



**CONSTITUTIONAL DIFFICULTIES WITH
PROPOSED MARYLAND ENERGY LEGISLATION**

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As requested by the Electric Power Supply Association, this white paper addresses the legal ramifications of enactment of Maryland Senate Bill No. 795 (the “Pipkin-Rosapepe Bill”) or Bill No. 844 (the “Middleton Bill”) (collectively, the “Bills”). Either bill, if enacted, would be plainly unlawful.

First, the Bills are openly protectionist and thus clearly unconstitutional. Each proposes to give Maryland’s citizens preferential access to electricity generated in Maryland, leaving out-of-state customers with access only to the remainder. Furthermore, each allows only companies that serve retail customers in Maryland and their parents and affiliates to own new generation facilities in the State, while prohibiting out-of-state companies from doing so. The Supreme Court has long made clear that the Constitution bars such invidious economic protectionism by granting Congress, not the states, the authority to regulate interstate commerce. U.S. Const. Art. I, §8, cl. 3. Indeed, in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), and *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), the Court held unconstitutional state laws that are strikingly similar to the proposals here. In light of these decisions, there can be no doubt that if enacted, either Bill would violate the Commerce Clause.

Second, each Bill also would violate the Supremacy Clause of Art. VI, cl. 2. Each Bill seeks to regulate wholesale sales of electricity in interstate commerce, a domain Congress has chosen to make exclusively federal. Moreover, each Bill purports to give the Maryland Public Service Commission (the “PSC”) authority to second-guess determinations of the Federal Energy Regulatory Commission (“FERC”) regarding the justness and reasonableness of wholesale power rates. It is well-established, however, that FERC is the only entity with the authority to review such rates, and thus Maryland is without power to enforce the scheme these Bills propose.

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The Proposed Bills

Sharing similar language and structure, the Bills propose to add §7-518 to Maryland's Public Utility Companies Code. The Bills declare a "goal of the State" to return "to a regulated electric market for all customer classes." Bills §7-518(b). The Bills exempt certain small generators from their coverage, §7-518(c), but they otherwise would impose significant new regulations. First, any "electric generation facility constructed in the State for operation beginning on or after July 1, 2009 . . . shall be owned by an electric company in the State or a consortium," except that such a facility also "may be owned" by "an electricity supplier," "a parent or an affiliate of an electric company," or by "any combination" thereof. §7-518(d)(2). The Bills define "consortium" as a "combination of electric companies, each of which is in the State." Bills §7-518(a). The term "electricity supplier" is defined elsewhere to mean "a person . . . who sells . . . electricity," and expressly includes an "electric company." Md. Code Ann., Pub. Utility Companies §4-101(j). Second, the Bills provides that "[e]lectricity generated from an electric generation facility: (i) shall be offered for sale first to an electric company in the State or a consortium; and (ii) if not purchased, directly or through a contract, by an electric company in the State or a consortium, may then be sold to the electric grid." Bills §7-518(d)(3).

The Bills also expand the power of the PSC. The Bills empower the PSC to issue regulations implementing their provisions. See Pipkin-Rosapepe Bill §7-518(g); Middleton Bill §7-518(e). Moreover, when an electricity supplier "enter[s] into a contract with an electric company in the State or a consortium . . . for the sale of electricity generated" by a facility "owned by the electricity supplier," those contracts must be "approved by the [PSC]" under the standards set forth in Md. Code Ann., Pub. Utility Companies §4-101 et seq. Bills §7-518(d)(5). Those standards require, *inter alia*, that rates be "just and reasonable." Md. Code Ann., Pub. Utility Companies §4-201.

The Pipkin-Rosapepe Bill contains two additional provisions without analogs in the Middleton Bill. First, the PSC "shall direct each electric company in the State to develop a plan toward meeting" the State's goals of providing an adequate electric supply. Pipkin-Rosapepe Bill §7-518(f). Second, at such "appropriate times" as the PSC determines, the PSC "shall take action to require an electric company in the State or a consortium to acquire the electric generation facility" or a share thereof. Pipkin-Rosapepe Bill §7-518(e)(2), (e)(4). Any electricity generated by such a facility, however, is subject to the same "first sale" rule embodied in §7-518(d)(3): any such electricity "(i) shall be offered for sale first to an electric company in the State or a consortium; and (ii) if not purchased . . . by an electric company in the State or a consortium, may then be sold to the electric grid." Pipkin-Rosapepe Bill §7-518(e)(5).

Analysis

I. The Bills, if enacted, would clearly violate the Commerce Clause.

Under the United States Constitution, it is primarily Congress, not the several States, that has the power to regulate interstate commerce. See U.S. Const., Art. I, § 8, cl. 3. Recognizing the dominant role of the federal government over interstate commerce and the need for an open and unified national market, the Supreme Court's "dormant commerce clause" jurisprudence precludes openly protectionist state and local laws. See *Dep't of Revenue of Ky. v. Davis*, 128 S.Ct. 1801, 1808 (2008). The core of the dormant commerce clause is the rule that "State laws discriminating against interstate commerce on their face are virtually *per se* invalid." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575

(1997) (internal quotation marks omitted). Indeed, this is the most widely accepted aspect of the Court’s dormant Commerce Clause jurisprudence. See *American Trucking Ass’ns v. Michigan Pub. Svc. Comm’n*, 545 U.S. 429, 439 (2005) (Scalia, J., concurring in judgment). Such facially discriminatory laws are subject to “the strictest scrutiny,” *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), so much so that facially discriminatory laws are “typically struck down without further inquiry,” *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992).

The Middleton or Pipkin-Rosapepe Bills, if enacted, would obviously violate the dormant commerce clause. The Bills would trigger the virtual *per se* rule of invalidity because they facially discriminate against out-of-state businesses, in favor of in-state concerns, and the Bills would not withstand scrutiny because Maryland could achieve its legitimate aims through non-discriminatory means. The principles that condemn the Bills are neither novel nor particularly complicated. Indeed, the Bills contain provisions that are materially identical to state laws held unconstitutional in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), and *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980). In short, the Bills are manifestly unconstitutional.

A. Each Bill would face a virtual *per se* rule of invalidity because each is facially discriminatory.

Each Bill facially discriminates against interstate commerce in several ways. First, the Bills facially discriminate in favor of in-state electric companies by providing that any newly-constructed electric generation facility “*shall be owned by an electric company in the State or a consortium,*” *i.e.*, a “combination of electric companies, *each of which is in the State.*” Bills §7-518(d)(2), (a) (emphasis added).¹ The Bills’ express requirement that the owner of such a generator must be “in the State” openly discriminates against potential owners that are “out of the State.”

Second, the “first sale” provisions are facially discriminatory. The Bills provide that electricity generated by a newly-constructed facility “(i) shall be offered for sale *first to an electric company in the State or a consortium*; and (ii) if not purchased . . . by an electric company in the State . . . , may then be sold to the electric grid.” Bills §7-518(d)(3) (emphasis added); *see also* Pipkin-Rosapepe Bill §7-518(e)(5). This rule openly discriminates in favor of in-state electric companies, who get preferential access to electricity, and against out-of-state purchasers, who may purchase only what remains after the in-state market has been exhausted.

Third, the Pipkin-Rosapepe Bill further discriminates in favor of in-state electric companies by empowering the Maryland PSC to order the sale of an existing in-state generation facility, but only to

¹ Section 7-518(d)(2) provides an exception that a newly-constructed generation facility also “may be owned” by “an electricity supplier,” “a parent or an affiliate of an electric company,” or by “any combination” thereof. The most natural reading of §7-518(d)(2) is that the “in the State” requirement applies irrespective of the corporate form of the owner. Section 7-518(a) emphasizes this by preventing a consortium composed of in-state and out-of-state companies from owning such a facility. Alternatively, however, “in the State” could be read to qualify only “electric company,” thus exempting any of the alternate corporate forms from this requirement. Although grammatical, this interpretation is not plausible. On this reading, the statutory exception would swallow the rule, as there are many more corporate forms listed in the exception than in the primary clause. Moreover, on this reading, trivial differences in corporate form (such as between an “electric company” and a “parent or affiliate of an electric company”) would trigger significantly different legal rules (permitting versus prohibiting ownership). Quite simply, this would make no sense, and thus this cannot be the intended meaning of §7-518(d)(2).

“an electric company in the State or a consortium.” Pipkin-Rosapepe Bill §7-518(e)(2) (emphasis added). This rule plainly favors in-state electric companies over out-of-state electric companies, as in-state companies are eligible to purchase such an in-state generation facility, while out-of-state companies are not.

In short, the Bills repeatedly and expressly discriminate between in-state and out-of-state electric companies. Accordingly, they would face a virtual *per se* rule of invalidity.

B. Each Bill would be struck down under the virtual *per se* rule of invalidity.

The Bills would not withstand such heightened scrutiny. The Supreme Court will only uphold a facially discriminatory law if there is no alternative means by which the State adequately could achieve a non-protectionist purpose. See *C & A Carbone v. Clarkstown*, 511 U.S. 383, 392 (1994); *Maine v. Taylor*, 477 U.S. 131, 151 (1986). In other words, a State may adopt a facially discriminatory law only as a last resort.

Here, however, the State of Maryland appears to have adopted facial discrimination as its first choice. The State is clearly within its rights to be concerned that “retail electric markets have not developed as envisioned,” “[r]etail electricity rates” have increased, and “[n]o new sizable generation has been constructed in Maryland since 1992.” Bills Preamble. But Maryland need not resort to discrimination against out-of-state commerce to address its concerns, as non-discriminatory alternatives are readily apparent.

While there are strong policy reasons for not pursuing re-regulating Maryland power markets, the State could do so, for example, by providing non-discriminatory subsidies to in-state consumers, thus reducing the in-state purchase price of electricity. The State also could order (or subsidize) the construction of in-state generation facilities, thus directly addressing the problem that no such facility had been constructed since 1992. Indeed, the State could monopolize in-state generation and in-state retail sales, thus distinguishing between public and private entities, rather than between in-state and out-of-state entities. Neither Bill makes any effort to show why its facially discriminatory means are substantially more effective than these (or other) non-discriminatory alternatives.² Indeed, the discriminatory means chosen would likely be less effective than these non-discriminatory alternatives, as §7-518(d)(1)’s prohibition on out-of-state ownership of new generation facilities would *decrease* the likelihood that new generation facilities will be built in Maryland. The fact that Maryland has chosen to discriminate against interstate commerce, even though this would be a counterproductive way of promoting construction of new generation facilities, could signal to a court that Maryland’s true interest was not to build new power plants but to protect in-state industry from out-of-state competition.

The already-clear invalidity of the Bills would become even more obvious because a reviewing court could not overlook the significant untoward results that would flow from a ruling upholding the Bills. If Maryland may pass a law keeping for itself the electricity generated within its borders, then

² For similar reasons, the Bills would likely fail even under the state-friendly balancing test “which is reserved for [state or local] laws directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.” *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786, 1797 (2007) (internal quotation marks omitted). But there is nothing “incidental” about the burdens here; the burden is express, purposeful, and significant. Thus the virtual *per se* rule of invalidity would apply, not a balancing test.

“Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. . . . If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.” *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911). “Avoiding this sort of ‘economic Balkanization,’ and the retaliatory acts of other States that may follow, is one of the central purposes” of the dormant commerce clause. *Camps Newfound*, 520 U.S. at 577 (quoting *Hughes*, 441 U.S. at 325). The Bills thus would cause precisely the harm the dormant commerce clause is designed to prevent. The courts would not countenance such a result.

C. Each Bill would be struck down as a matter of *stare decisis*.

A court would not need to resort to general principles, or break any new ground, in order to strike down these Bills. The principles that condemn them have been clear for over 80 years, and the Courts have never wavered in applying them. The Bills’ provisions are materially identical to state laws held unconstitutional in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), and *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980). Bound by these precedents, it is highly doubtful that any court in the United States would hold these Bills constitutional.³

First, the Bills would be obviously unconstitutional under *Pennsylvania v. West Virginia*. In *West Virginia*, the Supreme Court addressed a commerce clause challenge to a West Virginia law with a “first sale” provision strikingly similar to the “first sale” provision proposed here. West Virginia had enacted a law requiring that natural gas generated by in-state producers first be sold to in-state consumers before being sold in the interstate market. See 262 U.S. at 595, 582 & n.1.⁴ The Court deemed the Act unconstitutional. With the Act, the Court explained, the State sought to subordinate the interstate natural gas market “to the local business within her borders.” “[T]his she may not do.” *Id.* at 597–98. The Bills’ “first sale” rule is materially identical to the “first sale” rule struck down in *West Virginia*. Here, as in *West Virginia*, the in-state market gets first dibs on in-state energy generation, and only what remains may pass into the interstate market. See Bills §7-518(d)(3); Pipkin-Rosapepe Bill §7-518(e)(5). This, *West Virginia* holds, Maryland simply “may not do.” 262 U.S. at 598.

³ Even Justice Scalia—a skeptic where the Court’s commerce clause jurisprudence is concerned—would hold the Bills unconstitutional. Justice Scalia will enforce the dormant Commerce Clause in only two situations: (1) where the state law facially discriminates against interstate commerce; or (2) where the law is indistinguishable from a type of law previously held unconstitutional by Court. *American Trucking Ass’n v. Michigan Pub. Svc. Comm’n*, 545 U.S. 429, 439 (2005) (Scalia, J., concurring in judgment). These Bills fall within both categories, as they facially discriminate against interstate commerce and are indistinguishable from the laws struck down in *West Virginia*, *New England Power*, and *Lewis*.

⁴ Although decided years ago, *West Virginia*’s commerce clause holding is clearly good law today. *West Virginia*’s commerce clause holding is frequently cited with approval. See, e.g., *Camps Newfound*, 520 U.S. at 576–77 & n.9 (1997). Moreover, the only disagreement in *West Virginia* turned on the questions whether the case was justiciable notwithstanding its unusual procedural posture, see 262 U.S. at 603 (McReynolds, J., dissenting); *id.* at 605 (Brandeis, J., dissenting), and whether the case could be distinguished from several *Lochner*-era precedents establishing that a state could give a preference to its inhabitants in the enjoyment of its natural resources, see *id.* at 602–03 (Holmes, J., dissenting) (citing *Geer v. Connecticut*, 161 U.S. 519 (1896)). These precedents have since been expressly overturned, see *Hughes v. Oklahoma*, 441 U.S. 322, 325, (1979), further entrenching *West Virginia* as settled law. Of course, even these overturned *Lochner*-era cases could not save the Bills, because electricity is surely not a natural resource: It has to be generated.

Second, the Bills would be obviously unconstitutional under *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). In *New England Power*, New Hampshire freely allowed in-state generators of electricity to sell to in-state buyers, but the state required such generators to obtain its permission before selling out-of-state. Extending *West Virginia*'s rule from the context of a first-sale requirement to a permitting requirement, the Court unanimously held that New Hampshire's law was unconstitutional. As the Court explained, States are "without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *Id.* at 338 (internal quotation marks omitted).

The unconstitutionality of the Bills would follow *a fortiori* from *New England Power*. New Hampshire's requirement that a generator seek the state's permission before making an interstate sale is far less burdensome to interstate commerce than the Bills' requirement that a generator *exhaust the in-state market* before selling to the interstate grid. Indeed, Maryland openly seeks "to prevent [electricity] from being shipped and sold in interstate commerce on the ground that [it is] required to satisfy local demands or because [it is] needed by the people of" Maryland. *New England Power Co.*, 455 U.S. at 338. *New England Power* clearly establishes that Maryland is "without power" to enforce such a restriction. *Id.*

Third, the Bills would be unconstitutional because they would bar out-of-state electric companies from engaging in business that in-state electric companies are free to conduct. In *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980), the Supreme Court held that Florida could not prohibit out-of-state banks from operating investment subsidiaries or giving investment advice within the State, when Florida permitted in-state banks to conduct such business. *See id.* at 41–44; *cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978) (a state may impose significant restrictions on corporations if the state does not "distinguish between in-state and out-of-state companies in the retail market"). As the Court explained in *Lewis*, "the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." 447 U.S. at 44.

Under *Lewis*, §7-518(d)(2)'s rule that only in-state electric companies may own new generation facilities is clearly unconstitutional. Under this provision, in-state companies would have more than an unfair competitive advantage; out-of-state companies would be *completely shut out* of this market. Similarly, the Pipkin-Rosapepe Bill empowers the PSC to order the sale of an existing in-state generation facility—but only to an in-state buyer. Pipkin-Rosapepe Bill §7-518(e)(2). A State of course may favor in-state businesses when the State is acting as a "market participant." *See Dep't of Revenue of Ky. v. Davis*, 128 S.Ct. 1801, 1809 (2008). But the PSC clearly would be acting as a regulator, not a market participant, if it "*ordered the sale of an existing in-state generation facility*" to an in-state buyer. Pipkin-Rosapepe Bill §7-518(e)(2) (emphasis added). These provisions are plainly protectionist and, under *Lewis*, would be plainly unconstitutional.⁵

In sum, the Bills propose to amend Maryland's laws to facially discriminate against out-of-state energy companies. The Bills would be subject to a virtual *per se* rule of invalidity, and because the State could achieve its goals through non-discriminatory means, the Bills would not withstand heightened scrutiny. Moreover, there could be little doubt about the unconstitutionality of the Bills because the "first sale"

⁵ Such a forced sale might also raise independent concerns under the Takings and Just Compensation Clauses of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

and in-state ownership provisions are materially identical to statutes previously struck down by the Supreme Court.

II. The Bills, if enacted, would be preempted by the Federal Power Act.

In addition to violating the Commerce Clause, the Bills would be preempted by Part II of the Federal Power Act, 16 U.S.C. §824 et seq. (the “FPA”). Under the Supremacy Clause, the laws of the United States are the “supreme Law of the Land,” binding “the Judges in every State” notwithstanding any provision “to the Contrary” in the “Constitution or Laws of any State.” U.S. Const., Art. VI, cl. 2. When the federal law speaks directly to preemption, the only question is whether the state measure falls in an area Congress intended to preempt. *See, e.g., Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1006 (2008). In the absence of such a provision, Congress’s intent to preempt may be inferred if the federal law indicates that Congress intended to occupy the legislative field, if there is an actual conflict between state and federal law, or if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. NFTC*, 530 U.S. 363, 372–73 (2000) (internal quotation marks omitted). Under these principles, there is little doubt that the Bills would be preempted.

A. Each Bill would be preempted because it regulates wholesale sales of electricity.

FERC’s jurisdiction over wholesale electricity sales is exclusive, and thus a State may not impose its own regulations in this area. The FPA grants FERC jurisdiction over “the sale of electric energy at wholesale in interstate commerce.” 16 U.S.C. §824(b)(1). “Sale of electric energy at wholesale” is defined expansively to mean “a sale of electric energy to any person for resale.” 16 U.S.C. §824(d). Electricity is “in interstate commerce” if the energy is transmitted in, or connected to, the interstate grid. *See New York v. FERC*, 535 U.S. 1, 16 (2002); *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 466–67 (1972).

Before the FPA was enacted, the Supreme Court held that States could regulate retail sales of electricity, but that they could not regulate wholesale sales in interstate commerce. *See Pub. Utilities Comm’n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). At that time, there was no federal regulation of wholesale energy sales, so *Attleboro* left a vacuum in which there was no regulation at all. Congress responded to *Attleboro* by enacting the FPA, granting FERC authority to regulate in this area. *See* 16 U.S.C. §824. But Congress also provided in the FPA that States may regulate only “those matters which are . . . subject to regulation by the States.” §824(a). In *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964), the Supreme Court squarely held that the FPA’s preemption clause codified the *Attleboro* test, under which States could regulate only retail sales. *See id.* at 210–15. The FPA, the Court stated flatly, “left no power in the states to regulate . . . sales for resale in interstate commerce.” *Id.* at 215 (emphasis added) (internal quotation marks omitted).

The Bills contain several provisions that would impermissibly regulate wholesale energy sales in interstate commerce. First, the “first sale” provisions expressly require that electricity generated by a newly-constructed facility “shall be offered for sale first to an electric company [and] if not purchased . . . , may then be sold to the electric grid.” Bills §7-518(d)(3) (emphases added); *see also* Pipkin-Rosapepe Bill §7-518(e)(5). Second, the Bills empower the Maryland PSC to regulate wholesale energy sales. *See* Pipkin-Rosapepe Bill §7-518(g); Middleton Bill §7-518(e). Each of these provisions plainly regulates wholesale energy sales. Indeed, sales to an “electric company” are at wholesale by definition,

because an “electric company” is defined as a person who “distributes electricity in the State to a retail electric customer.” Md. Code Ann., Pub. Utility Companies §4-101(h). Moreover, each provision regulates electricity “in interstate commerce” because Maryland, like every other state, is connected to an interstate electricity grid. Under *Southern California Edison*, therefore, each of these provisions is clearly preempted.

B. The Bills would be preempted because it grants the Maryland PSC power to review the validity of rates that have been filed with FERC.

FERC’s core obligation is to ensure that rates charged for wholesale electricity in interstate commerce are “just and reasonable.” 16 U.S.C. §824d(a). To enable FERC to fulfill its congressional mandate, “all rates and charges” for wholesale electricity in interstate commerce, “together with all contracts which in any manner affect or relate to such rates [or] charges,” must be filed with FERC. §824d(c). Because Congress has endowed FERC with the responsibility to determine whether filed electricity rates are just and reasonable, the Supreme Court has repeatedly held that state utility commissions may not second-guess the validity of a filed rate. *See, e.g., Entergy Louisiana, Inc. v. Louisiana Pub. Svc. Comm’n*, 539 U.S. 39, 47 (2003); *see also Montana-Dakota Utilities Co. v. Northwestern Pub. Svc. Comm’n*, 341 U.S. 246, 251–52 (1951). This is known as the “filed rate doctrine.” *Id.*

The Bills could not be implemented without violating the filed rate doctrine. All contracts for wholesale energy sales must be duly filed with FERC, *see* 16 U.S.C. §824d(c)–(d), yet the Bills require that when an electricity supplier “enter[s] into a contract with an electric company in the State . . . for the sale of electricity,” those contracts also must be “*approved by the [PSC].*” Bills §7-518(d)(5) (emphasis added). Because the Bills provide that the standards in Article 4 of the Maryland Public Utility Companies Code will apply, such approval will be granted only where the PSC determines, *inter alia*, that these wholesale rates are “just and reasonable.” Md. Code Ann., Pub. Utility Companies §4-201. In short, under the scheme established by the Bills, electricity suppliers would be required to obtain approval for their wholesale electricity rates from two regulators: FERC and the Maryland PSC. Once a rate is filed with FERC, however, the filed rate doctrine establishes that the rate “may not be subjected to reevaluation in state ratemaking proceedings.” *Entergy Louisiana, Inc.*, 539 U.S. at 42. It is only FERC, and not a state agency, that may determine whether wholesale energy rates are just and reasonable.

Conclusion

If enacted, either of the Bills would be clearly unconstitutional because each violates the Commerce Clause and the principles of the Supremacy Clause because each would be preempted by the FPA.