



COLUMBIA LAW SCHOOL

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Regulating Electricity Imports: Legal Considerations

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Two Primary Legal Considerations in Designing Import Regulations

1. The Federal Power Act

2. The Dormant Commerce Clause

Preemption by the Federal Power Act

- FPA gives FERC *exclusive* control over:
 - “[T]he transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce”; and
 - Ensuring “just and reasonable rates” for wholesale power.

Possible Preemption Claims

- *“Field Preemption”*
 - No state regulation is allowed when the federal scheme of regulation is so comprehensive that there is no room left for the states in the field
- *“Conflict Preemption”*
 - State regulations cannot “stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress”

FPA Preemption of Import Regulations?

<i>Potential Regulation</i>	<i>Point of Regulation</i>	<i>Field Preemption</i>	<i>Conflict Preemption</i>
Carbon Procurement Adder	Load Serving Entities	Probably not preempted. State environmental & public health regulations are permissible.	Probably not preempted. Targets retail entities; FERC can still ensure “just and reasonable” wholesale rates.
Carbon Procurement Emissions Rate			
Portfolio Standard			
Load-Based Cap			
First Jurisdictional Deliverer	Mixed—wholesale sellers, in-state generators, LSEs, etc.	Probably not preempted, for the same reason listed above.	Probably not preempted, but potentially more complicated.

The Dormant Commerce Clause

- Prohibits states from discriminating against citizens of other states to give a competitive advantage to in-state businesses
- Courts apply a two-step analysis

Step 1: Does the law discriminate
against out-of-staters or attempt
to regulate beyond a state's
jurisdiction?

If yes → Strict Scrutiny (!)

If no → Proceed to Step 2

Step 2: “Pike Balancing Test”

- From *Pike v. Bruce Church, Inc.*: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”
- In other words:

Legitimate Local Benefits > Burdens on Interstate Commerce

(and there are no less burdensome ways to regulate)

Potential Imports Regulations and the DCC

	Step 1
	<i>Test likely to be applied</i>
<i>Potential Regulations</i>	
Carbon Procurement Adder	Pike Balancing
Carbon Procurement Emissions Rate	Pike Balancing
Portfolio Standard	Pike Balancing
Load-Based Cap	Pike Balancing
<i>Other Possible Regulations</i>	
First Deliverer	Pike Balancing
Administrative Approach	Pike Balancing
Direct Rules for Out-of-State Energy	Strict Scrutiny
Tax on Out-of-State Imports	Strict Scrutiny?

	Step 2: Pike Balancing		
	Legitimate Interest?	Least burdensome?	Benefits > Burdens
Potential Regulations			
Carbon Procurement Adder	Likely ; framing & design are important	Almost certainly	Likely
Carbon Procurement Emissions Rate	Likely ; framing is important	Almost certainly	Likely-depends on how applied
Portfolio Standard	Likely	Almost certainly	Almost certainly
Load-Based Cap	Likely	Almost certainly	Likely
Other Possible Regulations			
First Deliverer	Likely	Almost certainly	Likely
Administrative Approach	Likely	Almost certainly	Almost certainly
Direct Rules or Tax for Out-of-State Energy	N/A	N/A	N/A

In Sum

Most proposed import regulations have the potential to withstand a dormant commerce clause or FPA challenge, but...

A legal challenge on these grounds should be anticipated, and the devil will be in the details of how the regulations are designed.

Recommendations to avoid dormant commerce and FPA preemption problems

- Build a strong record of the need for leakage control
- Demonstrate that the selected policy will effectively manage the leakage problem
- Emphasize state/regional environmental, public health and safety, and consumer protection concerns driving these regulations
- In filling in details, make sure in-state and out-of-state entities are treated equally in all respects