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NEWS & ANALYSIS

An Analysis of the Factors That Courts Use to Determine Whether a Regulation Is Voluntary; A Threshold Determination Courts Make Before Granting Judicial Review of an Order

by Jamie Tosches

In 1999, the Federal Energy Regulatory Commission (FERC) issued Order 2000.¹ Order 2000 gave public utilities the option to voluntarily participate in a regional transmission organization (RTO).² A public utility participating in an RTO must give the RTO the right to manage its transmission system.³

Public utilities did not want to comply with Order 2000.⁴ Refusal to join an RTO, however, would potentially cost the public utilities economic benefits available to RTO participants giving.⁵ Caught between a rock and a hard place, the Public Utility District No. 1 (PUD No. 1) of Snohomish County, Washington, challenged FERC's authority to issue Order 2000 in *Public Utility District No. 1 of Snohomish County v. Federal Energy Regulatory Commission*.⁶ The court, however, did not reach the merits of the case holding that PUD No. 1 did not have standing to challenge a voluntary order.⁷

This Article analyzes the *Snohomish County* decision to provide an understanding to determine whether a rule is involuntary, why it is important to make the determination, and why the decision gives administrative agencies more power to regulate. Part I of this Article provides background information on RTOs, transmission systems, and Order 2000, to facilitate an understanding of the *Snohomish County* ruling. Part II reviews the *Snohomish County* deci-

sion in detail. Finally, Part III analyzes the *Snohomish County* decision against selected Tenth Amendment rules of law, to identify factors that determine whether a regulation is involuntary. Finally, the Article explains why the *Snohomish County* decision gives the administrative agency the incentive to issue voluntary rules to insulate itself from judicial review and why this results in more power to the administrative agency.

I. Background

A. The Transmission System Dilemma

A public utility loads the power that it produces onto a transmission system, a network of high-voltage power lines.⁸ The transmission system transports the power in bulk amounts from the public utility to the distribution system.⁹ The distribution system, in turn, distributes power to consumers.¹⁰

Historically, each public utility held a regional monopoly and operated without competition within that region.¹¹ Each public utility owned and maintained a transmission system to transport the electricity that it produced to distributions systems within its region.¹² Each transmission system held a connection to transmission systems in neighboring regions.¹³ Interconnections encouraged the health of the transmission systems.¹⁴ Moreover, the public utility did not transport its electricity from one transmission system to another.¹⁵

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1. Order 2000 Final Rule, 65 Fed. Reg. 810 (Dec. 20, 2000) (to be codified at 18 C.F.R. pt. 35.34).

2. *Id.*; see also *Public Util. Dist. No. 1 of Snohomish County v. Federal Energy Regulatory Comm'n*, 272 F.3d 607, 614-17 (D.C. Cir. 2001).

3. See generally 65 Fed. Reg. at 810-11, 821, 823.

4. *Snohomish County*, 272 F.3d at 616.

5. *Id.* at 614-15.

6. 272 F.3d 607, 614 (D.C. Cir. 2001).

7. *Id.* at 616-17; see also *id.* at 613-14 (explaining that in order to obtain review of Order 2000, the petitioner must show they are aggrieved under the Federal Power Act (FPA), 16 U.S.C. §8251(b), and are injury-in-fact).

8. STEVEN FERREY, *THE NEW RULES: A GUIDE TO ELECTRIC MARKET REGULATION* 423 (Penn Well Corp. 2000) (defining transmission).

9. *Id.*

10. *Id.* at 404 (defining distribution systems).

11. Order 888, 60 Fed. Reg. 17662, 17668 (proposed Mar. 29, 1995) (to be codified at 18 C.F.R. pt. 35.15, 35.26-35.29) (noting that most utilities "entered into long-term contracts, . . . bundled sales of generation and transmission to municipal, cooperative, and other investor-owned utilities connected to each utility's transmission system").

12. Notice of Proposed Rulemaking, 64 Fed. Reg. 31390-94 (proposed June 10, 1999) (to be codified at 18 C.F.R. pt. 35).

13. *Id.*

14. *Id.*

15. *Id.*

A series of technological changes and regulatory developments that began in the 1960s, and continued through the 1980s, promoted competition by encouraging investors to build new power plants.¹⁶ The new power plants competed with public utilities by undercutting prices and selling cheaper power, the first time public utilities experienced competition.¹⁷ Without its transmission system, the new power plant had to transport electricity to consumers via the public utility-owned transmission system.¹⁸

In an effort to reduce or stop competition, public utilities used their market power to discriminate against the new power plants.¹⁹ They engaged in two types of anticompetitive behavior.²⁰ By resisting or refusing to allow new power plants access to their transmission systems, the public utilities made it difficult or even impossible for the new power plants to transport electricity to consumers.²¹ Additionally, the public utilities charged the new power plants inflated rates for access to their transmission systems, making it more expensive for the new power plants to transport power to consumers.²² Consumers consequently paid more than the fair market price for electricity because utilities drove up the price of electricity by overcharging for transmission access.²³ Secondly, the new power plants' use of the transmission systems prompted by regulatory changes put additional stress on the transmission systems.²⁴ Increased stress heightened the possibility that the transmission systems would eventually break down, become unreliable, and fail, causing blackouts.²⁵

B. Order 2000 Encourages Public Utilities to Participate in RTOs

FERC promulgated Order 2000 to encourage each public utility to participate in an RTO.²⁶ An RTO is "[a] voluntary organization of transmission owners [including public utilities], users and other entities interested in coordinating transmission planning, expansion, operation and use on a regional and interregional basis."²⁷ An RTO must meet four minimum characteristics and essentially grants manage-

ment to the RTO.²⁸ A public utility, therefore, cannot discriminate against new power plants or engage in other anticompetitive behaviors because it does not have the power to do so.²⁹ Additionally, RTOs coordinated management approach reduces stress on the transmission systems because it maximizes the efficiency and reliability of transmission systems.³⁰

The Order 2000 states that it requires merely the voluntary participation of public utilities in an RTO. However, it mandates that they consider joining an RTO by filing reasons for nonparticipation.³¹ Once the RTO gains FERC's approval, the RTO and its participants become eligible to receive economic incentives.³² FERC admitted that it might deny economic incentives to those public utilities that do not participate in an RTO.³³ Therefore, the economic incentives offered to RTO participants could encourage the public utilities to join an RTO on less than voluntary terms.³⁴

Incentives include preferential rate treatment.³⁵ Preferential rate treatment allows the RTO to recover capital investment costs more quickly.³⁶ A second incentive to join an RTO is the increased likelihood that FERC will approve a merger or corporate restructuring between a transmission owner such as a public utility and another entity.³⁷ Therefore, under some circumstances, FERC may condition merger approval for a public utility looking to merge with another company only if the public utility joins an RTO.³⁸

C. Procedural History: PUD No. 1 Objects to Order 2000

During Order 2000's notice-and-comment period, 250 commenters, including PUD No. 1, raised a variety of legal, policy, and technical issues.³⁹ FERC responded, and issued

16. 60 Fed. Reg. at 17662, 17668-70.

17. *Id.* at 17670.

18. *Id.* at 17662-69) (discussing discriminatory practices utilities employed to gain an advantageous market position).

19. *Id.* at 17671.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Cf.* Final Rule, 61 Fed. Reg. 21540, 21546 (noting that utilities paid less for transmission than pure generation facilities they overcharged).

24. 64 Fed. Reg. at 31390, 31393-94.

25. *Id.* (explaining that restructuring of the electric market created new stresses on transmission systems). Also noting transmission systems were used to transport electric energy over larger geographical areas caused stress on the transmission systems or more commonly referred to as the grid. *Id.* at 31393-94.

26. 65 Fed. Reg. at 810; Regional Transmission Organizations, 18 C.F.R. §35.34 (2000). Order 2000 applies to all public utilities that own, operate, or control facilities for the transmission of electric energy in interstate commerce, that are subject to Order 888, and requires them to make certain filings by a certain date with respect to formation and participating in an RTO. *Id.* §35.34(c).

27. FERREY, *supra* note 8 (defining regional transmission group).

28. 18 C.F.R. §35.34(j) (listing and explaining the four minimum characteristics, which include independence, scope and regional configuration, operational authority, and short-term reliability). Order 2000 also sets RTO functions including tariff administration and design, congestion management, parallel path flow, ancillary services, OASIS and total transmission capability (TTC) and available transmission capability, market monitoring planning and expansion and interregional coordination. *See* 65 Fed. Reg. at 811 (listing minimum functions). Order 2000 also provides a FERC-sponsored and FERC-supported collaborative process to work toward voluntary development of RTOs' guidance of flexible transmission rates. *Id.* at 812.

29. 65 Fed. Reg. at 825-29 (explaining comments of individual electric market participants on RTO benefits and noting a whole host of benefits exist).

30. *Id.* at 825-29 (explaining comments of individual electric market participants on RTO benefits and noting a whole host of benefits exist); *see also supra* note 22 and accompanying text.

31. *Snohomish County*, 272 F.3d at 614 (paraphrasing the notice of proposed rulemaking for Order 2000 in which FERC stated the order is voluntary); *see also* 64 Fed. Reg. at 31034 (noting that FERC is "not adopting as a generic policy that RTO participation is required").

32. *Snohomish County*, 272 F.3d at 614-17.

33. *Id.* at 616.

34. *Cf. id.*

35. *Id.* at 614-16; *see also* 18 CFR 35.34(e).

36. *Id.* at 614-16.

37. *Id.* at 614.

38. *Id.* at 616.

39. 65 Fed. Reg. at 810-11, 821, 823 (PUD No. 1 arguing that (1) it is not clear that benefits outweigh the costs of certain RTO proposals (and requested that FERC not impose such an RTO in their region), (2) charging higher rates for certain transmission transactions is unfair, (3) Order 2000 violates FERC's duty to eliminate discriminatory rates, (4) "RTO's would penalize . . . utilities who have no practicable

Order 2000.⁴⁰ Subsequently, 38 petitioners, again including PUD No. 1, filed a request for a rehearing on the issues that FERC did not address.⁴¹ Specifically, PUD No. 1 sought a rehearing on FERC's alleged unwillingness to look at the costs and benefits of RTO formation, but FERC denied PUD No. 1's request by failing to respond.⁴²

II. Facts

A. Snohomish County Case and the Standing Issue

After FERC denied PUD No. 1's request for a rehearing, PUD No. 1 sought judicial review of Order 2000.⁴³ Relying on the Federal Power Act (FPA), PUD No. 1 alleged that FERC acted outside its authority when it promulgated Order 2000 because the order is arbitrary and capricious.⁴⁴ Also, PUD No. 1 challenged FERC's authority to promulgate the order because the order illegally ceded to the public utilities the ability to manage their transmission systems.⁴⁵

Further, the FPA requires PUD No. 1 to show that it is aggrieved by the terms of Order 2000 to obtain standing to challenge the order in court.⁴⁶ The petitioner, however, is only an aggrieved party under the FPA if the petitioner demonstrates that it suffered an injury-in-fact, a requirement of Article III standing.⁴⁷ FERC alleged that the court did not have jurisdiction to hear PUD No. 1's claims because Order

2000 is a voluntary regulation that has not injured nor aggrieved PUD No. 1.⁴⁸

In response, the court stated that if Order 2000 is a voluntary regulation, then PUD No. 1 could not be aggrieved because it is not injured-in-fact.⁴⁹ Therefore, the court explained that it had to answer the threshold inquiry: is Order 2000 voluntary? If not, then petitioners do not have standing.⁵⁰ Inevitably, the court held that the order was voluntary for the reasons explained below.⁵¹

B. PUD No. 1 Argues That Order 2000 Is Not a Voluntary Regulation

In *Snohomish County*, PUD No. 1 strongly objected to FERC's evasion of "all responsibility for its action by declaring its entire program [established by Order 2000] 'voluntary.'"⁵² In total, PUD No. 1 made three arguments as to why the order is involuntary.⁵³ The court, however, rejected them all holding that the order is voluntary.⁵⁴

First, PUD No. 1 argued that Order 2000 is involuntary because it mandates that every public utility either (1) submit a proposal to form or participate in an RTO or alternatively, (2) make a filing to justify nonparticipation in an RTO.⁵⁵ The court rejected its argument holding that mandatory filing requirements do not make a regulation involuntary.⁵⁶ The court reasoned that the order's voluntary nature lies within the existence of the alternative, albeit mandatory, filing, which allows a public utility to opt out of participating in an RTO.⁵⁷ The court noted that both the Preamble and Order 2000 stated the requirement that public utilities *merely consider* joining an RTO.⁵⁸

In its second argument, PUD No. 1 alleged that the order's voluntary nature is a "mirage" because incentives force RTO participation.⁵⁹ The order's incentives, PUD No. 1 contended, are so damaging to public utilities operating outside an RTO that utilities must participate in an RTO.⁶⁰ To support this argument, PUD No. 1 relied on *Associated Gas Distributors v. Federal Energy Regulatory Commission*.⁶¹

In *Associated Gas*, the court ruled that FERC had issued an involuntary order with respect to gas pipelines even

choice about whether to participate in the RTO," and (5) "RTO formation may be impractical without public power participation . . ."); *but see id.* at 859, 952 (documenting PUD No. 1's support of the order's collaborative approach and an open negotiation process).

40. *See generally id.*

41. *See* 65 Fed. Reg. 12088, 12089 (Mar. 8, 2001).

42. *Id.*

43. *Snohomish County*, 272 F.3d at 612. The FPA provides that

[a]ny party to a proceeding under this Act . . . aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States . . . for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing

16 U.S.C. §8251(b).

44. *Id.* at 612, 614.

45. *Id.* at 612-13, alleging that

(1) the Commission lacked the statutory authority to mandate a division of rate filing responsibilities in which transmission owners must involuntarily cede their alleged statutory right to file rates, (2) the Order's division of rate filing responsibilities is arbitrary and capricious both because the division was unjustified and because it would hinder a transmission system owner's ability to recover costs, (3) Order 2000 improperly limited transmission owner's right to contract to make a unilateral rate modifications, (4) the Order's open architecture requirement is arbitrary and capricious, and (5) the Order's transmission expansion requirement impermissibly abdicated the FERC's authority to approve interconnections and expansions.

46. *Supra* note 44 and accompanying text.

47. *Snohomish County*, 272 F.3d at 613-14. The court cited *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 22 ELR 20913 (1992) noting that it set out the three requirements for constitutional standing; injury-in-fact, a causal connection between injury and the conduct complained of, and redressability).

48. *Snohomish County*, 272 F.3d at 614.

49. *Id.* at 613.

50. *Id.* (noting that an involuntary regulatory is required for a showing of an immediate and concrete injury, a requirement for constitutional standing).

51. *Id.*

52. *Id.* at 613-14.

53. *Id.*

54. *Id.*

55. *Id.* at 614.

56. *Id.*

57. *Id.* (discussing Order 2000 choice between an option to file a proposal for participation in an RTO or to file an alternative filing notifying FERC of its nonparticipation).

58. *Id.* at 614 (noting that the text of the Preamble of the Notice of Proposed Rulemaking does not support PUD No. 1's allegations that Order 2000 is involuntary); *see also* 64 Fed. Reg. at 31390-91.

59. *Snohomish County*, 272 F.3d at 614-15.

60. *Id.* (referring to innovative rate treatment, and FERC's ability to require membership in an RTO as a condition for approving mergers and other corporate restructurings as incentives).

61. 824 F.2d 981, 1024 (D.C. Cir. 1987).

though FERC insisted the order was voluntary.⁶² The order gave gas pipeline owners the option to voluntarily choose to operate under certain contracts, but the court ruled that the order was involuntary.⁶³ It reasoned that the gas pipelines faced bankruptcy regardless of whether or not they chose to operate under the order and that the impacts of the order were inescapable making the order involuntary.⁶⁴

The court in *Snohomish County* distinguished *Associated Gas*. The court noted that under the *Associated Gas* standard, PUD No. 1 would have to show that Order 2000 substantially harmed all public utilities, i.e., caused bankruptcy.⁶⁵ PUD No. 1, however, failed to make such a showing.⁶⁶ The court reasoned that participation in an RTO may make FERC more likely to grant a public utility merger approval or preferential rate incentives, but that merely sways a public utilities decision to participate in RTOs, and does not cause all public utilities substantial harm.⁶⁷ The court suggested, in dicta, however, that if all mergers and market-based rate incentives had the prerequisite of joining an RTO, then the order may be involuntary because it would have a substantial impact on all public utilities.⁶⁸

Finally, PUD No. 1 offered a third, lesser argument.⁶⁹ PUD No. 1 alleged that public utilities and all other transmission owners that joined an organization similar to an RTO before the issuance of Order 2000 must participate in an RTO in order to reorganize the organization.⁷⁰ Again, the court stated that the text of the order states that any transmission owner can opt not to participate in an RTO; therefore, the order is involuntary.⁷¹

III. Analysis

A. The Tenth Amendment Cases and Snohomish County Employ Similar Goals and Ask Similar Questions

The Tenth Amendment prohibits the U.S. Congress from passing a statute that encroaches on state sovereignty.⁷²

62. *Id.* at 1013, 1033. FERC argued that Order 436 provided gas pipelines the option to voluntarily operate under Order 436. *Id.* Gas pipelines could “voluntarily” offer a supply of gas under a contract that provides a unilateral right to the customer to alter it. *Id.* The court held that Order 436 was not voluntary because it presented a risk to gas pipelines, that they would become bankrupt, regardless of whether or not they operated under Order 436. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 616.

66. *Id.*

67. *Id.* The court also stated that FERC should decide on a case-by-case basis whether or not to condition the public utilities receipt of market-based rates and market-based mergers on RTO participation. *Id.* at 615-16.

68. *Id.* at 616.

69. *Id.* at 614.

70. *Id.* (referring to independent system operators (ISOs)). An ISO is “[a] neutral operator of transmission and distribution system” that developed prior to RTOs. FERREY, *supra* note 8, at 49, 50, 409 (defining transmission).

71. *Snohomish County*, 272 F.3d at 614 (stating that FERC did not make a generic finding that ISOs must participate in RTOs to change its structure).

72. U.S. CONST. AMEND. X. The Tenth Amendment of the U.S. Constitution states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” See also *Hodel v. Virginia Sur-*

States must have the freedom to consider and choose policies, statutes, and regulation to function as states.⁷³ A federal statute may give states the freedom to adopt a federally favored statutory structure or regulatory option but cannot mandate them to adopt it.⁷⁴

Although the Tenth Amendment precedent sets rules that protect state sovereignty, the rules apply to *Snohomish County* or similar cases in that it determines whether a regulation is voluntary. Similar to other Tenth Amendment cases that inquire whether a federal statute requires state participation in a statutory or regulatory program, *Snohomish County* asked whether Order 2000 mandated that the public utility participate in an RTO. Otherwise stated, the fundamental question asked in either case is whether the regulation or statute is voluntary.

In either case, the goal is to protect the regulated entity from an action by a federal governmental body. The Tenth Amendment protects states from a federal statute that illegally usurps the states’ constitutionally granted power whereas the FPA, under which the petitioners in *Snohomish County* sought review of the order, protects the energy market participants from arbitrary and capricious regulations issued by FERC.

B. Tenth Amendment Case Law Sets Out Rules to Determine Whether a Regulation Is Voluntary

The U.S. Supreme Court, in a number of Tenth Amendment cases, provided three rules of law on whether a federal statute or a regulation is voluntary.⁷⁵ For the purposes of this Article, the rules are called the Consideration Only Rule, the Incentives Rule, and the Options Rule. *Snohomish County* applied the Consideration Only Rule and the Incentives Rule, but not the Options Rule.

According to Tenth Amendment case law precedent, a federal statute is involuntary if it requires the state to consider adopting a statutory structure or regulatory option even if it imposes procedural requirements on how the state should consider the program.⁷⁶ This is called the Consider-

face Mining & Reclamation Ass’n, 452 U.S. 264, 288, 11 ELR 20569 (1981).

73. Federal Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 761, 12 ELR 20896 (1982) (commenting on the principles of federalism).

74. *Hodel*, 452 U.S. at 288. In *Hodel*, the Court upheld the Surface Mining Control and Reclamation Act of 1977. *Id.* It did not “commandeer” the states’ legislative process in any way or directly compel them to act but offered them the option to choose to regulate; the states could refrain from regulating mining, and leave the regulating to the federal government. See *New York v. United States*, 505 U.S. 144, 175-76 (1992) (holding that Congress cannot pass a statute that requires a state to choose between an option to institute legislation to dispose enacted by Congress or an acceptance of liability for waste because these options would be involuntary regulations on their own) *Mississippi*, 456 U.S. at 761-65 (holding that Congress may pass a statute that commands the state to consider adoption of a certain regulatory program as a requirement to regulate in an otherwise preemptable field).

75. *New York*, 505 U.S. at 171-74; *Mississippi*, 456 U.S. at 742.

76. See generally *Mississippi*, 456 U.S. at 742. The Mississippi Public Service Commission challenged provisions of a federal energy act that said state *must* consider adoption of specified rate-making standards, and need not adopt them as a requirement to gain approval to promulgate its own rate-making standards in a preemptable field. *Id.* There was no Tenth Amendment violation because the statute only required consideration of the program, even though it provided procedures the state must follow to consider the program. *Id.*

ation Only Rule. In *Snohomish County*, the court applied the Consideration Only Rule when it rejected PUD No. 1's first argument. Specifically, PUD No. 1's first argument asserted that Order 2000 was involuntary because it required PUD No. 1 to either join an RTO or file reasons why it will not participate in an RTO.⁷⁷ The court employed the Consideration Only Rule when it replied that the rule merely required PUD No. 1 to consider joining an RTO and that a regulation that requires consideration only is still a voluntary rule.

Additionally, under the Tenth Amendment, Congress may encourage states to adopt a statutory structure or regulatory option by holding out incentives to the states.⁷⁸ This is called the Incentives Rule. The type of incentives that a state may hold out to states varies in degree and type.⁷⁹ A statute that offers state monetary incentives like grants-in-aid to a state that adopts a statutory structure or regulatory option is voluntary.⁸⁰ Further, incentives that are so strong that any state would probably have no choice but to comply with the statute to gain the incentives is still a voluntary statute.⁸¹ Therefore, a federal statute is still voluntary even if it provides strong incentives that have a profound influence on the states choices in that the state effectively only has one choice and that is to comply with the statute.⁸² *Snohomish County* applied the Incentives Rule in responding to PUD No. 1's second argument that the incentives made the rule involuntary.⁸³ In applying the Incentives Rule, the court reasoned that Order 2000 was involuntary despite the fact that the order contained incentives that would prompt or encourage PUD No. 1 to participate in an RTO.

Finally, a third rule exists which the *Snohomish County* court did not employ the rule because the facts of the case did not trigger its application. The third rule states that a federal statute is involuntary if it provides the state the option to adopt one of two statutory structures or regulatory options.⁸⁴ This rule is called the Options Rule. Just because the statute provides a choice between two involuntary options does not make it voluntary.

C. Implications From *Snohomish County* for FERC and Other Administrative Agencies

The *Snohomish County* court's application of the Incentives rule provides substantial implications for the future by

77. *Supra* notes 55-58 and accompanying text.

78. *See, e.g., New York*, 505 U.S. at 171-74 (Congress may allow states to discriminate in interstate commerce and provide monetary incentives in exchange for the adoption of federally drafted hazardous waste disposal policies and regulations in a preemptable field); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (monetary incentives); *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 142-44 (1947) (same).

79. *Id.*

80. *South Dakota*, 483 U.S. at 206 (noting that Congress may condition federal highway funds on states adoption of Congress' choice of minimum drinking age).

81. *Mississippi*, 456 U.S. at 767. The dissent pointed out that the Court's choice is an absurdity, for if its analysis is sound the Constitution no longer limits federal regulation of state governments. *Id.* at 779.

82. *Id.*

83. *Supra* notes 59-68 and accompanying text.

84. *See supra* note 44 and accompanying text. When Congress put forth an incentive that provided that a state must either (1) institute legislation enacted by Congress or (2) accept ownership of waste or liability

deeming a regulation issued by FERC that is, in effect, involuntary by its incentives, and unchallengeable.⁸⁵ The decision therefore creates an incentive for FERC to pass voluntary regulations that lure energy market participants to comply with the rule because the decision guarantees that FERC will not have to endure judicial review of these voluntary regulations. Therefore, FERC will have more power to regulate because it can essentially pass regulations beyond the purview of the courts. Other administrative agencies may also take advantage of this immunity from judicial review by passing voluntary regulations.

Such immunity may become especially advantageous to FERC or other administrative agencies when regulated entities do not agree with a regulation because it will foreclose their opportunity to obtain judicial review of the regulation. Another offshoot is that if electric market participants or other entities regulated by an administrative agency do not have judicial review available, then they will be more willing to work with, or even more determined to lobby, FERC or the applicable agency at the administrative level knowing that it is their only chance to influence a regulation.

Yet FERC and other administrative agencies will have incentives available to attach to a voluntary regulation in a limited number of circumstances. A voluntary regulation will likely be ineffective without such incentives; therefore, voluntary regulations are not always a practical option for FERC or any other administrative agency. As a result, the frequency that administrative agencies use voluntary regulations that are insulated from judicial review may be limited.

Even so, the *Snohomish County* ruling illustrates that an occasional application of the Incentives Rule can have significant impacts in the electric market or any market regulated by an administrative agency. To the electric market, it means that the public utilities have no judicial review of Order 2000. Order 2000, however, provides the incentives that will result and has already resulted in the formation of RTOs so that it serves as a vehicle to reshape management of the nation's transmission system. This is quite a profound impact on public utilities that do not have judicial review and does appear to be some type of injury.

IV. Conclusion

Tenth Amendment case law and the *Snohomish County* decision employ the same factors to determine whether a statute or regulation is voluntary. If a regulation is voluntary, even if it contains strong incentives that have an involuntary effect, the court will not have jurisdiction to review the regulation because a voluntary regulation cannot cause injury-in-fact. FERC and other administrative agencies have an incentive to issue voluntary regulations in the future that contain strong incentives to insulate itself from judicial review of the regulation. Voluntary regulations coupled with incentives act together more like a secret weapon than a widely used tool.

ity for it Congress provided an incentive that prompted action on the states part regardless of what option the state took and such action is therefore regulation of the state.

85. *See supra* note 55 and accompanying text.