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 THOMAS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, concurring in part and dissenting in part.

Today the Court finds that the Federal Energy Regulatory Commission (FERC or Commission) properly construed its statutory authority when it determined that: (1) it may require a utility that "unbundles" the cost of transmission from the cost of electric energy to transmit competitors' electricity over its lines on the same terms that the utility applies to its own energy transmissions; and (2) it need not impose that requirement on utilities that continue to offer only "bundled" retail sales. Under the Federal Power Act (FPA), 16 U. S. C. §824 *et seq*., FERC has jurisdiction over all interstate transmission, regardless of the type of transaction with which it is associated, and I concur in the Court's holding with respect to transmission used for unbundled retail sales and join

Parts II and III of its opinion. I dissent, however, from the Court's resolution of the question concerning transmission used for bundled retail sales because I believe that the Court fails to properly assess both the Commission's jurisdictional analysis and its justification for excluding bundled retail transmission from the Open Access Transmission Tariff (OATT). FERC's explanations are inadequate and do not warrant our deference.

I

While the Court does not foreclose the possibility that FERC's jurisdiction extends to transmission associated with bundled retail sales, the Court defers to FERC's decision not to apply the OATT to such transmission on the ground that the Commission made a permissible policy choice, *ante*, at 26 (quoting *Transmission Access Policy Study Group* v. *FERC*, 225 F. 3d 667, 695–696 (CADC 2000)), and by reference to FERC's assertions that: (1) such relief was not "necessary," *ante* at 24 (citing Order No. 888, FERC Stats. & Regs., Regs. Preambles, Jan. 1991–June 1996, ¶31,036, p. 31,699; Order No. 888–A, FERC Stats. & Regs., Regs. Preambles, July 1996–Dec. 2001, ¶31,048, p. 30,225); and (2) "the regulation of bundled retail transmissions 'raises numerous difficult jurisdictional issues' that did not need to be resolved in the present context.'" *Ante*, at 24 (citing Order No. 888, at 31,699; Order No. 888–A, at 30,225–30,226). The Court concludes that both reasons "provide valid support for FERC's decision not to regulate bundled retail transmissions." *Ante*, at 24.[1]

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[1] I note that the "reasons" upon which the Court relies were made only in the specific context of FERC's explanation of its decision not to unbundle retail transmission and distribution. Order No. 888, at 31,698–31,699. The comments were not given as a general explanation for FERC's decision not to apply the OATT to transmission associated

I disagree. The Court defers to the Court of Appeals' characterization of FERC's decision as a "policy choice," rather than to any such characterization made by FERC itself.[2] But a *post-hoc* rationalization offered by the Court of Appeals is an insufficient basis for deference. "[A]n agency's action must be upheld, if at all, *on the basis articulated by the agency itself*." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 50 (1983) (emphasis added).

Therefore, in order to properly assess FERC's decision not to apply the OATT to transmission connected to bundled retail sales, we must carefully evaluate the two justifications that the Court points to and relies on. Neither is sufficient. As I discuss below, FERC failed to explain why regulating such transmission is not "necessary," and FERC's inconclusive jurisdictional analysis does not provide a sound basis for our deference.

A

I cannot support the Court's reliance on FERC's explanation that "[a]lthough the unbundling of retail transmission and generation, as well as wholesale transmission and generation, would be helpful in achieving comparability, we do not believe it is necessary." Order No. 888, at 31,699. Aside from this conclusory statement, FERC

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with bundled retail sales, and FERC did not rely on the second explanation in Order No. 888–A. See *infra*, at 15.

[2] Specifically, the Court of Appeals stated that, in light of the fact that a regulator could reasonably construe the transmission component of bundled retail sales as either part of a retail sale or a transmission service in interstate commerce, "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)]." *Transmission Access Policy Study Group* v. *FERC*, 225 F. 3d 667, 694–695 (CADC 2000).

provides no explanation as to why such regulation is unnecessary and attaches no findings to support this single statement. As such, we have no basis for determining whether FERC's decision is justified. A brief review of the electric industry, and the nature of transmission in particular, further calls into question both FERC's conclusory statement and its logical inference: That regulation of transmission is not necessary when used in connection with one type of transaction but is necessary when used for another.

An electric power system consists of three divisions: generation, transmission, and local distribution. Electricity is generated at power plants where "a fuel such as coal, gas, oil, uranium or hydro power is used to spin a turbine which turns a generator to generate electricity." Brief for Electrical Engineers et al. as *Amici Curiae* 12 (hereinafter Brief for Electrical Engineers). "[G]enerating stations continuously feed electric energy into a web of transmission lines (loosely referred to as 'the grid') at very high voltages." P. Fox-Penner, Electric Utility Restructuring: A Guide to the Competitive Era 5 (1997) (hereinafter Fox-Penner). The transmission lines in turn feed "*substations* (essentially transformers) that reduce voltage and spread the power from each transmission line to many successively smaller *distribution* lines, culminating at the retail user." *Id.*, at 23.[3]

Unlike the other electricity components—and with the exception of transmission in Alaska, Hawaii, and parts of Texas—transmission is inherently interstate.[4] It takes

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[3] At the local distribution centers, "the power flow is split to send power to a number of primary feeder lines that lead to other transformers that again step down and feed the power to secondary service lines that in turn deliver the power to the utility's customers." Brief for Electrical Engineers 13.

[4] In the contiguous United States, this system is composed of three major grids: the Eastern Interconnection, the Western Interconnection,

place over a network or grid, which consists of a configuration of interconnected transmission lines that cross state lines. Brief for Electrical Engineers 13. These lines are owned and operated by the Nation's larger utilities. No individual utility, however, has "'control over the actual transfers of electric power and energy with any particular electric system with which it is interconnected.'" *Id.*, at 15 (quoting *Florida Power & Light Co.*, 37 F. P. C. 544, 549 (1967)). Electricity flows at extremely high voltages across the network in uncontrollable ways and cannot be easily directed through a particular path from a specific generator to a consumer. Fox-Penner 26–27. The "[t]ransfer of electricity from one point to another will, to some extent, flow over all transmission lines in the interconnection, not just those in the direct path of the transfer." Van Nostrand's Scientific Encyclopedia 1096 (D. Considine ed., 8th ed. 1995). The energy flow depends on "where the load (demand for electricity) and generation are at any given moment, with the energy always following the path (or paths) of least resistance." Brief for Electrical Engineers 13. The paths, however, "change moment by moment." Fox-Penner 27. And "[t]rying to predict the flow of electrons is akin to putting a drop of ink into a water pipe flowing into a pool, and then trying to predict how the ink drop will diffuse into the pool, and which combination of outflow pipes will eventually contain ink." *Ibid.*

Nonetheless, buyers and sellers do negotiate particular contract paths, "route[s] *nominally* specified in an agreement to have electricity transmitted between two points." T. Brennan, Shock to the System 76 (1996) (emphasis added).[5] In practice, however, it is quite possible that

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and the Texas Interconnection. Restructuring of the Electric Power Industry: A Capsule of Issues and Events, Energy Information Administration 6 (DOE/EIA–X037, Jan. 2000).

[5] FERC notes that whether transmission is in interstate commerce "does not turn on whether the contract path for a particular power or

most of the power will never flow over the negotiated transmission lines. The transactional arrangements, therefore, bear little resemblance to the physical behavior of electricity transmitted on a power grid and, as such, it is impossible for either a utility or FERC to isolate or distinguish between the transmission used for bundled or unbundled wholesale or retail sales.

Given that it is impossible to identify which utility's lines are used for any given transmission, FERC's decision to exclude transmission because it is associated with a particular type of transaction appears to make little sense. And this decision may conflict with FERC's statutory mandate to regulate when it finds unjust, unreasonable, unduly discriminatory, or preferential treatment with respect to any transmission subject to its jurisdiction. See 16 U. S. C. §§824d, 824e.[6] FERC clearly recognizes the

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transmission sale crosses state lines, but rather follows the physical flow of electricity." Order No. 888, Appendix G, at 31,968. FERC states that "[b]ecause of the highly integrated nature of the electric system, this results in most transmission of electric energy being 'in interstate commerce.'" *Ibid*.

[6] Section 824d(b), for example, provides:

"No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

Section 824e(a) further provides that whenever FERC, after conducting a hearing, finds that:

"any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, *the Commission shall determine* the just and reasonable rate, charge, classification, . . . practice, or contract to be thereafter observed and in force, and shall fix the same by order." (Emphasis added.)

statute's mandate, stating in Order No. 888–A that "our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so, as necessary to eliminate undue discrimination and protect electricity customers." Order No. 888–A, at 30,176.[7] And it is certainly possible that utilities that own or control lines on the grid discriminate against entities that seek to use their transmission lines regardless of whether the utilities themselves bundle or unbundle their transactions.[8] The fact that FERC found undue discrimination with respect to transmission used in

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[7] FERC likewise states in Order No. 888, at 31,634, that the "legal and policy cornerstone of these rules is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce." FERC also recognized that to comply with the statute's mandate, it "must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others." *Id.,* at 31,635.

[8] For example, the Electric Power Supply Association explains that transmission owning utilities may discriminate against entities that seek to use their transmission systems, thereby preventing the entities from using their lines, in the following ways: (1) They may block available transfer capacity—the capability of the physical transmission network to facilitate activity over and above its committed uses—by overscheduling transmission for their own retail loads across "valuable" transmission paths; (2) they may improperly avoid certain costs that other entities would be subject to; or (3) they may fail to make accurate disclosure of available transfer capability, causing "serious difficulties for suppliers attempting to schedule electricity sales across their transmission facilities." Brief for Respondent Electric Power Supply Association 7–9. Similarly, petitioner Enron explains that a "utility can reserve superior transmission capacity for its own bundled retail sales, at times even closing its facilities to other transmissions . . . forcing competitors of the utility to scramble for less direct, less predictable and more expensive transmission options." Brief for Petitioner in No. 00–809, pp. 41–42.

connection with both bundled and unbundled wholesale sales and unbundled retail sales indicates that such discrimination exists regardless of whether the transmission is used in bundled or unbundled sales. Without more, FERC's conclusory statement that "unbundling of retail transmission" is not "necessary" lends little support to its decision not to regulate such transmission. And it simply cannot be the case that the nature of the commercial transaction controls the scope of FERC's jurisdiction.

To be sure, I would not prejudge whether FERC *must* require that transmission used for bundled retail sales be subject to FERC's open access tariff. At a minimum, however, FERC should have determined whether regulating transmission used in connection with bundled retail sales was in fact "necessary to eliminate undue discrimination and protect electricity customers." Order No. 888–A, at 30,176. FERC's conclusory statement instills little confidence that it either made this determination or that it complied with the unambiguous dictates of the statute. While the Court essentially ignores the statute's mandatory prescription by approving of FERC's decision as a permissible "policy choice," the FPA simply does not give FERC discretion to base its decision not to remedy undue discrimination on a "policy choice."

The Court itself struggles to find support for FERC's conclusion that it was not "necessary" to regulate bundled retail transmission in order to remedy discrimination. First, the Court points to the fact that FERC's findings 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.'" *Ante*, at 24 (quoting Brief for Petitioner in No. 00–809, pp. 12–13). Second, the Court notes that the title of Order No. 888 confirms FERC's focus because it references promoting wholesale competition. *Ante,* at 24. Finally, the Court

relies on the fact that FERC has identified its goal as "'facilitat[ing] competitive *wholesale* electric power markets.'" *Ibid.* (quoting Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶33,047, p. 33,049).

I fail to understand how these statements support FERC's determination that it was not "necessary" to regulate bundled retail transmission. Utilities that bundle may use their market power to discriminate against those seeking access to the lines in connection with *either* retail or wholesale sales. It is certainly possible, perhaps even likely, that the only way to remedy undue discrimination and ensure open access to transmission services is to regulate *all* utilities that operate transmission facilities, and not just those that use their own lines for the purpose of wholesale sales or in connection with unbundled retail transactions. FERC does not suggest that the only entities that engage in discriminatory behavior are those that use their transmission facilities for wholesale sales or unbundled retail sales. And relying on FERC's reference to wholesale markets makes little sense when FERC regulates transmission connected to retail sales so long as the transmission is in a State that unbundles retail sales or where the utility voluntarily unbundles. See *infra*, at 15–16.

"We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner. . . . " *Motor Vehicle Mfrs. Assn.*, 463 U. S., at 48. Here, FERC's failure to do so prevents us from evaluating whether or not the agency engaged in reasoned decisionmaking when it determined that it was not "necessary" to regulate bundled retail transmission.

B

The Court also relies on FERC's explanation that the prospect of unbundling retail transmission and generation "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 context of a state retail wheeling program." Order No. 888, at 31,699. The Court provides the following explanation for its decision to rely on this statement:

> "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." *Ante*, at 26.

This explanation is wholly unsatisfying, both because the Court's reliance on FERC's statement fails to take into account the unambiguous language of the statute and because FERC has given various inconsistent explanations of its jurisdiction.

1

FERC's statement implies that its decision not to regulate was based, at least in part, both on a determination that the statute is ambiguous and on a determination that certain interstate transmission may fall outside of its jurisdiction. The FPA, however, unambiguously grants FERC jurisdiction over the interstate transmission of electric energy in interstate commerce. 16 U. S. C. §824(b)(1). As the Court notes, "[t]here is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market." *Ante*, at 14. The Court correctly recognizes that "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." *Ante*, at 17.

Similarly, although FERC draws a jurisdictional line between transmission used in connection with bundled and unbundled retail sales, the statute makes no such distinction. The terms "bundled" and "unbundled" are not found in the statute.[9] The only jurisdictional line that the statute draws with regard to transmission is between interstate and intrastate. See §824(b)(1). Congress does not qualify its grant to FERC of jurisdiction over interstate transmission. Nor does the Court explain how the statute grants FERC jurisdiction over unbundled retail transmission, yet is ambiguous with respect to the question of bundled retail transmission.

Even if I agreed that the statute is ambiguous, FERC did not purport to resolve an ambiguity in the passage upon which the Court relies. Instead, FERC *refused to resolve* what it considered to be a statutory ambiguity, in part because it determined that resolving this question was too difficult. Thus, while under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 842–843 (1984), the Court will defer to an agency's reasonable *interpretation* of an ambiguous statute, this passage does not provide an interpretation to which the Court can defer.

2

FERC does provide more explicit interpretations of its jurisdiction elsewhere. It is difficult, however, to isolate FERC's position on this matter because FERC presents different interpretations in its orders, its brief, and at oral argument. At certain points, FERC affirmatively states

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[9]The difference between the two types of sales is that with an unbundled retail sale, a utility, either voluntarily or pursuant to state law, presents separate charges for the electricity, the transmission service, and the delivery service. In a bundled sale, all components are combined as one charge. See Brief for Petitioner in No. 00–809, at 4–5.

that it lacks jurisdiction to regulate this transmission; at other times, FERC is noncommittal. The Court's heavy reliance on *one* statement, therefore, is misplaced. And while the Court recognizes in a footnote that FERC made conflicting representations, see *ante*, at 23, n. 14, in deciding to defer to the agency the Court fails to place any weight on the fact that the agency presented inconsistent positions. See *United States* v. *Mead Corp*., 533 U. S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position . . . "). These inconsistencies alone, however, convince me that the Court should neither defer to the aforementioned statement of FERC's jurisdiction nor rely on any other explanation provided by FERC.

For example, in its brief FERC argues that because the statute is ambiguous, the Court of Appeals properly deferred under *Chevron* to FERC's reasonable decision not to regulate. Brief for Respondent FERC 49. FERC then contends that it made a reasonable finding that it *lacked* jurisdiction over the transmission component of bundled retail sales and that it was therefore not required to regulate the transmission component. *Id.,* at 49–50; see also *id*., at 44 ("The Commission reasonably concluded that Congress has not authorized federal regulation of the transmission component of bundled retail sales of electric energy"). The brief also notes, however, that FERC *has* attempted to regulate transmission connected to retail bundled sales and maintains that it continues to believe that it has authority to require public utilities to treat customers of unbundled interstate transmission in a manner comparable to the treatment afforded bundled trans-

mission users. *Id.,* at 48.[10]

At oral argument, FERC proposed a different explanation. It stated that the agency was not disclaiming its authority to order the unbundling of the transmission component of a retail sale. Tr. of Oral Arg. 42–43. FERC explained that it lacks jurisdiction over the transmission "*as long as* the State hasn't unbundled [the retail sale], the utility has not unbundled it, and FERC has not exercised whatever authority it would have to unbundle it." *Id.,* at 50 (emphasis added).

FERC's orders present still more views of its jurisdiction. As already noted, when considering whether FERC should unbundle retail transmission and generation, FERC asserts that this particular question "raises numerous difficult jurisdictional issues" more appropriately considered at a later time. Order No. 888, at 31,699. FERC, at other points, however, makes clear its belief that there *is* a jurisdictional line between unbundled and bundled retail transmission. Explaining its "legal determination" that it has exclusive jurisdiction over unbundled

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[10] FERC earlier rejected the proposed curtailment provisions of a public utility's federal OATT that favored the utility's bundled retail customers over its wholesale transmission customers. It asserted that, in compliance with Order No. 888 and in order to enforce the OATT, it could regulate transmission curtailment in a manner that had an indirect effect upon the utility's services to its retail customers. Brief for Respondent FERC 48; *see Northern States Power Co.* v. *FERC*, 176 F. 3d 1090, 1095 (CA8 1999). The United States Court of Appeals for the Eighth Circuit, noting that "FERC concede[d] that it has no jurisdiction whatsoever over the state's regulation of [the utility's] bundled retail sales activities," held that FERC exceeded its authority under the FPA. *Id.,* at 1096. While I do not endorse the court's conclusion with respect to FERC's jurisdiction, I note that the Court of Appeals' pointed to the inconsistencies in FERC's position, explaining that "FERC's observation that no inherent conflict exists between its mandates and practical application is viewed through an adversarial bias." *Id.,* at 1094.

retail transmission in interstate commerce, FERC notes that it found "compelling the fact that section 201 of the FPA, *on its face*, gives the Commission jurisdiction over transmission in interstate commerce (by public utilities) without qualification." *Id.*, at 31,781. Nonetheless, when addressing why "its authority attaches only to unbundled, but not bundled, retail transmission in interstate commerce," FERC affirmatively states that "we believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail" and that "[u]nder the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales." *Ibid.*

By contrast, when the "retail transaction is broken into two products that are sold separately," FERC "believe[s] the jurisdictional lines change." *Ibid.* FERC explains:

> "In this situation, the state clearly retains jurisdiction over the sale of the 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 power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation." *Ibid.*

FERC here concludes that the *act of unbundling itself* changes its jurisdictional lines. Unbundling, FERC notes, may occur in one of two ways: (1) voluntarily by a public utility or (2) as a result of a State retail access program that orders unbundling. *Ibid.* Either action brings the transmission within the scope of FERC's jurisdiction.

Subsequently, in Order No. 888–A, FERC responded to rehearing requests by supplanting its earlier conclusion that "the matter raises numerous difficult jurisdictional

issues" with the explanation quoted above from Order No. 888, at 31,781. See Order No. 888–A, at 30,225. It is possible, therefore, that FERC abandoned its "difficult jurisdictional issues" explanation altogether. Thus, while it is true that FERC, at one point, evades the jurisdictional question by deeming it too "difficult" to resolve, more often than not FERC affirmatively concludes that it in fact does not have jurisdiction over the transmission at issue here. From this survey of FERC's positions, I can only conclude that the Court's singular reliance on the one statement is misguided.

3

Finally, to the extent that FERC has concluded that it *lacks* jurisdiction over transmission connected to bundled retail sales, it ignores the clear statutory mandate. By refusing to regulate the transmission associated with retail sales in States that have chosen not to unbundle retail sales, FERC has set up a system under which: (a) each State's internal policy decisions concerning whether to require unbundling controls the nature of federal jurisdiction; (b) a utility's voluntary decision to unbundle determines whether FERC has jurisdiction; and (c) utilities that are allowed to continue bundling may discriminate against other companies attempting to use their transmission lines. The statute neither draws these distinctions nor provides that the jurisdictional lines shift based on actions taken by the States, the public utilities, or FERC itself. While Congress understood that transmission is a necessary component of all energy sales, it granted FERC jurisdiction over all interstate transmission, without qualification. As such, these distinctions belie the statutory text.

II

As the foregoing demonstrates, I disagree with the

deference the Court gives to FERC's decision not to regulate transmission connected to bundled retail sales. Because the statute unambiguously grants FERC jurisdiction over all interstate transmission and §824e mandates that FERC remedy undue discrimination with respect to all transmission within its jurisdiction, at a minimum the statute required FERC to consider whether there was discrimination in the marketplace warranting application of either the OATT or some other remedy.

I would not, as petitioner Enron requests, compel FERC to apply the OATT to bundled retail transmissions. I would vacate the Court of Appeals' judgment and require FERC on remand to engage in reasoned decisionmaking to determine whether there is undue discrimination with respect to transmission associated with retail bundled sales, and if so, what remedy is appropriate.

For all of these reasons, I respectfully dissent from Part IV of the Court's opinion.