Federal-State Relations in Energy Law in the United States of America

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Part 1:
Electric and Natural Gas Infrastructure Basics
1. Generating plant
2. High-voltage transmission line
3. Substation – steps down voltage from transmission to distribution voltage
4. Transformers – step down voltage further
5. Service lines to customer premises
The North America Electric Grid
Natural Gas System Schematic

U.S. Natural Gas Pipeline System

Source: U.S. Energy Information Administration,

Legend
- Interstate Pipelines
- Intrastate Pipelines

Source: Energy Information Administration, Office of Oil & Gas, Natural Gas Division, Gas Transportation Information System
Part 2:
The U.S. Constitution of 1787
United States Constitution of 1787

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

- Preamble, U.S. Constitution (1787)
Dimensions of the U.S. in 1789
The “Commerce Clause”

Article 1 of the United States Constitution includes among the enumerated powers of the Congress the power ...

“To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”

- *U.S. Constitution, Article 1, Section 8, Paragraph 3*
The “Dormant Commerce Clause”

Although a grant of authority to Congress, the Commerce Clause also has long been understood to restrict the power of the individual states to interfere with interstate commerce.

– This is referred to as the “dormant” or “negative” Commerce Clause

The “Supremacy Clause”

Article 6, Clause 2, of the Constitution provides that federal statutes and treaties “shall be the supreme law of the land” and must be given binding effect, “anything in the constitution or laws of any state to the contrary notwithstanding.”

– This is the source of “federal preemption” of inconsistent state or local laws.

– Not just statutes and treaties, but also regulations and rulings duly adopted by federal administrative agencies, can preempt state and local law.

See, e.g., City of New York v. FCC, 486 U.S. 57, 63-64 (1988)
Part 3:
Federal and State Regulation in the Natural Gas and Electric Power Industries
The Landmark Case of *Rhode Island v. Attleboro Steam & Electric Co.*

273 U.S. 83 (1927)
Attleboro Case Holding

Neither Rhode Island nor Massachusetts had authority to adjust a contractual price for a sale of electricity at wholesale from a Rhode Island utility (Narragansett Company) to a Massachusetts utility (Attleboro Company).

“The rate is ... not subject to regulation by either of the two states in the guise of protection to their respective local interests, but, if such regulation is required it can only be attained by the exercise of the power vested in Congress [under the Commerce Clause].”

*Attleboro*, 273 U.S. at 90.
Missouri v. Kansas Gas Co.
265 U.S. 98 (1924)
Missouri v. Kansas Gas Case Holding

Neither Kansas nor Missouri had authority to block an interstate pipeline (Kansas Gas) from imposing a large price increase on wholesale sales of natural gas to gas distribution utilities serving retail gas customers in the two states.

“[T]he sale and delivery here is an inseparable part of a transaction in interstate commerce -- not local, but essentially national, in character -- and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve.”

Kansas Gas, 265 U.S. at 308.
The “Attleboro Gap”

Interstate wholesale sales of natural gas (Kansas Gas case) and electric power (Attleboro case), and their transmission in interstate commerce, can be regulated, if at all, only under federal statutes enacted by Congress.

Because of the “dormant” Commerce Clause, the individual states in the United States were held to have no authority to regulate sales-for-resale (i.e., wholesale sales) of natural gas or electricity in interstate commerce, or the transmission of gas or electricity in interstate commerce.
Federal Statutes to fill the “Attleboro Gap”

Congress enacted Part 2 of the Federal Power Act (1935) and the Natural Gas Act (1937), authorizing a Federal Commission to regulate both sales-for-resale and transmission of electricity and natural gas in interstate commerce.

These statutes, the Supreme Court has said, were “so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.”

*Atlantic Refining Co. v. Public Service Comm’n of New York, 360 U.S. 378, at p. 388 (1959).*

Part 4:
The Challenge of Applying *Attleboro* in Modern Times
Attleboro’s Context: Vertically Integrated Electric Utilities, With Monopoly Service Territories, Interconnected at Their Boundaries
Today’s Electric Industry: Disaggregated and Highly Interconnected
Theme of Contemporary Cases

• Today’s disaggregated, highly interconnected electric industry was not foreseen by the authors of the Federal Power Act in 1935.
• Federal authorities (especially FERC) have assumed a central role in the regulation of the electric industry.
• State authority is being displaced, arguably to a degree that is excessive.
Contemporary Cases – Leading Examples

  Judicial review of FERC Order No. 888, mandating “open access” transmission in the interstate electric industry

• **United Distribution Companies v. FERC**, 88 F.3d 1105 (D.C. Cir. 2002)
  Judicial review of FERC Order No. 636, mandating “open access” transportation by interstate natural gas pipelines

  Judicial review of FERC Order No. 1000, requiring regional transmission planning and prescribing cost allocation principles
Two Pending Cases

  Overturning, based on federal preemption, a Maryland statute providing subsidies for new in-state power plants, via a “contract-for-difference” pegged to the FERC-regulated regional capacity price

  Same result, for a similar New Jersey subsidy statute

Note: Crowell & Moring LLP represents a power plant developer whose interests are aligned with the two state commissions in the above cases, and Crowell lawyers are counsel of record on behalf of that developer in both cases.
Part 5: Regulation of the Electric Power and Natural Gas Industries
Price Regulation – Wholesale and Retail

- State public utilities commissions set **retail rates** for electricity and natural gas sold to consumers by investor-owned utilities.
- Federal Energy Regulatory Commission (FERC) regulates **wholesale prices** for electricity and natural gas in interstate markets, and interstate transmission.
Federal Infrastructure Access Rules

- Federal Energy Regulatory Commission sets terms and conditions for access to the high-voltage interstate electric grid, and also sets and enforces reliability rules.

- Similarly, FERC also sets the rules for gas transportation and storage services provided by interstate natural gas pipelines.
Combating Climate Change: State Renewable Portfolio Standards

The individual states have authority to set standards for the power portfolios of retail electric utilities they regulate, and by this device can promote the development of renewable and alternative energy.
A federal statute (the Public Utilities Regulatory Policies Act of 1978) gives the states authority to prescribe prices and other terms for wholesale power purchases by retail utilities from renewable and other alternative energy sources (“Qualifying Facilities”).
Infrastructure Construction: Electric

- State authorities (not federal) authorize construction of electric transmission and distribution facilities.
- State authorities also authorize construction of electric generating plants – except nuclear and hydroelectric plants.
The U.S. Nuclear Regulatory Commission has exclusive authority to issue licenses for construction and operation of nuclear power plants.
The Federal Energy Regulatory Commission has exclusive authority to issue licenses for construction and operation of hydroelectric plants on “navigable waterways” of the U.S.
Infrastructure Construction: Natural Gas

Federal Energy Regulatory Commission authorizes construction of interstate gas pipeline and storage facilities.

State authorities authorize construction of intrastate gas pipeline and storage facilities, and gas distribution systems.
APPENDIX:
Various Types of Electric and Gas Utilities in the U.S.
Investor-owned Electric and Gas Utilities

The U.S. relies predominantly (but not exclusively) on investor-owned companies to provide electricity and natural gas services. These “public utility” enterprises are subject to the various forms of government regulation described above.
Municipal (Government) Utilities

Electric Power Cooperatives

Rural Electric Cooperatives by County
Average Revenue per Cooperative

Data Source: University of Wisconsin Center for Cooperatives and USDA/Extension

*13 out of 590 co-ops did not report revenue and are not included in the calculations. All co-ops are depicted.
Federal Authorities

Tennessee Valley Authority

Bonneville Power Administration