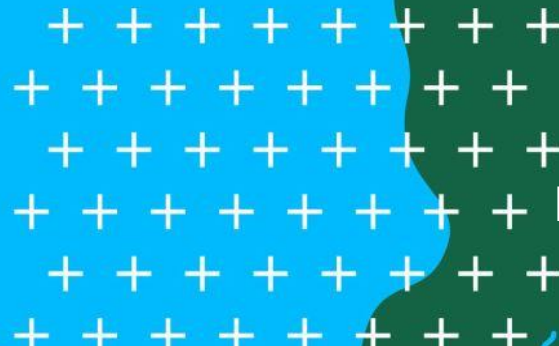


Federalism in the Energy Sector

State Regulators and Federal Law



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March 4, 2021

Disclaimer

- Views expressed are my own. They are not representative of the Attorney General's Office or the Idaho Public Utilities Commission.
- This presentation is for informational purposes only, not legal advice.
- My coworkers said they would buy me a cold hoppy beverage if I mentioned how much I like to drive my ATV around Idaho City.
 - I do. Vroom Vroom.

Plan:

- Historic functions, duties, powers of IPUC under *Idaho Code*.
- Public Utility Regulatory Policies Act of 1978 (“PURPA”).
 - Purpose
 - Relevant provisions
 - Challenges
 - Idaho history – administration and litigation
- Order 872 – recently finalized rulemaking
 - More flexibility to states
 - Less certainty to independent power producers – “qualifying facilities” or “QFs”
 - What happens next?

IPUC History

- Established 1913.
- A lot of Title 61 reflects ye olde west and no longer applies
 - E.g., *Idaho Code* § 61-106 – “Transportation of persons” – “includes every service in connection with or incidental to the safety, comfort, or convenience of the person transported and the receipt, carriage and delivery of such person and his baggage.”
 - PUC regulates/regulated railroad corporations, street railroads, freighters, common carriers, pipelines, gas corporations, electrical corporations, telephone corporations, water corporations

IPUC Authority

Idaho Code Title 61 - The Public Utilities Law

- Rates:
 - Fair, just, and reasonable rates for consumers. Sufficient for utilities.
 - *Idaho Code* § 61-301, -502, -503
 - Non-discriminatory. No “unreasonable difference” between localities/classes of service.
 - *Idaho Code* § 61-315
 - Must be approved by Commission before utility can charge.
 - *Idaho Code* § 61-307, -313

IPUC Authority

Idaho Code Title 61 - The Public Utilities Law

- Convenience, Safety, Adequate Service
 - *Idaho Code § 61-302.* “Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.”
 - *Idaho Code § 61-508* – IPUC can order improvements.
 - *Idaho Code § 61-515*– Safety regulations – IPUC has power to “require every public utility to maintain and operate its line, plant, system, equipment, apparatus and premises in such manner as to promote and safeguard the health and safety of its employees, customers and the public . . .”
 - *Idaho Code § 61-526* – Certificates of Convenience and Necessity

IPUC Authority Upheld

- *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222 (1914).
 - Police power – IPUC can refuse to issue a CPCN.
 - Delegation of legislative authority – determining reasonable rates is purely administrative so not unlawful.

Appeals from IPUC decisions

- Direct appeal to Idaho Supreme Court.
 - *Idaho Code* § 61-627.
- Friendly standard of review. Broad discretion.
 - *Idaho Code* § 61-629. “. . . . The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or of the state of Idaho. . . .”
- PURPA has review mechanism to federal district court or state court depending on whether implementation challenge or as-applied challenge. 16 U.S.C. § 824a-3(g),(h).



PURPA

- Response to 1970s energy crisis.
- Congress regulated under Commerce Clause.
- Goal to "encourage" small power production from diversified generation resources:
 - American energy independence through conservation, diversification, and modicum of competition.
- 16 U.S.C. § 824a-3.

PURPA Provisions

- Must-purchase obligation. Also must sell to and interconnect.
 - 18 C.F.R. § 292.303.
- Avoided cost rates. Marginal cost of energy.
 - 18 C.F.R. § 292.304. Fair, just, and reasonable to consumers. Non-discriminatory to QFs. Not above avoided cost of energy.
 - Determined at time of contracting or establishing a legally enforceable obligation (“LEO”).
 - FERC provided list of factors for states to consider when setting.

Challenges to PURPA

- U.S. Supreme Court.
 - *FERC v. Mississippi*, 456 U.S. 742 (1982).
 - Upheld against 10th Amendment challenge.
 - Well within authority of Congress under Commerce Clause to regulate interstate commerce.
- Idaho Supreme Court.
 - *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781 (1984).
 - PURPA conferred upon IPUC responsibilities not conferred under state law.
 - Upheld against 10th Amendment challenge.
 - IPUC can compel Idaho Power to enter into fixed term contract.



Commerce Clause

- Electrons flow in interstate commerce.
- “[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect.” *FERC v. Miss*, 456 US at 757.

Afton I/III

- Idaho Power argued that IPUC had no authority to make Idaho Power sign contract w/ previously established avoided cost rates because it was not freely negotiated.
- IPUC found it had authority and duty to do so. Upheld.
- “The Commission is the agency authorized and directed by statute to regulate public utilities. Its statutory authority specifically includes the power to approve or disapprove proposed generating facilities and to regulate those matters which impact utility rates. In this instance the federal government is permitting the Commission to further certain federal policies through the performance of those functions the Commission is authorized to perform under Idaho statutes.” *Afton I/III*, 107 Idaho at 784.

Afton I/III

- Cites
 - *Idaho Code* § 61-501 (all things necessary to effectuate intent of Title 61)
 - *Idaho Code* § 61-502, -503 (reasonable rates)
 - *Idaho Code* § 61-526 (certificates of convenience and necessity)
 - *Idaho Code* § 61-508 (order improvements)
 - *FERC v. Mississippi*, 456 U.S. 742 (1980)
- Finds
 - Clear authority for IPUC to order utilities to enter contracts at pre-determined avoided cost rates.

IPUC Dockets

- GNR-E-11-03. Order No. 32697.
 - Set project eligibility cap for published avoided cost rates at 100 kW for wind and solar and 10 aMW for other QF resource types.
 - Ability to disaggregate. “Gaming” of system.
 - Large projects breaking apart to take advantage of higher published rates. Wind and solar especially capable of disaggregating.
- IPC-E-15-01. Order No. 33357.
 - Set contract term to 2 years for all QFs above project eligibility cap.

Order 872

- 172 FERC ¶ 61,041 (July 16, 2020), 85 Fed. Reg. 86656
- Went into effect February 2021.
- Challenges filed in 9th Circuit and D.C. Circuit.
- Pertinent updates to Idaho:
 - Allow for variable energy prices. Capacity still fixed at time of contracting.
 - Can set by looking at market prices (if utility can show that's their marginal resource).
 - One-Mile Rule.
- Guidance on LEO formation
 - Perhaps different than Idaho case law developed over 80s – 10s.



Order 872-A

- Cited Idaho Commission/Commissioners testimony
 - Found evidence that forecasts have consistently overestimated the avoided cost rates.
 - Therefore a detriment to ratepayers, contrary to goal of statute.
 - Ability to adjust energy portion of contract may lead state regulators to allow longer contract terms.

What's next?

- Litigation
- State implementation
- FERC revision
- Legislation
 - E.g., Climate Leadership and Environmental Action for our Nation's Future Act . . . CLEAN Future Act . . . Introduced in House Energy and Commerce Committee
 - Mandate RTOs/ISOs everywhere
 - Revert PURPA contract requirements back to fixed