SUPREME COURT OF THE UNITED STATES

Nos. 00–568 and 00–809

NEW YORK ET AL., PETITIONERS
00–568 *v.*
FEDERAL ENERGY REGULATORY COMMISSION
ET AL.

ENRON POWER MARKETING, INC., PETITIONER
00–809 *v.*
FEDERAL ENERGY REGULATORY COMMISSION
ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 4, 2002]

JUSTICE STEVENS delivered the opinion of the Court.

These cases raise two important questions concerning the jurisdiction of the Federal Energy Regulatory Commission (FERC or Commission) over the transmission of electricity. First, if a public utility "unbundles"—*i.e.*, separates—the cost of transmission from the cost of electrical energy when billing its retail customers, may FERC require the utility to transmit competitors' electricity over its lines on the same terms that the utility applies to its own energy transmissions? Second, must FERC impose that requirement on utilities that continue to offer only "bundled" retail sales?

In Order No. 888, issued in 1996 with the stated purpose of "Promoting Wholesale Competition Through Open

Access Non-Discriminatory Transmission Services by Public Utilities,"[1] FERC answered yes to the first question and no to the second. It based its answers on provisions of the Federal Power Act (FPA), as added by §213, 49 Stat. 847, and as amended, 16 U. S. C. §824 *et seq*., enacted in 1935. Whether or not the 1935 Congress foresaw the dramatic changes in the power industry that have occurred in recent decades, we are persuaded, as was the Court of Appeals, that FERC properly construed its statutory authority.

I

In 1935, when the FPA became law, most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems. Although there were some interconnections among utilities, most operated as separate, local monopolies subject to state or local regulation. Their sales were "bundled," meaning that consumers paid a single charge that included both the cost of the electric energy and the cost of its delivery. Competition among utilities was not prevalent.

Prior to 1935, the States possessed broad authority to regulate public utilities, but this power was limited by our cases holding that the negative impact of the Commerce Clause prohibits state regulation that directly burdens interstate commerce.[2] When confronted with an attempt

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[1] FERC Stats. & Regs., Regs. Preambles, Jan. 1991–June 1996, ¶31,036, p. 31,632, 61 Fed. Reg. 21540 (1996). Order No. 888 also deals with the recovery of "stranded costs" by utilities, but this aspect of the order is not before us.

[2] For example, in cases involving the interstate transmission of natural gas, we held that a State could regulate direct sales to consumers even when the gas was drawn from interstate mains, *Pennsylvania Gas Co.* v. *Public Serv. Comm'n of N. Y.,* 252 U. S. 23 (1920); *Public Util.*

by Rhode Island to regulate the rates charged by a Rhode Island plant selling electricity to a Massachusetts company, which resold the electricity to the city of Attleboro, Massachusetts, we invalidated the regulation because it imposed a "direct burden upon interstate commerce." *Public Util. Comm'n of R. I.* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 89 (1927). Creating what has become known as the "*Attleboro* gap," we held that this interstate transaction was not subject to regulation by either Rhode Island or Massachusetts, but only "by the exercise of the power vested in Congress." *Id.*, at 90.

When it enacted the FPA in 1935,[3] Congress authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro*, but it also extended federal coverage to some areas that previously had been state regulated, see, *e.g.*, *id.*, at 87–88 (explaining, prior to the FPA's enactment, that state regulations affecting interstate utility transactions were permissible if they did not directly burden interstate commerce). The FPA charged the Federal Power Commission (FPC), the predecessor of FERC, "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Util. Co.* v. *FPC*, 411 U. S. 747, 758 (1973). Specifically, in §201(b) of the FPA, Congress recognized the FPC's jurisdiction as including "the transmission of electric energy in interstate commerce" and "the sale of

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Comm'n of Kan. v. *Landon,* 249 U. S. 236 (1919), but that a State could not regulate the rate at which gas from out-of-state producers was sold to independent distributing companies for resale to local consumers, *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.,* 265 U. S. 298, 309 (1924).

[3] The FPA was enacted as Title II of the Public Utility Act of 1935, 49 Stat. 847. Title I of the Public Utility Act—not at issue here—regulated financial practices of interstate holding companies that controlled a large number of public utilities.

electric energy at wholesale in interstate commerce." 16 U. S. C. §824(b). Furthermore, §205 of the FPA prohibited, among other things, unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission," 16 U. S. C. §§824d(a)–(b), and §206 gave the FPC the power to correct such unlawful practices, 16 U. S. C. §824e(a).

Since 1935, and especially beginning in the 1970's and 1980's, the number of electricity suppliers has increased dramatically. Technological advances have made it possible to generate electricity efficiently in different ways and in smaller plants.[4] In addition, unlike the local power networks of the past, electricity is now delivered over three major networks, or "grids" in the continental United States. Two of these grids—the "Eastern Interconnect" and the "Western Interconnect"—are connected to each other. It is only in Hawaii and Alaska and on the "Texas Interconnect"—which covers most of that State—that electricity is distributed entirely within a single State. In the rest of the country, any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce.[5] As a result, it

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[4] In Order No. 888, FERC noted that the optimum size of electric generation plants has shifted from the larger, 500 megawatt plants (with 10-year lead time) of the past to the smaller, 50-to-150 megawatt plants (with 1-year lead time) of the present. These smaller plants can produce energy at a cost of 3-to-5 cents per kilowatt-hour, as opposed to the older plants' production cost of 4-to-15 cents per kilowatt-hour. Order No. 888, at 31,641.

[5] See Brief for Respondent FERC 4–5. Over the years, FERC has described the interconnected grids in a number of proceedings. For example, in 1967, the FPC considered whether Florida Power & Light Co. (FPL)—a utility attached to what was then the regional grid for the southeastern United States—transmitted energy in interstate commerce as a result of that attachment. The FPC concluded that FPL's transmissions were in interstate commerce: "[S]ince electric energy can be delivered virtually instantaneously when needed on a system at a

is now possible for power companies to transmit electric energy over long distances at a low cost. As FERC has explained, "the nature and magnitude of coordination transactions" have enabled utilities to operate more efficiently by transferring substantial amounts of electricity not only from plant to plant in one area, but also from region to region, as market conditions fluctuate. Order No. 888, at 31,641.

Despite these advances in technology that have increased the number of electricity providers and have made it possible for a "customer in Vermont [to] purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma," *Transmission Access Policy Study Group* v. *FERC*, 225 F. 3d 667, 681 (CADC 2000) (case below), public utilities retain ownership of the transmission lines that must be used by their competitors to deliver electric energy to wholesale and retail customers. The utilities' control of

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speed of 186,000 miles per second, such energy can be and is transmitted to FPL when needed from out-of-state generators, and in turn can be and is transmitted from FPL to help meet out-of-state demands; . . . there is a cause and effect relationship in electric energy occurring throughout every generator and point on the FPL, Corp, Georgia, and Southern systems which constitutes interstate transmission of electric energy by, to, and from FPL." *In re Florida Power & Light Co.*, 37 F. P. C. 544, 549 (1967). This Court found the FPC's findings sufficient to establish the FPC's jurisdiction. *FPC* v. *Florida Power & Light Co.*, 404 U. S. 453, 469 (1972).

As *amici* explain in less technical terms, "[e]nergy flowing onto a power network or grid *energizes the entire grid*, and consumers then draw undifferentiated energy from that grid." Brief for Electrical Engineers et al. as *Amici Curiae* 2. As a result, explain *amici*, any activity on the interstate grid affects the rest of the grid. *Ibid*. *Amici* dispute the States' contentions that electricity functions "the way water flows through a pipe or blood cells flow through a vein" and "can be controlled, directed and traced" as these substances can be, calling such metaphors "inaccurate and highly misleading." *Id*., at 2, 5.

transmission facilities gives them the power either to refuse to deliver energy produced by competitors or to deliver competitors' power on terms and conditions less favorable than those they apply to their own transmissions. *E.g.*, Order No. 888, at 31,643–31,644.[6]

Congress has addressed these evolving conditions in the electricity market on two primary occasions since 1935. First, Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), 92 Stat. 3117, 16 U. S. C. §2601 *et seq.*, to promote the development of new generating facilities and to conserve the use of fossil fuels. Because the traditional utilities controlled the transmission lines and were reluctant to purchase power from "nontraditional facilities," PURPA directed FERC to promulgate rules requiring utilities to purchase electricity from "qualifying cogeneration and small power production facilities." *FERC* v. *Mississippi*, 456 U. S. 742, 751 (1982); see 16 U. S. C. §824a–3(a).

Over a decade later, Congress enacted the Energy Policy Act of 1992 (EPAct), 106 Stat. 2776. This law authorized FERC to order individual utilities to provide transmission services to unaffiliated wholesale generators (*i.e.*, to "wheel" power) on a case-by-case basis. See 16 U. S. C. §§824j–824k. Exercising its authority under the EPAct, FERC ordered a utility to "wheel" power for a complaining wholesale competitor 12 times, in 12 separate proceedings.

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[6] In addition to policing utilities' anticompetitive behavior through the various statutory provisions that explicitly address the electric industry, discussed in more detail below, the Government has also used the antitrust laws to this end. For example, in *Otter Tail Power Co.* v. *United States,* 410 U. S. 366 (1973), the Court permitted the Government to seek antitrust remedies against a utility company which, among other things, refused to sell power at wholesale to some municipalities and refused to transfer competitors' power over its lines. *Id.*, at 368. The Court concluded that the FPA's existence did not preclude the applicability of the antitrust laws. *Id.*, at 372.

Order No. 888, at 31,646. FERC soon concluded, however, that these individual proceedings were too costly and time consuming to provide an adequate remedy for undue discrimination throughout the market. *Ibid.*

Thus, in 1995, FERC initiated the rulemaking proceeding that led to the adoption of the order presently under review. FERC proposed a rule that would "require that public utilities owning and/or controlling facilities used for the transmission of electric energy in interstate commerce have on file tariffs providing for nondiscriminatory open-access transmission services." Notice of Proposed Rulemaking, FERC Stats. & Regs., Proposed Regs., 1988–1999, ¶32,514, p. 33,047, 60 Fed. Reg. 17662 (hereinafter NPRM). The stated purpose of the proposed rule was "to encourage lower electricity rates by structuring an orderly transition to competitive bulk power markets." NPRM 33,048. The NPRM stated:

> "The key to competitive bulk power markets is opening up transmission services. Transmission is the vital link between sellers and buyers. To achieve the benefits of robust, competitive bulk power markets, all wholesale buyers and sellers must have equal access to the transmission grid. Otherwise, efficient trades cannot take place and ratepayers will bear unnecessary costs. Thus, market power through control of transmission is the single greatest impediment to competition. Unquestionably, this market power is still being used today, or can be used, discriminatorily to block competition."[7] *Id.*, at 33,049.

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[7] Later in the NPRM, FERC explained that §206 of the FPA authorizes FERC to remedy unduly discriminatory practices, and found: "that utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and

Rather than grounding its legal authority in Congress' more recent electricity legislation, FERC cited §§205–206 of the 1935 FPA—the provisions concerning FERC's power to remedy unduly discriminatory practices—as providing the authority for its rulemaking. See 16 U. S. C. §§824d–824e.

In 1996, after receiving comments on the NPRM, FERC issued Order No. 888. It found that electric utilities were discriminating in the "bulk power markets," in violation of §205 of the FPA, by providing either inferior access to their transmission networks or no access at all to third-party wholesalers of power. Order No. 888, at 31,682–31,684. Invoking its authority under §206, it prescribed a remedy containing three parts that are presently relevant.

First, FERC ordered "functional unbundling" of wholesale generation and transmission services. *Id.*, at 31,654. FERC defined "functional unbundling" as requiring each utility to state separate rates for its wholesale generation, transmission and ancillary services, and to take transmission of its own wholesale sales and purchases under a single general tariff applicable equally to itself and to others.

Second, FERC imposed a similar open access requirement on unbundled *retail* transmissions in interstate commerce. Although the NPRM had not envisioned applying the open access requirements to retail transmissions, but rather "would have limited eligibility to wholesale transmission customers," FERC ultimately concluded that it was "irrelevant to the Commission's jurisdiction whether the customer receiving the unbundled transmission service in interstate commerce is a wholesale or retail

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increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices." NPRM 33,052.

customer." *Id.*, at 31,689. Thus, "if a public utility voluntarily offers unbundled retail access," or if a State requires unbundled retail access, "the affected retail customer *must* obtain its unbundled transmission service under a nondiscriminatory transmission tariff on file with the Commission." *Ibid.*[8]

Third, FERC rejected a proposal that the open access requirement should apply to "the transmission component of bundled retail sales." *Id.*, at 31,699. Although FERC noted that "the unbundling of retail transmission and generation . . . would be helpful in achieving comparability," it concluded that such unbundling was not "necessary" and would raise "difficult jurisdictional issues" that could be "more appropriately considered" in other proceedings. *Ibid.*

In its analysis of the jurisdictional issues, FERC distinguished between transmissions and sales. It explained:

> "[Our statutory jurisdiction] over sales of electric energy extends only to wholesale sales. However, when a retail transaction is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier), we believe the jurisdictional lines change. In this situation, the state clearly retains jurisdiction over the sale of power. However, the unbundled transmission service involves *only* the provision of 'transmission in interstate commerce' which, under the FPA, is exclusively within the jurisdiction of the Commission. Therefore, when a bundled retail sale is unbundled and becomes separate transmission and

[8] While it concluded that "the rates, terms, and conditions of all unbundled transmission service" were subject to its jurisdiction, FERC stated that it would "give deference to state recommendations" regarding the regulation of retail transmissions "when state recommendations are consistent with our open access policies." Order No. 888, at 31,689.

> power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation." *Id.*, at 31,781.[9]

In 1997, in response to numerous petitions for rehearing and clarification, FERC issued Order No. 888–A, FERC Stats. & Regs., Regs. Preambles, July 1996–Dec. 2001, ¶31,048, p. 30,172, 62 Fed. Reg. 12274. With respect to various challenges to its jurisdiction, FERC acknowledged that it did not have the "authority to order, *sua sponte*, open access transmission services by public utilities," but explained that §206 of the FPA explicitly required it to remedy the undue discrimination that it had found. Order No. 888–A, at 30,202; see 16 U. S. C. §824e(a). FERC also rejected the argument that its failure to assert jurisdiction over bundled retail transmissions was inconsistent with

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[9] FERC also explained that it did not assert "jurisdiction to order retail transmission directly to an ultimate consumer," Order No. 888, at 31,781, and that States had "authority over the *service* of delivering electric energy to end users. . . . State regulation of most power production and virtually all distribution and consumption of electric energy is clearly distinguishable from this Commission's responsibility to ensure open and non-discriminatory interstate transmission service. Nothing adopted by the Commission today, including its interpretation of its authority over retail transmission or how the separate distribution and transmission functions and assets are discerned when retail service is unbundled, is inconsistent with traditional state regulatory authority in this area." *Id.*, at 31,782–31,783.

With respect to distinguishing "Commission-jurisdictional facilities used for transmission in interstate commerce" from "state-jurisdictional local distribution facilities," *ibid.*, FERC identified seven relevant factors, *id.*, at 31,771, 31,783–31,784. Recognizing the state interest in maintaining control of local distribution facilities, FERC further explained that, "in instances of unbundled retail wheeling that occurs as a result of a state retail access program, we will defer to recommendations by state regulatory authorities concerning where to draw the jurisdictional line under the Commission's technical test for local distribution facilities . . . ." *Id.*, at 31,784–31,785.

its assertion of jurisdiction over unbundled retail transmissions. FERC repeated its explanation that it did not believe that regulation of bundled retail transmissions (*i.e.*, the "functional unbundling" of retail transmissions) "was necessary," and again stated that such unbundling would raise serious jurisdictional questions. Order No. 888–A, at 30,225. FERC did not, however, state that it had no power to regulate the transmission component of bundled retail sales. *Id.*, at 30,225–30,226. Rather, FERC reiterated that States have jurisdiction over the retail *sale* of power, and stated that, as a result, "[o]ur assertion of jurisdiction . . . arises only if the [unbundled] retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail program." *Ibid.*

II

A number of petitions for review of Order No. 888 were consolidated for hearing in the Court of Appeals for the District of Columbia. After considering a host of objections, the Court of Appeals upheld most provisions of the order. Specifically, it affirmed FERC's jurisdictional rulings that are at issue in the present cases. 225 F. 3d, at 681.

The Court of Appeals first explained that the open access requirements in the orders—for both retail and wholesale transmissions—were "premised not on individualized findings of discrimination by specific transmission providers, but on FERC's identification of a fundamental systemic problem in the industry." *Id.*, at 683. It held that FERC's factual determinations were reasonable and that §§205 and 206 of the FPA gave the Commission authority to prescribe a market-wide remedy for a market-wide problem. Interpreting Circuit precedent—primarily cases involving the transmission of natural gas, *e.g., Asso-*

ciated Gas Distributors v. *FERC*, 824 F. 2d 981 (CADC 1987)—the Court of Appeals concluded that even though FERC's general authority to order open access was "limited," the statute made an exception "where FERC finds undue discrimination." 225 F. 3d, at 687–688.

In its discussion of "Federal Versus State Jurisdiction over Transmission Services," *id.*, at 690–696, the Court of Appeals also endorsed FERC's reasoning. The Court of Appeals first addressed the complaints of the state regulatory commissions that Order No. 888 "went too far" by going beyond the regulation of wholesale transactions and "asserting jurisdiction over unbundled retail transmissions." *Id.*, at 691, 692. The Court of Appeals concluded that the plain language of §201 of the FPA, which this Court has construed broadly,[10] supported FERC's regulation of transmissions in interstate commerce that were part of unbundled retail sales, as §201 gives FERC jurisdiction over the "transmission of electric energy in interstate commerce." 16 U. S. C. §824(b)(1). Even if the FPA were ambiguous, the Court of Appeals explained that, given the technological complexities of the national grids, it would have deferred to the Commission's interpretation of §201 "as giving it jurisdiction over both wholesale and retail transmissions." 225 F. 3d, at 694.

The Court of Appeals next addressed the complaints of transmission-dependent producers and wholesalers that Order No. 888 did not "go far enough." *Id.*, at 692. The Court of Appeals was not persuaded that FERC's assertion of jurisdiction over unbundled retail transmission required FERC to assert jurisdiction over bundled retail transmissions or to mandate unbundling of retail transmissions. *Id.*, at 694. Noting that the FPA "clearly contemplates

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[10] See *FPC* v. *Florida Power & Light Co.,* 404 U. S. 453 (1972); *Jersey Central Power & Light Co.* v. *FPC,* 319 U. S. 61 (1943).

state jurisdiction over local distribution facilities and retail sales" the Court of Appeals held:

> "A regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission services in interstate commerce or as an integral component of a retail sale. Yet FERC has jurisdiction over one, while the states have jurisdiction over the other. FERC's decision to characterize bundled transmissions as part of retail sales subject to state jurisdiction therefore represents a statutorily permissible policy choice to which we must also defer under *Chevron* [*U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 842–843 (1984)]." *Id.*, at 694–695.

Because of the importance of the proceeding, we granted both the petition of the State of New York et al. (collectively New York) questioning FERC's assertion of jurisdiction over unbundled retail transmissions and the petition of Enron Power Marketing, Inc. (Enron), questioning FERC's refusal to assert jurisdiction over bundled retail transmissions. 531 U. S. 1189 (2001). We address these two questions separately. At the outset, however, we note that no petitioner questions the validity of the order insofar as it applies to wholesale transactions: The parties dispute only the proper scope of FERC's jurisdiction over *retail* transmissions. Furthermore, we are not confronted with any factual issues. Finally, we agree with FERC that transmissions on the interconnected national grids constitute transmissions in interstate commerce. See, *e.g.*, *FPC* v. *Florida Power & Light Co.*, 404 U. S. 453, 466–467 (1972); n. 5, *supra*.

III

The first question is whether FERC exceeded its jurisdiction by including unbundled retail transmissions within the scope of its open access requirements in Order No. 888. New York argues that FERC overstepped in this regard, and that such transmissions—because they are part of retail transactions—are properly the subject of state regulation. New York insists that the jurisdictional line between the States and FERC falls between the wholesale and retail markets.

As the Court of Appeals explained, however, the landscape of the electric industry has changed since the enactment of the FPA, when the electricity universe was "neatly divided into spheres of retail versus wholesale sales." 225 F. 3d, at 691. As the Court of Appeals also explained, the plain language of the FPA readily supports FERC's claim of jurisdiction. Section 201(b) of the FPA states that FERC's jurisdiction includes "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U. S. C. §824(b). The unbundled retail transmissions targeted by FERC are indeed transmissions of "electric energy in interstate commerce," because of the nature of the national grid. There is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market, although the statute does limit FERC's *sale* jurisdiction to that at wholesale. See *ibid.*; cf. *FPC* v. *Louisiana Power & Light Co.,* 406 U. S. 621, 636 (1972) (interpreting similar provisions of the Natural Gas Act, 15 U. S. C. §717(b), to mean that FPC jurisdiction "applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale").

In the face of this clear statutory language, New York advances three arguments in support of its submission that the statute draws a bright jurisdictional line between

wholesale transactions and retail transactions. First, New York contends that the Court of Appeals applied an erroneous standard of review because it ignored the presumption against federal pre-emption of state law; second, New York claims that other statutory language and legislative history shows a congressional intent to safeguard pre-existing state regulation of the delivery of electricity to retail customers; and third, New York argues that FERC jurisdiction over retail transmissions would impede sound energy policy. These arguments are unpersuasive.

The Presumption against Pre-emption

Pre-emption of state law by federal law can raise two quite different legal questions. The Court has most often stated a "presumption against pre-emption" when a controversy concerned not the scope of the Federal Government's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority. See, *e.g.*, *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 471 U. S. 707, 715 (1985) (citing cases); see also *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996); *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 518 (1992). In such a situation, the Court "'start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" *Hillsborough County*, 471 U. S., at 715 (quoting *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977)). These are not such cases, however, because the question presented does not concern the validity of a conflicting state law or regulation.

The other context in which "pre-emption" arises concerns the rule "that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency

literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n* v. *FCC,* 476 U. S. 355, 374 (1986). This is the sort of case we confront here—defining the proper scope of the federal power. Such a case does not involve a "presumption against pre-emption," as New York argues, but rather requires us to be certain that Congress has conferred authority on the agency. As we have explained, the best way to answer such a question—*i.e.*, whether federal power may be exercised in an area of pre-existing state regulation—"is to examine the nature and scope of the authority granted by Congress to the agency." *Ibid.* In other words, we must interpret the statute to determine whether Congress has given FERC the power to act as it has, and we do so without any presumption one way or the other.

As noted above, the text of the FPA gives FERC jurisdiction over the "transmission of electric energy in interstate commerce and . . . the sale of such energy at wholesale in interstate commerce." 16 U. S. C. §824(b). The references to "transmission" in commerce and "sale" at wholesale were made part of §201 of the statute when it was enacted in 1935.[11] Subsections (c) and (d) of §201 explain, respec-

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[11] This reference is found twice in §201 of the FPA. Section 201(a), as codified in 16 U. S. C. §824(a), states in full: "It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of *the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce* is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." (Emphasis added.)

Section 201(b)(1), as codified in 16 U. S. C. §824(b)(1), states in full:

tively, the meaning of the terms "transmission" and "sale of electricity at wholesale."[12] This statutory text thus unambiguously authorizes FERC to assert jurisdiction over two separate activities—transmitting and selling. It is true that FERC's jurisdiction over the *sale* of power has been specifically confined to the wholesale market. However, FERC's jurisdiction over electricity *transmissions* contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid.

Legislative History

Attempting to discredit this straightforward analysis of

"The provisions of this subchapter shall apply to *the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce*, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." (Emphasis added.)

[12] Section 201(c) of the FPA, as codified in 16 U. S. C. §824(c), explains that "[f]or the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States." Finally, §201(d), as codified in 16 U. S. C. §824(d), states that the "term 'sale of electric energy at wholesale' when used in this subchapter, means a sale of electric energy to any person for resale."

the statutory language, New York calls our attention to numerous statements in the legislative history indicating that the 1935 Congress intended to do no more than close the "*Attleboro* gap," by providing for federal regulation of wholesale, interstate electricity transactions that the Court had held to be beyond the reach of state authority in *Attleboro*, 273 U. S., at 89. To support this argument, and to demonstrate that the 1935 Congress did not intend to supplant any traditionally state-held jurisdiction, New York points to language added to the FPA in the course of the legislative process that evidences a clear intent to preserve state jurisdiction over local facilities. For example, §201(a) provides that federal regulation is "to extend only to those matters which are not subject to regulation by the States." 16 U. S. C. §824(a). And §201(b) states that FERC has no jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U. S. C. §824(b).

It is clear that the enactment of the FPA in 1935 closed the "*Attleboro* gap" by authorizing federal regulation of interstate, wholesale sales of electricity—the precise subject matter beyond the jurisdiction of the States in *Attleboro*. And it is true that the above-quoted language from §201(a) concerning the States' reserved powers is consistent with the view that the FPA was no more than a gap-closing statute. It is, however, perfectly clear that the original FPA did a good deal more than close the gap in state power identified in *Attleboro*. The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation. See, *e.g.*, *Attleboro*, 273 U. S., at 85–86 (noting, prior to the enactment of the FPA, that States

could regulate aspects of interstate wholesale sales, as long as such regulation did not directly burden interstate commerce). More importantly, as discussed above, the FPA authorized federal regulation of interstate *transmissions* as well as of interstate wholesale sales, and such transmissions were not of concern in *Attleboro*. Thus, even if *Attleboro* catalyzed the enactment of the FPA, *Attleboro* does not define the outer limits of the statute's coverage.

Furthermore, the portion of §201(a) cited by New York concerning the preservation of existing state jurisdiction is actually consistent with Order No. 888, because unbundled interstate transmissions of electric energy have never been "subject to regulation by the States," 16 U. S. C. §824(a). Indeed, unbundled transmissions have been a recent development. As FERC explained, at the time that the FPA was enacted, transmissions were bundled with the energy itself, and electricity was delivered to both wholesale and retail customers as a complete, bundled package. Order No. 888, at 31,639. Thus, in 1935, there was neither state nor federal regulation of what did not exist.[13]

Moreover, we have described the precise reserved state powers language in §201(a) as a mere "'policy declaration'" that "'cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.'" *FPC* v. *South-*

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[13] FERC recognized this point in reaching its jurisdictional conclusion: "Rather than claiming 'new' jurisdiction, the Commission is applying the same statutory framework to a business environment in which . . . retail sales and transmission service are provided in separate transactions. . . . Because these types of products and transactions were not prevalent in the past, the jurisdictional issue before us did not arise and . . . the Commission cannot be viewed as 'disturbing' the jurisdiction of state regulators prior to and after the *Attleboro* case." Order No. 888–A, at 30,339–30,340.

ern Cal. Edison Co., 376 U. S. 205, 215 (1964) (quoting *Connecticut Light & Power Co.* v. *FPC,* 324 U. S. 515, 527 (1945)); see also *United States* v. *Public Util. Comm'n of Cal.,* 345 U. S. 295, 311 (1953). Because the FPA contains such "a clear and specific grant of jurisdiction" to FERC over interstate transmissions, as discussed above, the prefatory language cited by New York does not undermine FERC's jurisdiction.

New York is correct to point out that that the legislative history is replete with statements describing Congress' intent to preserve state jurisdiction over local facilities. The sentiment expressed in those statements is incorporated in the second sentence of §201(b) of the FPA, as codified in 16 U. S. C. §824(b), which provides:

> "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

Yet, Order No. 888 does not even arguably affect the States' jurisdiction over three of these subjects: generation facilities, transmissions in intrastate commerce, or transmissions consumed by the transmitter. Order No. 888 does discuss local distribution facilities, and New York argues that, as a result, FERC has improperly invaded the States' authority "over facilities used in local distribution," 16 U. S. C. §824(b). However, FERC has not attempted to control local distribution facilities through Order No. 888. To the contrary, FERC has made clear that it does not have jurisdiction over such facilities, Order No. 888, at

31,969, and has merely set forth a seven-factor test for identifying these facilities, without purporting to regulate them, *id.*, at 31,770–31,771.

New York also correctly states that the legislative history demonstrates Congress' interest in retaining state jurisdiction over retail sales. But again, FERC has carefully avoided assuming such jurisdiction, noting repeatedly that "the FPA does not give the Commission jurisdiction over sales of electric energy at retail." *Id.*, at 31,969. Because federal authority has been asserted only over unbundled *transmissions*, New York retains jurisdiction of the ultimate sale of the *energy*. And, as discussed below, FERC did not assert jurisdiction over bundled retail transmissions, leaving New York with control over even the transmission component of bundled retail sales.

Our evaluation of the extensive legislative history reviewed in New York's brief is affected by the importance of the changes in the electricity industry that have occurred since the FPA was enacted in 1935. No party to these cases has presented evidence that Congress foresaw the industry's transition from one of local, self-sufficient monopolies to one of nationwide competition and electricity transmission. Nor is there evidence that the 1935 Congress foresaw the possibility of unbundling electricity transmissions from sales. More importantly, there is no evidence that if Congress had foreseen the developments to which FERC has responded, Congress would have objected to FERC's interpretation of the FPA. Whatever persuasive effect legislative history may have in other contexts, here it is not particularly helpful because of the interim developments in the electric industry. Thus, we are left with the statutory text as the clearest guidance. That text unquestionably supports FERC's jurisdiction to order unbundling of wholesale transactions (which none of the parties before us questions), as well as to regulate the unbundled transmissions of electricity retailers.

Sound Energy Policy

New York argues that FERC jurisdiction over unbundled retail transmission will impede sound energy policy. Specifically, New York cites the States' interest in overseeing the maintenance of transmission lines and the siting of new lines. It is difficult for us to evaluate the force of these arguments because New York has not separately analyzed the impact of the loss of control over unbundled retail transmissions, as opposed to the loss of control over retail transmissions generally, and FERC has only regulated unbundled transactions. Moreover, FERC has recognized that the States retain significant control over local matters even when retail transmissions are unbundled. See, *e.g.*, Order No. 888, at 31,782, n. 543 ("Among other things, Congress left to the States authority to regulate generation and transmission siting"); *id.*, at 31,782, n. 544 ("This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose non-bypassable distribution or retail stranded cost charges"). We do note that the Edison Electric Institute, which is a party to these cases, and which represents that its members own approximately 70% of the transmission facilities in the country, does not endorse New York's objections to Order No. 888. And, regardless of their persuasiveness, the sort of policy arguments forwarded by New York are properly addressed to the Commission or to the Congress, not to this Court. *E.g.*, *Chemehuevi Tribe* v. *FPC*, 420 U. S. 395, 423 (1975).

IV

Objecting to FERC's order from the opposite direction, Enron argues that the FPA gives FERC the power to apply its open access remedy to *bundled* retail transmissions of electricity, and, given FERC's findings of undue discrimination, that FERC had a duty to do so. In making this argument, Enron persistently claims that FERC held that it had no jurisdiction to grant the relief that Enron seeks.[14] That assumption is incorrect: FERC chose not to assert such jurisdiction, but it did not hold itself powerless to claim jurisdiction. Indeed, FERC explicitly reserved decision on the jurisdictional issue that Enron claims FERC decided. See Order No. 888, at 31,699 (explaining that Enron's position raises "numerous difficult jurisdictional issues that we believe are more appropriately considered when the Commission reviews unbundled retail transmission tariffs that may come before us in the con-

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[14] See, *e.g.*, Brief for Petitioner in No. 00–809, p. 12 ("FERC . . . held itself powerless to address the vast majority of the problem"); *id.*, at 14 ("FERC determined, however, that it did not have authority to extend its functional unbundling remedy to transmissions for bundled retail sales"); *id.*, at 18 ("FERC's decision that it did not have jurisdiction to apply [an open-access tariff] to transmissions for bundled retail sales was contrary to law"); *id.*, at 20 ("[FERC found] no jurisdiction when the cost of the transmission is bundled with the cost of power at retail").

Surprisingly, FERC seemed to agree with Enron's characterization of its holding at some places in its own brief. *E.g.*, Brief for Respondent FERC 44–45 ("The Commission reasonably concluded that *Congress has not authorized* federal regulation of the transmission component of bundled retail sales of electric energy" (emphasis added)). Yet, FERC's brief also stated more accurately that FERC had decided not to assert jurisdiction, rather than concluded that it lacked the power to do so. *E.g.*, *id.*, at 15 ("[FERC] was not asserting jurisdiction to order utilities to unbundle their retail services . . ."); *id.*, at 49 (citing "the Commission's reasonable decision not to override the States' historical regulation of transmission that is bundled with a retail sale of energy").

text of a state retail wheeling program"). Absent Enron's flawed assumption, FERC's ruling is clearly acceptable.

As noted above, in both Order No. 888 and rehearing Order No. 888–A, FERC gave two reasons for refusing to extend its open-access remedy to bundled retail transmissions. First, FERC explained that such relief was not "necessary." Order No. 888, at 31,699; see also Order No. 888–A, at 30,225. Second, FERC noted that the regulation of bundled retail transmissions "raises numerous difficult jurisdictional issues" that did not need to be resolved in the present context. Order No. 888, at 31,699; see also Order No. 888–A, at 30,225–30,226. Both of these reasons provide valid support for FERC's decision not to regulate bundled retail transmissions.

First, with respect to FERC's determination that it was not "necessary" to include bundled retail transmissions in its remedy, it must be kept in mind exactly what it was that FERC sought to remedy in the first place: a problem with the *wholesale* power market. FERC's findings, as Enron itself recognizes, concerned electric utilities' use of their market power to "'deny their *wholesale* customers access to competitively priced electric generation,'" thereby "'deny[ing] consumers the substantial benefits of lower electricity prices.'" Brief for Petitioner in No. 00–809, pp. 12–13 (quoting NPRM 33,052) (emphasis added). The title of Order No. 888 confirms FERC's focus: "Promoting *Wholesale Competition* Through Open Access Non-Discriminatory Transmission Services . . . ." Order No. 888, at 31,632 (emphasis added). Indeed, FERC has, from the outset, identified its goal as "facilitat[ing] competitive *wholesale* electric power markets." NPRM 33,049 (emphasis added).

To remedy the wholesale discrimination it found, FERC chose to regulate all wholesale transmissions. It also regulated unbundled retail transmissions, as was within its power to do. See Part III, *supra*. However, merely

because FERC believed that those steps were appropriate to remedy discrimination in the wholesale electricity market, does not, as Enron alleges, lead to the conclusion that the regulation of *bundled* retail transmissions was "necessary" as well. Because FERC determined that the remedy it ordered constituted a sufficient response to the problems FERC had identified in the wholesale market, FERC had no §206 obligation to regulate bundled retail transmissions or to order universal unbundling.[15]

Of course, it may be true that FERC's findings concerning discrimination in the wholesale electricity market suggest that such discrimination exists in the retail electricity market as well, as Enron alleges. Were FERC to investigate this alleged discrimination and make findings concerning undue discrimination in the retail electricity market, §206 of the FPA would require FERC to provide a remedy for that discrimination. See 16 U. S. C. §824e(a) (upon a finding of undue discrimination, "the Commission shall determine the just and reasonable . . . regulation, practice, or contract . . . and shall fix the same by order"). And such a remedy could very well involve FERC's decision to regulate bundled retail transmissions—Enron's desired outcome. However, because the scope of the order presently under review did not concern discrimination in the retail market, Enron is wrong to argue that §206 requires FERC to provide a full array of retail-market remedies.

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[15] Indeed, given FERC's acknowledgement "that recovery of legitimate stranded costs is critical to the successful transition of the electric utility industry from a tightly regulated, cost-of-service utility industry to an open access, competitively priced power industry," NPRM 33,052, it was appropriate for FERC to confine the scope of its remedy to what was truly "necessary": the broader the remedy, the more complicated FERC's already challenging goal of permitting utilities to recover stranded costs.

Second, we can agree with FERC's conclusion that Enron's desired remedy "raises numerous difficult jurisdictional issues," Order No. 888, at 31,699, without deciding whether Enron's ultimate position on those issues is correct. The issues raised by New York concerning FERC's jurisdiction over unbundled retail transmissions are themselves serious. See Part III, *supra*. It is obvious that a federal order claiming jurisdiction over *all* retail transmissions would have even greater implications for the States' regulation of retail sales—a state regulatory power recognized by the same statutory provision that authorizes FERC's transmission jurisdiction. See 16 U. S. C. §824(b) (giving FERC jurisdiction over "transmission of electric energy," but recognizing state jurisdiction over "any . . . sale of electric energy" other than "sale of electric energy at wholesale"). But even if we assume, for present purposes, that Enron is *correct* in its claim that the FPA gives FERC the authority to regulate the transmission component of a bundled retail sale, we nevertheless conclude that the agency had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues. Like the Court of Appeals, we are satisfied that FERC's choice not to assert jurisdiction over bundled retail transmissions in a rulemaking proceeding focusing on the wholesale market "represents a statutorily permissible policy choice." 225 F. 3d, at 695–696.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.