

## Electricity Jurisdiction: Actions by Market Participants

Action	Actor	Legal Subject	Jurisdiction			
			FERC Exclusive <sup>a</sup>	State Exclusive	Concurrent FERC and State	Other
<b>Electric Energy and Capacity</b>						
Sell retail electricity	Public utility	Rates		FPA 201		
Sell wholesale electricity	Public utility	Rates	FPA 201			
Purchase wholesale electricity	Public utility	Rates		FPA 201 <sup>b</sup>		
Set regional capacity requirement	RTO	Rates, reliability	FPA 201			
Allocate regional capacity obligation to LSEs	RTO	Rates, reliability	FPA 201			
Own, use or operate "bulk power system"	Owner, user or operator of the bulk power system	Reliability			FPA 215 <sup>c</sup>	
Set reliability standards	ERO	Reliability	FPA 215			
Site and construct generation facilities	Public utility	Need, rates		FPA 201		
Construct and operate nuclear power plants	Person	Safety				NRC
<b>Demand Response</b>						
Sell DR into wholesale organized market	Anyone	Rates	FPA 201			
Sell DR to retail utilities	Retail customer	Rates		FPA 201		
Purchase DR from retail customers	Public utility	Rates		FPA 201		
Purchase DR from wholesale organized markets	LSE	Rates			FPA 201 <sup>d</sup>	

<sup>a</sup> Section 201 restricts FERC's authority to transactions in interstate commerce. Court, FPC and FERC cases have found that due to the interconnectedness of the electricity network, all electricity transactions are in interstate commerce, regardless of their contractual origin or destination, with the exception of transactions wholly within Alaska, Hawaii and Texas. See *Florida Power & Light Co. v. Federal Power Commission*, 404 U.S. 453 (1972).

<sup>b</sup> Except in the unusual situation where FERC's approval of a capacity allocation to retail utilities is viewed by the courts as FERC "ordering" the utility to purchase the allocated capacity. See *Mississippi Power & Light v. State of Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

<sup>c</sup> Federal Power Act Section 215(i)(3) preserves from preemption state regulation of reliability-related actions, unless the state regulation is "inconsistent with" federal standards. Section 215 does not apply to Alaska or Hawaii. See Section 215(k).

<sup>d</sup> FERC sets the compensation but states can determine the prudence of the utility's purchase. Cf. *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Comm'n*, 837 F.2d 600 (3d Cir. 1988); *Pike County Light & Power v. Pennsylvania PUC*, 465 A.2d 735, 737-38 (Pa. Commw. Ct. 1983).

Action	Actor	Legal Subject	Jurisdiction			
			FERC Exclusive <sup>a</sup>	State Exclusive	Concurrent FERC and State	Other
<b>Transmission</b>						
"Transmit" retail electricity, bundled <sup>e</sup>	Public utility	Rates		FPA 201		
Transmit retail electricity, unbundled <sup>e</sup>	Public utility	Rates	FPA 201, Order 888, <i>New York v. U.S.</i>			
Transmit wholesale electricity, bundled	Public utility	Rates	FPA 201			
Transmit wholesale electricity, unbundled	Public utility	Rates	FPA 201			
"Local" distribution of retail electricity <sup>f</sup>	Public utility	Rates		FPA 201		
"Non-local" distribution of wholesale electricity <sup>f</sup>	Public utility	Rates	FPA 201			
Site transmission facilities <sup>g</sup>	Person	Transmission need, siting				FPA 216
<b>Other</b>						
Merge with utility; acquire utility or utility assets	Public utility, person	Corporate structure			FPA 203, PUHCA 2005	DoJ, FTC (antitrust)
Issue equity or debt <sup>h</sup>	Public utility	Finance				FPA 204

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<sup>e</sup> Transmission service is "unbundled" when the customer buys transmission service from the transmission provider while buying generation service from someone else. When transmission service is unbundled, the rates, terms and conditions are exclusively FERC-jurisdictional. *New York v. U.S.*, 505 U.S. 144 (1992) (upholding FERC's ruling in Order No. 888). In a traditional sale of retail electricity, transmission remains bundled with the generation service; thus the state retains jurisdiction over the associated transmission cost. In two other situations, FERC has determined that transmission service is unbundled: (a) where the state has authorized retail customers to shop for power among competing retail sellers (FERC Order No. 888); and (b) where the retail utility has joined a regional transmission organization, because in that situation the utility is buying unbundled transmission service from the RTO (FERC Order No. 2000).

<sup>f</sup> Section 201(b) denies FERC jurisdiction over "local" distribution. FERC has found that the transportation of wholesale power over a distribution system is non-"local" distribution. This situation arises when a generator is connected to a distribution system, and its wholesale customer is not the distribution owner.

<sup>g</sup> Before 2005, states had exclusive jurisdiction over transmission facility siting. Concerned that one state might block projects necessary to serve other states, Congress in 2005 added Section 216. This section empowers FERC to grant an applicant a preemptive siting permit for transmission projects located in DOE-designated "national interest electric transmission corridors." FERC obtains this power only if the state has "withheld" siting approval for more than 12 months or attaches conditions making the project uneconomic or unable to reduce congestion; or if there is no state agency with authority to grant siting permission. FERC also must make certain public interest findings. The Fourth Circuit has held that a state that denies approval has not "withheld" approval." If FERC does get jurisdiction, three contiguous states may form a compact to oust FERC. Section 216 does not apply to Alaska or Hawaii.

<sup>h</sup> Federal Power Act Section 204 provides that FERC has jurisdiction over a utility's securities issuances only if the state does not.

## Jurisdiction over Resource Adequacy: Actions by Regulators

Action	Jurisdiction		
	FERC Exclusive	State Exclusive	Concurrent FERC and State
Approve reliability standards			FPA 215(i)(3) <sup>a</sup>
Order retail utility to construct and/or own generation		FPA 201	
Order retail utility to purchase of wholesale electricity		FPA 201 <sup>b</sup>	
Determine power supply mix for retail customers		FPA 201	
Approve wholesale market design	FPA 201, 205, 206		
Approve wholesale allocation of LSEs' responsibility for capacity	FPA 201, 205, 206		
Approve wholesale price of capacity	FPA 201, 205, 206		
Order RTOs to accept bids from DR sellers	FPA 201, 205, 206		
Establish compensation for sellers of DR into RTO markets	FPA 201, 205, 206		
Establish compensation for sellers of DR to the retail utility		FPA 201	
Determine eligible buyers of DR		FPA 201	
Determine eligible sellers of DRs (including into wholesale markets)		FPA 201	

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