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Supreme Court Rejects Pre-Emption Claim in State Antitrust Action

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Given the Federal Energy Regulatory Commission's (FERC) exclusive jurisdiction over wholesale sales, the pipelines argued to the Supreme Court that the state antitrust claims were field pre-empted by the NGA because the state antitrust claims at issue targeted anticompetitive activities that affected wholesale (in addition to retail) sales. The pipelines noted that FERC has prohibited the very kind of anticompetitive conduct that the state antitrust actions address. In response to the discovery of widespread manipulation of these price indices in the early 2000s, FERC issued a Code of Conduct that amended all natural gas certificates to explicitly prohibit this kind of manipulative behavior. FERC also issued a policy statement setting forth minimum standards for the publication of price indices.

In declining to find pre-emption, the majority reasoned that the NGA was "drawn with meticulous regard for the continued exercise of state power," and that when, as here, "a state law can be applied to nonjurisdictional as well as jurisdictional sales, [the Court] must proceed cautiously, finding pre-emption only where detailed examination convinces [the Court] that a matter falls within the pre-empted field as defined by our precedents." The Court went on to interpret its field pre-emption precedent as holding that the Court must consider "the **target** at which the state law **aims**." For example, the Court distinguished between state "measures aimed directly at interstate purchasers and wholesalers for resales" and those measures aimed at subjects left to the states to regulate, with the latter, and not the former, typically being a permissible exercise of a state's jurisdiction. The majority noted that the state antitrust laws are targeted at all businesses in the marketplace – not natural gas companies in particular – and concluded that this broad applicability supports a finding of no pre-emption.

Responding to the dissent penned by Justice Scalia, which argued that there should be a clear division between areas of state and federal regulation, the majority replied that such a

"Platonic ideal does not describe the natural gas regulatory world." Given the intertwined nature of state and federal jurisdictions in this industry, the majority reasoned that finding pre-emption any time a state law affects wholesale sales would largely nullify the explicit provisions in the NGA limiting FERC's jurisdiction and leaving regulation of all other portions of the industry to the states.[1]

This decision from the highest court provides an interesting perspective with which to view two circuit court decisions issued last year involving federal pre-emption by the Federal Power Act (FPA), the federal electricity statute analogous to the NGA.[2] In two similar decisions, the Third and Fourth Circuits concluded that the New Jersey and Maryland state programs, respectively, were pre-empted by the FPA. The state programs at issue offered state subsidies to planned electric generation facilities, contingent upon the planned resources clearing in PJM Interconnection L.L.C.'s FERC-regulated wholesale capacity market.[3] Both courts held that the programs represented an impermissible intrusion into FERC's exclusive jurisdiction over wholesale rates. Although the Supreme Court has not weighed in on the New Jersey and Maryland programs,[4] the lower courts appeared particularly uneasy with the direct and substantial interference by the state programs that effectively established, for certain selected generation units, a wholesale rate for capacity separate and apart from the wholesale market's price signals. Indeed, the states were clear that their intent was to supplement what they viewed as a dysfunctional wholesale market that failed to incent development of new electric generation.

In *Oneok, Inc. v. Learjet, Inc.*, the majority of the Court appears to have concluded that the state antitrust suits were not field pre-empted because they were not **targeted** at FERC-jurisdictional matters, a distinction Justice Scalia characterized in his dissent as "unprecedented."

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[1] Note that no party to the proceeding advanced a conflict pre-emption claim, and the Court's analysis focused exclusively on whether the state antitrust claims were field pre-empted.

[2] *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *petition for cert. filed*; *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *petition for cert. filed*.

[3] States have jurisdiction over the construction of electric generation facilities, while FERC has exclusive jurisdiction over any wholesale sales of power.

[4] Petitions for certiorari are pending in these cases. *See supra* note 2.

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