IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 21-3068, 21-3205, 21-3243
(consolidated)

PJM POWER PROVIDERS GROUP, ET AL.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF OF AMICI CURIAE ELECTRICITY REGULATION SCHOLARS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are 26 public utility and energy law scholars. This brief informs the Court about the history of the word "discrimination" in laws regulating common carriers and utilities. We write to set the record straight and counter Petitioners' novel theory that discrimination in the Federal Power Act (FPA) refers to the dormant Commerce Clause doctrine and compels FERC to police spillover effects of certain state policies. Petitioners' assertions betray history, discard generations of legal scholarship, and dismiss 150 years of precedent. We urge the Court to reject Petitioners' unsupportable theory.

Amici are listed in the Appendix. No party objected to the filing of this brief. Counsel and amici have not been compensated for this brief. No party funded this brief. The undersigned counsel authored this brief.

SUMMARY OF THE ARGUMENT

The word "discrimination" has distinct meanings under various legal doctrines and statutes. In utility laws such as the Federal Power Act (FPA), discrimination refers to similarly situated customers receiving unequal service from a utility provider. Prohibiting discrimination is a standard feature of utility regulation that is traceable to the common law.

Losing sight of the FPA's plain text and ignoring precedent, Petitioners claim that the phrase "unduly discriminatory" in the FPA refers to discrimination under the dormant Commerce Clause doctrine. Based on that faulty premise, Petitioners assert that FERC has a duty to police state policies using expansive powers far beyond what the dormant Commerce Clause provides to federal courts. Petitioners' theory flouts the well-established history of discrimination in laws regulating common carriers and utilities. In this brief, we outline that history to explain why and how FERC remedies unduly discriminatory utility tariffs.

I. DISCRIMINATION HAS A DISTINCT MEANING UNDER UTILITY LAW THAT ORIGINATES FROM COMMON LAW REGULATION OF PUBLIC SERVICE COMPANIES

The common law has long forbidden public service companies from discriminating between two customers who request the same service. States began codifying anti-discrimination rules no later than the mid-nineteenth century. In the 1870s, for instance, at least twelve states ratified constitutions that prohibited railroads and other carriers from providing discriminatory service. *See Atchison, T.&S. F.R. Co. v. Denver & N.O.R. Co.,* 110 U.S. 667 (1884). State legislatures likewise forbade telephone and telegraph firms, grain warehouses, and other companies serving the public from discriminating. *See Munn v. Illinois,* 94 U.S. 113, 117 (1876) (quoting an 1871 Illinois statute). Legislatures later included identical anti-discrimination standards in laws regulating numerous industries, including cotton gins, insurance providers, taxis, and electric utilities.

But these codifications were "merely declaratory of the common law." *Scofield v. Lake Shore & M.S.R. Co.*, 43 Ohio St. 571, 619 (1885). At least initially, even a state's constitutional prohibition "impose[d] no greater obligations upon the company than the common law would have

imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination …" *Atchison v. Denver*, 110 U.S. at 674; *accord Budd v. New York*, 143 U.S. 517, 541 (1892).

Anti-discrimination rules protected consumers by preventing municipal or state-licensed service providers from "fix[ing] a variety of prices, or impos[ing] different terms and conditions, according to their caprice or whim." *Owensboro Gaslight Co. v. Hildebrand*, 19 Ky.L.Rptr. 983 (1897). They also protected competition in other industries by ensuring that regulated providers could not "kill the business of one, and make alive that of another…[and become] masters of the cities they were established to serve." *Griffin v. Goldsboro Water Co.*, 122 N.C. 206 (1898).

II. THE FPA'S ANTI-DISCRIMINATION PROVISIONS ARE COPIED FROM OTHER FEDERAL LAWS AND ARE ROOTED IN THE COMMON LAW

Starting in 1887 with enactment of the Interstate Commerce Act (ICA), Congress regulated numerous industries with statutes that prohibited unjust or undue discrimination. The FPA is a direct descendant of the ICA, with anti-discrimination provisions that are

copied from earlier federal laws. "Discrimination" under these federal laws took a similar meaning as it did under the common law and state laws. Disregarding this history, Petitioners create an alternate reality where Congress chose to prohibit "discrimination" in the FPA because that word has an unrelated meaning under the dormant Commerce Clause doctrine. Ass'n Br. 34–47; P3 Br. 42–46. Their interpretive leap from utility law to the Commerce Clause ignores the unbroken chain of precedent connecting the FPA to common law anti-discrimination rules.

Preventing discriminatory service and rates is at the heart of federal laws regulating common carriers and utilities. The ICA was "based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the [ICA] is the prevention of these discriminations." *Houston, E.&W.T.R. Co. v. U.S.*, 234 U.S. 342, 356 (1914) (quoting the ICA's legislative history). The ICA targeted such discriminatory and "anti-competitive" practices, including "excessive rate differences and other preferences — railroad pooling, secret

rebates, and drawbacks." Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1799 (2016).

The ICA's anti-discrimination rules required regulated companies to provide "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." *Interstate Commerce Comm'n v. Baltimore & O.R. Co.*, 145 U.S. 263, 281–82 (1892). To adjudge whether a company's service was discriminatory, the ICA obligated regulated companies to publish tariffs that contained detailed rates, terms, and conditions of service. By "requiring the publication of tariffs, and by prohibiting secret departures from such tariffs," the ICA aimed to ensure that all customers received non-discriminatory service while also providing regulators with a baseline for evaluating whether a utility's service to a specific customer was discriminatory. *New York, N.H.&H.R. Co. v. Interstate Commerce Comm'n.*, 200 U.S. 361, 391 (1906).

The published tariff was thus central to the ICA's anti-discrimination scheme. Congress copied this tariff-centric model in subsequent statutes, including the Shipping Act (1916), Packers and Stockyards Act (1921), Communications Act (1934), Motor Carrier Act

(1935), Federal Power Act (1935), Natural Gas Act (1938), and the Civil Aeronautics Act (1938). Each statute prohibits regulated companies from discriminating and, typically in a separate statutory provision, empowers regulators to remedy unjust or undue discriminations.

The plain text of these provisions in the FPA confirms that discrimination under the statute comports with the common law understanding. Section 205 requires that all tariffed rates and rules affecting those rates be "just and reasonable," while section 206 requires FERC to remedy any rate or rule that it finds to be "unjust and unreasonable." This parallel structure follows through to the provisions' anti-discrimination language. Section 205 prohibits rates and rules that "grant any undue preference or advantage to any person" or "maintain any unreasonable difference in rates, charges, service, facilities …" 16 U.S.C. §824d. Section 206 orders FERC to remedy any rate or rule that it finds to be "unduly discriminatory or preferential." 16 U.S.C. §824e. On their face, these two provisions connect undue discrimination to undue preferences and unreasonable differences in rates charged to customers. This understanding of discrimination — as applying to

preferential and anti-competitive treatment of specific customers — is consistent with the ICA and other federal statutes. Eisen at 1805–09.

Indeed, since the FPA's enactment, the Federal Power Commission (FERC's predecessor) understood that the FPA's anti-discrimination provisions were informed by ICA precedent and state utility law. *See In the Matter of Otter Tail Power Co.*, 2 FPC 134 (1940) (citing several state and federal cases). Courts affirmed the FPC's understanding that the FPA's anti-discrimination scheme is "analogous to that of the Interstate Commerce Act," *Northwestern Public Service Co. v. Montana-Dakota Utilities*, 181 F.2d 19, 22 (8th Cir. 1950), and have applied ICA precedent on discrimination to the FPA. *St. Michaels Utilities Comm'n v. FPC*, 377 F.2d 912, 915–17 (4th Cir. 1967); *Alabama Elec. Co-op. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

As under the ICA, the FPA's anti-discrimination provisions prohibit utilities from treating similarly situated customers differently. FERC must "prevent favoritism by insuring equality of treatment on rates for substantially similar services." *St. Michaels Utilities Comm'n,* 377 F.2d at 915 (citations omitted). FERC's inquiry is fact specific: "differences in rates are justified where they are predicated upon

factual differences between customers and that these differences may arise from differing costs of service or otherwise." *Cities of Newark, et al. v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985). But FERC must find undue discrimination where a utility fails to justify a rate disparity among customers or customer classes. *Alabama Elec. Co-op.*, 684 F.2d at 29; *Public Service Co. of Indiana v. FERC*, 575 F.2d 1204, 1212–13 (7th Cir. 1978).

Historically, a typical fact pattern involved rates charged to a municipally or cooperatively owned utility for wholesale energy sales or transmission service provided by an adjacent regulated utility. *Id.* The proceeding would focus on specific tariffs as applied to identified customers. Beginning in the 1980s, FERC broadened its discrimination analysis under both the FPA and Natural Gas Act (NGA). Rather than remedy undue discrimination on a tariff-by-tariff basis, FERC applied industry-wide remedies to all filed tariffs for electric transmission or pipeline transportation service. In separate proceedings, FERC determined that "general findings of systemic monopoly conditions and the resulting potential for anti-competitive behavior" by transmission and pipeline providers were sufficient to find unduly discriminatory

service across both industries. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 688 (D.C. Cir. 2000); *aff'd New York v. FERC*, 535 U.S. 1 (2002). Concluding that the Acts "fairly bristle[] with concern for undue discrimination," *Assoc. Gas Dist. v. FERC*, 824 F.2d 981, 997 (D.C. Cir. 1987), courts upheld FERC's industry-wide approach to finding and remedying discrimination.

Under the FPA, FERC now requires all electric transmission providers, including Regional Transmission Organizations such as PJM, to file transmission tariffs that meet FERC's minimum standards. FERC regularly updates these standards based on findings that industry changes have exposed long-standing utility practices as unduly discriminatory. *See e.g.,* Order No. 2003, 104 FERC ¶ 61,103 at PP 11–12 (2003) (finding that standardized generator interconnection procedures will "minimize opportunities for undue discrimination").

As applied to interstate markets, such as the PJM capacity auction at issue here, the FPA's anti-discrimination provisions demand that market rules treat similarly situated capacity sellers alike. FERC's discrimination analysis is akin to a traditional case. FERC ensures that

the PJM's tariff does not unfairly disadvantage a particular market participant or class of market participants.

Without considering this history, Petitioners invent a new etymology of the word discrimination that originates with the dormant Commerce Clause rather than common law regulation of public service companies. Petitioners jumble a bewildering mix of legal doctrines in an effort to convince this Court that FERC has a non-discretionary duty to mitigate the spillover effects of certain state policies. Their smoking gun is that in 1927 the Supreme Court held that the Commerce Clause restrains states from regulating interstate power sales and transmission service, thus setting up the "the jurisprudential context in which the FPA was enacted in 1935." Ass'n Br. 41.

Petitioners make too much of very little. The Supreme Court's holding in *Attleboro* was an unremarkable application of a dormant Commerce Clause test that courts no longer apply. *Arkansas Elec. Co-op. v. Arkansas PSC*, 461 U.S. 375, 389–94 (1983). Eight years after *Attleboro*, a New-Deal era Congress enacted the FPA, thus filling the regulatory gap created by *Attleboro*'s holding that states may not regulate interstate transactions.

But *Attleboro* is just the beginning of the FPA's history. In 1928, the Federal Trade Commission began issuing a series of reports released over seven years that "chronicled at length the venal conditions and iniquitous practices" of the holding companies that owned electric utilities. *Salt River Project v. FPC*, 391 F.2d 470, 475 (D.C. Cir. 1967). The two-part Public Utility Act of 1935 "had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1973). The FPA served the latter purpose, while the Public Utility Holding Company Act empowered the Securities and Exchange Commission to address the "economic evils resulting from uncoordinated and unintegrated public utility holding company systems." *North Am. Co. v. SEC,* 327 U.S. 686, 706 (1946).

Attleboro was by no means the only or even the primary "policy problem to which Congress was responding by passing the FPA." Ass'n Br. 41. The proper historical perspective is that Congress passed the Act "in the context of, and in response to, great concentrations of

economic and even political power vested in" utility holding companies. *Gulf States Utilities Co.*, 411 U.S. at 758. The FPA's anti-discrimination provisions are part of a well-established statutory scheme designed to protect consumers and promote competition, twin aims that are traceable to the common law.

III. BY DISREGARDING HISTORY AND MISREPRESENTING THE DORMANT COMMERCE CLAUSE DOCTRINE, PETITIONERS INVENT A NEW MEANING OF DISCRIMINATION UNDER THE FPA

Ignoring over a century of precedent, Petitioners purport to uncover a new obligation hidden in the FPA. Because discrimination is a dormant Commerce Clause "term of art," Ass'n Br. 41, Petitioners surmise that the FPA "incorporates [a] Commerce Clause principle," which demands that FERC ensure tariffs quarantine the effects of certain state policies within the enacting state. P3 Br. 42–43; Ass'n Br. 34–44. Parts I and II show that Congress's word choice is wholly explained by decades of laws that preceded the FPA. The Commerce Clause simply has no role to play.

Setting that fatal deficiency aside, Petitioners' claim is also unmoored from any Commerce Clause principle. Their attempt to root a

"state-state non-interference principle" in the Commerce Clause is irreconcilable with case law. Ass'n Br. 38. In the underlying proceeding, FERC appropriately "dismissed [Petitioners'] legal contention out of hand." Ass'n *Br.* 43. This Court should not remand to FERC for further consideration of Petitioners' theory.

Petitioners' theory overextends the "dormant branch of the dormant Commerce Clause." *IMS Health Inc. v. Mills,* 616 F.3d 7, 29 (1st Cir. 2010). Under the rarely used extraterritoriality test, constitutionality "depends largely on the territorial scope of the transaction that the state law seeks to regulate." *A.S. Goldmen Co. v. N.J. Bureau of Securities*, 163 F.3d 780, 786 (3d Cir. 1999).

Here, Petitioners do not contend that any state is regulating an out-of-state capacity sale, either directly or via PJM's tariff. Retreating from case law, they insist that "principles animating dormant Commerce Clause jurisprudence" compel FERC to mitigate effects of non-jurisdictional policies that "distort" prices in interstate markets. P3 Br. 46. But the only federal appeals court to hear such an extraterritorial claim about spillover effects of a state electricity policy dismissed it.

Writing for the Tenth Circuit, then-Judge Gorsuch rejected the argument championed by Petitioners in this case that indirect price impacts are redressable under the dormant Commerce Clause. *EELI v. Epel*, 793 F.3d 1169 (10th Cir. 2015). He wrote that the petitioner's argument in that case about the scope of the dormant Commerce Clause had "no limiting principle." *Id.* at 1175. He declined the petitioner's "audacious invitation" to embark on a "novel lawmaking project" based on turning Supreme Court "dicta into a weapon far more powerful" than the Court has wielded under the dormant Commerce Clause. *Id.*

Here, Petitioners are even bolder. Like the Tenth Circuit litigants, Petitioners' claim about the spillover effects of state policies has no constitutional foundation. Without a viable basis for linking the dormant Commerce Clause to interstate price effects of state policies, Petitioners reach for "principles of horizontal federalism." Ass'n Br. 34. But whatever those principles are, they are unrelated to the word "discrimination," which is the linchpin of their theory. Petitioners fail to connect the dots. Their sleight of hand cannot justify burdening FERC with an unheralded obligation to police non-jurisdictional policies.

CONCLUSION

Whatever discretionary authority FERC has under the FPA to mitigate effects of state policies is not derived from the dormant Commerce Clause doctrine. When it sets just and reasonable rates FERC has wide latitude and may "determine where it wishes to strike the balance" between competing policy objectives. *N.J. B.P.U. v. FERC,* 744 F.3d 74, 109 (3d Cir. 2014). We urge the court to reject Petitioners' claims about the FPA's anti-discrimination provisions.

Respectfully submitted,

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CERTIFICATIONS

Pursuant to this Court's Order dated June 17, 2022, I have been admitted pro hac vice for purposes of filing an amicus brief.

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and this Court's April 18, 2022 Order because it contains 2,596 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Century Schoolbook font.

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Dated: August 12, 2022

/s/ Ari Peskoe
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CERTIFICATE OF SERVICE

I certify that on August 12, 2022, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. Participants in the case will be served by the CM/ECF system.

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