and *Hughes v. Talen*,[113] which offer the latest word from the Supreme Court on how federal-state jurisdictional boundaries are drawn under the FPA. Analysis of how the lower courts and FERC have applied the principles from these cases offers valuable insight into how authority over the electricity sector is apportioned between states and the federal government. The survey focused on application of these cases for two additional reasons. First, the cases are often analyzed as a trio by courts and academics alike.[114] Second, focusing

Pub. Util. Comm'n, Co-Chair of Comm. on Reg'l Elec. Power Coop., et al. (July 14, 2023), https://www.westernenergyboard.org/wp-content/uploads/Letter-to-CREPC-WIEB-Regulators-Call-for-West-Wide-Market-Solution-7-14-23-1.pdf.

111. *See generally* Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015).

112. *See generally EPSA*, 577 U.S. 260 (2016).

113. *See generally Hughes*, 578 U.S. 150 (2016).

114. *See, e.g.*, Daniel A. Lyons, *Protecting States in the New World of Energy Federalism*, 67 EMORY L. J. 921, 949 (2018); *see also* Joshua Macey & Matthew Christiansen, *Long Live the Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360, 1368-69 (2021).

on application provided an important and necessary means to limit the scope of the study.[115] Effectively, *EPSA*, *Hughes*, and *Oneok* were used as a filter to identify relevant cases to answer the question of how the courts and FERC view FPA jurisdiction today.

1. Oneok, EPSA, and Hughes

Together, *Oneok*, *EPSA*, and *Hughes* establish the modern framework for how we should understand the scope of FERC's exclusive "field" of jurisdiction under the FPA. Two of the cases, *Oneok* and *Hughes*, addressed federal preemption of state law. *EPSA* clarified the scope of FERC's exclusive FPA authority. The principles established by each case are taken in turn, below.

Oneok clarified that a preemption analysis must consider the "target at which the state law aims in determining whether that law is pre-empted."[116] The Court determined a nuanced rule was necessary, since the "Platonic ideal" of a "clear division between areas of state and federal authority" no longer exists in the modern electricity market.[117] Using this rule, the Court determined that state antitrust claims aimed only at retail price manipulation "targeted" an area under exclusive state jurisdiction, and therefore were not federally preempted despite the fact that the claims would have an incidental impact on wholesale rates.[118]

In *Hughes*, the Supreme Court held that state activities aimed at areas under exclusive state jurisdiction could nevertheless be federally preempted when those activities are "tethered" to participation in wholesale electricity markets.[119] Pursuant to this rule, the Court invalidated a Maryland policy providing a subsidy for a natural gas-fired power plant in the state.[120] The state subsidy's "fatal defect" was that it "operate[d] within" the wholesale market by conditioning the payment of funds on the plant bidding into, and clearing, the wholesale market.[121] This changed the terms of wholesale market participation, thereby intruding on FERC's jurisdiction.[122] However, the Court qualified its opinion, noting that it should not be read to foreclose states from encouraging production of new generation through measures "untethered" to a generator's wholesale market participation.[123]

115. Note that FERC does not always cite cases when conducting this analysis. On some occasions, FERC has used the test from either *Oneok*, *EPSA*, or *Hughes*, but cited a prior FERC order rather than the Supreme Court precedent. Despite this, there is no reason to believe the FERC cases should have turned out differently from other cases directly citing the case law. *See, e.g.,* Hollow Rd. Solar L.L.C., 174 F.E.R.C. ¶ 61,200 at P 20 (2021) (finding that a state statute is "not nearly directed at or tethered to wholesale market participation," but not citing *Hughes*).

116. *Oneok*, 575 U.S. at 385 (emphasis in original).

117. *Id*. at 387.

118. *Id.* at 398.

119. *Hughes*, 578 U.S. 150, 166 (2016).

120. *Id.*

121. *See id*. at 165-66.

122. *Id*. at 162.

123. *Id*. at 166.

Finally, in *EPSA*, the Supreme Court held that, under FPA sections 205 and 206, FERC's exclusive jurisdiction over rules or practices "affecting" wholesale rates extends only to those "rules or practices" that "directly affect wholesale rates."[124] Applying this rule, the Court concluded that a FERC Order dictating the compensation rules for demand response resources in the wholesale markets was a valid exercise of FERC's authority under the FPA.[125] The fact that FERC's order affected retail rates, "even substantially," was of "no legal consequence."[126] Citing *Oneok*, the Court reasoned that state and federal spheres of jurisdiction in the electricity sector are "not hermetically sealed from one another."[127] Thus, wholesale transactions would naturally impact the retail market.[128]

Together, this trifecta of cases presents the modern legal test for FPA jurisdiction. Per *EPSA*, matters within FERC's exclusive federal jurisdiction include any rules or practices that directly affect wholesale rates.[129] State actions that fall within this zone of exclusive federal jurisdiction may be preempted under the *Hughes* or *Oneok* frameworks. Per *Oneok*, state laws cannot aim at or target matters within exclusive federal jurisdiction.[130] Per *Hughes*, even if a state policy aims at an area within exclusive state jurisdiction, such as retail sales, generation facilities, or the distribution system, the policy may still be preempted if it is "tethered" to the wholesale market in some way, either by affecting market participation or changing wholesale rates.[131]

These cases opened the door for an expanded conception of FERC's jurisdiction over the electricity sector. Despite the Court's goal to prevent federal jurisdiction under the FPA from "assuming near-infinite breadth," many scholars have read *Oneok*, *EPSA*, and *Hughes* as expanding federal jurisdiction over the electricity sector.[132] One author reflected that these cases create "standards of review that favor expansive FERC jurisdiction."[133] Another challenged the Court's adherence to the historic "bright line" standard, instead noting that these cases support an emerging idea of "concurrent jurisdiction" that "affords great

124. *EPSA*, 577 U.S. 260, 276-78 (2016) (emphasis added) (citing Cal. Indep. Sys. Operator Corp. v. Fed. Energy Regul. Comm'n, 372 F.3d 395, 403 (D.C. Cir. 2004)) (limiting practices "affecting" rates "to those methods or ways of doing things that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so").

125. *Id*. at 276.

126. *Id*. at 281-82.

127. *Id*. at 281.

128. *Id*.

129. *Id*. at 276, 278.

130. Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 385 (2015).

131. *Hughes*, 578 U.S. 150, 166 (2016). This framework also applies in the inverse. While states cannot target matters of exclusive federal jurisdiction, with equal force nor can FERC directly regulate or aim at matters under exclusive state jurisdiction. The Court emphasized this principle in *EPSA*: "FERC cannot take an action transgressing [the FPA's] limit no matter how direct, or dramatic, its impact on wholesale rates." *EPSA*, 577 U.S. at 280.

132. *See id*. at 278.

133. Kristoffer James S. Jacob, *Energy Jurisdiction in the Twenty-First Century*, 44 ECOLOGY L.Q. 375, 378 (2017).

deference to federal authority."[134] The subsequent case law applying *EPSA*, *Hughes*, and *Oneok* addresses the extent to which these predictions of expanded federal jurisdiction have borne out.

2. Case Survey Approach

The case survey reviewed over four hundred cases that have cited *EPSA*, *Hughes*, and *Oneok* since 2016. About half of these cases were in front of FERC, while the other half were in federal courts. Not all of the over four hundred reviewed cases addressed jurisdictional disputes in the energy sector. Accordingly, the review focused on those cases that did analyze jurisdictional disputes in the energy sector, specifically between FERC and others: either states, RTOs, or private actors. The most relevant cases were those addressing jurisdictional disputes under several sections of the FPA: section 201, which describes the scope of federal and state jurisdiction; section 205, which requires rates and practices within federal jurisdiction to be just and reasonable; and section 206, which empowers FERC to correct unjust federally jurisdictional rates and practices.[135] To the extent it could inform analysis under the FPA, the analysis also included some cases arising under the Natural Gas Act (NGA).[136]

Those cases and FERC orders that make their jurisdictional holdings using the *EPSA*, *Hughes*, or *Oneok* tests are the most relevant to this analysis; however, cases analyzing federal-state jurisdictional issues under the FPA without relying on these tests for their final holdings were included in the landscape analysis as well. In total, forty-seven cases provided meaningful in-depth analysis of jurisdictional issues, and thirty cases had less robust analysis on the relevant issues. In the former group, a vast majority of these cases were before FERC. A list of these cases is provided in the appendix. The analysis that follows focused on the takeaways from the forty-seven most relevant cases.

B. General Trend: Expanding Federal Jurisdiction

The case survey highlighted that federal jurisdiction under the FPA is expanding, particularly in the context of RTOs and the regional electricity markets. As noted above, scholars have interpreted *EPSA*, *Hughes*, and *Oneok* as paving the way for expanded federal jurisdiction in the electricity sector.[137] Since 2016, this prediction has borne out in the intervening case law. This is due to both a generous interpretation of the statutory text of the FPA, as well as how

134. Charles Kreuzberger, *Preemptive Attack: California's SB 100, the FPA, and Combating Climate Change*, 11 SAN DIEGO J. CLIMATE & ENERGY L. 1, 14 (2020).

135. Federal Power Act §§ 201, 205, 206, 16 U.S.C. §§ 824, 824d, 824e.

136. The NGA is analogous to the FPA in its jurisdictional boundaries and is often used to draw legal principles under the FPA (and vice versa). Relevant sections of the NGA include section 1, which describes the scope of federal jurisdiction; and section 4, which requires jurisdictional rates to be just and reasonable. The survey did not focus on jurisdictional analysis through other statutory sections or legal tests, like the NGA's eminent domain authority or FERC's test for distinguishing between transmission and distribution lines. *See supra* note 18.

137. *See supra* notes 131-133 and accompanying text.

it applies to a changed electricity sector and novel technologies. Today, FERC has authority over more aspects of the electricity sector than it has since the FPA's enactment.

FERC has had the final say on the scope of its own exclusive jurisdiction dozens of times since the Supreme Court issued its *EPSA*, *Hughes*, and *Oneok* opinions. Of the forty-seven cases identified in the case survey as having in-depth analysis of relevant FPA jurisdictional issues, the vast majority—thirty-nine in total—were issued by FERC itself.[138] In select cases, those FERC orders were affirmed by the D.C. Circuit.[139] All but one of the surveyed FERC orders held in favor of federal jurisdiction.[140]

In its orders, FERC has used *EPSA* and, to a lesser extent, *Hughes*, to identify an expanding list of matters that "directly affect" wholesale rates and therefore fall under exclusive federal jurisdiction.[141] For example, FERC has found that all wholesale market rules and the terms of wholesale transactions have direct effects on wholesale rates.[142] This includes rules regarding the eligibility of energy resources to participate in the wholesale market.[143] In addition to deciding whether resources can participate in the market, FERC has also found under *EPSA* that it has jurisdiction over "how resources participate" in the market, including how they "bid and are compensated."[144] In some instances, FERC has broadened this reach into some "surprising places" beyond the confines of the wholesale markets.[145] For example, FERC has found it has jurisdiction to address the effect of state policies on the markets when those policies "directly affect the capacity market clearing price" or "squarely impact the production of electricity or supply-side participation" in capacity markets and can develop market rules that mitigate the effects of those state policies on wholesale market prices.[146] The next Subpart, "Federalism Risks," explores these principles in more detail.

In addition to finding a myriad of direct effects on the wholesale electricity markets, FERC has also claimed jurisdiction over certain operational elements

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138. *See* appendix.

139. *See, e.g.*, Nat'l Ass'n of Regul. Util. Comm'rs v. FERC, 964 F.3d 1177 (D.C. Cir. 2020), United Power, Inc. v. FERC, 49 F.4th 554, 560 (D.C. Cir. 2022).

140. *See* Indiana Mun. Power Agency, & City of Lawrenceburg, Indiana, 172 F.E.R.C. ¶ 61,243 at P 89 (2020) (finding station power to be a retail sale outside of federal FPA jurisdiction).

141. *See EPSA*, 577 U.S. 260, 278 (2016).

142. *See* Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 61 (2017) ("The Commission may set the terms of transactions occurring in the organized wholesale markets."); *see also* Order No. 2222, *supra* note 56 (noting that Order No. 2222 only addresses wholesale market transactions).

143. Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 61 (2017) (finding FERC has exclusive jurisdiction to regulate the terms of transactions in wholesale markets, including the resources eligible to participate).

144. Carbon Pricing in Organized Wholesale Elec. Markets, 175 F.E.R.C. ¶ 61,036 at P 13, 14 (2021).

145. *EPSA*, 577 U.S. at 277.

146. *See* Calpine Corp., et al., v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,035 at P 78 (2020); *see* Hollow Rd. Solar L.L.C., 174 F.E.R.C. ¶ 61,200 at P 20 (2021) (citing Calpine Corp., et al., v. PJM Interconnection, L.L.C., 169 F.E.R.C. ¶ 61,239 at P 68 (2019). See *infra* Part III.C.1 for an overview of capacity markets.

of RTOs. For instance, FERC has found that RTO stakeholder processes have direct effects on wholesale rates and therefore fall under its jurisdiction when stakeholders can vote on the filings that appear in front of FERC for review and approval.[147] Notably, these conclusions appear to contradict prior court precedent holding that "corporate governance" does not fall within FERC's jurisdiction over wholesale rates.[148] This example shows the extent to which FERC's jurisdictional analysis in recent years has generously favored federal jurisdiction.

Many of these jurisdictional issues have arisen in the context of RTO operations and the federal markets, rather than other elements of the electricity sector, like transmission or, in the context of state policy, preemption. In fact, while FERC has wielded liberal authority over the wholesale electricity markets in recent years, the case survey indicates that federal preemption of state and local laws is rare. Despite FERC's significant authority over RTOs and wholesale electricity markets, it has mostly chosen not to use that authority in recent years to preempt state law. The limited cases that do exist lay out some potential principles for when states may risk preemption for infringing on the federal markets, and how a state can avoid that outcome. Those are detailed below in the Subpart "Preemption Risk: Implications for States."

C. Federalism Risks

This Article uses the term federalism risk to refer to the risk that expanded federal authority may limit state authority.[149] Pursuant to the general trend of expanding federal jurisdiction, the case survey identified several potential federalism risks that could result from participating in an RTO or a regional electricity market administered by an RTO. First, states face "policy risk," the risk that federal jurisdiction over electricity markets may interfere with the effectiveness of state clean energy policy. Second, states face "autonomy risk," the risk that federal jurisdiction may restrict state autonomy over certain electricity sector decisions, like the behavior of in-state energy resources. Third, states face "preemption risk," the risk that federal rules may preempt state law. Preemption is often a focus of jurisdictional analyses.[150] However, the case survey reveals that, although the effects of these risks manifesting would be less severe than outright preemption, policy risk and autonomy risk present the most probable federalism risks for states considering utility participation in an RTO or federal electricity market.

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147. RTO Insider L.L.C., 170 F.E.R.C. ¶ 61,035 at P 12 (2020) ("It is voting that has the direct effect. Even if the activities of the press and non-voting members could affect the views of [stakeholder group] voting members, that would be an indirect effect on rates.").

148. Cal. Indep. Sys. Operator Corp. v. Fed. Energy Regul. Comm'n, 372 F.3d 395, 404 (D.C. Cir. 2004).

149. This distinguishes risks arising out of the federal-state balance of authority from risks that may arise as a result of actions by other states. See *supra* Part II.C for more information.

150. *See generally, e.g.*, CARLSON ET AL., *supra* note 22.

This Subpart details the findings from the case survey regarding each of these risks. In Part IV, specific principles from the case survey are applied to the Western states considering joining regional cooperation efforts in the West. Importantly, that application reveals that in spite of overarching trends from the case survey, as well as the specific risks identified below, federalism risk for states remains low in the context of Western regionalization.

1. Policy Risk: Federal Market Rules May Reduce Efficacy of State Policy

The case survey revealed that states whose utilities participate in RTOs or federal wholesale markets face a particular type of risk: that, shy of preemption, federal rules governing the wholesale electricity markets will interfere with the effectiveness of state energy policy. This is termed "policy risk." In terms of threats to state authority, this is the biggest risk identified in the case survey.

Centralized capacity markets create significant policy risk for states. In certain RTO-run capacity markets in the Eastern United States, FERC has issued federal market rules designed to mitigate the potency of state financial incentives for preferred generation.[151] While this risk and its association with capacity markets presents the biggest federalism risk for states, Part IV notes that this risk is alleviated by the lack of Western support for a capacity market.[152] This Part details FERC's recent involvement in capacity markets and the risk it creates for state policy.

Capacity market auctions operate similarly to energy markets, but their purpose is to incentivize long-term resource adequacy rather than optimize next-day and real-time electricity delivery.[153] In a capacity market, generators bid into the market to commit generating capacity far into the future, typically three years, rather than bidding in to supply electricity to the grid the next day or the next hour.[154] Like in an energy auction, bidders are awarded payments from lowest to highest price bid, until the capacity quota is met.[155] Capacity market payments supplement generators' revenues from energy and ancillary services markets, and are intended to act as price signals when the market needs additional capacity. High capacity prices, for example, signal new resources should enter the market, either due to forecasts of high future electricity demand, the generating capacity of the current resource mix, or both.[156] Because capacity markets are designed to send market signals about when new market entrants are needed to support future electricity demand, they affect RTO oversight of

151. *See infra* notes 164-169 (discussing capacity market rules).
152. HURLBUT ET AL., *supra* note 48, at 106.
153. *Id*.
154. *Id.*
155. *Id.*
156. *Id.*

resource adequacy and state decisions related to procurement of new generating resources.[157]

RTOs that manage centralized capacity markets must adhere to FERC's capacity market regulations.[158] In recent years, FERC has prescribed numerous capacity market rules, many of which are designed to tamper the exercise of market power in centralized capacity markets. Market power rules require generators to make bids into the capacity market at or above a price floor, unless they can show that they do not possess "market power."[159] Accordingly, these rules are often called "Minimum Offer Price Rules" (MOPRs).[160] FERC has claimed jurisdiction over these rules as part of its obligation to ensure that wholesale rates are just and reasonable.[161] Throughout the case survey, MOPRs appeared in several eastern RTOs, including ISO New England (ISO-NE), New York ISO (NYISO), and PJM Interconnection (PJM).[162]

Between 2017 and 2020, FERC's jurisdiction and influence in this area greatly increased. Many of the rules it created interfered with state policies, making them less effective. While it later walked back this jurisdictional reach in 2022, the active role FERC took in the Eastern capacity markets serves as a cautionary tale for other RTOs that want to avoid policy risk.

The role of the MOPR was originally limited to deterring the exercise of buyer-side market power, but between 2017 and 2020, FERC expanded the role of the MOPR to also address the impact of various state policies on capacity market prices.[163] FERC has required Eastern RTOs to subject many types of resources to market power screenings in the centralized capacity markets, effectively ensuring these resources bid into the market at or above a specified price floor. In many cases, this interfered with the effectiveness of state energy policies designed to promote preferred generation resources, like renewable resources, through subsidies or other financial support. In ISO-NE, NYISO, and PJM, FERC required the RTOs to subject a wide variety of capacity resources to these rules, despite protests about their impacts on state resource procurement policies:

> (1) Resources receiving state subsidies: In PJM, FERC required any resources receiving state support outside of the market to be subject to the MOPR. Several states in PJM had state subsidies to support the participation of preferred generation resources in the capacity market. These include, for

157. *See* CXA La Paloma, L.L.C., 165 F.E.R.C. ¶ 61,148 at P 76 (2018) (finding that the "[c]ommission has not required a centralized capacity market as part of a just and reasonable market design").

158. *See* U.S. CONST. art. IV, cl. 2 (providing that federal law is the "supreme Law of the Land")

159. *See, e.g.*, Calpine Corp., et al., v. PJM Interconnection, L.L.C., 163 F.E.R.C. ¶ 61,236 at P 5 (2018).

160. *Id*.

161. New York State Pub. Serv. Comm'n, et al., v. NYISO, 173 F.E.R.C. ¶ 61,060 at P 30 (2020) (internal citations omitted).

162. *See* ISO New England Inc. & New England Power Pool Participants Comm., 158 FERC ¶ 61,138 at 32-33 (2017).

163. Calpine Corp., et al., v. PJM Interconnection, L.L.C., 163 F.E.R.C. ¶ 61,236 at P 5 (2018).

example, the zero-emissions credits (ZEC) and Renewable Portfolio Standards (RPS) programs.[164] However, due to the "suppressive effect" such subsidies could have on capacity market prices, FERC required them to be subject to a price floor.[165]

(2) Renewable resources: In ISO-NE, FERC required all renewable energy resources, including those receiving state support, to be subject to the MOPR. FERC allowed a limited exemption in which up to 200 MW of renewable power could enter the auction without meeting the price floor.[166]

(3) Electric storage resources: In NYISO, FERC required all electric storage resources to be subject to the market power mitigation rules. In doing so, FERC expressed concern regarding the cumulative effect state subsidies for these resources could have in suppressing capacity prices: "Where state policies allow uneconomic entry into the capacity market, the Commission's jurisdiction applies, and we must ensure that wholesale rates are just as reasonable."[167]

(4) Demand response resources: In 2017, FERC approved a blanket exemption for "Special Case Resources" (SCRs), such as demand response resources, from the market power mitigation rules in NYISO.[168] Three years later in 2020, FERC reversed this determination, instead finding that all new SCRs should be subject to the market power mitigation rules because state support gave them the ability to suppress capacity market prices below competitive levels.[169]

Dissenting opinions throughout these orders criticized FERC's decision to broadly apply the market power mitigation rules to state policies. By applying the MOPRs to resources receiving state financial support, several dissents argued that FERC was targeting a matter within exclusive state jurisdiction by regulating state decisions over generation policy.[170] The dissents argued FERC had adopted a policy of "mitigating" instead of "facilitating" state policy: "Although a broad application of the MOPR may not technically amount to the regulation of generation, it has the potential to erect a significant impediment to states' efforts to shape the generation mix within their borders."[171] Through the MOPRs, Eastern RTOs would force new entrants into the capacity market to bid in at an administratively-determined estimate of what they "should" cost, while existing

164. *Id*. at P 1 n.1.

165. Calpine Corp., et al., v. PJM Interconnection, L.L.C., 163 F.E.R.C. ¶ 61,236 at P 2 (2018); Calpine Corp., et al., v. PJM Interconnection, L.L.C., 169 F.E.R.C. ¶ 61,239 at P 2 (2019).

166. ISO New England Inc. & New England Power Pool Participants Comm., 158 FERC ¶ 61,138, at P 4 (2017).

167. New York State Pub. Serv. Comm'n, et al., v. New York Indep. Sys. Operator, Inc., 170 F.E.R.C. ¶ 61,119 at P 37 (2020).

168. New York State Pub. Serv. Comm'n, et al., v. NYISO, 158 F.E.R.C. ¶ 61,137 at P 30 (2017).

169. New York State Pub. Serv. Comm'n, et al., v. NYISO, 170 F.E.R.C. ¶ 61,120 at PP 17-18 (2020).

170. *See, e.g.*, Calpine Corp., et al., v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,034 (2020) (Glick, dissenting).

171. ISO New England Inc., 162 F.E.R.C. ¶ 61,205 (2018) (Glick, dissenting at 2-3).

resources could bid in at a lower prices, which created "systemic bias in favor of existing resources."[172]

Practically, because new entrants tend to be new technologies and clean energy, the effect of these rules was to slow the transition to a cleaner resource mix. Thus, mitigation rules, the dissents noted, "evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states' exercise of their authority over resource decision making."[173] This policy enabled FERC to "nullify" state efforts to economically regulate electricity generation, such as cap-and-trade programs, clean energy standards, or potential future carbon taxes.[174]

In response to arguments claiming this intruded upon states' authority over generation resources, FERC found that subjecting certain resources to the MOPR did not constitute direct regulation of generation facilities or prevent states from using preferred resources, but merely required resources to clear the capacity market on a competitive basis.[175] It found that "[t]he Commission does not interfere with the states' authority over generation facilities, local reliability, retail sales or other matters the FPA reserved to the states merely by implementing wholesale rules affecting matters within the states' jurisdiction."[176] Rather, the FPA compels FERC to ensure that capacity rates are just and reasonable, which "requires a market design capable of attracting non-state-supported investment when such investment is necessary to meet resource adequacy objectives."[177]

It is not clear why FERC has assumed jurisdiction in the capacity markets so liberally. As noted above, capacity market clearing prices are intended to act as price signals to the market regarding when new resources are needed. High capacity prices, for example, signal that new generators should enter the market.[178] It is possible that FERC was particularly attuned to suppressed capacity market clearing prices because they would not send signals to the broader market that entry was needed. This could potentially affect long-term electricity reliability. Regardless, FERC's legal analysis in the Eastern capacity markets serves as a warning for states concerned about the efficacy of their state clean energy policies.

Despite these justifications for its MOPR policies, in 2022, FERC walked back its restrictions in the Eastern capacity markets, enabling fewer resources to be subject to its screenings and price floors. For example, in NYISO, FERC "change[d] course" and accepted NYISO's proposal to exclude a wide variety of

172. New York State Pub. Serv. Comm'n, et al., v. New York Indep. Sys. Operator, Inc., 170 F.E.R.C. ¶ 61,119 (2020) (Glick, dissenting at 3).

173. *Id*.

174. *See* Calpine Corp. v. PJM Interconnection, L.L.C., 169 F.E.R.C. ¶ 61,239 at PP 10, 89 (2019).

175. Calpine Corp., et al., v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,035 at P 17 (2020).

176. New York State Pub. Serv. Comm'n, et al., v. NYISO, 173 F.E.R.C. ¶ 61,060 at P 37 (2020) (citing *EPSA* 577 U.S. at 281-82).

177. ISO New England, Inc., 173 F.E.R.C. ¶ 61,161 at P 89 (2020).

178. *See* HURLBUT ET AL., *supra* note 49, at 106.

resources from market power rules, such as wind, solar, storage, hydroelectric, geothermal, non-fossil fuel cells, and demand response resources.[179] In doing so, FERC acknowledged that the expansive reach of the market power mitigation rules had the potential to increase costs, over-procure capacity, and distort capacity market price signals.[180] FERC also reversed its requirement in ISO-NE subjecting state-sponsored policy resources to market power mitigation rules. FERC opined that a reversal would "better comport" with the cooperative federalism scheme of the FPA, noting, "we no longer find it appropriate to presume that states' exercise of their reserved authority over generation facilities is the equivalent of anticompetitive conduct, simply because of the inevitable, albeit indirect, effect on capacity market prices."[181]

Notably, FERC has demonstrated some degree of deference to state preferences for capacity market rules in single-state RTOs. In the opinion rolling back the MOPR rules in the NYISO market, Commissioner Christie concurred, stating the following:

> Here the record shows—and this is critically important to my analysis—that no one has suggested that this single-state ISO's proposal to accommodate the resource decisions made by the New York legislature will harm consumers in other states . . . . A similar analysis could well lead to a different outcome in a multi-state RTO, if . . . the RTO was implementing one state's public policies as to preferred resources, and that implementation resulted in impacts being shifted to consumers in one or more other states in the multi-state RTO.[182]

While FERC has also approved MOPR rollbacks in ISO-NE, which is a multi-state RTO, this concurrence rings as a warning.[183] Although FERC has walked back the extent to which federal rules mitigate the efficacy of state policies, FERC commissioners remain closely attuned to the connection between the centralized capacity market and state clean energy policies.

Some continue to believe that capacity markets create a type of danger zone where FERC and RTO policies can have a significant influence on the efficacy of state resource policies. For example, during the time when FERC exercised its jurisdiction liberally over the capacity markets, FERC Commissioner Glick referred to this time as FERC engaging in a "quixotic campaign" to interfere with state policies.[184] He warned it would deter states from participating in RTOs with

179. New York Indep. Sys. Operator, Inc., 179 F.E.R.C. ¶ 61,102 at P 36 (2022).

180. *Id*.

181. New England Inc. New England Power Pool Participants Comm., 179 F.E.R.C. ¶ 61,139 at P 53 (2022).

182. New York Indep. Sys. Operator, Inc., 179 F.E.R.C. ¶ 61,102 (2022) (Christie, concurring at 3) (emphasis in original).

183. *See, e.g.*, New England Inc. New England Power Pool Participants Comm., 179 F.E.R.C. ¶ 61,139 (2022) (Christie, concurring at 3) (referencing opposition to a PJM proposal the previous year to eliminate its MOPR, where two states had opposed the proposal due to cost-shifting).

184. New England Inc. New England Power Pool Participants Comm., 179 F.E.R.C. ¶ 61,139 (2022) (Glick, concurring at 2); *see also* New York State Pub. Serv. Comm'n, et al., v. NYISO, 158 F.E.R.C. ¶ 61,137 (2017) (Bay, concurring) (arguing that the MOPR "places the Commission in direct and recurring conflict with the states.").

capacity markets.[185] By avoiding a capacity market, an RTO may avoid these types of influences on the state policy of participating states.

FERC's activity in the Eastern capacity markets is notable for its breadth. While FERC eventually rolled back some of its market power rules in NYISO and ISO-NE, for many years prior to that, FERC had heavily involved itself in the operations of capacity markets. Its initial expansion of how it applied the MOPR—from originally using it to deter buyer-side market power to applying it to any state policies that could impact capacity prices—ballooned FERC's understanding of its own jurisdiction over capacity market rates. Once FERC started issuing MOPR orders across PJM, NYISO, and ISO-NE capacity markets, those RTOs had no choice but to comply. Moreover, when FERC did eventually reverse the MOPR application in 2022, it did so after receiving extensive evidence presented by NYISO and ISO-NE advocates that the MOPR application was counterproductive to the market.[186] Evading FERC's jurisdictional influence required significant modeling and litigation—all of which took time and resources—to overturn.

MOPRs present significant policy risk for states. In states where utilities had joined Eastern RTOs with capacity markets, these federal market rules have interfered with the effectiveness of state policy aimed at reducing emissions and expanding clean energy. MOPRs in the Eastern capacity markets have diluted state policies without fully preempting them. Effectively, this has established a new type of jurisdictional risk for states: in addition to preemption, the efficacy of state policies can be attenuated by filtering them through wholesale market policies established by FERC.

It is possible this situation was idiosyncratically related to capacity markets, due to their connection to resource adequacy and decision making around procuring new generating resources, an area traditionally reserved for the states under the FPA. It is also possible that FERC will find other RTO market rules in the future over which it believes it should exercise jurisdiction and do so in a way that gives it significant authority over the function of the market. Because they are not forward-looking and thus do not affect resource planning decisions the same way capacity markets might, energy and ancillary services markets do not interlink with state policies to the same extent that capacity markets do. Regardless, it is impossible to say the influence such significant authority over energy or ancillary market rules might have on RTOs and states, until it happens. If FERC does exercise authority over energy or ancillary market rules, RTOs and

185. *See, e.g.,* New York State Pub. Serv. Comm'n, et al., v. NYISO, 173 F.E.R.C. ¶ 61,060 at P 19 (2020) (Glick, dissenting) (arguing that FERC's interference with state public policies will cause them to choose autonomy over the electricity markets and noting that already "numerous states are considering leaving … eastern RTOs [with] capacity rules that hinder states' exercise of their resource decisionmaking authority").

186. *See* NYISO, Inc., 179 F.E.R.C. ¶ 61,102 at P 25 (2022) (in which to justify the proposed rule change, NYISO conducted a study finding that NYISO's capacity market auctions would continue to produce competitive market outcomes and retain sufficient capacity to meet reliability needs as the resource mix evolves).

states must either submit to FERC's authority or expend significant resources and many years crafting a reasoned argument to reverse it.

2. Autonomy Risk: Federal Market Rules May Reduce State Autonomy

In addition to policy risk, the case survey pointed to "autonomy risk" for states: the risk that federal jurisdiction may restrict state autonomy over certain electricity sector decisions, like the behavior of in-state energy resources. States whose utilities participate in RTOs or federal wholesale markets may be bound by federal market rules governing the organized electricity markets. Of chief concern are several recent FERC orders prescribing which resources are eligible to participate in wholesale electricity markets.[187]

FERC has issued several market participation rules in recent years. In *EPSA*, the Supreme Court upheld FERC's authority to issue a blanket order defining the terms of transactions for demand response resources because such resources "directly affect" wholesale rates.[188] Subsequently, FERC used this "directly affecting" jurisdiction as a basis to assert exclusive federal jurisdiction over the rules governing market participation of other new technologies. FERC has recently issued several orders requiring RTOs to adjust their market rules to facilitate the participation of the following resources in wholesale markets: demand response resources (Order No. 719, and the subject of the order at issue in *EPSA*),[189] electric storage resources (Order No. 841),[190] DER aggregators (Order No. 2222),[191] and energy efficiency resources (PJM-specific order).[192] The orders preclude states from restricting certain resources from accessing the wholesale markets unless FERC has given states express authority to opt out of these requirements. These rules apply to all regional electricity markets: energy, capacity, and ancillary services markets.

Notably, FERC's jurisdiction over resource participation in the wholesale electricity markets reflects a generous interpretation of *EPSA*. The FERC rule at issue in *EPSA* did not have to do with participation of demand response resources in the wholesale markets; rather, it specified a compensation formula for demand response resources bidding into the market.[193] In finding that this rule fell under FERC's exclusive jurisdiction over practices affecting wholesale rates, the Court reasoned that demand response would reduce wholesale prices by displacing higher-priced generation in the market. Because demand response could lower rates, the "rules and practices that determine how those programs operate" also

187. As described in this Part, these orders include Orders No. 719 and 745 (demand response), Order No. 841 (electric storage resources), and Order No. 2222 (DER aggregators).

188. *EPSA*, 577 U.S. 260, 279 (2016).

189. Wholesale Competition in Regions with Organized Electric Markets, 125 FERC ¶ 61,071 (2008) ("Order No. 719").

190. Elec. Storage Participation in Markets Operated by Reg'l Transmission Organizations & Indep. Sys. Operators, 162 F.E.R.C. ¶ 61,127 (2018) [hereinafter Order No. 841].

191. Order No. 2222, *supra* note 55.

192. Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 6, 61 (2017).

193. *EPSA*, 577 U.S. at 276.

had a direct effect on rates and were under FERC's jurisdiction.[194] In other words, the Court emphasized the rate-reducing power of demand response as having "directly affecting" wholesale rates.[195] The Court then explained the specifics of how the compensation rule at issue affected demand response, and therefore rates. First, the compensation rule would increase the participation of demand response resources in the market, and second, it would apply "downward pressure" to other generators' bids in the auction.[196] Increased participation and market competition were important to the Court as specifically tied to demand response resources.[197] Nowhere in the opinion did the Court hold that FERC has exclusive jurisdiction over all participation rules in the wholesale markets.

A year after *EPSA*, FERC continued to reason that it had jurisdiction over the rules governing resources with potential to lower wholesale prices, acknowledging the limitations imposed by a strict interpretation of *EPSA*. In 2017, FERC required PJM to permit the participation of energy efficiency resources in its wholesale markets.[198] PJM had proposed a market rule that would enable state authorities to restrict the participation of energy efficiency resources in wholesale markets.[199] FERC overturned the rule, reasoning that because energy efficiency resources reduced consumer electricity demand and displaced higher-priced bids, the "terms of eligibility" for these resources directly affected wholesale rates.[200] Therefore, FERC had exclusive federal jurisdiction over the participation of energy efficiency resources in the PJM market, and states could not restrict their access without FERC's express authority to do so via an "opt-out" from the rule.[201]

However, a year later, FERC debuted a more liberal reading of *EPSA* that grants it broad exclusive jurisdiction over the "criteria for participation" in the wholesale markets.[202] FERC dropped the qualification that it had jurisdiction only over participation of those resources demonstrated to affect wholesale rates, instead finding that it had broad jurisdiction over all participation rules in the wholesale markets.[203] This reasoning featured in two broad orders FERC issued to apply to all wholesale markets managed by RTOs: Orders No. 841 and 2222.

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194. *See id*. at 279.

195. *Id*.

196. *Id.*

197. *See id*., 282-83.

198. *See* Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 61 (2017).

199. *Id*. at P 9.

200. *Id*. at P 60 (finding that the "direct effect occurs when energy efficiency is offered directly into the wholesale capacity market, causing a reduction in demand and an increase in supply of capacity, thereby resulting in a lower wholesale capacity price").

201. *Id.* at P 61 (holding that FERC has exclusive jurisdiction to regulate the terms of transactions in wholesale markets, including the resources eligible to participate).

202. *See* Elec. Storage Participation in Markets Operated by Reg'l Transmission Organizations & Indep. Sys. Operators, 167 F.E.R.C. ¶ 61,154 at P 9 (2019) ("Order No. 841-A").

203. *Id*.; Order No. 2222, *supra* note 56, at P 57 ("The Commission has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets, including the wholesale market rules for participation of resources connected at or below distribution-level voltages.").

In Order No. 841, issued in 2018, FERC directed RTOs to revise their tariffs to facilitate the participation of electric storage resources (i.e., batteries) in wholesale markets.[204] In that order, FERC held that it had broad "exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets."[205] FERC reasoned that the direct effect on wholesale rates arose out of the fact that participation of storage resources would broadly "enhance competition" in the wholesale markets.[206] In Order No. 841, FERC declined to provide an opt-out for states.[207] The D.C. Circuit upheld this reasoning, finding that participation rules intended to "increase wholesale competition" had a direct effect on wholesale rates, granting FERC exclusive jurisdiction over the criteria for participation in wholesale markets.[208]

In Order No. 2222, issued in 2020, FERC directed RTOs to revise their participation models to ensure DER aggregators could participate in wholesale markets.[209] As part of the rule, FERC held that it had exclusive jurisdiction over DER aggregators' participation in wholesale markets as part of its jurisdiction over practices directly affecting wholesale rates.[210] Again, FERC declined to provide a state opt-out.[211] That decision proved challenging to implement, as under Order No. 719 states can opt out of ensuring that demand response resources—which are often part of DER aggregations—can participate in wholesale markets.[212] At the time of this writing, resolution is still pending on this issue.[213]

The most recent collection of FERC orders on wholesale market participation reveals the extent to which *EPSA*'s meaning has transformed over time. In one FERC order related to Order No. 2222, FERC reasoned that "EPSA held that the Commission's regulation of demand response participation in

204. Order No. 841, *supra* note 190, at P 1.

205. *Id*.

206. *Id*. at P 2.

207. *Id*. at P 12.

208. Nat'l Ass'n of Regul. Util. Comm'rs v. FERC, 964 F.3d 1177, 1186 (D.C. Cir. 2020).

209. Order No. 2222, *supra* note 55, at 6.

210. *Id.* at 57.

211. *Id*. at 56.

212. One wrinkle in the implementation of Order No. 2222 without an opt-out is how it squares with previous Order No. 719, which provided a state opt-out for the participation of demand response (DR) resources in wholesale markets. *Compare, e.g.*, Participation of Distrib. Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators, 174 F.E.R.C. ¶ 61,119 (2021); *cf.* Participation of Distrib. Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators, 175 F.E.R.C. ¶ 61,227 (2021) (finding alternative resolutions on the issue of aligning the opt-outs in Order Nos. 841 and 2222). DR resources are often part of DER aggregations, including homogenous DER aggregations comprised of only DR resources. To address the alignment of these two orders, FERC opened the issue to public comment in 2021. FERC sought comment on whether DR resources that are part of a homogenous aggregation (one that only includes DR) as well as DR resources that are part of a heterogeneous DER aggregation (one that includes DR and other DERs) should both be subject to an opt-out. Participation of Aggregators of Retail Demand Response Customers in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators, 174 F.E.R.C. ¶ 61,198 at PP 1-2 (2021).

213. Still pending resolution as of January 2025.

wholesale markets is a practice that directly affects wholesale rates."[214] However, as noted above, EPSA did not expressly hold that FERC had jurisdiction over the participation of demand response resources, but rather the compensation for demand response, which in turn affected their participation.[215] In this way, FERC has embraced a liberal reading of *EPSA* that grants it broad jurisdiction over the participation of resources in the wholesale markets.

This shift in FERC's jurisdiction is subtle but potentially meaningful for states. For one, this recent trend of FERC participation rules suggests that FERC is likely to issue a participation order each time a new set of technologies comes onto the scene in the electricity sector. In this way, states can expect FERC's claimed jurisdiction over the participation of various energy technologies in wholesale markets to continue to grow.

This reasoning also opens the door for FERC to claim jurisdiction over the "criteria for participation" of individual DERs or other resources "located on the distribution system or behind the meter," such as individual rooftop solar, battery, or demand response customers.[216] Under a strict reading of *EPSA* where FERC's jurisdiction is limited to those resources that have significant potential to reduce the wholesale rate, individual DERs would likely not fit the bill due to their miniscule market share. However, under a more liberal interpretation of *EPSA* where FERC has broad jurisdiction over the criteria for participation in wholesale markets, FERC could dictate that any manner of resources can participate in the wholesale markets—including individual DERs. To date, FERC has disclaimed jurisdiction over individual DERs.[217] However, this legal reasoning opens the door wider than ever for FERC to facilitate the participation of individual DERs in the wholesale market.

States that wish to control their resource mix by limiting resources' access to the wholesale markets may perceive this collection of FERC orders as a limit to their jurisdiction over generation and other retail electricity assets, especially since many resources must use state distribution systems to access federal wholesale markets. Accordingly, risks associated with these recent FERC orders is termed "autonomy risk," as it may reduce the breadth of state autonomy over electricity sector decisions. As detailed in Part IV, while this may limit state decision making, it is unlikely to present significant federalism concerns for those states considering utility participation in Western regionalization efforts.

3. Preemption Risk: Federal Market Rules May Preempt State Law

The third risk to states is preemption risk. This is the risk that FERC's broad exclusive jurisdiction over regional electricity markets, which has expanded in recent years, may increase the likelihood that state policies are preempted by

214. Participation of Distrib. Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators, 175 F.E.R.C. ¶ 61,227 at P 27 (2021).

215. *EPSA*, 577 U.S. 260, 276 (2016).

216. Order No. 2222, *supra* note 56, at P 57; *see* Order No. 841-A at P 9.

217. Order No. 2222, *supra* note 56, at P 43.

federal rules. The case survey illuminates general preemption trends in recent years, as well as several core principles that outline the scope of FERC's exclusive jurisdiction over the electricity sector. These principles illuminate the extent to which any single state's policy faces preemption risk. As detailed further in Part IV, the case survey does not indicate that preemption risk is significant as compared to policy risk or autonomy risk.

First, federal preemption of state and local laws remains rare. Cases involving full federal preemption of state and local laws comprise a proportionately small piece of the surveyed cases.[218] While this does not reveal much as to specifically when and why state law may be preempted by federal law, it does indicate that *EPSA*, *Hughes*, and *Oneok* have not catalyzed an onslaught of attacks on state policies in recent years.[219] This is a helpful backdrop to consider preemption issues specifically in the context of the federal regional electricity markets.

Second, the case survey outlines the scope of FERC's exclusive field of jurisdiction over RTOs and the wholesale electricity markets. Because FERC's jurisdiction over the wholesale electricity markets is exclusive, states cannot enact policies that infringe on those markets without risking preemption.[220] For example, if they enact policies that operate within the market or otherwise set the terms of wholesale market transactions, they may run afoul of federal jurisdiction and the policies can be federally preempted.[221] The principles outlined in the case survey provide a framework for when states may risk preemption for infringing on the federal markets.

Since *EPSA*, FERC has doubled down on its exclusive authority over the rules and terms of transactions in the wholesale markets. As described in Part II.A, "Basics of Electricity Markets," centralized wholesale electricity markets are critical features of RTOs. Each RTO runs at least one energy market, and some also oversee centralized markets for ancillary services and capacity. For example, CAISO operates centralized wholesale energy markets for next-day and real-time delivery (respectively, EDAM and WEIM) as well as a market for ancillary services but does not have a centralized capacity market.[222] *EPSA*, *Hughes*, and the intervening case law have emphasized FERC's broad jurisdiction over the wholesale markets operated by RTOs. In affirming FERC's extensive authority over the wholesale markets, the Court in *EPSA* noted that Congress charged FERC with ensuring that "both wholesale rates and the panoply of rules and practice affecting them" are just and reasonable.[223] Wholesale rates emerge from the results of auctions in the centralized wholesale markets. It follows that wholesale market rules are "practices" directly affecting

218. Seven of the forty-seven identified cases address preemption. *See* Appendix.
219. *See* Appendix.
220. *See supra* Part I.
221. *See supra* Part I.
222. *See* HURLBUT ET AL., *supra* note 49, at 106.
223. *EPSA*, 577 U.S. 260, 277 (2016).

wholesale rates.[224] Since then, FERC has held it has exclusive jurisdiction to "extensively regulate[] the structure and rules of wholesale auctions."[225]

FERC has exclusive jurisdiction to set the "terms of transactions" in the regional wholesale electricity markets.[226] This includes terms like the compensation formula at issue in *EPSA*, whether generators are eligible to participate in the wholesale markets, and how to account for state carbon charges in wholesale auction prices.[227] Theoretically, FERC's jurisdiction over wholesale market rules is limited to those wholesale market rules that themselves directly affect rates, as the Court suggested in *EPSA*.[228] However, the case survey did not yield any examples where FERC was found to have overstepped its jurisdiction by issuing, requesting, or approving a wholesale market rule of any kind. This suggests that the scope of FERC's jurisdiction over transaction terms is very broad indeed. Because FERC's FPA jurisdiction is exclusive to the states, states must consider this broad scope when analyzing the nature of their preemption risk.

States can avoid infringing on FERC's exclusive jurisdiction over the terms of wholesale market transactions by avoiding setting those terms themselves. If states do enact their own terms, they must keep several things in mind. For one, as noted above, states cannot enact policies that affect whether and how generators participate in the wholesale markets.[229] States cannot "bar, restrict, or otherwise condition the participation" of resources that FERC has declared important to wholesale market competition, unless FERC gives them express authority to do so.[230] Resources that FERC has declared important to all wholesale markets include demand response aggregations, electric storage resources, and DER aggregations, even when these resources are located behind the meter or entirely on the local distribution grid.[231] States that attempt to bar these resources from participating in the wholesale market may be preempted.[232] States may opt out of enabling demand response resources from participating in

224. Order No. 2222, *supra* note 56, at P 41 (2020).

225. Advanced Energy Econ., 163 F.E.R.C. ¶ 61,030 at P 36 (2018).

226. *See* Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 61 (2017) ("The Commission may set the terms of transactions occurring in the organized wholesale markets."); *see also* Order No. 2222*, supra* note 56, at P 10 (noting that Order No. 2222 only addresses wholesale market transactions).

227. *See EPSA*, 577 U.S. at 276; Carbon Pricing in Organized Wholesale Elec. Mkts, 175 F.E.R.C. ¶ 61,036 at P 13 (2021) (holding that FERC has exclusive jurisdiction over market rules for incorporating state-issued carbon prices); *See* Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 61 (2017) (finding that terms of wholesale transactions include "which resources are eligible to participate" in the wholesale markets).

228. *EPSA*, 577 U.S. at 279 (finding that because demand response affects wholesale rates, the "rules and practices that determine how those programs operate" are direct effects as well).

229. *See supra* Part III.C.2.

230. *Supra* Part III.C.2 (FERC has exclusive jurisdiction to regulate the terms of transactions in wholesale markets, including the resources eligible to participate).

231. *See generally EPSA*, 577 U.S. 260 (demand response); Order No. 841(electric storage resources); Order No. 2222, *supra* note 56 (DER aggregators).

232. *See* Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 61 (2017).

markets; because demand response is often part of DER aggregations, FERC is still figuring out how to reconcile these orders.[233]

Terms of transactions under exclusive federal jurisdiction also include terms that affect the compensation wholesale market participants receive in the auction. For example, the Maryland subsidy at issue in *Hughes* conditioned the payment of funds on clearing the wholesale market. This changed the terms of wholesale auction participation, intruding on federal jurisdiction under the FPA.[234] States can avoid the result in *Hughes* by ensuring their policies do not require generators to participate or "operate within" the wholesale market.[235] The Court emphasized that states could continue to encourage new generation through measures "untethered" to a generator's wholesale market participation.[236] For example, subsidies, incentives, or contracts that transfer ownership entirely outside of the market would be permissible under the *Hughes* framework. To date, state policies have only been at risk of federal preemption if they specifically touch the terms, transactions, or operations of the wholesale market itself. Policies with more distant effects on market participation, such as providing financial assistance to keep generators in business or enable them to lower market prices, have not been found to interfere with federal jurisdiction under the FPA since they "can influence the auction price only indirectly."[237]

States with utilities participating in federal wholesale markets run by RTOs may be exposed to preemption risk associated with those wholesale markets and the resources that participate in them. However, as Part IV details, this risk is not significant for states in the context of Western regionalization.

IV. IMPLICATIONS FOR WESTERN STATES CONSIDERING UTILITY PARTICIPATION IN REGIONALIZATION EFFORTS

In recent years, efforts to expand the Western regional electricity markets have accelerated: CAISO has been operating an expanded real-time energy market—WEIM—since 2014 and received approval from FERC to expand its real-time energy market—EDAM—starting in 2026.[238] In addition, several state representatives initiated an effort in 2023 to develop a multi-state RTO in the West, a new entity that would oversee the Western regional electricity markets and operate the grid.[239] In this way, numerous Western states have opted into a shifting balance of authority over electricity decisions in the West. Meanwhile, as Part III describes, the legal landscape in the electricity sector has been undergoing a shift of its own, strongly favoring federal interests over the interests

233. Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Reg'l Transmission Organizations & Indep. Sys. Operators, 174 F.E.R.C. ¶ 61,198, at PP 1-2 (2021) (seeking comments on how to reconcile the opt-outs in Orders No. 719 and 2222).

234. *Hughes*, 578 U.S. 150, 163 (2016).

235. *See id.* at 165-66.

236. *Id*. at 165-66.

237. *See* Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 524 (7th Cir. 2018).

238. *See* discussion *supra* Part II.

239. *Supra* Part II.

of states. Much of FERC's jurisdictional accretion has taken place in the context of the regional electricity markets administered by RTOs. Where do these various moving parts leave Western states considering utility participation in a regional electricity market or a future RTO?

Western states must decide whether to permit in-state utilities to join the expanding CAISO markets as well as a potential future RTO. As part of these decisions, states must determine whether their authority over the electricity sector would suffer due to exposure to these expanded federal markets. Specifically, states must determine if the threats of policy risk, autonomy risk, or preemption risk outweigh regionalized electricity markets' cost savings, emissions reduction, and efficiency benefits.

To inform states' decisions regarding whether they should permit in-state utilities to participate in Western regionalization efforts, this Part considers how recent developments in FERC's jurisdiction over wholesale electricity markets may affect Western states' authority. In the context of RTOs and regional wholesale electricity markets, "the retention of state authority is a highly nuanced issue, which depends on the position of individual states and utilities and, perhaps most importantly, the specifics of a market's design."[240]

This Part applies the federalism risks identified in the case survey—policy risk, autonomy risk, and preemption risk—to the context of Western states weighing these decisions. Importantly, in spite of overarching trends from the case survey, jurisdictional risks for states remain low in the context of regionalization. This is because the biggest potential risks to state authority do not apply to market features currently contemplated in the West.

A. Policy Risk: Implications for States

The creation of a centralized capacity market in a future multi-state Western RTO presents the most substantial risk to state authority for states considering utility participation in regionalization efforts. Trends in the Eastern capacity markets, described in Part III, may alarm states concerned about the policy risks of expanding Western electricity markets. Despite these concerns, CAISO does not currently operate a capacity market and creating a centralized capacity market in the West has not historically been supported by Western states.[241] Because of the unlikelihood that a capacity market would be created if a Western RTO does materialize, any jurisdictional risks states face due to FERC policy impeding state policy objectives in these markets are low.

Despite the low risk associated with capacity markets specifically, states should monitor both the potential for market rules in non-capacity markets to affect state policy, and FERC's use of legal analysis finding that general market forces can have direct effects on wholesale rates. For instance, FERC has recently replicated the approach it took with the MOPRs in a policy statement

240. ENERGY STRATEGIES TECHNICAL REPORT, *supra* note 98, at 41.
241. *See* HURLBUT ET AL., *supra* note 49, at 106.

addressing the effect of state-issued carbon prices on wholesale markets, including energy markets.[242] Not only does the rule affect state policy outside of the capacity market construct, but FERC's legal analysis in doing so also reflects a broadening conception of federal jurisdiction.[243] While this does not present immediate policy risk for states considering utility participation in WEIM, EDAM, or a multi-state RTO, states should monitor the similarities between the approach FERC has taken with carbon pricing and the approach it had in the Eastern capacity markets because it may illustrate a pattern of jurisdictional expansion across market types.

This Subpart describes the policy risk Western states face in the context of regionalization efforts, starting with its connection to capacity markets and ending with trends worth monitoring.

1. A Western Capacity Market is Unlikely

Federal market power rules implemented in a Western capacity market could dilute state energy policies, as was the case in ISO-NE, NYISO, and PJM.[244] While this would present significant policy risk for Western states, several indicators suggest that a Western capacity market is unlikely to materialize in the near future.

For one, CAISO does not currently operate a centralized capacity market, nor is it considering initiating one.[245] As such, entrants to CAISO or its markets cannot participate in a CAISO-run capacity market. Thus, the policy threat FERC's capacity market rules pose to Western states is primarily relevant to the prospect of a new multi-state Western RTO via the Pathways Initiative.

A capacity market is one of the elements that the Pathways Initiative may choose to include in a new RTO. As discussed in Part III, the purpose of a capacity market is to assist with long-term resource adequacy: capacity auction prices send signals to market participants regarding whether the market can support the entrance of new generating capacity. These signals can affect generators' decisions whether to build new capacity and states' decisions whether to mandate procurement of additional generating resources.[246] However, this is not the only method states use to manage resource adequacy on the electricity grid. For example, California's resource adequacy scheme is managed almost exclusively by the state public utilities commission through a complex contracting scheme. The California Public Utilities Commission requires utilities and other electricity service providers to procure certain quantities and types of generating capacity so that it is available to CAISO when

242. *See infra* notes 279-280 (referencing the carbon pricing policy statement).
243. *See infra* notes 281-282 (discussing the legal analysis used by FERC in the policy statement).
244. *See* discussion *supra* Part III.C.1.
245. *See* HURLBUT ET AL., *supra* note 49, at 106.
246. *See supra* notes 151-155 and accompanying text (discussing capacity market operations).

and where needed.[247] This occurs without the assistance of centralized market signals.

In contemplating market design for a potential future western RTO, and whether it should include or forgo a capacity market, the Pathways Initiative should consider the history of FERC's involvement with the Eastern capacity markets. As highlighted in Part III, withholding a capacity market from Western RTO market design is a key strategy for maintaining state authority due to the policy risks associated with federal capacity markets. This is particularly important in a multi-state RTO, such as a potential future Western RTO. While FERC has demonstrated some degree of solicitude to state preferences in single-state RTOs, it may be less deferential in a multi-state RTO.[248] Leaving a centralized capacity market out of the design for a Western RTO would minimize policy risk for states and maximize state authority. Perhaps due to this understanding, a centralized capacity market is not among the leading elements that would be part of a multi-state Western RTO. To date, discourse around a multi-state RTO has not included discussion about a centralized capacity market, and Western states have historically not supported creating a centralized capacity market.[249]

Further, and importantly, FERC has disclaimed jurisdiction to force an RTO to establish a centralized capacity market. In 2018, a generator petitioned FERC to exercise its jurisdiction over resource adequacy to direct the implementation of centralized capacity procurement in CAISO.[250] FERC declined to exercise its jurisdiction in this way, noting that while it had opined on the benefits of specific features of the Eastern RTO centralized capacity markets within the context of those specific regions and market designs, it "has not imposed a centralized capacity market… or found that it is the only just and reasonable resource adequacy construct to attract and retain sufficient capacity."[251]

Therefore, while the case survey revealed that capacity markets represent the biggest jurisdictional risk to states considering joining a Western RTO, the likelihood of these risks being realized is low as long as sentiments in the West remain steady.

2. Trends to Monitor

Despite the low risk that a Western capacity market emerges, there are two related aspects of FERC's approach in the Eastern capacity markets that states should monitor: the potential for federal market rules to affect state policy, and FERC's use of legal analysis finding that general market forces can have direct

247. California Public Utilities Commission, *Resource Adequacy Homepage*, https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/electric-power-procurement/resource-adequacy-homepage.

248. *See* New York Indep. Sys. Operator, Inc., 179 F.E.R.C. ¶ 61,102 (2022) (Christie, concurring at 3)

249. *See* HURLBUT ET AL., *supra* note 49, at 106.

250. CXA La Paloma, L.L.C. 165 F.E.R.C. ¶ 61,148 at P 1 (2018).

251. *Id.*

effects on wholesale rates. Specifically, states should monitor whether and how these trends may be applied in energy markets outside of the capacity markets. Each of these issues is addressed, in turn, below.

First, states should monitor the potential for federal market rules promulgated by FERC to affect state policies. This is a new type of federalism risk that diminishes state authority, shy of outright preemption. FERC relied on *EPSA* to create this circuitous risk. As a reminder, the Court in *EPSA* held that FERC's FPA jurisdiction includes rules and practices directly affecting wholesale rates. Because federal FPA jurisdiction is exclusive,[252] together, these principles stand for the proposition that state actions directly affecting wholesale rates can be preempted by federal law.[253]

However, the "policy risk" approach is much more roundabout than strict preemption. For the MOPRs in the Eastern capacity markets, FERC's legal reasoning proceeded as follows: when state policies affect wholesale market prices, FERC has jurisdiction to address the effect of that state policy on wholesale rates through creation of a wholesale market rule.[254] On the one hand, this may be a desirable alternative to preemption for states, since it does not invalidate the state law at issue (even though it does enable FERC to create a market rule conditioning the state law). On the other hand, it expands the ways by which FERC can exercise its jurisdiction to impede implementation of state energy policies. Under this approach, when state laws directly affect wholesale rates, FERC now has options: it can either invalidate the state law through preemption, or it can create a wholesale market rule to address the effect of the state law on the market.

States should monitor the extent to which FERC employs this approach with other market rules. This may signal the extent to which FERC is willing to transfer its approach from the Eastern capacity markets into energy markets—which all RTOs, including CAISO and a potential multi-state Western RTO—have as part of their market design.

Second, states should monitor FERC's legal analysis associated with this approach. As noted, FERC has found that state policies can "directly affect[]" wholesale rates.[255] In the Eastern capacity markets, FERC found economic forces outside of the wholesale market itself created the direct effect.[256] Because state policies providing financial support for preferred generators could reduce capacity market clearing prices, the policies "directly affect[ed]" the wholesale

252. *See EPSA*, 577 U.S. 260, 279 (2016).

253. *See* Nat'l Ass'n of Regul. Util. Comm'rs v. FERC, 964 F.3d 1177, 1187 (D.C. Cir. 2020) ("[W]hile the FPA creates two separate zones of jurisdiction, the Supremacy Clause creates uneven playing fields.").

254. *See* Calpine Corp. v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,035 at P 78 (2020) (finding FERC may take action to "protect the integrity of federally-regulated markets against state policies that directly affect those markets").

255 *See, e.g.*, Calpine Corp., et al., v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,035 at P 16 (2018).

256. *See EPSA*, 577 U.S. at 278.

rate.[257] Offending state policies included zero-emissions credits (ZEC) and Renewable Portfolio Standards (RPS) programs.[258] Unlike the state policy at issue in *Hughes*, these types of state policies operate entirely outside of the wholesale auction.[259] Therefore, the only way they are able to affect the market clearing price is through general market forces like supply, demand, and competition.

Finding a direct effect on wholesale rates through economic forces outside of the market requires a liberal interpretation *EPSA*. While the Court discussed market forces in its opinion, it did not expressly state whether these forces alone constituted a direct effect on wholesale rates.[260] *EPSA*'s core holding was that because demand response resources had enormous potential to decrease wholesale rates, the rules governing the compensation of demand response itself had a direct effect on wholesale rates.[261] The Court then explained why the compensation rule affected the demand response resources' market behavior: improved compensation for demand would increase participation of these resources in the market and apply "downward pressure" to other generators' bids.[262] The Court pulled from economic concepts like market supply ("participation") and competitive pricing to explain why the compensation rule had a direct effect on rates, but it did not expressly hold that these forces themselves constituted direct effects on the wholesale rate.[263]

As the case survey reveals, federal courts have disagreed on whether general market forces constitute direct effects on wholesale prices. The Second and Seventh Circuits have rejected the notion that increasing the supply in the wholesale market, alone, has a direct effect on wholesale rates.[264] These circuits have held that while state financial incentive programs could increase the participation of preferred generators in the market, placing a "downward pressure" on generator costs, this type of effect on the wholesale market auctions amounts to "(at best) an incidental effect."[265] On the other hand, the D.C. Circuit

257. Calpine Corp., et al., v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,035 at PP 16, 78 (2018); *see also* Calpine Corp., et al., v. PJM Interconnection, L.L.C., 163 F.E.R.C ¶ 61,236 at P 2 (2018) (finding RPS programs to have a "suppressive effect" on capacity market prices); *see also* New York State Pub. Serv. Comm'n, et al., v. New York Indep. Sys. Operator, Inc., 170 F.E.R.C. ¶ 61,119, at P 37 (2020) (finding that state subsidies enabled "uneconomic entry" of resources into the capacity market).

258. Calpine Corp., et al., v. PJM Interconnection, L.L.C., 163 F.E.R.C. ¶ 61,236 at P 160 (2018) (requiring PJM to mitigate the effect of out-of-market state support); Calpine Corp., et al., v. PJM Interconnection, L.L.C., 171 FERC ¶ 61,035 at P 106 (2020) (suggesting that an RPS program is directed at or tethered to generating capacity in the market).

259. *See Hughes*, 578 U.S. 150, 165-66 (2016) (invalidating a contract that "operated within the auction").

260. *EPSA*, 577 U.S. at 279.

261. *Id*.

262. *Id*.

263. *Id.*

264. *See* Allco Fin. Ltd. v. Klee, 861 F.3d 82 (2d Cir. 2017); Coal. for Competitive Elec., Dynergy Inc. v. Zibelman, 906 F.3d 41, 56 (2d Cir. 2018); Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 524 (7th Cir. 2018).

265. *Allco*, *Zibelman*, and *Star* each addressed the question of whether state financial incentive programs were preempted by the FPA. In each case, states had enacted statutes that helped support

has suggested that market forces like supply and demand may constitute a direct effect on wholesale rates.[266] FERC has also taken this latter approach.[267]

In the context of the Eastern capacity markets, FERC has embraced the idea that economic forces outside of the wholesale markets can have direct effects on rates. For example, in PJM, FERC expressed concern that state subsidies ensured that preferred generation resources could remain in business and bid into the market.[268] In other words, FERC was concerned about market supply and competition. Further, FERC found that state support for generation resources fell "squarely" within its jurisdiction over practices directly affecting wholesale rates.[269] Because of this direct effect, FERC found that it was "within its jurisdiction to set wholesale rates in response to state policy decisions."[270]

When FERC walked back its application of the MOPR, it also walked back some of this reasoning. For instance, when FERC issued orders reversing the reach of its market power rules in NYISO and ISO-NE capacity markets, it acknowledged the "inevitable, albeit indirect, effect on capacity market prices" that results from state policies supporting preferred generation resources.[271] However, in other orders, FERC has suggested that state subsidies may directly affect wholesale prices, and therefore fall under its jurisdiction, if they "squarely impact the production of electricity or supply-side participation" in the capacity market.[272]

In light of these inconsistencies, a key open question is whether this reasoning could extend outside of the boundaries of the market power rules in the capacity markets. For example, could effects on general market forces justify preemption of state policies? If so, FERC's actions in the Eastern capacity

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preferred generators, increasing the potential participants in the wholesale market. *See* Allco Fin. Ltd. v. Klee, 861 F.3d 82 (2d Cir. 2017) (state contracting program for preferred generators); Coal. for Competitive Elec., Dynergy Inc. v. Zibelman, 906 F.3d 41, 56 (2d Cir. 2018) (New York zero emissions credit program); Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 524 (7th Cir. 2018) ("The zero-emissions credit system can influence the auction price only indirectly.").

266. *See* Nat'l Ass'n of Regul. Util. Comm'rs v. FERC, 964 F.3d 1177, 1186 (D.C. Cir. 2020) (holding that a FERC rule designed to increase wholesale market participants has a direct effect on wholesale prices).

267 *See* Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 60 (2017) (finding that energy efficiency resources reduce consumer demand and increase market supply, which directly affects wholesale rates).

268. Calpine Corp., et al., v. PJM Interconnection, L.L.C., 169 F.E.R.C. ¶ 61,239 at P 68 (2019); *see also* New York State Pub. Serv. Comm'n, et al., v. NYISO, 158 F.E.R.C. ¶ 61,137 at P 34 (2017) (expressing concern over a pattern of states "paying out-of-market subsidies to support new capacity, and then offer[ing] that capacity into the organized capacity market at prices below costs to drive down the market price"); *see also* New York State Pub. Serv. Comm'n, et al., v. New York Indep. Sys. Operator, Inc. (NYISO), 170 F.E.R.C. ¶ 61,119 at P 37 (2020) (expressing concern over the "cumulative effect" that state subsidies could have on the markets by enabling a significant number of market participants to reduce their market bids, resulting in lowering market clearing prices).

269. Calpine Corp., et al., v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,035 at P 16 (2020).

270. *Id*.

271. New England Inc. New England Power Pool Participants Comm., 179 F.E.R.C. ¶ 61,139 at P 53 (2022); New York Indep. Sys. Operator, Inc., 179 F.E.R.C. ¶ 61,102 at P 42 (2022) (emphasis added) (describing the state policies at issue in the capacity markets as having "indirect impacts" on wholesale prices).

272. Hollow Rd. Solar L.L.C., 174 F.E.R.C. ¶ 61,200 at P 20 (2021) (internal quotations omitted).

markets would not only create more policy risk for states, but also preemption risk as well. The principle that market forces like supply and demand alone can constitute a direct effect on wholesale prices could expand FERC's jurisdiction over the wholesale markets into some "surprising places," exactly the result the Court expressed a desire to avoid in its ruling in *EPSA*.[273]

To date, FERC has limited its findings that market forces constitute "direct effects" on wholesale rates to wholesale market rules.[274] This has successfully confined potential threats faced by states to policy risk alone: the risk that state policies may be diluted by FERC market rules. FERC or the courts should clarify if and when general market forces can expand beyond policy risk to create a preemption risk for states. In an unpublished opinion, the Seventh Circuit offered one framing that could clarify if and when FERC's jurisdiction opens the door for preemption:

> Read together, *EPSA* and *Hughes* stand for the proposition that preemption applies whenever a tether to wholesale rates is indistinguishable from a direct effect on wholesale rates. The qualifier 'direct' is important; influencing the market by subsidizing a participant, without subsidizing the actual wholesale transaction, is indirect and not preempted.[275]

In other words, only those state policies that directly subsidize wholesale transactions, not merely market participants, would be at risk of preemption. It would be helpful for FERC or the courts to clarify this point in future cases. Such a clarification would provide greater certainty for states regarding when state policies may be at risk of dilution due to policy risk, versus when they may be at risk of outright preemption. Adopting the rule above would align with *Hughes*, in which the Court expressly left open the possibility for states to "encourag[e] production of new or clean generation through measures 'untethered to a generator's wholesale market participation,'" such as "tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector."[276] Until courts choose to clarify this point, states should keep a close eye on how FERC analyzes its jurisdiction with respect to general economic forces like supply, demand, and market competition.

To date, general forces of supply and demand have not resulted in the preemption of state financial incentive programs like ZECs.[277] However, as described further below, some of this reasoning has been replicated outside of the capacity markets to apply to energy market pricing rules. This trend is also something states should keep an eye on.

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273. *EPSA*, 577 U.S. 260, 279 (2016).

274. *See id.* at 278.

275. Vill. of Old Mill Creek v. Star, No. 17 CV 1163, 2017 WL 3008289 (N.D. Ill. July 14, 2017), *aff'd sub nom.* Elec. Power Supply Ass'n v. Star, 904 F.3d 518 (7th Cir. 2018) (emphasis added).

276. *Hughes*, 578 U.S. 150, 166 (2016).

277. *See* Coal. for Competitive Elec., Dynergy Inc. v. Zibelman, 906 F.3d 41, 56 (2d Cir. 2018) (upholding a ZEC program in New York); *see also* Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 524 (7th Cir. 2018) (upholding an Illinois ZEC program).

3. Beyond Capacity Markets? Carbon Pricing

FERC's approach of filtering state policies through wholesale market rules, potentially diluting them in the process, has featured heavily in the Eastern capacity markets. However, it may not be limited to the capacity markets. FERC has recently replicated the approach it took with the MOPRs in a policy statement addressing the effect of state-issued carbon prices on wholesale markets, including energy markets.[278] Importantly, this does not present immediate policy risk for states considering utility participation in WEIM, EDAM, or a multi-state RTO. Nevertheless, states should monitor the similarities between the approach FERC has taken with carbon pricing and the approach it used in the Eastern capacity markets.

In 2021, FERC issued a non-binding policy statement explaining how it will evaluate RTO market rules proposing to incorporate state-determined carbon prices into wholesale market prices.[279] In the statement, FERC identified a series of considerations RTOs should include in their proposals when they submit them to FERC: how a carbon price would be reflected in electricity market clearing prices, how changes to state carbon prices would be reflected in market design, and other considerations.[280]

The policy statement mirrors FERC's MOPR approach in two key ways: it is a wholesale market rule that explicitly considers state policies, and its jurisdictional analysis is grounded in the idea that general market forces can directly affect wholesale electricity rates.

First, like the market power rules in the Eastern capacity markets, the carbon pricing policy prescribes a wholesale market rule that explicitly addresses the effect of state policies on the wholesale market. Just as FERC used the market power rules to mitigate the effects of state subsidies on capacity market clearing prices, here FERC is using the policy statement to evaluate whether carbon pricing schemes are just and reasonable.[281] Whereas in the Eastern capacity markets resources receiving state financial assistance were required to bid in at a price floor, in this instance, resources subject to state pricing are required to undergo FERC review.[282] In both instances, FERC has used a wholesale market directive to influence the ability of state policies to affect market prices.

Western states should be aware that their carbon pricing regimes may be subject to FERC review via wholesale market pricing rules if in-state utilities

278. Carbon Pricing in Organized Wholesale Elec. Mkts, 175 F.E.R.C. ¶ 61,036 at P 13 (2021).

279. *Id*.

280. The policy statement does not mandate that RTOs adopt these rules, or that they take prescribed approaches to incorporate different types of state carbon pricing regimes. However, in the statement, FERC "encourage[s]" RTOs and states to consider incorporating carbon prices into wholesale markets. *Id*.

281. Calpine Corp., et al., v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,035 at P 78 (2020) (finding FERC must use market power rules to "protect the integrity of federally-regulated markets against state policies that directly affect those markets").

282. *See* Calpine Corp., et al., v. PJM Interconnection, L.L.C., 163 F.E.R.C. ¶ 61,236 at P 100 (2018) (regarding the MOPR).

participate in the CAISO markets or a multi-state RTO.[283] While FERC would not gain jurisdiction over a state-determined carbon price itself, FERC may be able to alter the effect of the carbon price through the specifics of how it is incorporated into the wholesale market rule. The fact that FERC is using a wholesale market rule to determine the effects of state policies on market prices shows that FERC is willing to translate its approach from the Eastern capacity markets into the energy markets as well. As in the Eastern capacity markets, incorporating state policies into wholesale market rules could have consequences ranging from "nullify[ing]" the effect of the state carbon price, to a limited impact, to no effect at all.[284]

Here, no states or parties have yet claimed that this carbon pricing policy dilutes the efficacy of state carbon prices. In fact, CAISO has already proposed wholesale market rules for WEIM and EDAM that address how state-determined carbon prices operate within a multi-state wholesale electricity market.[285] In light of California's cap-and-trade program that creates carbon prices for electricity generation, CAISO proposed market rules for how resources outside of California can bid into WEIM and EDAM.[286] Under the rules, bids incorporate a carbon price if they are ultimately dispatched to serve customer load in California, and do not incorporate a carbon price if they are ultimately dispatched outside of California.[287] CAISO accepted this rule for WEIM in 2015,[288] and for EDAM in 2023.[289] Outside of CAISO, this type of greenhouse gas price component is not a common feature of other wholesale electricity markets.[290] For example, some Eastern RTOs assist in tracking greenhouse gas emissions across generation sources between different states, without having that accounting interfere with the centralized dispatch of electricity.[291]

Second, FERC's jurisdictional analysis in the statement uses general market forces as the basis of its jurisdiction to create this market rule. As part of the policy statement, FERC determines that it has jurisdiction over wholesale market

283. California and Washington have carbon pricing policies in the form of cap-and-trade programs. California initiated its cap-and-trade program in 2013, and Washington launched its Cap-and-Invest Program in January 2023. *U.S. State Carbon Pricing Policies*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, https://www.c2es.org/document/us-state-carbon-pricing-policies/ (last updated Jan, 2025). Several other states, including Colorado, Nevada, New Mexico, and Oregon are publicly considering cap-and-trade schemes. *Regional Carbon Pricing Initiatives*, CLIMATE X CHANGE, https://climate-xchange.org/regional-cap-and-invest/.

284. Calpine Corp. v. PJM Interconnection, L.L.C., 169 F.E.R.C. ¶ 61,239 at PP 10, 89 (2019).

285. Cal. Indep. Sys. Operator Corp., 153 F.E.R.C. ¶ 61,087 at PP 9-11, 57 (2015).

286. *Id*.

287. *Id*.

288. *Id*.

289. Memorandum from Anna McKenna, Vice President of Market Policy and Performance, to ISO Board of Governors and Western Energy Imbalance Market, Re: Decision on the extended day ahead market (EDAM) (Jan. 26, 2023), http://www.caiso.com/Documents/DecisiononExtendedDay-AheadMarket-Memo-Feb2023.pdf.

290. HURLBUT ET AL., *supra* note 49, at 11.

291. *See* Western Resource Advocates, *Greenhouse Gas Accounting Systems in Wholesale Regional Electricity Markets: Considerations for the Western Interconnection* (Jan. 22), https://westernresource advocates.org/wp-content/uploads/2022/01/2022_0119_GHG_Accounting_-Regional-Markets_f.pdf.

rules incorporating state-determined carbon prices as part of its exclusive jurisdiction over practices directly affecting wholesale rates.[292] Citing *EPSA*, FERC reasons that practices directly affecting wholesale rates include "how [market participants] participate in the RTO/ISO markets, including the levels at which they bid and are compensated."[293] Carbon pricing rules fall under this market conduct jurisdiction when they "govern how resources participate in the RTO/ISO markets, how market operators dispatch those resources, and how those resources are ultimately compensated."[294] Each of these factors is a type of general market force that can become the basis of a FERC rule in the wholesale markets.

As with other general market forces, many factors could affect how generators participate, bid, and are compensated by the market. For instance, state policies that operate entirely outside of the market may affect whether generators stay in business, whether they participate in the market, and the levels at which they bid into the auctions. FERC itself has noted that state policies related to industrial development or local siting support might affect the wholesale rate as much as state subsidies for preferred generation.[295]

While this policy statement does not present an immediate policy risk to states, as no one has yet claimed that this policy has the potential to reduce the effectiveness of state policies, states should take heed nonetheless. The approach FERC has taken in the policy statement signals that FERC is willing to extend the approach it took with market power rules in the Eastern capacity markets past the confines of those markets and into the energy markets. States should monitor this trend for recurring policy risk outside of capacity markets.

B. Autonomy Risk: Implications for States

In the context of regionalization, some states may be concerned about "autonomy risk," the risk that federal rules governing RTOs and the wholesale electricity markets will restrict state autonomy over in-state energy resources. While federal rules for RTOs and wholesale markets bind states in certain ways, the FPA continues to reserve broad authority for states over in-state generation and distribution decisions. Accordingly, the autonomy risk faced by Western states considering utility participation in regionalization efforts is low.

FERC has issued a number of rules in recent years governing the operation of wholesale electricity markets: rules governing eligibility for market participation, auction pricing rules that accommodate state policies, and market rules governing centralized capacity markets.[296] Of chief concern are several

292. Carbon Pricing in Organized Wholesale Elec. Mkts, 175 F.E.R.C. ¶ 61,036 at P 13 (2021).

293. *Id.*

294. *Id.* at P 14 (2021).

295. *See* Calpine Corp., et al., v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,034 (2020) (Glick, dissenting at 23) (criticizing opinion for not explaining why some states are more tethered to the wholesale market than others, citing *Hughes*, 578 U.S. 150).

296. *See, e.g.*, Elec. Storage Participation in Markets Operated by Reg'l Transmission Organizations & Indep. Sys. Operators, 162 F.E.R.C. ¶ 61,127 (2018) (participation rule); Carbon Pricing in Organized

recent FERC orders prescribing which resources are eligible to participate in wholesale electricity markets.[297] These orders preclude states from restricting certain resources from accessing the wholesale markets, unless FERC has given them express authority to opt out of these requirements.[298] States that wish to control the resource mix by limiting resources' access to the wholesale markets may perceive this as a limit to their jurisdiction over generation assets, especially since many resources must use the state distribution systems to access wholesale markets.[299]

One concern is that these rules may reduce state authority over the generation mix by requiring states with in-state utilities participating in wholesale electricity markets to adhere to federal resource participation rules. States with utilities already participating in WEIM or considering participating in EDAM must be prepared to follow the directives in Orders No. 719 (demand response), 841 (electric storage resources), and 2222 (DER aggregators).[300] Under these orders, state authorities cannot not act "unilateral[ly]" to restrict participation of these resources; they can only do so if FERC expressly grants them such authority.[301] FERC provided an opt-out for states in Order No. 719 (demand response), enabling states to preclude demand response from reaching the wholesale market.[302] However, FERC has asserted that it is not required to provide such an opt-out to states, and has followed through on this assertion more often than not.[303] In Orders No. 841 (electric storage resources) and 2222 (DER aggregators), for example, FERC did not authorize states to opt out of the rules. This means that Western states with utilities participating in WEIM and EDAM must ensure that electric storage resources and DER aggregators can participate in those markets. Likewise, if utilities enter into a multi-state RTO, the states in which those utilities are located will likewise be bound by these rules.

For some states, the inability to preclude these resources from accessing the wholesale market may seem like a limit on state control over the generation mix. An example of this is the 2017 PJM order.[304] In that order, FERC declared that

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Wholesale Elec. Markets, 175 F.E.R.C. ¶ 61,036 (2021) (auction pricing rule); Calpine Corp., et al., v. PJM Interconnection, L.L.C., 163 F.E.R.C. ¶ 61,236 (2018) (capacity market rule).

297. As described in this Part, these orders include Orders No. 719 and 745 (demand response), Order No. 841 (electric storage resources), and Order No. 2222 (DER aggregators). *See supra* notes 189-1191.

298. *See supra* notes 207-213 (discussing the lack of an opt-out provision in Order Nos. 841 and 2222).

299. *See, e.g.*, Order No. 841-A at Dissent (noting that the only way an electric storage resource can sell its energy at wholesale is by using the distribution system).

300. *See supra* notes 190-191. Note that FERC's participation rule for energy efficiency resources only applies to PJM, which must comply with the regulation.

301. *See* Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 P 61 (2017).

302. Many states have taken advantage of the opt-out provision in Order No. 719. For example, in the Midcontinent ISO (MISO), sixteen of the nineteen participating states have opted out. *See* Forrester, *Aggregations in Opt-Out States* (Dec. 15, 2022), https://www.nrel.gov/grid/ieee-standard-1547/assets/pdfs/ieee-std-1547-workshop-2022-aggregations-in-opt-out-states.pdf.

303. Elec. Storage Participation in Markets Operated by Reg'l Transmission Organizations & Indep. Sys. Operators, 162 F.E.R.C. ¶ 61,127, P 12 (2018).

304. Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at PP 60-61 (2017).

state authorities could "not bar, restrict, or otherwise condition the participation" of energy efficiency resources in the wholesale markets, unless FERC gave them express authority to do so.[305] FERC affirmed this conclusion on rehearing.[306] Notably, PJM had proposed this market rule to fulfill an assurance it had made to the Kentucky Public Service Commission regarding participation of these resources in the PJM market.[307] However, through these orders, FERC preempted contrary action from the states.[308] For Kentucky and other states that wished to limit the participation of energy efficiency resources in the wholesale markets, this federal rule reduced their authority.

Federal participation rules alter the methods that states can use to control in-state generation and distribution systems. Once generation assets exist in a state and FERC has claimed jurisdiction over the market participation of those resources, pursuant to the Supremacy Clause, states cannot bar them from using state infrastructure to access the markets.[309] FERC has acknowledged that many of these resources may need to use state distribution systems—an area of exclusive state jurisdiction under the FPA—to access the wholesale markets. For instance, for electric storage resources to sell energy at wholesale, a customer must "use" distribution facilities,[310] and DER aggregations are, by definition, located on the distribution grid.[311] In Orders No. 841 and 2222, FERC expressly held that its exclusive authority over the participation rules for electric storage resources and DER aggregators, respectively, extended to those resources located on the distribution system or behind the meter.[312] This conclusion was affirmed by the D.C. Circuit, which found the need to use state distribution systems to access the wholesale market was a "permissible effect" of FERC's regulation of market access.[313]

Despite the potential for these rules to alter state authority, the courts have been careful to specify that states retain their traditional authority under the FPA to regulate generation and distribution.[314] The FPA grants states exclusive jurisdiction over electricity generation facilities.[315] This authority remains despite these federal rules.[316] FERC continues to maintain that "states may select the type of generation to be built—wind or solar, gas or coal—and where to build

305. Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 61 (2017) (holding that FERC has exclusive jurisdiction to regulate the terms of transactions in wholesale markets, including the resources eligible to participate).

306. Advanced Energy Econ., 163 F.E.R.C. ¶ 61,030 at P 36 (2018).

307. Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 13 (2017).

308. While FERC did not use the language "preemption" in this order, as the rule at issue was a rule proposed by PJM rather than a state-issue law, the effect on states is the same.

309. U.S. CONST. art. IV, para 2 (providing that federal law is the "supreme Law of the Land").

310. *See* Order No. 841-A (Dissent).

311. *See* Order No. 2222, *supra* note 56, at P 40.

312. *See* Order No. 841-A; Order No. 2222, *supra* note 56, at P 57.

313. *See* Nat'l Ass'n of Regul. Util. Comm'rs v. FERC, 964 F.3d 1177, 1187 (D.C. Cir. 2020).

314. *See, e.g.*, Entergy Nuclear Vt. Yankee, L.L.C.. v. Shumlin, 733 F.3d 393, 417 (2d Cir. 2013).

315. Federal Power Act, 16 U.S.C. §824(i).

316. *Id*.

the facility. Or states may elect to build no electric generation facilities at all."[317] States have authority over all siting and permitting for construction of in-state generation facilities, can regulate zoning, and are allowed to create incentives for preferred infrastructure development.[318] States also maintain control over many aspects of the distribution system, even when resources must be able to use them to access the wholesale electricity markets. For instance, states maintain authority over distribution system planning, operations, reliability, interconnection to the distribution system, and retail rates.[319]

Moreover, the fact that these rules have effects on states is to be expected in the electricity sector, since federal and state zones of authority are "not hermetically sealed from one another."[320] *Oneok* and *EPSA* stand for the proposition that it is legally permissible under the FPA for federal rules to have incidental effects on states.[321] While states may not be able to bar some resources from reaching the wholesale markets, the FPA authority they maintain over generation and distribution assets suggests that state authority is not significantly diminished by federal market participation rules.

Notwithstanding the arguable expansion of FERC's authority over resource participation in wholesale markets, autonomy risk does not pose a significant federalism risk to those states with utilities participating in WEIM or considering participating in EDAM because the FPA reserves significant authority for states over electricity sector decisions. Pursuant to this authority, states are free to enact a wide range of policies. For instance, while states cannot restrict these resources from accessing wholesale markets, they remain free to incentivize preferred generation resources in many ways: resource procurement programs, permitting and land use decisions, and financial incentives for preferred resources. Accordingly, federal participation rules can also be viewed as presenting only a small jurisdictional risk to Western states considering joining a regional electricity market like WEIM or EDAM.

C. Preemption Risk: Implications for States

Amongst the three federalism risks illuminated by the case survey, preemption risk presents the lowest risk compared to policy risk and autonomy risk. State policies that set the terms of wholesale market transactions or otherwise touch market operations may run afoul of federal jurisdiction and be preempted.[322] Expanding the territory of the federal markets, which increases the volume of federal electricity transactions taking place, may create more opportunities for federal preemption. However, states without utilities currently participating in federal markets likely do not have policies touching wholesale

317. PPL EnergyPlus, L.L.C. v. Solomon, 766 F.3d 241, 255 (3d Cir. 2014).
318. CARLSON ET AL., *supra* note 22, at 8.
319. *See* Order No. 2222, *supra* note 56, at P 61.
320. *See EPSA*, 577 U.S. 260, 281 (2016).
321. *See* Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 385 (2015); *see also EPSA*, 577 U.S. at 278.
322. *See supra* Part III.C.3.

markets. Those that do have participating utilities are already monitoring these risks. And importantly, the case survey does not indicate that the risk of federal preemption has increased. Accordingly, this Part concludes general preemption risks are low.

As discussed in Part III, states cannot enact policies that infringe on FERC's exclusive jurisdiction over the regional wholesale electricity markets without risking preemption. States cannot enact policies that are "tethered" to or otherwise set the terms of wholesale market transactions.[323] Terms of transactions include whether generators are eligible to participate in the wholesale markets and how generators bid and are compensated in wholesale auctions.[324]

Expanding Western markets like WEIM and EDAM to include more territory and more transactions may affect the extent to which Western states with utilities participating in those markets are at risk of federal preemption, as expanded markets create more ways for Western states to affect market transactions. The only Western states with in-state utilities currently participating in CAISO are California and Nevada. While entities from all Western states, except for Colorado, currently have utilities participating in WEIM, the real-time energy market represents only about 5 percent of daily customer electricity demand.[325] Day-ahead markets like EDAM are much larger, executing transactions for roughly 95 percent of daily customer electricity demand.[326] The larger and more encompassing the markets, the likelier it is that state policies may infringe on them by affecting the terms of market transactions. Accordingly, expanding the Western markets may affect the extent to which Western states with utilities participating in those markets are at risk of federal preemption for infringing on the wholesale markets. This is particularly true for Western states without utilities currently participating in WEIM, like Colorado.

Despite the broad scope of FERC's exclusive jurisdiction over the federal wholesale markets and the potential for regionalization to expand the volume of transactions to which FERC's exclusive jurisdiction adheres, preemption risk for Western states is unlikely to increase due to regionalization. For one, states without utilities currently participating in federal markets likely do not have policies touching wholesale markets. For instance, the state policy that was preempted in *Hughes* specifically conditioned payment to the natural gas-fired power plant on clearing the federally-managed wholesale auction.[327] Likewise, state action to restrict wholesale market participation was preempted by FERC

323. *See supra* Part I.

324. *See generally EPSA*, 577 U.S. 260 (2016); Carbon Pricing in Organized Wholesale Elec. Mkts, 175 F.E.R.C. ¶ 61,036 (2021) (holding that FERC has exclusive jurisdiction over market rules for incorporating state-issued carbon prices); *see* Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 61 (2017) (finding that terms of wholesale transactions include "which resources are eligible to participate" in the wholesale markets).

325. *See* HURLBUT ET AL., *supra* note 49, at 109.

326. *See id.*

327. *Hughes*, 578 U.S. 150, 162 (2016).

in the PJM market.[328] It is unlikely, even impossible, for states to have these policies if a state's utilities do not participate in a wholesale market.

Those states whose utilities are participating in wholesale markets like WEIM or EDAM will already be monitoring preemption risks associated with that participation. Jurisdictional risk of preemption related to the wholesale markets is not new. Furthermore, as described in Part III, the risk of preemption has not increased in recent years. While FERC has claimed significant authority in recent years over the wholesale electricity markets and operations of RTOs, it has not used this authority to preempt state and local policies. Only the markets are changing. Because, as part of best practice, states are likely to conduct an audit prior to joining WEIM, EDAM, or an RTO, this does not create new jurisdictional risk to states of Western regional cooperation efforts, regardless of recent legal trends. Any risk of preemption that exists is independent of recent expansions in federal jurisdiction, because courts' and FERC's findings that state laws are preempted have not kept pace with the expansion of federal jurisdiction. Accordingly, preemption risk to states as a result of Western regionalization efforts is low.

States considering joining Western regional markets or a future multi-state Western RTO should audit their state policies to ensure they are not at risk of federal preemption due to the expanding reach of WEIM, EDAM, and a multi-state RTO. While it is outside of the scope of this Article to conduct a case-by-case analysis of each state's energy policies and the extent to which they may be at risk of preemption for infringing on the wholesale electricity markets, the case survey illuminates the scope of FERC's exclusive jurisdiction over the wholesale markets. As detailed in Part III, although federal jurisdiction has expanded in recent years, this has not come with an increase in federal preemption of state energy policies.

CONCLUSION

Electricity regionalization efforts have accelerated in the West. Western states must contemplate whether or not to join expanded CAISO markets or a potential future RTO. While expanding the markets offers significant benefits in terms of greenhouse gas emissions reductions, cost savings, and reliability,[329] it also has the potential to reduce the authority of individual states with utilities participating in those markets by exposing them to federal authority.[330] States must evaluate the extent to which they will have to adhere to federal rules, whether they would be vulnerable to federal preemption of state policies, or whether there are other federal interventions that might reduce their autonomy over the electricity sector.

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328. Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 at P 61 (holding that FERC has exclusive jurisdiction to regulate the terms of transactions in wholesale markets, including the resources eligible to participate).

329. *See* discussion *supra* Part II.B.

330. *See* discussion *supra* Part II.C.

To help inform Western states concerned about their authority in the context of Western regionalization, this Article explores how and to what extent joining these markets or a multi-state RTO would expose states to jurisdictional risk. A case survey of about four hundred jurisdictional cases in recent years illuminates how FERC and the federal courts view the current divide between state and federal authority under the FPA. The survey reveals that, while preemption of state policies remains rare, there is a trend of expanding federal jurisdiction under the FPA.

This Article highlights three types of federalism risks states may face as a result of regionalization: policy risk, the risk that federal jurisdiction over electricity markets may interfere with the effectiveness of state clean energy policy; autonomy risk, the risk that federal jurisdiction can restrict state autonomy over behavior of in-state energy resources; and preemption risk, the risk that federal rules may preempt state law.

In spite of the overarching trend of expanding FERC jurisdiction, evaluating each of these federalism risks in the context of Western regionalization reveals that none poses a significant threat to state authority. Policy risk and autonomy risk present the biggest federalism risks for states considering participating in an RTO or federal electricity market, although they do not involve outright preemption of state policies.

Policy risk poses the biggest risk to states. Some federal rules for organized electricity markets have diluted the effectiveness of state policies in the energy sector.[331] Creating a centralized capacity market in the West could expose Western states to this risk, and thus capacity market rules that run counter to state policy goals represent the single largest potential risk to state authority. While this raises concerns, CAISO does not operate a centralized capacity market, and Western states have historically not supported developing one.[332]

Recently, FERC has applied some of the approach and analytical reasoning it used in the capacity markets in the energy markets as well via a federal rule addressing how state carbon prices should be incorporated into market prices.[333] While the rule itself does not dilute state authority and does not present immediate jurisdictional risks, states may wish to monitor whether the approach taken in the rule surfaces in other FERC decisions.

Autonomy risk may present limited risk for some states. Recent federal rules require that certain electricity resources—including storage resources (i.e., batteries) and aggregations of DERs—be able to access the federal power markets, even if they must use state distribution systems to do so.[334] States participating in federal electricity markets cannot bar these resources from accessing federal markets. States that perceive these rules as limiting their authority over in-state generation may see these rules as posing jurisdictional

331. *See* discussion *supra* Part III.C.1.
332. *See* discussion *supra* Part IV.A.1.
333. *See* discussion *supra* Part IV.A.3.
334. *See* discussion *supra* Part III.C.2.

risk. Despite these rules, states retain significant authority under the FPA over many other aspects of electricity generation, including procurement, land use, and incentives for preferred resources.[335] Accordingly, the risk associated with these rules is low.

Preemption risk presents the lowest risk for states. State policies that set the terms of wholesale market transactions or otherwise touch market operations may run afoul of federal jurisdiction and be preempted.[336] Expanding the territory of the federal markets, which increases the volume of federal electricity transactions taking place, may create more opportunities for federal preemption. However, states without utilities currently participating in federal markets likely do not have policies touching wholesale markets. Those that do have participating utilities are likely already monitoring these risks. And, importantly, the case survey does not indicate that the risk of federal preemption has increased. Accordingly, general preemption risks are low.[337] Individual states weighing utility participation in Western regional markets should audit their state policies to ensure they would not infringe on the federal markets to avoid federal preemption.

Collectively, this analysis suggests that Western states considering utility participation in regionalization do not face significant jurisdictional risks. The biggest potential risks to state authority identified in the case survey do not apply to market features currently contemplated in the West. Accordingly, Western states do not face a significant risk of losing their authority over state energy decisions by letting in-state utilities join one of the CAISO markets or take part in a future multi-state RTO. While each state must conduct a case-by-case analysis of the risks of regionalization, this Article's analysis indicates that any risks likely do not outweigh the potential benefits to grid reliability, ratepayers, and the climate.

APPENDIX: CASE SURVEY CONTENTS

The survey of 400+ cases citing *EPSA*, *Hughes*, and *Oneok* yielded forty-seven cases with in-depth analysis of FPA jurisdictional issues. Below they are sorted into categories of cases addressing preemption and other cases with jurisdictional analysis.

Preemption Cases (Supporting "Preemption Risk" Analysis)

Allco Fin. Ltd. v. Klee, 861 F.3d 82 (2d Cir. 2017)

Allco Fin. Ltd. v. Klee, No. 3:15-CV-608 (CSH), 2016 WL 4414774 (D. Conn. Aug. 18, 2016), aff'd Allco Fin. Ltd. v. Klee, 861 F.3d 82 (2d Cir. 2017)

335. *See* discussion *supra* Part IV.B.
336. *See* discussion *supra* Part III.C.3.
337. *See* discussion *supra* Part IV.C.

Coal. for Competitive Elec., Dynegy Inc. v. Zibelman, 272 F. Supp. 3d 554 (S.D.N.Y. 2017), aff'd sub nom. Coal. for Competitive Elec., Dynergy Inc. v. Zibelman, 906 F.3d 41 (2d Cir. 2018)

Coal. for Competitive Elec., Dynergy Inc. v. Zibelman, 906 F.3d 41 (2d Cir. 2018)

Elec. Power Supply Ass'n v. Star, 904 F.3d 518 (7th Cir. 2018)

New England Ratepayers Ass'n, 168 F.E.R.C. ¶ 61,169 (2019)

Vill. of Old Mill Creek v. Star, No. 17 CV 1163, 2017 WL 3008289 (N.D. Ill. July 14, 2017), aff'd sub nom. Elec. Power Supply Ass'n v. Star, 904 F.3d 518 (7th Cir. 2018)

Jurisdictional Cases
(Supporting "Policy Risk" and "Autonomy Risk" Analyses)

Advanced Energy Econ., 161 F.E.R.C. ¶ 61,245 (2017)

Advanced Energy Econ., 163 F.E.R.C. ¶ 61,030 (2018)

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