
The FPC and State Commissions

In a paper I wrote a few months ago wherein I reviewed the history of the Federal Power Commission as revealed in its annual reports from 1920 until the present time, I cited the Commission's varying pronouncements on today's subject. Today's subject is not a new one.

As with so many other things in this world, what the Commission has done speaks more loudly than what it has said. The Commission in its early years emphasized and reemphasized its commitment to the idea that it should engage in no activity which was being handled by the States. Still, as I pointed out, even in the conservative era of President Hoover, the Commission boldly marched into disputed territory.

Your own President, Jim Karber, in his scholarly presentation to the Great Lakes Conference of Public Utility Commissioners last August, effectively used the historical perspective approach in pointing up where we are, and how we got there, in the matter of federal-state relationships in the field of regulation.

President Karber may have passed up an opportunity to point out that the federal regulatory attitude toward state regulation is not a seamless web. Each federal commission from time to time feels it necessary to disavow any intention of displacing state regulation, the language of our Commission being more or less typical:

... given the limitations of jurisdiction ... we must assume that the affected state commission will discharge their respective responsibilities in furtherance of the objectives of their legislative charters, the Natural Gas Act, and the action we take herein.

Within the commissions, differences of view show up on the matter of relationships with states as well as on any other subject you might mention.

In Rule Making Docket No. R-297, which culminated in the issuance of Order No. 370 on "net investment" calculations under section 3(13) of the Federal Power Act, I devoted a considerable part of my dissenting statement to my contention that the Rule, as adopted, did not conform to the legislative scheme in the assignment of a role to state regulation.

My colleagues who constituted the majority and thus spoke for the Commission applied a little hindsight in deducing Congressional intent, saying they thought the concept of fifty or more disparate modes of determination of the proper return governing the amount which
the people of the United States must pay to recover the
resources belonging to them is plainly not a viable one
when a uniform standard was set by Congress. Especially
is this so when we realize that the extent and vigor of
state regulation has varied greatly over the years. 2/

The story of the relationship of a federal regulatory commis-
sion and the state commissions charged with responsibility in the
same subject area is not told only in the attitude of the respective
members of the commissions. To understand it, one must, as Presi-
dent Karber has done, review the history of both state and federal
regulation in the particular regulated field.

This will show a role both for the courts and for the Congress,
both more significant in their influence than the role of the mem-
bership of the commissions.

In the field of electric utility regulation, for example,
Atteboro,3/ City of Colton,4/ New River,5/ and Taum Sauk,6/ evi-
dence judicial support for an expanding federal role, just as
Lo-Vaca,7/ Phillips (I 8/ and II 9/), and most recently Permian 10/
do in natural gas regulation.

Most of the federal commissions work under the surveillance of
courts. The courts have sometimes measured the federal responsi-
bilities in terms beyond those outlined even by the agencies--witness
Scenic Hudson 11/ and High Mountain Sheep 12/ for two recent examples.

The Federal Power Commission has a good record of avoiding
judicial reversal, but a couple of recent "set-backs" may or may
not signal a trend. The Duke Power case,13/ for example, found the
Commission reminded, rather sharply, that
to accept the Commission's theory would emasculate the
restriction Congress imposed upon the exercise of this
power and expand it "to the constitutional limit of
Congressional authority over commerce."

In that case, the Court of Appeals for the District of Columbia
surprised some (one commentator said he was "refreshed"), by finding
that Congress specifically reserved certain regulatory powers to
the states.

It is the Congress which specifies the working limits of the
exercise of federal jurisdiction. Congress preempts some areas of
regulation almost entirely for the federal government, while leaving
others almost entirely to the state government. Radio and television
licensing is an example at one end of the spectrum, while regulation
of the insurance industry is at the other.

Within the ambit of FPC activity, we find electric and gas
interstate sales both federally regulated, but only on the gas side
is the transportation itself placed under the federal requirement
of a certificate.
Congress modeled most regulatory statutes after the act creating the Interstate Commerce Commission, sometimes with a good fit, and sometimes with a fit not so good. Where the latter has been the situation, the courts and commissions have had a freer hand to adjust the system to their own ideas of rationality. And technology has moved faster than legislation—the FCC's struggle with CATV is an example.

Occasionally corrective legislation has been tried, sometimes successfully, as with the Hinshaw amendment, sometimes unsuccessfully, as with the Harris bill.

Legislative efforts to restrict regulatory jurisdiction must survive many obstacles in the executive branch, most notably adverse reports to the Committees. Even so, one cannot read the testimony on such proposals as that in the Holland-Smathers bill without concluding that Congress, as an institution, is basically more friendly to preserving state prerogatives, or establishing new ones, than other branches of the government.

In a related natural resources field, I recently advised the states to abandon the old and sterile struggles about "states rights" in the field of Western water development policy. I recommended they promote the states' legitimate interests by seeking a better quality legislative product from Congress. Laws can and should be precisely drafted in order to specify the real intent of the framers. The language of the bills should be clear and articulate so that Congressional intentions to leave a measure of local initiative and local control is not buried in subsequent interpretation of general language which ascribes to Congress the desire to preempt a field to the full extent that it is constitutionally allowed.

Some of the same medicine seems to me to be proper for prescription in the matter of federal-state relations in the areas subject to regulation by the FPC. In a word, I think it fruitless to discuss the subject of federal-state relations only in terms of our decisions, or in terms of yours, or in terms of our personal relationships. [These latter are going to be good—they cannot help being so, with Commissioner Carl Bagge as our liaison and member of your executive committee.]

Rather, we must all be students of government, apt enough to see that the ebb and flow of power in these areas will be at different rates, sometimes in different directions, depending on a myriad of variables. Strong presidents, strong chairmen, strong courts, strong Congressional leaders, strong leadership among the state commissions, and strong voices from consumer and industry groups pull at the strands which make up the warp and woof of the federal system, but seldom in the same direction at the same time.

Generally speaking, however, the movement has been as President Karber said—in the direction of strengthening the federal regulator while correspondingly weakening the state regulator.
This is a result of the growing complexity of our society, and the heightened demands upon a national government, far more than it is a conspiratorial power grab by the "feds."

Still the forces for a continuing role for the states remain strong within the federal system, and nowhere stronger than in the Congress.

There, in my opinion, we ought to focus not on the constitutional limits of federal power, but the policy limits of its exercise. Not how far the federal government may go, but how far it should go. This has to be expressed in legislative language which resists modification by Commission or judicial interpretation.

I do not advocate taking all our bones of contention back to Congress. Some bones of contention, such as the one in Rule Making Docket No. R-297 I think worthy of that approach, but by and large, our common duty is to help identify all the policy alternatives, so that Congress, when it chooses among them, can spell out its instructions in such a way that the opportunities for friction between us are minimized.

Along with all of you, I value the federal system; I want to preserve it, and I want there to be a system like that envisaged in most of the regulatory statues--mutually supportive regulatory activities at the state and federal level.


10/ Permian Basin Area Rate Cases, 390 U.S. 747 (1968).


