State Climate Actors Under the Federal Power Act: A 2017 FPA Update, Guidance, and Solution

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I. INTRODUCTION

Climate change poses the greatest single threat to nearly every being on this planet. It is the result of many factors, but anthropogenic emissions of carbon and other greenhouse gasses (GHGs) are among the largest contributors to climate change.[1] Though many sources emit anthropogenic GHGs, the energy sector is the largest global emitter of any economic sector.[2] As such, the energy sector has come under particular scrutiny as it relates to climate change policy.

Today in the United States, state climate action is as prevalent as ever. However, the federal government's environmental progress under the Obama Administration has come to a halt under the Trump Administration. Fortunately, this shift in federal leadership has not dissuaded states. Rather, it increased climate change activity among them.[3] In light of this increased fervor and relative youth of the renewables market—which has

1. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2014: SYNTHESIS REPORT 47–52 (2015), http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf [https://perma.cc/UTG2-8PCF].

2. *Global Greenhouse Gas Emissions Data*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data [https://perma.cc/5BKP-3RMJ] (last visited Apr. 2, 2019).

3. *E.g.*, *Jerry Brown and Michael Bloomberg Launch "America's Pledge" in Support of Paris*, BLOOMBERG PHILANTHROPIES (Oct. 29, 2017), https://www.bloomberg.org/program/environment/americas-pledge/#overview [https://perma.cc/6HA5-RGXA] ("Led by California Governor Jerry Brown and Michael Bloomberg, America's Pledge on climate change is a new initiative to compile and quantify the actions of states, cities and businesses in the United States to drive down their greenhouse gas emissions consistent with the goals of the Paris Agreement.").

its own inefficiencies to resolve[4]—plenty of reasons exist for continued optimism in renewable energy and state deployment thereof.[5]

That said, it is imperative for policy makers to understand the federal-state jurisdictional boundary in the energy sector. Longstanding federal legislation broadly divides the federal and state energy regulatory spheres, but evolving energy markets and recent case law render this jurisdictional line sufficiently unclear. This Article parses recent cases to clarify the line and proposes some guiding Rules and Principles designed to simplify the federal-state jurisdictional boundaries.

This Article is based on the judiciary's Federal preemption analysis as it relates to the Federal Power Act (FPA). Although there are related Commerce Clause issues, this Article is limited to analysis of federal and state jurisdiction issues under the FPA. That is in part because "hard cases make bad law"[6]—electrical energy often produces tough factual scenarios that do not fit neatly into Commerce Clause jurisprudence.[7] Courts should consider avoiding constitutional analysis wherever a court can rule on other legal grounds.[8] This Article also focuses on federal-state jurisdiction under the FPA instead of the Commerce Clause for the following reasons:

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4. *E.g.*, GREGORY NEMET ET AL., SOURCES OF PRICE DISPERSION IN U.S. RESIDENTIAL SOLAR INSTALLATIONS (2017), http://eta-publications.lbl.gov/sites/default/files/nemet_et_al_pv_price_dispersion_2017.pdf [https://perma.cc/PQV7-EADT] (analyzing price disparities of the seemingly homogenous good of photovoltaic installations and impacts thereof on current and future adoption of residential solar).

5. *E.g., Global Trends in Renewable Energy Investment 2016*, FRANKFURT SCH.-UNEP CTR. FOR CLIMATE & SUSTAINABLE FIN. (2016), https://www.actu-environnement.com/media/pdf/news-26477-rapport-pnue-enr.pdf [https://perma.cc/U7MJ-FYR7].

6. *See* Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").

7. *See* North Dakota v. Heydinger, 825 F.3d 912, 926 (8th Cir. 2016) (Murphy, J., concurring) ("This case can be resolved by a preemption analysis that avoids the complex issues surrounding an application of the extraterritoriality doctrine to the electricity markets . . ."). *E.g.*, Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 210–11 (1964) (explaining Southern California Edison's sale of energy to the City of Colton, California for the city to resell was a sale for resale which constituted a wholesale sale under the FPA. Although the sale occurred entirely within California's borders, it was a wholesale sale, so it fell under FERC's jurisdiction according to the FPA).

8. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case . . . if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

the FPA's creation supports such analysis;[9] the persuasive preemption analysis arguments advanced in *Heydinger*;[10] and the lack of thorough FPA preemption analyses by commentators in comparison to that for the Commerce Clause.[11]

The FPA originated from a judicial recognition of the federal government's need to provide a regulatory framework for energy markets within its jurisdiction. In early twentieth century Supreme Court jurisprudence, the Court exposed the *Attleboro* gap in federal energy regulation.[12] The Court recognized in *Attleboro* that a state regulator could not regulate the price paid by a utility company operating in another state because doing so would unconstitutionally burden interstate commerce[13]—such a sale was within the federal government's jurisdiction. However, no regulations existed in 1927 to distinguish jurisdictional boundaries of state and federal regulation in the energy sector; thus, the regulatory (*i.e.*, *Attleboro*) gap. To fill this void, Congress enacted the FPA shortly after the Court decided *Attleboro*, effectively codifying a cooperative federalism structure that protected the state's traditional authority. However, the FPA also created the Federal Energy Regulatory Commission (FERC). The FPA delegated to FERC jurisdiction over wholesale sales, but it permitted states to govern retail and all other non-wholesale electricity sales. While this wholesale versus retail jurisdictional divide remains, its application in modern markets is still subject to debate.

In 2016, federal courts issued decisions in *Heydinger* (8th Circuit), *Hughes* and *Electric Power Supply Association* (Supreme Court).[14] These cases

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9. Namely, this is explained by the *Attleboro* gap, which is elaborated upon in the subsequent paragraph of the text.

10. *See* Heydinger, 825 F.3d at 923, 929 (Murphy, J., concurring) (Colloton, J., concurring) (supporting FPA analysis over Commerce Clause).

11. Commentators often cite *Heydinger* as a case that debates preemption versus Dormant Commence Clause analysis, and the literature is limited as to streamlined analyses of the preemption issues. *E.g.*, Tessa Gellersen, *Extraterritoriality and the Electric Grid: North Dakota v. Heydinger, A Case Study for the State Energy Regulation*, 41 HARV. ENVTL. L. REV. 563 (2017) (discussing Justice Colloton's concurring opinion in *Heydinger* concluding the Clean Air Act preempted Minnesota's statute).

12. *See* New York v. FERC, 535 U.S. 1, 5–6 (2002) (referencing Pub. Util. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89–90 (1927)); *FERC at the Supreme Court: Drawing the Line Between Federal and State Jurisdiction Over Electric Power Markets*, MARTEN L. (Mar. 23, 2016), http://www.martenlaw.com/newsletter/ 20160323-ferc-jurisdiction-electric-power-markets [https://perma.cc/H9YED6A8].

13. Pub. Util. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89–90 (1927) (holding Rhode Island Commission's order placed a direct burden over interstate commerce while also noting these interstate rates could only be regulated under powers vested to Congress, suggesting no such power had been exercised).

14. North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016); Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016); FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016).

represent a recent discussion of federal-versus-state jurisdictional boundaries in the energy sector; in fact, a difficult discussion that could use additional guidance.[15] Questioning from the justices during the oral argument in *Electric Power Supply Association* indicates a desire for clarity of the jurisdictional designation of wholesale and retail energy markets.[16] *Heydinger* produced some controversy as to its impact on energy federalism, so it appeared to leave the Justices with scarce answers for the Court's decision in *Electric Power Supply Association*. This Article aims to provide a guide to federal-state jurisdictional analysis in the energy sector, with an eye toward illuminating a path forward for state climate actors.

The Rules and Principles established in this Article are intended to supplement the FPA's basic jurisdictional distinction. The Rules highlight how directly or indirectly state or federal regulators may affect wholesale and retail markets. The Principles are meant to be read alongside the Rules, akin to policy considerations which accompany statutory rules. To illustrate the Rules and Principles, I apply them to an important climate change law in California. The California law is relevant because it shares similarities with the portions of the Minnesota legislation struck down in *Heydinger*. The distinctions between these California and Minnesota laws are also significant because, despite some similar goals amongst the bills, California's law has not faced a legal challenge. For state climate actors, it is important to understand why California's law has stood the test of time whilst Minnesota's law did not.

Though state climate actors might fear the aftermath of cases discussed herein (as they relate to this Article's Principles of federal regulatory creep into the state jurisdictional realm and to FERC's evolving role), California's law does not violate my Rules (*i.e.*, there is no impermissible direct effect on FERC regulated wholesale sales). As discussed in detail below, any effect California's law has on the wholesale market is permitted because it would be indirect. *Heydinger* merely provides confusion and does not indicate an expansion of the wholesale regulatory sphere. That said, to

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15. *E.g.*, Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399 (2016) (discussing claims that we are amidst a paradigm shift in the United States federalism model); Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773 (2013) (proposing dynamic federalism principles responsive to challenges created by federal-state interactions in energy regulation).

16. *See* Oral Argument at 00:45, 2:20, 12:36, FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016) (No. 14-840), https://www.oyez.org/cases/2015/14-840 [https://perma.cc/YA5B-JCCW] (providing questions from Justices Kennedy, Scalia, and Roberts).

safeguard against potential misguidance from *Heydinger*, courts may consider giving discretion to the stated aim of the regulation or to apply a presumption against preemption. Both alternatives provide guardrails to help courts arrive at the correct interpretation of the jurisdiction for an energy regulation.

The discussion below presents cases which provide the backdrop for the most recent understanding of federal-state jurisdiction under the FPA. Then, this paper provides Rules and Principles that emerge from these cases, followed by an application of the Rules and Principles to a similar factual case in California's Senate Bill (SB) 1368. Finally, this Article concludes with a proposal for how state climate actors should use the Rules as a guide and how to best utilize the Rules reach a desired—and jurisdictionally permitted—result.

II. THE CASES AT HAND

Several cases in 2016 concerned important climate change policy issues related to electrical energy. The Supreme Court decided two of these cases, *Electric Power Supply Association* and *Hughes*, and the Eighth Circuit decided the third case, *Heydinger*. For the most part, these three decisions are factually driven and might only narrowly apply to states that implement similar climate change policy tools. Nevertheless, these cases stand as an important series of decisions in the recent federal-state jurisdictional tug-of-war. Some have suggested there is a trend of federal regulatory creep into states' jurisdiction.[17] Others may support the lines being drawn to maintain FERC's plenary grant of authority over wholesale energy markets. *Heydinger*, *Electric Power Supply Association*, and *Hughes* are each significant in their own right because they illustrate judicial review of noteworthy state energy policies, show circuit splits and divided appellate panels, and provide recent Supreme Court analysis of FPA preemption.

A. The 2016 Case Series

1. FERC v. Electric Power Supply Association (2016) (Kagan, J.)

Electric Power Supply Association is the first of two FPA cases the Supreme Court decided in 2016. The case involved FERC Order 745, which FERC promulgated to clarify how demand response (DR) would function in wholesale electrical energy auction markets and, more specifically, determine the formula for the clearing price of DR. DR is a practice, "in which operators of wholesale markets pay electricity consumers for commitments

17. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 772 (2016).

not to use power at certain times."[18] DR is submitted as a bid into a grid operator's auction market—if it has a winning bid, DR will be chosen over other generation sources.[19]

FERC issued Order 719 in 2008 as an initial address of DR participation in wholesale markets. Order 719 requires market operators to accept DR bids into the market.[20] From the outset, the Order retained some state authority over DR by allowing a, "state regulatory body to prohibit consumers in its retail market from taking part in wholesale demand response programs."[21] Later, in 2011, FERC issued Order 745 to further DR participation in wholesale markets. Order 745 newly directed market operators on how to price DR bids, and the order continued the policy of retaining a state authority carve-out.[22] The Electric Power Supply Association (EPSA) challenged this new pricing rule, as well as the broader notion of FERC having any authority over DR, in its suit against FERC.[23] The D.C. Circuit agreed with EPSA, but the Supreme Court reversed and found that FERC properly operated within its authority.[24]

The Court announced a new rule of construction for the FPA regarding FERC's jurisdiction and, applying this rule, construed FERC's regulation of DR prices to be well within FERC's jurisdiction. The Court's new rule limits FERC's jurisdiction to rules and practices that "*directly* affect" wholesale rates.[25] With this finding, the Court held Order 745 precisely fits within FERC's newly construed jurisdiction because DR prices directly affect wholesale rates.[26] Because DR is bid into the auction market just as any other wholesale supply, scheduling DR's price directly affects the

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18. *Id.* at 767.
19. *Id.* at 769–70. The Court in *Electric Power Supply Association* discussed several benefits of DR but focused on DR's ability to improve grid reliability and reduce wholesale prices. *Id.*
20. *Id.* at 771 (citing Order No. 719, 73 Fed. Reg. 64119, ¶ 154 (codified at 18 C.F.R. § 35.28(g)(1) (2015))).
21. *Id.* at 772.
22. *Id.* at 771 (citing Order No. 745, 76 Fed. Reg. 16658 (codified at 18 C.F.R. § 35.28(g)(1)(v))).
23. *Id.* at 780.
24. *Id.* at 773. The case also dealt with a second issue: If FERC was acting within its authority, the Court must determine whether FERC was arbitrary or capricious in creating the rule. *Id.* at 782. Given this Article's focus on jurisdictional lines, discussion of the second issue will be omitted.
25. *Id.* at 774.
26. *Id.* at 774–75.

wholesale auction market.[27] Thus, it is within FERC's authority to regulate wholesale rates and grid reliability.

The Court also discussed why the DR price formula was not a regulation of retail sales. The FPA protects traditional areas of state regulation because it preserves state regulatory authority over retail rates.[28] The Court explained that, "FERC cannot take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates."[29] Here, the Court further held FERC did not transgress that line.[30] Though the Court recognized some wholesale rules naturally affect retail rates, it provided, "[w]hen FERC regulates what takes place on the wholesale market, as part of carrying out its charge to improve how that market runs, then no matter the effect on retail rates, [section] 824(b) imposes no bar."[31] The Court determined that such was the case in *Electric Power Supply Association*.

Justice Scalia dissented in this case and distinguished a notable point. Scalia argued the Court inverted the question at issue and looked to see if DR was not retail, rather than determining if it was wholesale.[32] This is significant because, under the FPA, retail and "*any other* sale of electric energy" that is not wholesale is reserved for state authority.[33] Scalia argued DR should be viewed as "any other sale" because it is not a sale for *resale* and thus does not meet the FPA's definition for wholesale energy.[34] Moreover, Scalia argued DR is a retail electrical sale because DR participants are retail customers, and DR incentivizes retail users to curb their demand.[35] In effect, DR participants must consider added costs to participating in the retail market, which is the opportunity cost of choosing *not* to bid their DR.[36]

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27. *Id.* at 774.
28. *Id.* at 775 (citing FPA 16 U.S.C. § 824(b)).
29. *Id.*
30. *Id.* at 776.
31. *Id.*
32. *Id.* at 785 (Scalia, J., dissenting).
33. *Id.* (quoting 16 U.S.C. § 824(b)(1)).
34. *Id.* at 785–86 (quoting 16 U.S.C. § 824(d)). *See also id.* at 786 ("For FERC's regulatory authority over electric-energy sales depends not on which 'market' the 'transactions occu[r] on' . . . but rather on the *identity of the putative purchaser*. If the purchaser is one who resells electric energy to other customers, the transaction is one 'at wholesale' and thus within FERC's authority. If not, then not. Or so, at least, says the statute.").
35. *Id.* at 786.
36. *Id.*

2. Hughes v. Talen Energy Marketing, LLC (2016) (Ginsburg, J.)

After *Electric Power Supply Association*, the Supreme Court decided another FPA case in 2016, regarding the permissibility of a *state* regulation. In *Hughes*, Maryland created a unique scheme for promoting new in-state generation.[37] However, this created the issue of whether the scheme interfered with the FERC's authority over the auction market. The Court in *Hughes* found such an interference, so the Court struck down Maryland's scheme because it disregarded wholesale rates and required generators' wholesale market participation.[38]

To be sure, Maryland experiences electrical grid congestion, as the Northeastern United States is the most densely populated region in the country.[39] Maryland thus felt the need to address the issue and attempted to increase its in-state electrical energy supply.[40] The state petitioned FERC to strengthen rules designed to help and encourage new generators entering the wholesale market.[41] However, FERC rejected Maryland's proposed rules because, in FERC's view, the proposal would create unfair incentives for new entrants.[42] Still concerned with congestion, the Maryland Public Service Commission (PSC) issued an order to solicit a project intended to increase in-state generation.[43]

The Maryland PSC's Generation Order solicited bids to win a state-backed contract for new generation:

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37. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1292 (2016).

38. *Id.* at 1299.

39. *See* Jamie Smith Hopkins, *Power Plants Coming to Power-Hungry Region*, BALTIMORE SUN (July 13, 2014), http://www.baltimoresun.com/business/bs-bz-maryland-power-plants-20140713-story.html [https://perma.cc/H9G2-D58U?type=image] ("Under the system run by multistate grid manager PJM Interconnection, the [Baltimore Gas & Electric Co.] territory paid about $90 million in 'congestion' charges each of the last two years . . . These charges are part of the reason that [Baltimore Gas & Electric Co.] and Pepco customers who buy electricity from their utility are paying over 20 percent more for that supply this summer than customers of Potomac Edison in Western Maryland, beyond the point of transmission congestion.").

40. Hughes, 136 S. Ct. at 1294.

41. *See id.* (explaining Maryland's proposal that FERC alter its New Entry Price Adjustment, which guaranteed some new generators a stable capacity price for their first three years, to instead apply for ten years).

42. *Id.* at 1294.

43. *Id.*; Robert Walton, *What the Hughes v. Talen Supreme Court Decision Means for State Power Incentives*, UTIL. DIVE (Apr. 25, 2016), https://www.utilitydive.com/news/what-the-hughes-v-talen-supreme-court-decision-means-for-state-power-incen/418046/ [https://perma.cc/M3CN-KP83].

> Unlike a traditional bilateral contract for capacity, the *contract for differences* does not transfer ownership of capacity from [the generator] to [the load serving entities]. Instead [under the contract for differences,] [the generator] sells its capacity on the PJM market, but Maryland's program guarantees [the generator] the contract price rather than the auction clearing price.[44]

This meant the generator, CPV, would bid its electrical energy into the auction market but take the price it contracted for with Maryland, regardless of the clearing price at auction. Still, Maryland stands to gain or lose any difference between the clearing price and contracted price.[45] The Maryland PSC eventually selected a generation project,[46] but other pre-existing generators allegedly harmed by the project brought an action against the PSC, thus initiating the *Hughes* litigation.[47]

In affirming the lower courts' decisions to strike down the contract for differences, the Supreme Court found, "Maryland's program set[] an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators."[48] The Court explained FERC's plenary authority over the auction market[49] and concluded the pre-approved clearing price inherently meets FERC's duty to set rates that are "just and reasonable."[50] Maryland's contract for differences set a wholesale price independent of the wholesale auction clearing price and thus impermissibly invaded FERC's purview regulatory. The Court in *Hughes* warned that states do not have authority to second-guess FERC jurisdictional rates—Congress's plenary grant of power to FERC over the wholesale rates left no room for such state action.[51]

The end of the *Hughes* decision provided a key phrase for the states in the energy market realm. While emphasizing the limited scope of this decision, Justice Ginsburg ensured states of the broad latitude they have in policymaking, so long as their energy policies are, "untethered to a generator's wholesale market participation."[52] Specifically, Justice Ginsburg referenced policy tools available to states to encourage new and clean

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44. Hughes, 136 S. Ct. at 1295 (emphasis added). Maryland is a part of the PJM Interconnection, a regional transmission organization (RTO) that coordinates the movement and sales of wholesale electricity in all or parts of various states in the greater mid-Atlantic and mid-West region. *Who We Are*, PJM INTERCONNECTION, http://www.pjm.com/about-pjm/who-we-are.aspx [https://perma.cc/TSW9-7YFC] (last visited Apr. 2, 2019).
45. Hughes, 136 S. Ct. at 1295.
46. CPV Maryland, LLC, submitted the winning bid.
47. Hughes, 136 S. Ct. at 1296. The named party in the suit was W. Kevin Hughes, the Chairman of the Maryland PSC.
48. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016).
49. *Id.* at 1298.
50. *Id.* at 1297.
51. *Id.* at 1298.
52. *Id.* at 1299.

generation beyond the scope of the *Hughes* decision, including, "tax incentives, land grants, direct subsidies, [and] construction of state-owned generation facilities."[53]

Notably, Justice Sotomayor joined the majority but also wrote a concurring opinion to clarify guiding federal preemption principles.[54] Although her points appear more cautionary than substantive, they are nonetheless valuable for federal-state energy jurisdiction. Justice Sotomayor cautioned courts to be careful not to confuse "the 'congressionally designed interplay between state and federal regulation' for impermissible tension that requires preemption under the Supremacy Clause."[55]

3. North Dakota v. Heydinger (8th Circuit 2016)

Heydinger is a contentious Eighth Circuit case.[56] It followed *Electric Power Supply Association* and *Hughes* and thus provided immediate insight into how circuits courts might interpret similar cases. For those who see *Electric Power Supply Association* and *Hughes* as part of an expansion of federal regulatory reach in the energy sector, *Heydinger* supports this view.[57] Regardless of the existence of such a trend, the case illustrated an overstep of state authority after the court struck down a Minnesota climate change mitigation policy. Doctrinally, the Eighth Circuit's analysis in *Heydinger* also highlights the debate on whether to decide a case on preemption or dormant Commerce Clause grounds. Still, the case does not clearly resolve the debate. Nonetheless, after the dust settled, FPA preemption carried the day in *Heydinger* to both gain support of the panel's majority and to produce a holding.

Heydinger concerned a Minnesota law called the Next Generation Energy Act of 2007 (NGEA).[58] The Eighth Circuit panel reviewed a section of the

53. *Id.*
54. *Id.*
55. *Id.* at 1300 (quoting Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493 (1989)).
56. North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016). *See* Todd L. Lundy, *The False Analogies of Electricity, and Toward an Analysis of Contractual Relationships to Differentiate Transactions Among States Under the Dormant Commerce Clause*, 11 TEX. J. OIL GAS & ENERGY L. 31, 66, 72–73 (2016); Gellersen, *supra* note 11.
57. *E.g.*, FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 787 (2016) (Scalia, J., dissenting).
58. North Dakota v. Heydinger, 825 F.3d 912, 915–16 (8th Cir. 2016) (citing MINN. STAT. ANN. § 216H.03, subd. 3 (West 2017)).

NGEA which stated "no person shall. . . (2) import or commit to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions; or (3) enter into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions."[59] Three non-profit cooperatives comprised of small rural utilities challenged these two provisions. They claimed Minnesota's law impermissibly impacted their wholesale activities in other states.[60]

Both the district court and Eighth Circuit agreed with the cooperatives and struck down the Minnesota law. However, four judges that rendered decisions in the case and were split in their reasoning. Understandably, the plurality in reasoning only added to existing confusion in this case. The district court found the provisions violated the extraterritoriality doctrine of Commerce Clause jurisprudence and were thus *per se* invalid state laws.[61] Judge Locken, the author of the Eighth Circuit's main decision, agreed with the lower court's extraterritoriality decision.[62] However, the two remaining judges on the Eighth Circuit panel, Judge Colloton and Judge Murphy, disagreed and instead ruled on preemption grounds.[63] Although the two agreeing Eighth Circuit judges form a majority opinion based on preemption, each wrote after Judge Locken, indicating they concurred with Judge Locken's opinion. To further confuse the matter, while Judge Colloton agreed with Judge Murphy's FPA preemption analysis, he also found preemption under the Clean Air Act.[64] The main *Heydinger* decision thus stems from agreement between two out of three circuit judges in finding the FPA preempted Minnesota's law. Unfortunately, the court spent much of the decision on the debate over the determinative doctrine, so there is ample discussion of the statute under FPA preemption.

For Judge Murphy, *Heydinger* turned on the Minnesota law's outright ban on wholesale sales.[65] She reasoned:

59. MINN. STAT. ANN. §§ 216H.03, subd. 3(2)-(3) (West 2017).
60. Heydinger, 825 F.3d at 913–14.
61. *Id.*
62. *Id.* at 921–22.
63. *Id.* at 927 (Murphy, J. concurring); *id.* at 929 (Colloton, J., concurring).
64. *Id.* at 928 (Colloton, J., concurring). This *Heydinger* discussion focuses on FPA preemption due to this Article's focus on FPA preemption and because the majority vote in this case actually comes from FPA preemption. Clean Air Act preemption and a Dormant Commerce Clause violation each only received one vote of support from the Eighth Circuit panel. Both rationales will only be referenced herein to further the discussion surrounding FPA preemption.
65. Heydinger, 825 F.3d at 926–27 (Murphy, J., concurring).

> [s]ince the import provision bans contracts for power from new large power plants, it thus bans wholesale sales of electric energy in interstate commerce. The FPA "leaves no room either for direct state regulation of the prices of interstate wholesales" or for regulation that "would indirectly achieve the same result."[66]

According to Judge Murphy, Minnesota's ban on certain wholesale sales is a state regulation of wholesale sales that directly conflicts with FERC's jurisdiction over wholesale rates,[67] a fatal finding under FPA preemption analysis.[68]

Judge Colloton's view is just as important as Judge Murphy's in forming Eighth Circuit FPA preemption precedent here because both concurrences are necessary to form a majority in this case. Judge Colloton agreed with Judge Murphy's point regarding the fundamental flaw of the provisions—the fact the law bans wholesale sales.[69] In Judge Colloton's words, "[b]ecause a State may not regulate wholesale rates, it follows that a State may not impose a complete ban on wholesale sales, effectively forbidding the parties to arrive at *any* mutually agreeable price."[70] Moreover, Judge Colloton addressed the breadth of the statute. Minnesota argued for a narrower interpretation that, "applies only to bilateral contracts in which a Minnesota entity agrees to purchase power from an out-of-state energy provider."[71] In response, Judge Colloton noted that Minnesota would be preempted, even under the narrow construction argued by Minnesota. Judge Colloton appeared to reason that regardless of how encompassing of entities the statute is, a state may never impose a complete ban on wholesale sales.[72] This bodes poorly for those who think a more state-friendly reading of the statute would have been sufficient for Minnesota to succeed.

B. What Do These Cases Mean?

Even with the three aforementioned Federal High Court decisions regarding the federal-state jurisdictional line in the energy sector, there does not appear to be sufficient guidance for future courts to answer similar jurisdictional questions. *Electric Power Supply Association* attempted to

66. *Id.* at 926 (Murphy, J., concurring) (quoting FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 780 (2016)).
67. *Id.* at 926–27 (Murphy, J., concurring).
68. *Id.* at 927 (Murphy, J., concurring).
69. *Id.* at 928 (Colloton, J., concurring).
70. *Id.*
71. *Id.* at 927.
72. *Id.* at 928.

clarify the line when the Court announced a new rule of construction limiting FERC's regulatory authority over wholesale energy sales. Although this case appeared to provide some help, the Supreme Court decided *Hughes* later that same year and did not apply the *Electric Power Supply Association* test. The *Hughes* decision, compounded with the disheveled aftermath of *Heydinger*, left unresolved questions and arguably made it more difficult for courts to decide issues of regulatory jurisdiction.

Furthermore, *Heydinger* may be especially problematic for states with similar regulations such as California.[73] The *Heydinger* court opinions discussed the flaw in the Minnesota provision as if it was an inherent flaw, but the comparable law in California has gone a decade without a legal challenge.[74]

There are different ways to coalesce the 2016 case series. One can interpret the cases narrowly to provide answers to specific factual scenarios: DR pricing is FERC jurisdictional; state regulations tethered to wholesale market participation violate FERC's jurisdiction; and state bans on wholesale sales are regulations of the wholesale price which the FPA preempts. However, many will look to the 2016 cases for much more than those simple answers. Because a big picture understanding could provide crucial for regulatory effectiveness, it is key to identify common threads that run through these cases.

III. EMERGING RULES AND PRINCIPLES FROM THE THREE CASE SERIES

In just one year, all three of these significant opinions were issued to address the core jurisdictional issue facing energy regulators. Nonetheless, we are left without a clear determination of the boundary between federal and state regulators. This section synthesizes succinct Rules and Principles that can be extrapolated from the aforementioned cases, in the absence of a clear boundary from the courts. Overall, the 2016 cases highlight the directness with which regulators can affect markets inside or outside their jurisdiction, FERC's evolving role in the increasingly complex and interconnected wholesale energy market, and FPA's preemption of state action.

A. Rules of Directness: The Effect Regulations May Have on Markets

The courts in *Electric Power Supply Association*, *Hughes*, and *Heydinger* discussed how direct a regulation may impact prices or rates through references

73. *See* discussion of S.B. 1368 (Stats. 2006, Ch. 598), *infra* Section IV(A).
74. How California would fare against legal challenge is discussed in Section IV.

to "direct" and "indirect" effects. These discussions formed holdings in each case but did not provide a concrete understanding of the reach a regulatory effect has on markets. Thus, the Rules of Directness below address the spectrum of effects regulators might have on markets.

To elaborate on the direct versus indirect effects, consider a hypothetical state public utility commission aiming to create a retail rate program that lowers prices for certain retail customers. This regulation would be a direct effect on retail prices. In contrast, if FERC assessed new fees on coal-powered electricity generators bidding into ISO/RTO auction markets, there would be a direct effect on wholesale markets. However, markets are necessarily interconnected. In each hypothetical, one could imagine the ways in which a regulation impacts the market it was not intended to impact—retail rate regulations could affect the wholesale market and vice versa, even if the unintended effect on the market is only indirect.

The distinction between direct and indirect effects does not exclude regulations that *actually* regulate the market rates, as opposed to regulations that merely *affect* rates. The Rules herein fold actual rate regulations into regulations that directly affect rates. This means Rules which apply to direct effects also apply to *actual* affects because the directness Rules equally constrain regulations that *directly* affect price and those which *actually* regulate price. The Court's analysis in *Hughes* supports this, as the Court determined Maryland actually set wholesale rates,[75] even though the Court cited to multiple decisions that considered regulatory effects.[76] Although Maryland's contract for differences in *Hughes* constituted actual rate setting, the FPA preempted it just as it would a state regulation that tethered itself to the wholesale market in a way that directly affected the wholesale market. Thus, this Article intertwines the discussion of regulations with actual effects and those with direct effects, with a focus on direct and indirect effects on markets.

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75. *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016) ("We agree with the Fourth Circuit's judgment that Maryland's program sets an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators.").

76. *See* Hughes, 136 S. Ct. at 1296–98 (citing FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016); Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 370 (1988); Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591 (2015)). In *Oneok*, while discussing the FPA's sister legislation, the Natural Gas Act, the Court stated, "[w]here, as here, a practice affects nonjurisdictional as well as jurisdictional sales, pre-emption can be found only where a detailed examination convincingly demonstrates that a matter falls within the pre-empted field as defined by this Court's precedents. Those precedents emphasize the importance of considering the target at which the state-law claims aim." Oneok, 135 S. Ct. at 1592.

Whether a regulation has a direct or indirect effect on a market applies to both state and federal regulations for either retail or wholesale markets. In the hypothetical regulations mentioned above, the first scenario involves a state regulation on retail markets, and the second scenario concerns a federal regulation on wholesale markets. Because the Rules consider both hypothetical situations, they account for both direct and indirect effects that both state and federal regulators may have on the market.

There are a finite number of scenarios available to test how "direct" a regulation effects a market. This is arguably beneficial because it provides an exhaustive list of how an energy regulation may impact a given market. There are three factors, each with two possibilities, which, as described below, allows for eight possible scenarios to test the impacts of direct regulations. The first factor is the regulating body, which is either state or federal; the second factor is directness of effect, which is either direct or indirect; and the third factor is the affected market in question and is either a wholesale or retail market. The eight Rules are extrapolations from the recent case law discussed above in Section II and are formulated to determine whether the particular regulatory effect is in accordance with the jurisdictional parameters set out in both the FPA and judicial decisions.

EIGHT RULES OF DIRECTNESS

1. FERC regulations may directly affect the wholesale market;
2. FERC regulations may not regulate outside its explicit jurisdictional boundary for the purpose of indirectly affecting wholesale markets;
3. FERC regulations may not directly affect the retail market;
4. FERC regulations may indirectly regulate the retail market;
5. State regulators may not directly affect wholesale markets;
6. State regulators may indirectly affect wholesale markets;
7. State regulators may directly affect retail markets; and
8. State regulators may indirectly affect retail markets.

Should future confusion arise from application of these Rules, it is likely due to mislabeling an effect as direct or indirect. Indirect effects have causal steps that stand between the regulation and the affected market (i.e., the regulation does not target the particular impact, or impacts, realized). In contrast, direct effects involve a directly linked cause and effect, such that the regulation aims to impact the affected market. Although direct effects can be confused for meaningful or strong effects, how substantial an effect is does not bear on its directness. Rather, directness speaks to the causal link of an effect. Whether a regulation and effect are directly or indirectly related could result in a very noteworthy impact or be entirely unimportant, but that does not determine its proper jurisdiction or the legality of the regulation.

1. Rules 1 and 2: FERC Regulations with Effects on the Wholesale Market

1. FERC regulations may directly affect the wholesale market; and
2. FERC regulations may not regulate outside its explicit jurisdictional boundary for the purpose of indirectly affecting wholesale markets.

Electric Power Supply Association was the Court's first decision of the 2016 cases discussed herein, and the opinion's "direct effects" language was later cited to in the two subsequent decisions.[77] The case elaborates on FERC's jurisdictional limitations on regulating the wholesale market.[78] As a federal agency tasked with regulating wholesale energy markets, FERC is an ideal exemplar to demonstrate how Rules 1 and 2 exhibit the natural limits on administrative agencies. Agencies must work within their sector to affect the sector, and they cannot step outside the sector to indirectly affect change.

In *Electric Power Supply Association*, the Court stated that FERC has authority to regulate in ways that affect wholesale rates.[79] The Court then clarified the extent of this authority and adopted a new rule of construction that limits, "FERC's 'affecting' jurisdiction to rules or practices that '*directly* affect the [wholesale] rate.'"[80] Thus, Rule 1 is a comfortable assertion with approval from our highest court.[81]

However, the Court excluded indirect effects as a regulatory means for FERC to affect the wholesale market—hence Rule 2. If FERC regulated to indirectly affect wholesale markets, FERC would need to create a regulation beyond the scope of its inherent wholesale regulatory duties. In other words, FERC would need to devise an otherwise unsanctioned way to affect the wholesale market. For example, suppose FERC tried to regulate a congressional tax break for certain energy producers with a tax

77. *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016); North Dakota v. Heydinger, 825 F.3d 912, 926 (8th Cir. 2016) (Murphy, J., concurring).
78. *E.g.*, FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 767–68 (2016).
79. *Id.* at 774 ("That means FERC has the authority—and, indeed, the duty—to ensure that rules or practices 'affecting' wholesale rates are just and reasonable.").
80. *Id.*
81. *See id.* at 784–85 (Scalia, J., dissenting) (showing support for the rule concerning direct affects while disagreeing with the majority's view to the contrary).

that alters generators' competitiveness in wholesale markets. Here, FERC would not have authority to directly regulate taxes because it would indirectly affect the wholesale electrical energy market. FERC's authority does not extend that far, and it is constrained to regulatory rules and practices that *directly* affect wholesale rates.[82] The inverse of Rules 1 and 2 is true for FERC in the retail market, which leads to Rules 3 and 4.

2. *Rules 3 and 4: FERC Regulations Affecting Retail Markets*

3. FERC regulations may not directly affect the retail market; and
4. FERC regulations may indirectly regulate the retail market.

FERC regulations may only *indirectly* affect retail rates. Rules 3 and 4 occupy an area where the Court occasionally waivers in its consistent analysis of regulatory effects and perhaps demonstrates why there is a disconnect between the Court's 2016 decisions and the Justices' yearning for more clarity as to guiding rules. Nonetheless, by focusing on an affects analysis, implicit support for Rules 3 and 4 can be found in the Court's use of contrasting language to show a meaningful limitation of FERC in retail markets.

FERC may indirectly affect retail rates, and Rule 4 reflects this. The Court in *Electric Power Supply Association* noted, "FERC regulation does not run afoul of [the FPA's jurisdictional] proscription just because it affects—even substantially—the quantity or terms of retail sales."[83] The Court went so far as to say there is "no legal consequence" to FERC for any regulatory effect on the retail market when the regulation is dealing with the wholesale market.[84] This gives FERC considerable leeway to regulate the wholesale market.

However, this explanation contrasts with the strict limitation prohibiting FERC from directly affecting the retail market.[85] The FPA limits FERC's jurisdiction to the wholesale market, reserving regulatory authority over retail sales to the states.[86] The Court in *Electric Power Supply Association* stated, "FERC cannot take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates."[87] This language restrains

82. *Id.* at 775.
83. *Id.* at 776.
84. *See id.* ("When FERC sets a wholesale rate, when it changes wholesale market rules, when it allocates electricity as between wholesale purchasers—in short, when it takes virtually any action respecting wholesale transactions—it has some effect, in either the short or the long term, on retail rates. That is of no legal consequence.").
85. *Id.* at 775. *See also* 16 U.S.C. § 824(b).
86. Elec. Power Supply Ass'n, 136 S. Ct. at 775 (2016) (referencing FPA section 824(b)).
87. *Id.*

the broad language of the previous paragraph by showing FERC may not regulate endlessly in the name of the wholesale market. Because FERC can regulate wholesale markets, even when a regulation indirectly effects the retail market, this contrasting directive implies that FERC regulations which more directly affect the retail market transgress the state's jurisdictional authority. Thus, Rule 3 bans FERC from directly affecting the retail market.

Rule 3 is further supported by the practical requirements of Rule 2 because a FERC regulation directed at the retail market exceeds the explicit jurisdictional boundary of wholesale markets. Even if FERC did this to have *some* impact on the wholesale market, such a run-around regulation of the wholesale market is prohibited under Rule 2. Any FERC regulation directly affecting the retail market is likely to violate Rule 2, thus supporting Rule 3 and its prohibition of FERC's direct effects on the retail market.

3. *Rules 5 and 6: State Regulations Affecting Wholesale Markets*

5. State regulators may not directly affect wholesale markets; and
6. State regulators may indirectly affect wholesale markets.

Although FERC is the FPA's focal point,[88] the statute nonetheless references state regulations. Given that the wholesale market is strictly within FERC's jurisdiction, states may not directly affect the wholesale market. However, because Congress is cognizant of the interconnectedness of the retail and wholesale markets, the FPA permits states to regulate in ways that indirectly affect the wholesale market. In short, the FPA recognizes a system of cooperative federalism by delegating some authority to FERC and retaining the rest for states.[89] In *Hughes*, Justice Sotomayor cautioned, "courts must be careful not to confuse the 'congressionally designed interplay between state and federal regulation,' for impermissible tension that requires preemption under the Supremacy Clause."[90] Accordingly, states may only indirectly affect wholesale markets as they operate in a cooperative middle ground with FERC. As Justice Scalia discussed in *Electric Power Supply Association*, though FERC has sole jurisdictional authority over DR rate scheduling, states may opt-out of the DR program altogether.[91]

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88. *See* 16 U.S.C. § 824.
89. Elec. Power Supply Ass'n, 136 S. Ct. at 785 (Scalia, J., dissenting) (citing 16 U.S.C. §§ 824(a)-(b)(1)).
90. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring) (internal citation omitted).
91. *See supra* text accompanying note 100.

FERC's jurisdiction over the wholesale market is intended to be plenary, and thus states cannot directly affect it.[92] Justice Kagan made this clear in *Electric Power Supply Association* when she stated, "[t]he FPA 'leaves no room either for direct state regulation of the prices of interstate wholesales' or for regulation that 'would indirectly achieve the same result.'"[93] Justice Ginsburg also alluded to the directness of regulatory effect in *Hughes*, but instead used the term "tethered."[94] There, Justice Ginsburg explained states may regulate "through measures 'untethered to . . . wholesale market participation,'"[95] so only those with an indirect effect on the wholesale market were permissible under the FPA.[96] As such, Maryland should have untethered its regulations to the wholesale market. By failing to do so, Maryland violated the FPA because its regulations directly affected the wholesale market.[97]

Despite the strong prohibition of state regulations on wholesale markets, states regulations may indirectly affect wholesale markets. Justice Kagan's statement in *Electric Power Supply Association*[98] may appear expressly contradictory to this, but one must draw a fine line in the Justice's statement to show no contradiction to Rule 6's allowance of state indirect effects on wholesale markets. Justice Kagan references *direct state regulations*, not regulations with direct *effects*. She adds indirectness to the statement as well, but again, she is *not* referencing indirect *effects*. Justice Kagan's statement instead relates to Rule 2 regarding direct regulations of things outside the energy regulatory realm that secondarily impact rates (*e.g.* directly regulating taxes, which directly or indirectly affects the energy market). State "regulation[s] that 'would indirectly achieve the same result'" as a direct state regulation of wholesale price would be like a state tax that directly regulates wholesale prices.[99] This is because it is a direct state regulation of taxes that indirectly achieves the goal of altering wholesale prices, just not through effects. Rather, the tax break achieves the goal of altering wholesale prices by directly addressing a feature of wholesale rates. Therefore, Justice Kagan's statement prohibiting states from indirectly regulating the wholesale market does not extend to indirectly *affecting* the wholesale market. Rather, she prohibits *direct regulations*, regardless of their intent.

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92. Hughes, 136 S. Ct. at 1298.
93. Elec. Power Supply Ass'n, 136 S. Ct. at 780.
94. Hughes, 136 S. Ct. at 1299.
95. *Id.*
96. Something tethered is "attached" and thus directly connected or affected. *See* Tether, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/tether [https://perma.cc/54FV-5VFT].
97. *See supra* text accompanying notes 48–51.
98. *See supra* text accompanying note 93.
99. Elec. Power Supply Ass'n, 136 S. Ct. at 780.

Although there are clear grants of plenary authority between the state and FERC, this authority operates within a cooperative federalism model. As such, there is a middle ground in which states and FERC permissibly operate. This "middle ground" encompasses the area in which states may indirectly affect the wholesale market. Justice Kagan did not intend to strike down state actions in this realm, and the Court approved such actions in *Electric Power Supply Association*. If indirect effects were not permitted, the results may be ridiculous, given the interconnectedness of the respective markets.

The Court's recognition of states' ability to indirectly affect the wholesale market comports with the way courts have looked at state jurisdictional authority. For example, in *Electric Power Supply Association*, FERC's DR price formula was the wholesale price component of DR. However, FERC also respected states ability to regulate DR, as shown by FERC providing states the power to opt out of DR.[100] DR prices are within FERC's jurisdiction because they are bid into the wholesale market and affect wholesale prices—in that they intend to drive down wholesale prices.[101] However, when a state removes itself from a scheme that is intended to lower wholesale prices, such removal effects on wholesale prices. Nevertheless, the Court in *Electric Power Supply Association* showed no concern for FERC allowing states to regulate in this way and instead viewed the effect on wholesale prices as only indirect and, thus, permissible.[102]

A rule disallowing states to indirectly affect the retail capacity market would risk absurd results. As Justice Kagan stated, "[i]t is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other. To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level."[103] Yet, courts permit FERC regulations with indirect effects on the retail market because regulating these interconnected markets have naturally relational consequences.[104] It must therefore be true that a state's regulation of the retail market is not prohibited because of its indirect

100. *Id.* at 789 (Scalia, J., dissenting) ("[T]he fact that FERC . . . is willing to let [s]tates opt out of its demand-response scheme serves to highlight just how far the rule intrudes into the retail electricity market.").
101. *Id.* at 775.
102. *See id.* at 774.
103. *Id.* at 776.
104. *Id. See also supra* Section III.A.2 (discussing Rules 3 ("FERC regulations may not directly affect the retail market") and 4 ("FERC regulations may indirectly regulate the retail market")).

effect on the wholesale market. Courts do not apply a strict scrutiny review standard for regulatory retail rate schedules to determine whether the regulations and associated rate schedules alter wholesale prices. An indirect effect may include countless causal steps between the retail regulation and wholesale price. Thus, some indirect effects must be permitted to avoid the absurdity that would result from barring all retail regulations that impact wholesale prices.

In the absence of demonstrable distinction amongst regulations that create indirect effects, it appears state actions with indirect effects on the wholesale market are and will subsist as a natural, acceptable component part of cooperative federalism—at least in the capacity market realm. Based on the aforementioned analysis, we know courts do not ask *how* indirect the effect is. Because courts do not count causal steps between a state regulation and a measured affect in the market, it remains to be seen how a regulation may indirectly affect the markets in a "permissible" way. For now, at least, a state may indirectly affect the wholesale market, regardless of how indirect the effect is.

4. Rules 7 and 8: State Regulations Affecting Retail Markets

1. State regulators may directly affect retail markets; and
2. State regulators may indirectly affect retail markets.

The final two Rules of Directness show the area in which states have the most latitude: retail markets and any market not deemed wholesale.[105] States may both directly and indirectly affect retail markets. States have broad police powers limited only by constitutional constraints and other recognized limits in federalism. In the energy sector, the FPA specifically grants authority to FERC, whereas the FPA recognizes the broad authority states have over retail markets and, "any other sale[s] of electric energy . . . ."[106] Again, the allowance for states to affect retail markets or "any other sale of electric energy" that is not wholesale would exclude other explicit prohibitions, such as a prohibition on states directly regulating wholesale markets.

Rule 8 allows states to indirectly regulate retail rates and thus illustrates the area wherein states and FERC Rules conflict. Because this Article refers to states generally, Rule 8 encompasses state commissions and legislatures not confined by statutory grants to specific subject matter. This contrasts my references to FERC at the exclusion of Congress or Federal regulators

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105. *See* Elec. Power Supply Ass'n, 136 S. Ct. at 785 (Scalia, J., dissenting) (citing 16 U.S.C. §§ 824(a)-(b)(1)).
106. 16 U.S.C. § 824(b)(1).

broadly. By focusing on the conflict between states and FERC, this analysis reflects the FPA's jurisdictional lines more adequately than a broad federal-versus-state discussion.

B. The Evolving FERC

One principle of energy regulation is the ever-evolving nature of FERC. The Supreme Court's recurring reference to the "evolving FERC"[107] without similar statements about the states suggests the Court sees FERC as primarily regulating new innovations and disruptions in the energy market. With an increasingly interconnected grid, it is fair to suspect that more and more energy sector activity will involve FERC through wholesale effects. Nonetheless, it is still debatable just how much weight these statements deserve.

The Court noted in *Electric Power Supply Association* and *Hughes* that the energy sector is becoming increasingly complex and interconnected. This is followed by a comment about FERC's evolving role in cooperative federalism.[108] In the Court's words, "[s]ince the FPA's passage, electricity has increasingly become a competitive interstate business, and FERC's role has evolved accordingly."[109] With so many regulatory and market forces at play in the energy sector, and with the intersection of such forces becoming more apparent, it seems indisputable that FERC is evolving as a regulator in this dynamic field.

Still, one may view the Court's statements as a benign comment about cooperative federalism. Since its creation, FERC has been discovering its role and defining the wholesale market it regulates.[110] For the same reasons, one could say FERC is evolving. Though states may also evolve in their own regulatory sphere, there may be rhetorical significance to the Court's comments about FERC.

FERC's evolution is also significant because the Court tends to rule in FERC's.[111] Although the idea of an evolving FERC may not be controversial

107. Elec. Power Supply Ass'n, 136 S. Ct. at 768; Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1292 (2016).
108. Elec. Power Supply Ass'n, 136 S. Ct. at 768; Hughes, 136 S. Ct. at 1292.
109. Hughes, 136 S. Ct. at 1292 (quoting Elec. Power Supply Ass'n, 136 S. Ct. at 768).
110. *E.g.,* Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205 (1964) (holding sale for resale occurring entirely intra-state is still within the Federal Power Commission's exclusive wholesale territory).
111. *Id. See also* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016); Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

on its face, some may nonetheless find this "Principle" controversial because the Court has not yet announced an analogous evolving concept for states. State actors may find this significant, but the next Principle discussed below further highlights the import of this concept, including that it is in tandem with FERC's evolution.

C. Federal Regulatory Creep and Why Heydinger *Matters*

The other Principle involves a broader view of the cases and their results. Courts in *Electric Power Supply Association*, *Hughes*, and *Heydinger* either ruled against a state regulation[112] or in favor of federal authority.[113] For state climate actors looking to be aggressive in the energy sector, these 2016 cases may be cause for concern.

The legitimacy of such fear may hinge on whether *Heydinger* was correctly decided or, alternatively, an outlier. This is particularly true for those in the Eighth Circuit because they must account for *Heydinger*'s precedential value. However, it is also true for anyone in the United States looking for judicial trends and those looking for how circuit courts respond to new Supreme Court decisions. The *Heydinger* court cited to both *Electric Power Supply Association* and *Hughes*, providing immediate feedback from one circuit as to how other circuits may interpret the two Supreme Court cases.[114]

Still, *Heydinger* has issues and gives reasons to question its precedential value. The way the opinion was authored, the confusions over what holds, and the odd mix of concurrences which outnumber the borderline de facto majority, provide reason to question *Heydinger*'s authority.[115] The following section applies Rules from this Article to California law and will provide further analysis of *Heydinger* and the argument regarding the role of federal regulatory creep in deciding jurisdictional boundaries. This analysis has important similarities to the Minnesota legislation struck down in *Heydinger*.

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112. *Hughes* shot down Maryland's contract for differences, and *Heydinger* voided two Minnesota provisions. Hughes, 136 S. Ct. at 1299; North Dakota v. Heydinger, 825 F.3d 912, 922 (8th Cir. 2016).

113. The Court held in *Electric Power Supply Association* that demand response wholesale market price scheduling was FERC jurisdictional. Elec. Power Supply Ass'n, 136 S. Ct. at 784.

114. Heydinger, 825 F.3d at 926–28.

115. This specifically refers to the lack of a majority in the *Heydinger* decision. *See supra* text accompanying notes 62–72.

IV. CALIFORNIA PUBLIC UTILITIES CODE SECTION 8341 UNDER THE EMERGING PRINCIPLES AND RULES

Armed with Rules and Principles to guide analysis of the FPA's federal-state jurisdictional boundary, we now turn to a California code viewed here as both a model statute that has not faced legal challenge and as a statute to showcase an argument. It is important for state climate actors to observe the difference between the law in California and the Minnesota law struck down in *Heydinger*. Both states seek to reduce emissions and broadly address GHGs on the supply-side of load serving entities (LSEs) in their state.[116] However, only California's Public Utilities Code Section 8341 remains intact after the Eighth Circuit struck down Minnesota's law in *Heydinger*.

A. Background on California's S.B. 1368 (2006)

California's S.B. 1368 is part of the myriad of significant climate change legislation from the Golden State.[117] Considered cutting-edge in 2006, S.B. 1368 was the world's first legislation to set GHG emissions performance

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116. CAL. PUB. UTIL. CODE § 8341(a) (Deering 2019) (setting an emissions performance standard for electrical energy contracted for by load-serving entities); MINN. STAT. ANN. §§ 216H.03, subd. 3(2)-(3) (West 2017) (banning essentially all purchases that would increase statewide power sector carbon dioxide emissions). Minnesota's law is rather blunt with its intentions, while California's comparable law leaves room for further investigation to understand how tough the law's standard would prove to be. The law permitted coal plants to reduce emissions enough to meet the performance standard, but the process is largely through carbon capture and storage (CCS) technology. *See Carbon Capture Use and Storage*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/technology/factsheet/CCS#_ednref8 ("The U.S. Energy Information Administration (EIA) estimates that natural gas, when used in an efficient combined cycle plant, emits less than half as much CO2 as coal.") [https://perma.cc/QB9P-NB6M]. When the Obama Administration EPA engaged in New Source Performance Standards rulemaking, it was said that the limit of 1400 pounds of carbon per megawatt hour (CO2/MWh) would "almost certainly require[]" new coal plants to employ CCS. *Regulating Power Sector Carbon Emissions* , CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/regulating-power-sector-carbon-emissions/ [https://perma.cc/3BMG-Z4SW]. However, California went on to adopt even tougher standards when it capped emissions at 1100 pounds CO2/MWh, both for POUs and LSEs. CAL. PUB. UTIL. COMM'N, Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard, Rulemaking (R.) 06-04-009 (Apr. 13, 2006); CAL. ENERGY COMM'N, SB 1368 EMISSION PERFORMANCE STANDARDS, http://www.energy.ca.gov/emission_standards/ [https://perma.cc/PJG3-HFDS].

117. 2006 Cal. Stat. ch. 598 (codified at PUB. UTIL. CODE §§ 8340–41).

standards for power plant investments.[118] Governor Schwarzenegger signed S.B. 1368 in 2006, effectively codifying the relevant emissions standard in California Public Utilities Code Sections 8340 and 8341.[119]

Public Utilities Code Section 8340 provides definitions and Section 8341 provides the substance of the law. Section 8341(a) sets forth the following:

> No load-serving entity or local publicly owned electric utility may enter into a long-term financial commitment unless any baseload generation supplied under the long-term financial commitment complies with the [GHGs] emission performance standard established by the commission, pursuant to subdivision (d), for a [LSE], or by the Energy Commission, pursuant to subdivision (e), for a local publicly owned electric utility.[120]

Because California regulates public owned utilities (POUs) and LSEs separately, both are distinctively recognized in Section 8341(a). After clarifying that Section 8341 applies to POUs and LSEs, the Code then forbids both entities from entering into long-term financing commitments that do not meet their respective performance standards.

Section 8341(d) and (e) mandate the same emissions performance standard but address the LSEs and POUs separately. Subdivisions (d) and (e) require the appropriate agency to, "establish a [GHGs] emission performance standard for all baseload generation of [LSEs and POUs] at a rate of emissions of [GHGs] that is no higher than the rate of emissions of [GHGs] for combined-cycle natural gas baseload generation."[121] The Section required agency proceedings to promulgate the standard, but the California Legislature set an emissions ceiling equal to that for combined-cycle natural gas baseload generation.

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118. NAT. RES. DEF. COUNCIL, *California Take on Power Plant Emissions: SB 1368 Sets Groundbreaking Greenhouse Gas Performance Standard* (Aug. 2007), https://www.nrdc.org/sites/default/files/sb1368.pdf [https://perma.cc/SNJ7-VS6M].

119. California's Legislature later amended those sections in 2008, but the 2008 amendments were non-substantive. CAL. PUB. UTIL. CODE § 8340 (Deering 2019); *id.* § 8341 (Deering 2019).

120. *Id.* § 8341(a) (Deering 2019).

121. *Id.* §§ 8341(d)-(e) (Deering 2019). The "appropriate agency" language refers to variation as applied to agencies because LSEs and POUs are regulated differently in California. The Energy Commission primarily oversees POUs, and the Public Utilities Commission primarily oversees LSEs. *E.g.,* CAL. ENERGY COMM'N, CALIFORNIA'S ENERGY GOVERNING INSTITUTIONS (June 2015), https://www.energy.ca.gov/commission/fact_sheets/documents/Fact_Sheet_California_Energy_Governing_Institutions.pdf [https://perma.cc/LS2F-XEHF].

B. Discussion and Analysis of the California and Minnesota Laws: The Good, The Bad, and Weathering a Challenge

This section first analyzes the *Heydinger* outcome in light of the fact that California has yet to experience a similar challenge, specifically by analyzing the important differences between the California and Minnesota statutes. Although California Public Utilities Code Section 8341 shares a similar aim with Minnesota Statute Section 216H.03, subdivision 3—the provision challenged in *Heydinger*—California's provision has yet to face a legal challenge, whereas Minnesota's provision was both challenged and struck down in *Heydinger*. This section then defends the California law using this Article's Rules and Principles to show how California exercises its rightful authority in a way that avoids the result in *Heydinger*. Lastly, this section responds to potential arguments against California's law and suggests how courts may reach the proper decision, either by deferring to regulators to effectuate legislative intent or through a presumption against preemption.

1. California as a Model to Avoid Legal Challenge—What It Does Right

Climate actors outside of California likely tire of its pedestal in climate change policy, but the State's active legislature and lofty environmental goals provide an essential laboratory for democracy in the environmental realm. Minnesota may have been well served to follow California more closely in 2007 when Minnesota's Legislature passed the NGEA.[122] As discussed above, the NGEA enacted the provisions later struck down in *Heydinger*.[123] Minnesota passed the NGEA only one year after California passed S.B. 1368. Yet, less than one decade later, *Heydinger* cast aside Minnesota's emissions reduction and climate change policy. Because comparable provisions in California's S.B. 1368 remain good law, it is important to note aspects of California's law that differ from Minnesota's law, specifically in ways significant to FPA jurisdiction. For example, contrast Minnesota's law—which was overly broad in its prohibitory language that banned anything in the power sector that increased the state's emissions—

122. *Greenhouse Gas Emissions in Minnesota*, MINN. POLLUTION CONTROL AGENCY, https://www.pca.state.mn.us/air/greenhouse-gas-emissions-minnesota-0 [https://perma.cc/V4WT-2BQY] (last visited Apr. 6, 2019) (providing for the year the NGEA was enacted).
123. North Dakota v. Heydinger, 825 F.3d 912, 915–16 (8th Cir. 2016).

with California's more precise language that narrowly tailors the regulation to a state performance standard, precisely applied to LSEs within California's authority.

Let us begin with the party addressed in each law. California broadly names the retail energy providers it regulates: LSEs and POUs.[124] Though not terribly specific, it was apparently sufficient to address only entities within the state's authority. This is the least stark comparison between California and Minnesota but is nonetheless noteworthy because Minnesota's provision was even broader and set a blanket mandate that "no person shall" violate the provision.[125] While the importance of this distinction between the states' provision remains unclear, parties that sued Minnesota were multi-state retail cooperatives that conducted *some* businesses in the state.[126] This suggests Minnesota's broad address caused it some trouble. The cooperatives' unique business model—compared to California's in-state investor owned utilities (IOUs) model—gives reason to think more precision may have helped Minnesota. By instead addressing *all* persons, Minnesota's cooperatives were treated no differently than out-of-state energy retailers under the law. The broad prohibitions Minnesota set on *all* persons put these cooperatives in a bind and differ from California's method for addressing in-state IOUs and POUs.

Next, each law proscribes a ban on actions responsible for carbon emissions in the electrical energy sector. In California, the banned action is long-term financial commitment for baseload generations that do not comply with the performance standard set forth in other provisions established by S.B. 1368. This now requires named parties in California to confirm that purchases of baseload generation are in compliance with those in the state[127]—a buy-side regulation of electrical utilities that is within California's authority.[128] This performance standard on all in-state purchases is a traditional exercise of state police power and does not broadly implicate interstate activity. In contrast, Minnesota provided "no person shall" construct, import, or long-term contract in ways that, "would increase statewide power sector carbon dioxide emissions."[129] Such a prohibition is overbroad and affects groups outside Minnesota's authority. Although this law purports to constrain such auction purchases, energy purchased in the wholesale auction market from a grid operator would

124. CAL. PUB. UTIL. CODE § 8341(a) (Deering 2019).
125. MINN. STAT. ANN. § 216H.03, subd. 3 (West 2017).
126. *See* Heydinger, 825 F.3d at 916–17.
127. CAL. PUB. UTIL. CODE § 8341(a) (Deering 2019).
128. *See* New York v. FERC, 535 U.S. 1, 24 (2002) (discussing, in dicta, that utility buy-side decisions are an area of traditional state authority).
129. MINN. STAT. ANN. §§ 216H.03, subd. 3(1)-(3) (West 2017).

constitute imports. As a result, Minnesota overstepped its authority and infringed FERC's plenary authority over these auction markets.

Finally, unlike in California, Minnesota's law did not include an express mandate for the role of administrative agencies. In California's performance standard provisions, a state agency is charged with setting the exact standard; although, the legislature set a rough cap on emissions that would suffice the standard.[130] This transferred responsibility to industry professionals to provide more detailed requirements and give California the opportunity to reach a consensus across all levels of state energy policymakers. This differed from Minnesota's law where administrative agencies were not specifically charged in the relevant provisions.[131] This was problematic for Minnesota because the state agencies were uncertain as to how the law should operate.[132] In *Heydinger*, Minnesota's Public Utilities Commission (MPUC) and Department of Commerce (MDOC) declined to clarify provisions related to the cooperatives' concerns about their interstate activity.[133] As a result, the cooperatives successfully sued and had these laws removed.

California seems to be safe from a similar outcome because the state agencies set the standard and must know how these laws work. For Minnesota, it is possible MDOC and MPUC were not on the same page as their legislature and thus did not know how to respond to the aggrieved cooperatives. Likewise, MDOC and MPUC did not have the opportunity to tweak the impact of the law to avoid implicating the rights of parties outside the authority of state law. Such consideration of the administrative agencies' roles may not save a facial challenge to a similar law but would at least provide a channel to ensure tailored treatment for specific parties that are most problematic to state regulators.

130. CAL. PUB. UTIL. CODE § 8341(a) (Deering 2019) (". . . emission performance standard established by the commission . . ."); *id.* §§ 8341(d)-(e) (Deering 2019).

131. *See* MINN. STAT. ANN. § 216H.03, subd. 3 (West 2017) (providing "no *person* shall . . ." but omitting any discussion of administrative and/or public entities) (emphasis added).

132. *See* North Dakota v. Heydinger, 825 F.3d 912, 916 (8th Cir. 2016) (referring to Minnesota's Public Utilities Commission and Department of Commerce as such state agencies).

133. *Id.* at 916.

2. *Applying the Rules of Directness and the Guiding Principles to Defend California*

Despite concerns from the 2016 cases as they relate to federal regulatory creep and FERC's evolving role, California does not violate this Article's Rules and Principles because the state's regulations discussed above avoid impermissible *direct* effects on FERC-regulated wholesale sales. Any effect California's regulations have on wholesale markets is permitted as only indirect. References herein to the evolving FERC and federal regulatory creep are intended only to demonstrate how these concepts are *not* impediments for California.

For consideration of directness, the Rules for state regulators apply. Rules 5 through 8 allow direct and indirect regulatory effects on the retail market, as well as indirect effects on the wholesale market. However, Rules 5 through 8 prohibit direct effects on the wholesale market. California's provisions prohibit LSEs and POUs from making future "long-term financial commitment[s]" with baseload generation producers.[134] This ban on long-term commitments broadly encompasses business activity like power purchase agreements for electrical energy, but it also entails other financial connections LSEs may have such as construction and ownership of power plants.

Utility supply- or buy-side decisions and decisions regarding generation siting are a function of state regulations.[135] Notably, various plant types require additional agency oversight.[136] California would likely argue its provisions do just that: regulate utility supply- or buy-side decisions and generation siting. The provisions are a direct regulation of what a utility may contract for and reflect the utility's ability to buy or purchase.

As a result, California regulates the performance standard of the electric energy LSEs and POUs purchases. The direct effect of this—the *initial* causal effect of this regulation—is on the retail market. Any effect on the wholesale market involves a secondary causal step from the effect on the retail market. Therefore, California's direct effect on the retail market is permitted under Rule 7, and the indirect effect on the wholesale market is permitted under Rule 6.

The Principles of the evolving FERC and federal regulatory creep should also factor into the analysis of state actors. The above discussion of the evolving FERC already exposed some holes for states to consider.[137] The

134. CAL. PUB. UTIL. CODE § 8341(a) (Deering 2019).
135. New York v. FERC, 535 U.S. 1, 24 (2002).
136. For example, ISOs must approve of interconnects and nuclear plants incur unique federal regulations.
137. *See supra* Section III.B.

evolving FERC is a Principle largely because it was referenced without a similar notion pertaining to progression in the states. California may scoff at the idea that FERC is evolving at the expense of California, but the state will not be left in the dust of other activity regulators in the energy sector. States like California undoubtedly have an evolving role in the energy sector. States too must evolve to meet new challenges as the industry continues to transform itself and as regulators become more creative. This evolution will surely occur alongside FERC.

Federal regulatory creep is the last hurdle for states. That there may be a trend disfavoring state actors should be taken seriously, but California should remain comfortable with its legal footing in this arena. *Heydinger* is more controversial than the two 2016 Supreme Court decisions, but all are important to understand how strong of a trend this might be. Ultimately, *Hughes* and *Electric Power Supply Association* are fair decisions, but *Heydinger* may mislead state actors by leaving them with a belief that certain state actions are more threatened by legal challenge than they truly are.

Further, *Hughes* should not stand for the broad proposition of federal regulatory creep. Though state regulators in *Hughes* may have acted with good intentions, Maryland acted overzealously. The state had a problem and tried resolve the issue through an innovative power plant funding mechanism. The fatal flaw resided in the regulation's effect of setting a wholesale rate for the generator to receive. In short, FERC's power is plenary over the wholesale market, and Maryland tried to take action state regulators may not take in tethering policy directly to the wholesale price.

Electric Power Supply Association provides a more precise case for federal creep.[138] The Majority made a compelling case for FERC jurisdiction over DR price scheduling. Because FERC's order addressed both wholesale price setting and grid reliability, it cannot be said that DR is beyond FERC's jurisdiction.[139] Although Justice Scalia made a strong case for FERC's effect on retail consumers, *Electric Power Supply Association* appears to be a permissible indirect effect on the retail market.[140] Therefore, *Electric*

138. Justices Scalia and Thomas would go further and say this *is* a case of federal creep, given their dissenting view that DR should be state jurisdiction. The pervasiveness of DR also gives more states reason to question whether they have had some of their authority wrongly taken. However, the majority's opinion rendered this an unnecessary fear.

139. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 779 (2016) ("In promoting demand response, FERC did no more than follow the dictates of its regulatory mission to improve the competitiveness, efficiency, and reliability of the wholesale market.").

140. *See* Rule 4.

Power Supply Association fairly incorporated a new policy tool into FERC's regulatory sphere and did not encroach on state authority.

Heydinger is the most problematic case in the 2016 series. It appears Minnesota went too far because a district court and three appellate judges voted to strike down provisions in the state law. However, the Eighth Circuit panel split in reasoning, and the two judges that formed the majority spent little time elaborating on their decision to preempt the state law under the FPA. Minnesota mandated "no *person* shall" contract for power that would raise the state's power sector emissions.[141] Judge Murphy decided the FPA preempted Minnesota's regulation because a ban on wholesale contracting is a ban on wholesale sales.[142] She cited to the FPA's reference to wholesale prices, which FERC may directly regulate and states may only indirectly affect. The majority's view is that banning wholesale contracting is a ban of a wholesale sale, and a ban of a wholesale sale is a regulation that affects price.[143] Yet, the Supreme Court gave reason to question the Eighth Circuit panel's rationale.

The Court's discussion of DR in *Electric Power Supply Association* helps fuel the idea that *Heydinger* was wrongly decided and that states may ban what would otherwise be wholesale contracts. *Electric Power Supply Association* referenced FERC's DR rules allowing states to opt out of DR participation altogether.[144] These rules further provide that if a state permits DR and DR *is* bid into the wholesale market, the sale is completely within FERC's purview and subject to its price schedule.[145] The state retains intrastate traditional control over people and businesses, and FERC maintains control over wholesale prices. The state's authority to opt out of an otherwise wholesale sale shows that states may prohibit would-be wholesale sales. Although *Electric Power Supply Association* did not address a challenge to this state carve-out provision, the Court at least tacitly approved this by expressing no concern over it.

Even if *Heydinger* was not wrongly decided because of the serious flaws in Minnesota's legislation, the Eighth Circuit may have over-stated the federal government's role in energy federalism. This position also helps quell fears of federal regulatory creep. A more conservative position—in lieu of overruling *Heydinger*—concurs with the result of striking down the law but dissents with the *Heydinger* court's rationale. This position recognizes the flaws in Minnesota's legislation while acknowledging that Minnesota

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141. MINN. STAT. ANN. § 216H.03, subd. 3 (West 2017).
142. North Dakota v. Heydinger, 825 F.3d 912, 926 (8th Cir. 2016) (Murphy, J., concurring).
143. *Id.* at 928 (Colloton, J., concurring).
144. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 771 (2016).
145. *Id.* at 772.

could implement some prohibitions the state sought to achieve. The *Heydinger* court made it seem like there was no quick fix—that the overall purpose of the law was to impermissibly ban wholesale contracting. As shown in *Electric Power Supply Association* with DR, there are policies with ample federal regulations which still provide states their traditional roles. That is akin to California setting quality standards for goods purchased intrastate even though the federal government determines the fate of those goods *inter*state. Again, this all supports the notion that states need not fear the results from the line of 2016 cases as a sign of things to come.

3. A Potential Argument and Response

Those challenging California's provision would likely argue *Heydinger* is on point and not wholly distinguishable because California's regulation bans wholesale sales. In *Heydinger*, prohibiting retail providers from contracting for power purchase agreements or imports was found to be a direct effect on the wholesale market.[146] There are differences in the two states' statutory provisions, but these differences are not legally significant here due to the court's broad reasoning in *Heydinger*. The *Heydinger* court suggested there was no possible quick fix to the statute and instead found the ban on wholesale sales to be a fatal flaw. This view could render California's provision impermissible because it too bans wholesale sales.

Courts should reject that view, however, and either decline to follow *Heydinger* or distinguish California's provision from Minnesota's.[147] Courts could both share this sentiment regarding *Heydinger* and agree with the Eighth Circuit's result, if they believe Minnesota's statute expands beyond utility supply-side decisions and invades FERC's regulatory space. This view accepts the court's decision to strike the Minnesota provision but also notes the court's doctrinal confusion and overstatement of the limited impact of states on wholesale markets.

If a court viewed *Heydinger* as just described, it would still strike down the Minnesota provision rejecting the outright ban on states' ability to contract in ways that would otherwise be part of the wholesale market. Minnesota inexplicably targets power imports from "outside the state" in one provision and "long-term power purchase agreements" in the other,

146. Heydinger, 825 F.3d at 921; *id.* at 926–27 (Murphy, J. concurring).
147. Or overturn *Heydinger* if it is the Supreme Court.

using the exact language the law applied for jurisdictional reaches of the federal government.[148] This language unnecessarily invoked the feeling of federal jurisdiction. In contrast, similar legislation in California regulates only "long term financial commitments" and is clearly constructed to apply only to that which utilities may purchase and supply.[149] Alternatively, one could defend California's law altogether by arguing the Eighth Circuit wrongly decided *Heydinger*. As discussed below in the review of *Electric Power Supply Association*, it is possible Minnesota was not in the wrong in *Heydinger*—particularly in light of how the Supreme Court in *Electric Power Supply Association* considered state authority under FERC's DR policy.

4. Final Guidance

For now, California's law appears safe from legal challenge.[150] There are two last ideas to prevent courts from wrongfully striking down the law of a state climate actor: (1) Employ deference to the regulator as to the intent of the action in determining what it affects; or (2) Employ a presumption against preemption. Both alternatives may provide guardrails on judicial decision-making.

That energy regulation employs cooperative federalism indicates there may be a muddled interplay wherein each party has some effect on the other.[151] To protect the delicate balance, courts may decide to give deference to regulators as to their claims of what a certain regulation aims to achieve. Courts should also avoid too easily determining an impact to be a direct effect. In *Electric Power Supply Association*, FERC claimed its regulations targeted wholesale sales and that such regulation was within its power, despite potential impacts such regulations might have on retail markets. Still, this suggested deference does not imply courts should defer to anything regulators claim to be the definitive or legitimate goal of a regulation. In *Hughes*, Maryland claimed it acted within its traditional regulatory role over state power plants but did not hide the fact that it also directly set a wholesale rate. If Maryland should receive any recognition for directly regulating in its retail capacity, at best it was also "indirectly achiev[ing]

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148. MINN. STAT. ANN. §§ 216H.03, subd. 3(2)-(3) (West 2017).

149. CAL. PUB. UTIL. CODE § 8341(a) (Deering 2019).

150. Here I refer specifically to the earlier discussion of the security of California's law as constructed, its adherence to FPA's jurisdictional boundaries as shown through my Rules and Principles, and through predicted responses to a legal challenge.

151. *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring).

the same result" as a direct state regulation of wholesale sales—Justice Kagan's cautionary prohibition.[152]

If courts opt not to defer to regulators in similar circumstances, then perhaps regulatory affects analyses should carry a presumption against preemption.[153] The second alternative to prevent courts from wrongfully striking down state climate laws would do just that. Where there is potential conflict between a state law and a power reserved to the federal government, the presumption against preemption would require courts to, "start[] with the assumption that the historic police powers of the [s]tates were not to be superseded . . . unless that was the clear and manifest purpose of Congress."[154] This would remind courts of the state-jurisdictional regulatory sphere, in light of FERC's authority over the wholesale market. At minimum, this presumption against preemption may force careful consideration of what affects are direct versus indirect to avoid the accidental over-prescription of direct affects.

V. CONCLUSION

As has hopefully become plain, *Heydinger* produced an unsatisfying doctrinal analysis, in-fighting over institutional understanding of electrical energy, a split appellate panel, and an unhappy observer.[155] That said, *Heydinger* dangerously appears to be a cut-and-dry case. This danger is exacerbated by *Electric Power Supply Association* and *Hughes*, both of which either struck down a state regulation or decided in favor of FERC's evolving jurisdiction.

States like California should not perceive *Heydinger* as the misguided case it may facially appear to be.[156] Sister circuits and the Supreme Court should not view *Heydinger* broadly—if favorably at all—and should closely determine what a regulator aims to achieve with a given regulation and direct effects thereof. Doing so may ensure indirect effects, even if substantial, are not perceived as impermissible regulatory actions.

152. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 780 (2016).
153. *See* New York v. FERC, 535 U.S. 1, 17 (2002) (explaining the "presumption against preemption" analysis involves questions of either the scope of federal power or whether state action conflicting with federal authority is displaced by such federal authority; here the court defined the scope of federal power rather than impute a presumption).
154. *Id.* at 18.
155. This author.
156. Still, the Federal Court of Appeals precedent from *Heydinger* is not something to ignore.

The aforementioned Rules of Directness provide some conceptual guidance for state climate actors.[157] These Rules should adequately enunciate the jurisdictional boundary at which FERC and state regulators may permissibly operate. State climate actors must understand this federal-state boundary to ensure they may aggressively regulate in their capacity as sovereigns, within appropriate legal bounds. Furthermore, California provides a specific example regarding how state regulators may utilize their authority in enacting and enforcing climate- and energy-focused regulations. Courts may also wish to apply the Rules of Directness in future cases to explicate the current—or rather, ever evolving—understanding of federal-state jurisdictional boundaries in the context of energy regulation. Courts may employ other tools as guardrails to ensure such a tailored analysis occurs.[158] Between the Rules of Directness and other protective tools at the judiciary's disposal, courts can more easily dissect energy policy to allow survival of regulations properly within their purview and to accurately describe how impermissible regulations reach beyond the applicable regulators' authority.

157. *See supra* page 225.
158. For example, courts may extend deference or provide a presumption against preemption to prevent hastily rendering a decision in the complex world of energy federalism.