NATIONAL REVIEW ONLINE WWW.NATIONALREVIEW.COM PRINT

AUGUST 25, 2014 4:00 AM

The EPA's Power Grab

The Clean Power Plan represents a federal takeover of the electricity market.

By Bill Peacock

The Environmental Protection Agency's Clean Power Plan (CPP) mandates sweeping reductions of CO2 emissions from existing electrical-generation plants. The rule will dramatically increase federal regulation of the nation's electric industry. It will impose devastating costs on working families across America — with hugely disparate impacts from one state to another. And if states comply with the CPP, the result will be a massive federal takeover of the state governments.

The assault on the dual sovereignty of the states — the federalism enshrined in our Tenth Amendment — is nothing new. Much of the battle over Obamacare turned on the attempt to force Medicaid expansion on the states, which the Supreme Court deemed a violation of the Tenth Amendment. However, with the CPP, the EPA is attempting to take federal control of states to a whole new level — perhaps hoping that the states will meekly comply rather than calling its bluff by challenging a rule based on very questionable statutory authority.

Writing in *The Atlantic*, Mario Loyola and Richard Epstein describe the federal takeover of the states through "cooperative federalism" programs as an effort to "turn states into mere field offices of the federal government." Already today, they point out,

> federal officials exert enormous influence over state budgets and state regulators, often behind the scenes. The new federalism replaces the "laboratories of democracy" with heavy-handed, once-size-fits-all solutions. Uniformity wins but diversity loses, along with innovation, local choice, and the Constitution's necessary limits on government power.

One such scheme is the Clean Air Act, which "allows the states to issue federal permits — but only under federally approved state implementation plans." The states can't be forced to take on this role, but Loyola and Epstein note that the EPA coerces

states to do so by telling them, “Implement our regulations for us, or we’ll do it ourselves, and your constituents will be sorry.” This is the hammer behind the CPP.

Much of the management of the electricity market in the United States is under the purview of the states. Either individually or collectively, states manage the market with the goal that citizens get a generally reliable — though not always affordable — supply of electricity. Public-utility commissions and, more recently, regional transmission organizations have been the means by which this is accomplished. States set retail prices, implement green-energy policies, and manage capacity as best they can to accomplish their policy goals.

Of course, the federal government managed to force its way into the mix. Under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) has used the interstate transmission of electricity to claim jurisdiction over wholesale operations of this major sector of the U.S. economy. So while states generally have a free hand in the retail market, management of the wholesale market is a mishmash of state and federal oversight. In recent years, the Obama administration has tried to extend FERC’s reach under the guise of maintaining reliability and promoting renewable energy. But in *Electric Power Supply Association v. FERC*, the D.C. Circuit Court of Appeals reminded the administration that there are limits on what it can do under the law.

The states’ lead role in electricity was clearly on display in the 1990s when many of them tried to introduce competition into the electricity market. At the time, utilities’ revenue usually came through rates set by regulators that reimbursed them for whatever approved expenses they had incurred — plus a reasonable profit. Even liberals at the time realized that this inefficient rate-of-return regulation couldn’t turn the cheap natural gas available then into cheap electricity. Many states ultimately failed, partly because, like California, they just couldn’t bring themselves to actually allow competition. But in many cases, the problem was closely linked to FERC’s regulation of the wholesale market.

Only Texas, which uniquely was able to regulate the entire market on its own, fully succeeded in creating a competitive electricity market. Over the years Texas had largely freed itself from significant FERC regulation by carefully isolating its electrical grid from the rest of the country, thereby eliminating the basis for federal “interstate commerce” jurisdiction. When it adopted its competitive reforms, the results were astounding. Texas now has the most competitive, successful electricity market in the U.S., if not the world.

These reforms have allowed Texas to keep up with a massive increase in demand for electricity. Since competition started in 2002, demand for electricity in Texas has increased 80 percent faster than in the rest of the country. But Texas electricity prices

have actually decreased by 14 percent in real dollars and by 57 percent relative to national prices.

This tremendous benefit to Texas consumers has been accomplished solely at the risk of investors and generators, who were allowed to invest more than $36 billion in new generation capacity to meet this demand. In every other state, much of the risk of investing in new generation is placed on consumers — they pay for the generation whether they need it or not.

This success was possible only because Texas's wholesale electricity market is not subject to FERC oversight. But if the CPP survives the many legal challenges it will face, Texas's electricity market will not be independent for long. At a workshop conducted by the Public Utility Commission of Texas on July 15, I joined a long list of witnesses in testifying that the CPP will result in the federal takeover of the Texas electricity market — and that of every other state as well.

The Supreme Court has repeatedly insisted that the federal government cannot require the states to regulate. Schemes such as the Clean Air Act therefore give states a "choice" between implementing EPA programs, through a State Implementation Plan (SIP), or letting EPA do the implementing itself, through a Federal Implementation Plan (FIP). The choice is coercive, because in a real "contractual" or "cooperative" setting among equals, you can't be forced to choose the lesser of two evils. But the Court has looked the other way, on the theory that so long as an FIP doesn't dragoon state agencies into federal service, there is no commandeering problem.

But there is a commandeering problem with the CPP. In *New York v. United States* (1992), the Supreme Court struck down a law requiring states to "take title" to low-level nuclear waste within their borders or dispose of it according to federal instructions. The Court ruled that states cannot be forced to choose between two schemes neither of which the federal government would be able to impose on them as a free-standing requirement. The CPP has a lot in common with the law that was struck down in *New York*, because whatever the state chooses to do, its agencies will be required to regulate in accordance with federal instructions.

If states decide to comply with the CPP by developing an SIP, they would have to restructure the jurisdictional relationships of their environmental and electrical regulating entities and make substantive changes to their electricity markets. Environmental regulators would become utility regulators, and vice versa. Renewable-energy and energy-efficiency mandates would have to be greatly expanded. The dispatch of electricity would be required to take into account environmental considerations — perhaps through the imposition of a carbon tax. Many of these changes would have to be made in the retail market, despite the D.C. Circuit Court's finding that Congress has specifically confined federal "jurisdiction over the sale of electricity . . . to the wholesale market." The states can't be forced to do this in an SIP.

If states choose not to participate in the CPP, the EPA will implement it through an FIP. But since the federal government can't regulate the retail market, the EPA would have to require state regulators to implement the federal regulations — again stepping beyond the authority that Congress has granted to FERC. In either case, the states really have no choices at all — either by SIP or by FIP, the states are forced to implement the provisions of the CPP that neither FERC nor the EPA has the authority to demand individually.

It is quite likely that the EPA knows it has overstepped its bounds. But the EPA is taking this step because it knows that it has little hope of achieving its desired CO2-emission-reduction goals if it is forced to regulate on its own the only entities it actually has authority to regulate — the generators. So the EPA's greatest hope is that the states will voluntarily turn their utility regulators into an extension of the federal government, fearing that if they fail to comply, the EPA would turn up the heat on the industry in a recalcitrant state by making impossible demands, threatening huge fines, and essentially shutting down the permitting of existing generation. Either states comply or the feds may turn out the lights.

While the potential of rolling blackouts is not an attractive option, the alternative is to take one more step down the road to a unified national bureaucracy. It might not be too long until state legislatures are no longer needed, except perhaps to tax their citizens to pay the state agency staff that will then regulate the economy under the direction of the federal government.

The Founders reserved to the states — and to the people — those powers not explicitly delegated to the federal government in order to protect the people from tyranny. While the CPP is purportedly about saving the world from the horrors of CO2 emissions, it will accomplish virtually nothing in that regard. Though the stakes are high, the states should force the EPA to show its hand in order to halt the creeping federal takeover of state governments, which continues to encroach on one of the most important protections in our Constitution — federalism, and the liberties it was meant to guarantee.

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