Why ISO Regionalization Legislative Proposals Should Be Opposed

A statutory change to the CA ISO's governance structure which will give all control over California's electricity markets and transmission grid to the Trump FERC will be pushed through the Legislature in 2018. This well-funded effort started in 2015 by the proponents of California's original deregulation fiasco who are determined to throw away the protections that California fought so hard for in the energy crisis. Governor Brown supports this legislative change, which will irrevocably tie the hands of the next Governor and prevent the next Governor from protecting California's interests against the Trump FERC.

California experienced the consequences of Pete Wilson's deregulation law (AB 1890 Brulte 1996) that destroyed California's ability to set its own electricity prices and protect its citizens. AB 1890 was jammed through the Legislature at the end of the 1996 legislative session and signed by Gov. Pete Wilson. In giving away California's authority to the Federal Energy Regulatory Commission (FERC), Wilson tied Gray Davis' hands and prevented Davis from controlling the energy-market manipulation that caused the CA energy crisis.

Before and during the energy crisis, the stakeholder ISO board created by AB 1890, the deregulation law, answered only to FERC -- and the FERC-controlled ISO exacerbated California's problems. It turned a blind eye to price manipulation and refused to even hear California's evidence or stop the fraud.

The same people who brought us energy deregulation and the 2000-01 energy crisis are again trying to turn the clock back to those times, calling to change state law back to a regional ISO stakeholder board that will answer only to FERC.

During the last energy crisis, we clawed back some protections from that FERC-controlled ISO board by enacting a statute that enabled CA, through the Governor, to control the ISO board. FERC refused to accept California's control over the ISO. California spent three years in court fighting the Bush FERC to uphold that statutory claw-back. The DC Circuit finally upheld California's law in *ISO v. FERC,* 372 F.3d 395 (D.C. Cir. 2004).

Once that statute is changed – which is what lies at the heart of all the regionalization proposals -- California will lose those protections and give its control over the ISO to the Trump FERC. There will be no getting those protections back. Once California gives up its control over the ISO board – and federalizes it through a regional RTO[1] -- that board will answer only to the Trump FERC and will not be subject to control or influence by California. The next Governor will be left without any weapons to fight the Trump FERC and the next generation of manipulators who will fleece California consumers.

The FERC's recent actions to wrest control of electricity pricing nation-wide, and to preempt state policies, give compelling reasons to not cede California's authority over the ISO again.

[1] Regional Transmission Organizations. The proposed RTO would be comprised of 7-12 states in which California would have a maximum one vote – versus California's single-state ISO or independent system operator.

Other states in RTOs have tried to protect their state's energy policies after they voluntarily ceded control to RTOs, but the FERC and the courts have often blocked their efforts.

Maryland and New Jersey, in *Hughes v. Talen,* 136 S.Ct. 1288 (2016), saw their regulations and laws concerning their state energy procurement policies invalidated – even though Maryland assumed that the mid-Atlantic regional RTO would honor their laws implementing their state resources plan (laws which were passed in part to address market power in the RTO market.) The regional RTO decided it did not like MD's laws and complained to FERC, and FERC sided with the RTO against the states. The U.S. Supreme Court upheld FERC against MD and NJ in April 2016.

In the *Heydinger* case, *North Dakota v. Heydinger*, 825 F.3d 912, 913–23 (8th Cir. 2016)[i] Minnesota's state energy laws were invalidated in a Commerce Clause challenge. Similarly, CT, NY[ii], IL,[iii] ME[iv] and OH have all been enmeshed in litigation, trying to keep their laws and rules that protect their citizens. Those states are vulnerable because of the control that their RTOs and FERC exert over them.

Before we irrevocably give away California's power to protect its businesses and families, the Legislature should investigate what has happened to other states and thoroughly understand how the law is evolving on state versus federal control in energy law. The last time California threw away state protections over electricity pricing, it cost Californians tens of billions of dollars and near-catastrophic injury. If FERC and a new regional RTO are handed control, California will be left powerless and subservient to the Trump FERC.

Don't be fooled by the fact that some states have fought back against Commerce Clause preemption of their state statutes, as in CT. The Second Circuit recently upheld a CT law against a Commerce Clause challenge. But *Federal Power Act preemption* cases have all gone against the states. When FERC and the RTOs line up against the states, the states almost always lose, because the courts defer to FERC on FPA preemption issues and FERC defers to the RTOs. The cases developing throughout the courts in 2016-17 do not bode well for California's ability to have any deal it makes before it joins a RTO respected or adhered to once it is in the RTO.

This is a complicated and evolving legal arena where the states are not safe. Another recent 2016 U.S. Supreme Court case, *EPSA v. FERC*, 136 S.Ct. 760 (2016), lays out an extremely broad "affecting FERC's jurisdiction" standard that now favors FERC's preemption of states' attempts to decide energy procurement issues for themselves.

But California, because of the *ISO v. FERC* case, has some protection -- based on the 2001 California statute concerning the ISO's governance that was upheld in that case. If the Legislature changes that statute, California loses the *res judicata* protection provided by that case and becomes subservient to the Trump FERC.

Now is not the time to take unnecessary risks. California should wait to make any changes to the ISO until the evolving law concerning FERC's power over the states is clear. Now is the

time to take a careful, in-depth look at the rapidly-changing law and other states' experiences with regional RTOs and with FERC before California gives away its hard-fought protections.

All legislative proposals to cede California's authority over the ISO board to the Trump FERC should be rejected. California should wait until the next Governor is elected. The next Governor and Legislature should decide California's energy future and the Legislature should not act in 2018 to limit California's statutory authority or the next Governor's ability to protect California's families and businesses against the Trump FERC.

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[i] [i] In 2007, Minnesota enacted the Next Generation Energy Act (NGEA), which sets goals for greenhouse gas reductions; establishes one of the nation's most aggressive array of renewable-energy standards; and provides that "no person" may contribute to or increase "statewide power sector carbon dioxide emissions." The Court found that the law directly affects the electric power industry, which is regulated by the federal government and operated cooperatively to ensure hourly accuracy as to supply and demand in such a manner that neither the supplier nor the consumer knows the destination or origins of the electricity it generates or uses. The amici included Mountain States Legal Foundation and the Montana Coal Council.

[ii] On October 19, 2016, the Coalition for Competitive Energy, along with several generators, filed a complaint in the Southern District of New York seeking to invalidate the New York Public Service Commission's new Clean Energy Standard and associated zero emission credit (ZEC) program. The complaint asserts that the program is preempted by the Federal Power Act because it "intrudes on the exclusive authority of FERC." The complaint also alleges a violation of the dormant Commerce Clause, arguing that the program only benefits the four New York nuclear programs and therefore "disadvantages" out-of-state generators that sell in the **interstate** electricity market.

[iii] *Illinois Commerce Com'n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013). The PJM Market Monitor, in discussing the IL and NY laws asserted: "[R]enewable energy mandates at both the federal and state levels have a significant impact on the cost of energy and capacity in PJM markets." The RTO's Market Monitor added, in language echoing the plaintiffs' complaints in Illinois and New York, that renewable energy credits "affect the offer behavior and the operational behavior of these resources in PJM markets and thus the market prices and the mix of clearing resources. RECs clearly affect prices in the PJM wholesale power market. Some resources are not economic except for the ability to purchase or sell RECs."

[iv] In *Maine v. FERC*, No. 15-1139, 854 F.3d __ (D.C. Cir. April 18, 2017) the D.C. Court of Appeals upheld FERC's Order 1000, and the NE ISO's actions that superseded the states' authority who were part of the NE ISO. Five states petitioned the appellate court to hold that FERC had asserted jurisdiction over utilities in a way that violated the Federal Power Act's reservation of authority to the states; the Court upheld FERC's assertion of jurisdiction in supporting the NE ISO's actions.