Legal Controversies about State Clean Energy Policies in Courts and at FERC

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The five years from 2014-2018 were full of cases focused on the borders between state and federal authority in the electricity sector, according to Ari Peskoe, Director of the Electricity Law Initiative at Harvard Law School, speaking in Monday's energy policy seminar.

What is driving the spike in litigation? In a period of almost no load growth, Peskoe suggested, opportunities for investment can be hard to come by—and it is just in the area of new investment that state policies such as renewable portfolio standards or support for specific technologies like offshore wind or nuclear power have the greatest impact. The result, for a student of energy law, is a "very exciting moment," Peskoe said.

Peskoe went on to lay out the legislative basis of the division of power between the federal government and the state. Federal authority over the electricity sector (vested in the Federal Energy Regulatory Commission) can be traced back to the 1935 Federal Power Act, which is the basis for FERC's mandate to oversee "just and reasonable" rates—a mandate that, with restructuring and the introduction of competition, has evolved to be understood as oversight over the proper functioning of wholesale electricity markets, rather than directly setting wholesale prices.

At the same time, states, Peskoe said, have always been understood to have authority over local distribution and over generation facilities, in the same way that they have authority to regulate any other industrial or manufacturing facilty. Prior to restructuring, states also oversaw resource planning, to ensure adequate electricity supply.

For many decades, these two areas of authority rarely came into conflict, Peskoe said. However, the combined effect of restructuring and increased state interest in supporting specific types of generation (renewables and nuclear, generally), the question of the line between appropriate state regulation and support of industry and inappropriate interference with wholesale markets has become a contentious issue, with five cases in the federal appeals courts and one case in the Supreme Court in the five years from 2014-2018.

State policies, Peskoe noted, are more vulnerable to legal attack the more closely they are connected to wholesale markets. Zero Emissions Credits (ZECs) and state RFPs for particular types of power (such as offshore wind) arguably do impact FERC-regulated markets. By providing funds for certain kinds of generation, they increase total supply, lowering clearing prices in wholesale energy markets and/or capacity markets. However, reviewing a number of cases in which such policies have been challenged, as long as state payments have not been specifically tied to wholesale market transactions, Peskoe observed, courts have viewed this as an "incidental effect," or "an inevitable consequence of a system in which power is shared between state and national governments."

States could take this too far, Peskoe noted, pointing to an act passed in Wyoming that would obligate utilities to purchase generation from coal power plants at avoided costs as a potential example. Meanwhile, FERC's policy orientation seems to be changing, perhaps in the direction of more regulation of state-sponsored resources in order to prevent them from suppressing capacity market prices.

Peskoe spoke as part of the Kennedy School's Energy Policy Seminar Series, which is sponsored by the Consortium for Energy Policy Research of the Mossavar-Rahmani Center on Business and Government and by the Belfer Center for Science and International Affairs.