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SECURING A RELIABLE ELECTRICITY GRID: A NEW ERA IN TRANSMISSION SITING REGULATION?

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Securing a Reliable Electricity Grid: A New Era in Transmission Siting Regulation?

By Steven J. Eagle*

ABSTRACT

A capacious and reliable electric transmission grid is vital to public health and safety, the economy, and national security. The recent shift from local generation and use of electric to regional and national markets in electric production requires substantially augmented transmission facilities. However, new transmission capacity often has been blocked by local favoritism, not-in-my-backyard concerns, and legislative and judicial doctrines mandating that benefits that would inure to other markets or states be disregarded in the approval process. The Energy Policy Act of 2005 contains siting provisions that offer some promise of relief. This article analyzes present conditions and the extent to which the new Act is apt to be efficacious.

I. THE NEED TO SITE A SECURE AND RELIABLE ELECTRICITY GRID

Electricity is of immense importance in our economy and culture. It has no close substitute in many of its functions and is uneconomical to store in anticipation of peak needs, future requirements, or times of crisis.¹ As the recent catastrophic events resulting from Hurricane Katrina indicate, our emergency management system, energy production, and public health are dependent upon the transmission of electricity.²

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¹ See Lois R. Lupica, *Transition Losses in the Electric Power Market: A Challenge to the Premises Underlying the Arguments for Compensation*, 52 RUTGERS L. REV. 649, 652 n.6 (2000).

² See, e.g., Jad Mouawad, *No Quick Fix for Gulf Oil Operations*, N.Y. TIMES, Aug. 31, 2005 at C1 (noting that a large petroleum pipeline company serving the Mid-Atlantic states and New England “warned that its operations were shut down because of ‘widespread damage to the electric grid.’”).

The United States now is undergoing a transition from local command-and-control electric production and distribution to regional production and distribution controlled by market forces. This profound transformation requires changes in federal and state regulatory regimes to ensure the availability of an adequate and reliable supply of electricity throughout the nation. In an age of terrorism, enhanced protection for critical electric infrastructure also is required. Related to these developments, the need for more electric generating stations and distribution lines and towers both creates and is stymied by NIMBY (“not in my back yard”) protests.³

The importance and particular nature of electricity does not render its production and distribution immune from basic problems affecting the energy industry in general.

While much needed energy infrastructure has been added in certain regions in the past several years, particularly with respect to electric generating capacity and national gas pipelines, critical needs remain and there are numerous examples of abandoned projects, difficult and time-consuming infrastructure siting processes, and strong political opposition. These siting difficulties stem from the friction between a public that is increasingly unwilling to accept the construction of energy and other industrial infrastructure in their local communities, and the growing need to add critical energy infrastructure to meet business and consumer demands and minimize the potential rippling effect on other economic sectors of major infrastructure-related outages or losses.⁴

There are many costs to the transition to market-based electric generation and distribution. Some involve transitional losses to traditional utilities, as costly assets acquired under the expectation (or implicit promise) of adequate cost recovery under regulated pricing may lose substantial value in the new era of market pricing.⁵

³ See *infra* Section II.D.1.

⁴ PAUL J. HIBBARD, U.S. ENERGY INFRASTRUCTURE: DEMAND, SUPPLY AND FACILITY SITING 3 (2004), available at <http://64.70.252.93/O82F4698.pdf>.

⁵ For an extended analysis and argument that government has a constitutional duty to compensate utilities for “stranded costs” resulting from rate deregulation, see J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES (1997).

“Perhaps the greatest obstacle to the construction of new [electric] transmission [capability] . . . is the age-old problem of gaining approval for new transmission lines.”⁶

Transmission lines, substations, circuit breakers, capacitors, and other equipment provide more than just a highway to deliver energy and power from generating units to distribution systems. Transmission systems both complement and substitute for generation. Transmission generally enhances reliability; lowers the cost of electricity delivered to consumers; limits the ability of generators to exercise market power; and provides flexibility to protect against uncertainties about future fuel prices, load growth, generator construction, and other factors affecting the electric system.

Because most of the U.S. transmission grid was constructed by vertically integrated utilities before the 1990s, these legacy systems support only limited amounts of inter-regional power flows and transactions. Thus, existing systems cannot fully support all of society’s goals for a modern electric-power system.⁷

A. The Restructuring of the Electricity Market

Experts began calling for a change in the structure of the electricity market from its natural monopoly roots in the mid 1980s.⁸ They cited studies performed between 1948 and 1974 that documented the existence of serious problems with the performance and efficiency of the market, including ineffective regulation and the failure of utilities to coordinate their activities and to take advantage of available economies of scale.⁹ These problems were estimated to cost the United States economy billions of dollars each year.¹⁰ When the price of electricity surged between 1974 and 1984, consumers and regulators began to take notice of the problem.¹¹

⁶ ERIC HIRST, EXPANDING U.S. TRANSMISSION CAPACITY 11 (2000), *available at* http://www.eei.org/industry_issues/energy_infrastructure/transmission/hirst2.pdf (brackets added).

⁷ ERIC HIRST, U.S. TRANSMISSION CAPACITY: PRESENT STATUS AND FUTURE PROSPECTS 1 (2004), *available at* http://www.eei.org/industry_issues/energy_infrastructure/transmission/USTransCapacity10-18-04.pdf.

⁸ Richard J. Pierce, Jr., *Completing the Process of Restructuring the Electricity Market*, 40 WAKE FOREST L. REV. 451, 453-55, 458 (2005).

⁹ *Id.* at 453.

¹⁰ *Id.*

¹¹ Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031, 2048-49 (1989).

With the development of efficient small-scale electricity generation and long-distance transmission, the generation function became ripe for deregulation and competition, although transmission and distribution remained natural monopolies.¹² In a restructured market, hundreds of independent generators could compete to produce and sell electricity for the lowest price.¹³ In addition, with the dramatic improvement in transmission technology and interconnectedness, the appropriate scale on which to regulate the market had expanded from a local to a regional, national, or even continental area.¹⁴ The success of restructuring in other industries convinced many in the industry that it was time to make changes to the electricity market.¹⁵

States, Congress, and the Federal Energy Regulatory Commission (FERC) have been attempting to restructure the electricity market to varying degrees for the past two decades.¹⁶ The focus has been on encouraging the growth of independent merchant generators, that use transmission capacity built by others to sell the electricity they produce on the market, and creating integrated regional electricity markets.¹⁷ For example, in the late 1990's the FERC issued orders that forced utilities to separate their transmission and generation functions, charge the same rates for transmission access to all generators, share transmission information with all generators, and join Regional Transmission Organizations (RTOs) (or justify to the FERC their reasons for not joining one).¹⁸

The success of the restructuring effort has varied dramatically within the United States. Those states and regions with low-cost electricity, such as the Southeast, North-

¹² *Id.* at 461-62; Michael Coyn Mateer, Comment, *When The Lights Go Out: The Impact of House Bill 6 on Regional Transmission Organizations and the Reliability of the Power Grid*, 12 GEO. MASON L. REV. 775, 809-10 (2004).

¹³ Pierce, *supra* note 8, at 462.

¹⁴ *Id.*

¹⁵ *Id.* at 463-64.

¹⁶ *See Id.* at 468-95; *infra* Section II.A.

¹⁷ *See Id.*; *infra* Section II.A.

¹⁸ Mateer, *supra* note 12, at 791-99.

west, and lower Midwest, have largely resisted restructuring out of fear that change would increase their prices and rob their economies of a competitive advantage.¹⁹

Only in the Mid-Atlantic region, New England, New York, and Texas has there been significant success in restructuring.²⁰ In each of these areas, power is provided mostly by independent merchant generators. Ownership of transmission, distribution, and generation assets largely is disaggregated, and the electricity grid is operated by a single regional entity.²¹ The Mid-Atlantic region has experienced savings of several billion dollars a year.²² Elsewhere in the country, the restructuring effort has been effectively blunted by the entrenched groups that oppose it.²³

Attempts at electricity market restructuring have faced many challenges in addition to the opposition of market and political actors in some regions. Restructuring is best implemented by a federal agency with broad regulatory power, but states have most of the regulatory authority in the electricity industry and the power of the FERC is severely limited.²⁴ Therefore it is impossible for restructuring to proceed in a coordinated fashion on a national level.

Another even more serious problem is the dramatic shortfall in transmission capacity throughout the nation.²⁵ This shortage “will eventually doom all restructuring efforts and... will yield disastrous results for the entire U.S. market no matter how it is

¹⁹ Pierce, *supra* note 8, at 459-60.

²⁰ *Id.* at 468-79.

²¹ *Id.* at 469.

²² RONALD J. SUTHERLAND, ESTIMATING THE BENEFITS OF RESTRUCTURING ELECTRICITY MARKETS: AN APPLICATION TO THE PJM REGION 5 (2003), available at <http://der.lbl.gov/pubs/BenefitsOct1Final.pdf>.

²³ Pierce, *supra* note 8, at 477-79.

²⁴ *Id.* at 466.

²⁵ *Id.* at 469.

structured, unless and until it is solved.”²⁶ This problem stems in part from the lack of FERC jurisdiction over electric transmission line siting.²⁷

In addition, some of the regulatory changes mandated by the FERC have exacerbated rather than relieved the transmission shortage.²⁸ For example, in its Order 888,²⁹ the FERC required utilities that owned transmission assets to charge the same rate to every company that used its transmission lines.³⁰ Unfortunately, some transmission lines are in greater demand than others and become congested.³¹ But even when some of a utility’s transmission lines are in a critical bottleneck area, it cannot charge a higher price for their use than for other lines the utility owns.³² Because of this restriction, there is no incentive for utilities to invest in critically needed new transmission capacity.³³

Furthermore, the rates set by the FERC for transmission access do not include an appropriate risk premium for the utility companies.³⁴ While in the past monopoly utilities had a stable regulatory environment and proven business structure and were relatively risk-free investments, that is no longer the case.³⁵ The regulatory system is currently in a state of flux and it is quite uncertain whether transmission companies can be profitable

²⁶ *Id.*

²⁷ *See Id.* at 493.

²⁸ For an argument that regulatory failure on the part of the FERC is the main cause of the transmission problems of the last two decades, *see* Lawrence J. Spiwak, *You Say Iso, I Say Transco, Let’s Call the Whole Thing Off*, 137 PUB. UTIL. FORT. 38 (Mar. 15, 1999).

²⁹ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 18 C.F.R. pts. 35, 385 (Apr. 24, 1996).

³⁰ Mateer, *supra* note 12, at 813. This rate is known as a “homogenous pro forma transmission tariff”. 18 C.F.R. § 35.28(c)(1)(i); Spiwak, *supra* note 28, at 41.

³¹ AMY ABEL, Cong. Research Serv., No. RL32075, ELECTRIC RELIABILITY: OPTIONS FOR ELECTRIC TRANSMISSION INFRASTRUCTURE IMPROVEMENTS 4-5 (2003), *available at* http://www.opencrs.com/rpts/RL32075_20050610.pdf [hereinafter ELECTRIC RELIABILITY].

³² *See* 18 C.F.R. § 35.28(c)(1)(i); Spiwak, *supra* note 28, at 41.

³³ Mateer, *supra* note 12, at 814.

³⁴ *Id.* at 814-15.

³⁵ ELECTRIC RELIABILITY, *supra* note 31, at 8-11.

over the long haul³⁶. Because this added risk is not accounted for in the pricing mechanism, transmission owners are systematically under-compensated and deterred from making further investments.³⁷

Adding to the problem is the fact that transmission is priced by the FERC on a short-run marginal cost basis that does not account for the massive sunk costs inherent in electricity transmission.³⁸ As a result, utilities cannot recover the full cost of transmission assets.³⁹

Many utility companies still own both transmission and generation assets.⁴⁰ When open access is mandated to allow for competitive merchant power generation, a utility that owns both generation and transmission infrastructure will not only under-invest in new transmission, but also actually engage in entry-detering practices to protect its existing assets.⁴¹ These practices are engaged in because new transmission lines make it easier for merchant generators to enter the market and compete with the utility in electric power generation, thus lowering the value of the utility's existing generation assets. After the FERC issued Order 888,⁴² mandating open access to transmission lines, investment in new bulk transmission facilities dropped by nearly 50%.⁴³

Faced with this shifting, uncertain, and ineffective regulatory environment, many experts in the electric utility industry believe that substantial changes must be made to the current system of state siting regulation if critical transmission investments are to be made. Under the existing regime, "any state or local agency has the power to veto any

³⁶ Mateer, *supra* note 12, at 814.

³⁷ *Id.* at 814-15.

³⁸ Spiwak, *supra* note 28, at 43.

³⁹ *Id.*

⁴⁰ See Mateer, *supra* note 12, at 817.

⁴¹ Spiwak, *supra* note 28, at 43.

⁴² Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 18 C.F.R. pts. 35, 385 (Apr. 24, 1996).

⁴³ Spiwak, *supra* note 28, at 39.

proposed expansion of transmission capacity, and there is a large and growing shortage of transmission capacity ... this allocation of regulatory power is certain to continue to produce a growing shortage of capacity that will have devastating effects on the price and availability of electricity.”⁴⁴

Yet others have questioned the role of state siting regulations in the shortage of electric transmission capacity. “State-based transmission siting processes vary considerably across the U.S., and, for the most part, worthy projects are approved, and deficient projects are discouraged, improved, or rejected. Most transmission projects are intrastate and small in scale.”⁴⁵ “Transmission continues to be built, especially to reinforce local areas. A somewhat old (1986) survey by the National Governor’s Association found that only 18 of 533 transmission projects applied for at the state level were denied.”⁴⁶ If the current system of state siting is working well, making dramatic changes may be counter-productive.

B. The Energy Policy Act of 2005

The Energy Policy Act of 2005⁴⁷ passed both houses of Congress with substantial majorities,⁴⁸ and was signed into law by President Bush on August 8, 2005.⁴⁹ The Act creates new energy efficiency standards and incentives for energy conservation and renewable energy sources and provides billions of dollars for research and development into new and cleaner energy technologies. The new legislation also establishes an independent organization to improve the reliability of the electricity and expands FERC authority to ensure open access to transmission lines and prevent market manipulation.⁵⁰

⁴⁴ Pierce, *supra* note 8, at 493.

⁴⁵ DAVID H. MEYER & RICHARD SEDANO, TRANSMISSION SITING AND PERMITTING E-26 (2001) (National Transmission Grid Study Issue Papers, Department of Energy, May 2002).

⁴⁶ Peter Fox-Penner, *Easing Gridlock on the Grid*, 14 ELEC. J. 11, 20-28 (Nov. 2001).

⁴⁷ QQ Insert proper citation when available. (Hereinafter “2005 Act.”)

⁴⁸ Conference report agreed to by the House, July 28, 2005 by recorded vote: 275-156 (Roll no. 445). 151 Cong. Rec. H6972 (2005); Conference report agreed to by the Senate, July 29, 2005 by recorded vote: 74-26 (Record vote no. 213). 151 Cong. Rec. S9374 (2005).

⁴⁹ QQ Insert proper citation when available.

⁵⁰ See *infra* Section III.B.

In addition to those widely publicized provisions, the Act reforms the siting process for electric transmission facilities, including backstop siting authority for the FERC,⁵¹ and strong support for the formation of Regional Transmission Organizations (RTOs).⁵² In the legislative hearings for the bill, many groups testified both in support for and opposition to the proposed regulatory changes.

Those in support of the changes included industry groups, such as the Edison Electric Institute (EEI) and American Public Power Association (APPA), and consumer groups, such as the Electric Consumers Alliance (ECA).⁵³ These organizations contended that the reform of siting procedures is necessary not only to ensure reliable, low-cost electric service for households and businesses, but for national security as well.⁵⁴ These organizations assert that current siting procedures are stifling the growth of transmission facilities, and particularly inter-state transmission lines, needed to relieve “bottle-neck” electric congestion areas and lower prices.⁵⁵

Those groups in opposition to the bill’s provisions include the Western Governors Association (WGA), the National Conference of State Legislatures, the National Association of Regulatory Utility Commissioners (NARUC), the National Association of Towns and Townships, the National Association of State Utility Consumer Advocates, and other state and local organizations.⁵⁶ These groups are interested in retaining their current sit-

⁵¹ 2005 Act, *supra* note 47, at § 216(b)(1). *See infra*, Part III.C.2. *See also* Thomas R. Kuhn, *Who’s Minding the Grid?* 140 No. 1 PUB. UTIL. FORT., Jan. 1, 2002 (using term “backstop siting authority”); Fox-Penner, *supra* note 46, at 14.

⁵² *See infra* Sections III.C.4; III.C.2.

⁵³ *See Electricity Proposals and Electric Transmission and Reliability Enhancement Act of 2003: Hearing Before the S. Comm. on Energy & Natural Res.*, 108th Cong. 74-80, 98-99 (2003) [hereinafter *Hearings*] (statements of H. Allen Franklin, Chairman, President, and CEO, Southern Company, on Behalf of Edison Electric Institute (EEI), and Alan H. Richardson, President and CEO, American Public Power Association (APPA)); MEYER & SEDANO, *supra* note 45, at E-28 (2001) (National Transmission Grid Study Issue Papers, Department of Energy, May 2002).

⁵⁴ *See Hearings*, *supra* note 53, at 74-80, 98-99; MEYER & SEDANO, *supra* note 53, at E-28.

⁵⁵ *See Hearings*, *supra* note 53, at 74-80, 98-99; MEYER & SEDANO, *supra* note 53, at E-28.

⁵⁶ *See* MEYER & SEDANO, *supra* note 53, at E-16, E-28; *Hearings*, *supra* note 53, at 13-16, 24, 26-27, 216-21 (statements of David A Svanda, President, National Association of Regulatory Utility Com-

ing power and believe that no changes are needed because the current methods for siting approval are being successfully adapted to the new challenges posed by regional markets.⁵⁷ They dispute any need for changes that would shift siting authority to regional or national entities, and argue that such a change might be counterproductive.⁵⁸

In light of these conflicting views, an analysis of the current legal structure for the siting of electric transmission facilities is necessary. The need for, and impact of, proposed regulatory changes must be considered in light of the benefits and detriments associated with the current procedures.

C. Critical Infrastructure

Considering the potential economic ramifications, an overloaded transmission grid may present an appealing target for terrorists as well. “We are dependent on electricity for almost every aspect of daily life. The transmission grid, due to its interconnected properties and overstressed condition, is vulnerable to an intentional attack. [W]idespread loss of grid functions would... be devastating.”⁵⁹

In 2001 the electric industry serviced almost 130 million households and institutions and the United States consumed over 3.6 trillion kilowatt hours.⁶⁰ Electricity is necessary not only for most productive activities, but also to produce other forms of energy

missioners (NARUC), Gerald Norlander, Chairman, Electricity Committee, National Association of State Utility Consumer Advocates (NASUCA), and Bill Richardson, Governor of New Mexico, on behalf of the Western Governors’ Association (WGA).

⁵⁷ See MEYER & SEDANO, *supra* note 53, at E-16, E-28; *Hearings*, *supra* note 53, at 13-16, 24, 26-27, 216-21.

⁵⁸ See MEYER & SEDANO, *supra* note 53, at E-16, E-28; *Hearings*, *supra* note 53, at 13-16, 24, 26-27, 216-21.

⁵⁹ Joel B. Eisen, *Regulatory Linearity, Commerce Clause Brinkmanship, And Retrenchment In Electric Utility Deregulation*, 40 WAKE FOREST L. REV. 545, 557 n.63 (2005). See also, ICF Consulting, *infra* note 98.

⁶⁰ *The National Strategy For The Physical Protection of Critical Infrastructures and Key Assets*, 50 (Feb. 2003), available at http://www.dhs.gov/interweb/assetlibrary/Physical_Strategy.pdf [hereinafter CRITICAL INFRASTRUCTURES].

like oil.⁶¹ “Were a widespread or long-term disruption of the power grid to occur, many of the activities critical to our economy and national defense—including those associated with response and recovery—would be impossible.”⁶²

In the aftermath of the August 2003 blackout affecting the eastern part of the United States and Canada, there was speculation that the grid failure was caused or exacerbated by terrorism.⁶³ Although that turned out not to be the case,⁶⁴ investigation revealed troubling vulnerability to future attacks.⁶⁵

The energy sector in North America is increasingly reliant on information technology and computer software to manage the complex electric transmission grid.⁶⁶ This reliance has opened the grid up to “malicious cyber events,” defined by the blackout report as “the manipulation of data, software or hardware for the purpose of deliberately disrupting the systems that control and support the generation and delivery of electric power.”⁶⁷ Some computer systems, designed to be isolated like the local transmission grids they controlled, were developed without concern for cyber security but are now directly connected to the global Internet.⁶⁸

Coinciding with this increased vulnerability to attack is an elevated threat level. “The threat environment is changing and... the risks are greater than in the past.”⁶⁹ “Current assessments suggest that there are terrorists and other malicious actors who have the capability to conduct a malicious cyber attack with potential to disrupt the energy infra-

⁶¹ *Id.*

⁶² *Id.*

⁶³ See U.S.-Canada Power System Outage Task Force, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA: CAUSES AND RECOMMENDATIONS, Ch. 9, p. 131, 134 (April 2004), available at <https://reports.energy.gov/> [hereinafter 2003 BLACKOUT REPORT].

⁶⁴ *Id.* at 131, 135-36.

⁶⁵ *Id.* at 132-33, 139-40

⁶⁶ *Id.* at 132.

⁶⁷ *Id.*

⁶⁸ *Id.* at 133.

⁶⁹ 2003 BLACKOUT REPORT, *supra* note 63, at 133.

structure.”⁷⁰ “The generation and delivery of electricity has been, and continues to be, a target of malicious groups and individuals intent on disrupting this system.”⁷¹

At the same time, the deregulation of the electricity market has induced a variety of new firms to enter the industry.⁷² These new participants, in contrast to the large, strictly regulated monopolies of old, are quite varied in size, organization, and focus.⁷³ These firms purchase whatever level of security they can afford and is consistent with their organizational philosophy.⁷⁴ In addition, these varied stakeholders often fail to share data in the efficient manner necessary to properly analyze and safeguard the systems they control.⁷⁵ Yet these firms may be responsible for key national assets and critical infrastructure.

Even worse, the potential damage that could be caused by an attack on the nation’s electricity infrastructure is magnified by the overloaded condition of the physical facilities that make up the national electricity grid.

Over the past decade or more, electricity demand has increased and the North American interconnections have become more densely woven and heavily loaded, over more hours of the day and year. In many geographic areas, the number of single or multiple contingencies that could create serious problems has increased. Operating the grids at higher loadings means greater stress on equipment and a smaller range of options and a shorter period of time for dealing with unexpected problems.⁷⁶

In order to relieve the system of this dangerous stress, new electric transmission lines must be sited and constructed.⁷⁷ However, companies seeking to expand transmission capacity face several difficulties nationwide. Transmission lines are long-term invest-

⁷⁰ *Id.* at 135.

⁷¹ *Id.* at 132.

⁷² CRITICAL INFRASTRUCTURES, *supra* note 60, at 51.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 2003 BLACKOUT REPORT, *supra* note 63, at 139-40.

⁷⁷ CRITICAL INFRASTRUCTURES, *supra* note 60, at 51.

ments and offer uncertain rates of return, but easily can be derailed by NIMBY opposition or state decisions to deny siting approval or the use of eminent domain.⁷⁸

II. PRESENT LAW IS INADEQUATE TO DEAL WITH SITING PROBLEMS

A. Siting Law and Doctrine are Based on the Former Local Utility Monopoly Model

Electricity markets in the United States once were primarily local and isolated from each other. Increasingly, however, utility markets and companies are evolving into interdependent regional entities whose performance has a profound impact on the national economy.⁷⁹ At one time, utility companies universally held regulated monopoly status in their designated service areas. They were responsible for both the generation and distribution of power within that area.⁸⁰ However, that situation has changed fundamentally.

In the United States, wholesale power sales by independent power producers (IPPs) began after passage of the Public Utility regulatory Policy Act of 1978, which established the right of non-utility producers to operate and sell their energy to utilities. This led to extensive IPP development in the northeast and west, increasing in-region and inter-regional power sales as utility loads grew without corresponding utility investments in transmission.⁸¹

The share of their power that investor-owned utilities purchased from other utilities and IPPs went from 17.8% in 1989, to 37.3% in 2002, and the share of power purchased by large public power entities went from 36.3% in 1992 to 40.5% in 2002.⁸²

In the Energy Policy Act of 1992,⁸³ Congress enhanced competition by introducing exempt wholesale generators that would compete in wholesale electric markets with

⁷⁸ *Id.*

⁷⁹ See Ashley C. Brown & Damon Daniels, *Vision Without Site: Site Without Vision*, 16 ELEC. J. 23 (Oct. 2003); MEYER & SEDANO, *supra* note 53, at E-14.

⁸⁰ See Hoang Dang, *New Power, Few New Lines: A Need For A Federal Solution*, 17 J. LAND USE & ENVTL. L. 327, 330 (2002).

⁸¹ 2003 BLACKOUT REPORT, *supra* note 63, at Ch. 4, p. 32.

⁸² *Id.* (citing RDI PowerDat database).

⁸³ Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of U.S.C.).

traditional utility generators.⁸⁴ It also broadened the FERC's authority to order access to transmission lines on a case by case basis.⁸⁵ Finally, in its Order 888,⁸⁶ FERC required open access of public utility-owned, operated, or controlled interstate transmission facilities for energy sales.⁸⁷ The Order also allowed for full recovery of "stranded" costs by utilities, that is, those costs that the utility prudently incurred to provide service to customers under the old regime of regulatory rate setting, but which are no longer recoverable because market-based open access has allowed those customers to obtain their service from a competitor.⁸⁸ In turn, an increasing number of companies became involved in the wholesale production and sale of electric power to whatever areas need it the most.⁸⁹

"Merchant generators" of electric power, built solely for market sales and not to serve the needs of a specific locale, have proliferated. At the same time, however, transmission capacity has been stagnant, increasing at a rate of only 1% per year.⁹⁰ The result has been an antiquated transmission system overloaded by the transfer of newly generated wholesale power.⁹¹ Several states have imposed temporary moratoria on the construction of new merchant plants in part because of concern that the local transmission grids will be overwhelmed by any influx of new power.⁹² "[T]he increased loads and flows across a transmission grid that has experienced little new investment is causing

⁸⁴ 15 U.S.C. § 79z-5a (2005).

⁸⁵ 16 U.S.C. § 824j(a) (2005).

⁸⁶ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 18 C.F.R. pts. 35, 385 (Apr. 24, 1996).

⁸⁷ Eisen, *supra* note 59, at 550.

⁸⁸ DAVID J. MUCHOW & WILLIAM A. MOGEL, ENERGY LAW & TRANSACTIONS § 82.03(4) (2004).

⁸⁹ Dang, *supra* note 80, at 327-28.

⁹⁰ ABEL, *supra* note 31, at 5.

⁹¹ *Id.* at 328, 332; Eisen, *supra* note 59, at 555-56.

⁹² *Nervous of NOx, Southern Govs. Put Plants on Hold*, 17 ELECTRICITY DAILY 40 (Aug. 28, 2001).

greater ‘stress upon the hardware, software and human beings that are the critical components of the system.’”⁹³

This strain on the transmission grid has had significant economic consequences already, leading to blackouts and power shortages in the ‘bottleneck’ areas most lacking in transmission capacity.⁹⁴ Because electric energy does not run down a directed route, but rather moves along all available paths once introduced into the power grid, every flow of electricity affects the entire distribution network.⁹⁵ The transfer capacity of an overall transmission system is therefore limited to the capacity of that part of the system where it is most narrowly channeled.⁹⁶ As a result, problems in bottleneck areas can have effects that range over wide areas. In several instances, large areas have lost power because of grid problems.⁹⁷ One notable event, the blackout of August 2003 that extended across much of the northeastern United States and Canada affected over 50 million people, and caused an economic loss of between \$7 and \$10 billion.⁹⁸ A bi-national task force, appointed to ascertain the causes of the blackout and means of avoiding repetition, issued a comprehensive report.⁹⁹ The task force noted the decline in relative U.S. electric transmission capacity:

Competition is not the only thing that has grown over the past few decades. Between 1986 and 2002, peak demand across the United States grew by 26%, and U.S. electric generating capacity grew by 22%, but U.S. transmission capacity grew little beyond the interconnection of new power plants. Specifically, “the

⁹³ 2003 BLACKOUT REPORT, *supra* note 63, at ch. 4 p. 32 (quoting a letter from Michael H. Dworkin, Chairman, Vermont Public Service Board, Feb. 11, 2004, to Alison Silverstein and Jimmy Glotfelty) (brackets added).

⁹⁴ Dang, *supra* note 80, at 332-33.

⁹⁵ Sager A. Williams, Jr., *Comment: Limiting Local Zoning Regulation of Electric Utilities: A Balanced Approach in the Public Interest*, 23 U. BALT. L. REV. 565, 572 (1994).

⁹⁶ *Id.*

⁹⁷ See 2003 BLACKOUT REPORT, *supra* note 63, at Ch. 7, p. 103.

⁹⁸ ICF Consulting, “The Economic Cost of the Blackout: An Issue Paper on the Northeastern Blackout, August 14, 2003,” available at http://www.icfconsulting.com/Markets/Energy/doc_files/blackout-economic-costs.pdf

⁹⁹ 2003 BLACKOUT REPORT, *supra* note 63.

amount of transmission capacity per unit of consumer demand declined during the past two decades and . . . is expected to drop further in the next decade.¹⁰⁰

Unfortunately, all indications are that the future construction of transmission capacity will lag well behind surging generation and transmission demand.¹⁰¹ Many experts believe that one factor contributing to the slow pace of transmission facility construction is the present procedure for siting such projects.¹⁰²

Although transmission technology, and with it the character of the markets, has changed, the method of obtaining approval for the siting of new transmission projects has remained largely in a “time warp.”¹⁰³ States have exclusive jurisdiction over transmission facility siting and each state has its own method of reviewing proposed transmission projects to determine if a project is necessary and preferable to alternative designs.¹⁰⁴ Any federal agencies that are impacted, because of environmental concerns or the desired use of federal lands, must conduct their own reviews.¹⁰⁵

In the case of an interstate transmission project, approval must be obtained from each state involved.¹⁰⁶ So a large interstate project may have to successfully navigate several independent state and federal review procedures before construction can begin, a process that has taken up to a decade for such projects and caused considerable ex-

¹⁰⁰ *Id.* at Ch. 4, p. 32 (quoting HIRST, *supra* note 6, at vii).

¹⁰¹ Eisen, *supra* note 59, at 556.

¹⁰² *See, e.g.*, Dang, *supra* note 80, at 329, 339; Fox-Penner, *supra* note 46, at 13.

¹⁰³ Brown & Daniels, *supra* note 79, at 24. “[S]iting and eminent domain . . . has undergone dramatically little change in the past decade. While policy has promoted competition in regional bulk power markets and removal of entry barriers, the siting laws and eminent domain statutes have continued for the most part in a time warp, unchanged from the days of local monopolies”. *Id.*

¹⁰⁴ *Id.* at 335-36; *infra* at II.C.

¹⁰⁵ *See, e.g.*, Classes of Actions that Normally Require EISs, 10 C.F.R. pt. 1021(D) Appendix D, D5, D6 (2005) (requiring environmental impact statements for transmission system additions and integration); Permits for Structures or Work In or Affecting Navigable Waters of the United States, 33 C.F.R. § 322.5(h)(5)(i) (2005) (requiring a federal permit for transmission lines crossing navigable waters); *see also* Fox-Penner, *supra* note 46, at 13.

¹⁰⁶ *See Id.*; Dang, *supra* note 80, at 339; MEYER & SEDANO, *supra* note 53, at E-5, E-15.

pense.¹⁰⁷ New transmission projects, particularly interstate ones, are already complex and expensive long-term investments.¹⁰⁸ Under the current siting regime, such projects may also be sidelined during the approval process by local politics, interstate squabbles, or by state courts empowered only to consider intrastate concerns in granting siting approval or the use of eminent domain.

B. Showing of Need and Public Use for Eminent Domain Purposes

The lands across which new transmission lines must run are generally owned by private individuals or firms, or by state or federal agencies. Therefore, electric utilities typically must obtain easements in order to begin construction.¹⁰⁹ Since power lines must be aligned across the lands of multiple owners, obtaining easements through negotiations would render the electric companies liable to holdout problems.¹¹⁰ Eminent domain has traditionally been used to acquire these necessary easements, but the power of eminent domain can only be exercised for public use.¹¹¹ Therefore in order to obtain approval for a project, a showing of public need must be made. Traditionally, this was satisfied by showing that the project would increase the reliability of the local transmission grid, to the benefit of the local consumers. But, given the change in the electricity generation and transmission market, the benefit of many transmission facilities is not primarily to a locality but to a regional energy market. For example:

¹⁰⁷ See MEYER & SEDANO, *supra* note 53, at E-8 to 9, E-38 to 39.

¹⁰⁸ Eisen, *supra* note 59, at 556-57; MEYER & SEDANO, *supra* note 55, at E-48 (asserting that “[d]elay and controversy have been more common in larger, interstate projects”).

¹⁰⁹ See Lisa M. Bogardus, *Recovery and Allocation of Electromagnetic Field Mitigation Costs in Electric Utility Rates*, 62 *FORDHAM L. REV.* 1705, 1707 (1994).

¹¹⁰ See, e.g., Richard A. Epstein, *Rights and Rights Talk*, 95 *HARV. L. REV.* 1106, 1114 (1992) (reviewing MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (asserting that “property rights are not absolute, for individual owners are not allowed to hold out against the community at large if the community is prepared to pay them just compensation for their losses”).

¹¹¹ See *Kelo v. City of New London*, 126 S.Ct. 2655 (2005) (adopting broad view of “public use” as including “public purpose”). *Kelo* affirmed that a locality “would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party.” *Id.* at 2661.

Due to the dynamic and highly integrated nature of the AC grid, an upgrade in one state may be required to enhance reliability and relieve congestion in an adjacent state. Also, a transmission addition may be required in a state to enable an upgrade undertaken in an adjoining state to function as planned.¹¹²

The problem, in a nutshell, is that while the need for siting transmission lines is regional and national, courts generally act on the proposition that a State cannot use its power of eminent domain for the benefit of the citizens of another State.¹¹³ They find this limitation within the source of the legislative power, which is the obligation of the sovereign to protect and promote the health, safety, morals, and welfare of citizens of the individual State.¹¹⁴

In *Mississippi Power & Light Co. v. Conerly*,¹¹⁵ for example, the Mississippi Supreme Court dismissed out-of-state benefits as a possible basis for the use of eminent domain and held that the primary beneficiaries of any such use must be Mississippi citi-

¹¹² TRANSMISSION ACCESS POLICY STUDY GROUP, EFFECTIVE SOLUTIONS FOR GETTING NEEDED TRANSMISSION BUILT AT REASONABLE COST 4 (2004) [hereinafter TAPS], available at <http://www.tapsgroup.org/sitebuildercontent/sitebuilderfiles/effectivesolutions.pdf>.

¹¹³ See *Miss. Power & Light Co. v. Conerly*, 460 So. 2d 107 (Miss. 1984) (excluding benefits to be derived outside the state from consideration in eminent domain proceedings); *Adams v. Greenwich Water Co.*, 83 A.2d 177, 182 (Conn. 1951) (holding that “no state is permitted to exercise or authorize the exercise of the power of eminent domain except for a public use within its own borders”); *People ex rel. Trombley v. Humphrey*, 23 Mich. 471, 472 (1871) (“For the one to enter the sphere of the other and employ its officers and machinery in the exercise of its eminent domain for the benefit of the other would not only be as much without warrant, but also as much a work of supererogation, as for the United States to exercise the like authority and employ the like agencies in a foreign country”); *Clark v. Gulf Power Co.*, 198 So.2d 368, 371 (Fla. App. 1967) (holding that the power of eminent domain is only “for the use and benefit of the people within the state”); *Grover Irrigation & Land Co. v. Lovella Ditch, etc., Co.*, 131 P. 43, 55 (Wyo. 1913) (“in every case where the use as a justification for the proceeding has been questioned, the inquiry in that respect has been confined to the interest and welfare of the state or sovereignty within whose limits or jurisdiction the land sought to be condemned is located”).

¹¹⁴ See, e.g., *Kohl v. U.S.*, 91 U.S. 367, 374 (1875) (“the right of eminent domain... is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another.”); *Square Butte Elec. Co-op. v. Hilken*, 244 N.W.2d 519, 525 (N.D. 1976) (“the public benefit, while not confined exclusively to the state authorizing the use of the power... is nonetheless inextricably attached to the territorial limits of the state because the state’s sovereignty is also so constrained”).

¹¹⁵ 460 So. 2d 107 (Miss. 1984).

zens.¹¹⁶ The court interpreted the statutory language of “public necessity” and “public use” to refer to use by the citizens of the state of Mississippi.¹¹⁷ The Mississippi legislature later endorsed this interpretation when it amended Miss. Code Ann. § 77-3-14 in 1992 to specifically consider only benefits to Mississippi citizens in allowing a new transmission facility to be constructed.¹¹⁸ From this determination that eminent domain cannot be used to benefit citizens of another state flows the question of whether eminent domain can ever be used for projects that somehow benefit citizens of another state in addition to citizens of the state exercising the power.

When a use indirectly and necessarily benefits citizens of another state as a by-product of its use to citizens of the state exercising the power of eminent domain, courts have universally held that does not preclude the state from proceeding in its condemnation.¹¹⁹ However, a trickier question arises when considering the use of eminent domain for projects that intend to benefit citizens of two or more states, but could be scaled down to meet the needs of only the state exercising the power. If the proposed project could be conceived as a combination of two projects, one of which benefits only the citizens of the state in which it is to be constructed and the other benefiting only individuals outside the

¹¹⁶ *Id.* at 113.

¹¹⁷ *Id.* (referring specifically to Miss. Code Ann. § 11-27-15).

¹¹⁸ Miss. Code Ann. § 77-3-14 (“The commission shall develop... an analysis of the... needs for expansion of facilities for the generation of electricity in Mississippi... to achieve maximum efficiencies for the benefit of the people of Mississippi”).

¹¹⁹ *See Adams v. Greenwich Water Co.*, 83 A.2d 177, 182 (Conn. 1951) (“If the taking is for a public use which will provide a substantial and direct benefit to the people of the state which authorizes it, it is a proper exercise of the power of eminent domain even though it also benefits the residents of another state.”); *Gilmer v. Lime Point*, 18 Cal. 229, 253 (1861) (holding that benefits to citizens of Oregon do not make an improvement less a public use in California); *Washington Water Power Co. v. Waters*, 115 P. 682, 686 (Idaho 1911) (holding that incidental benefits to citizens of other states do not defeat the right of condemnation); *Columbus Waterworks Co. v. Long*, 25 So. 702, 703 (Ala. 1898) (holding that the right of condemnation is not to be denied where public uses are promoted in other states as well as the one granting the right); *Clark v. Gulf Power Co.*, 198 So.2d 368, 371 (Fla. App. 1967) (holding that land cannot be condemned solely for the benefit of another state); *Square Butte Elec. Co-op. v. Hilken*, 244 N.W.2d 519, 525 (N.D. 1976) (holding that other states may also be benefited); *Gralapp v. Miss. Power Co.*, 194 So.2d 527, 531 (Ala. 1967) (“the right to condemn in this case cannot be denied because public uses in another state would be promoted also”).

state, under this reasoning it might make little sense to allow the power to be used for the merged project. Of course, determining what portion of the project benefits which citizens is not easy in practice, and courts have held in practice that the use of eminent domain for such projects is constitutional.¹²⁰

Although in recent cases it is clear that courts are cognizant of the regional benefits of some of these transmission proposals and seem to want to take these into account when making a determination of the appropriateness of the use of eminent domain,¹²¹ the courts are tied to the language of intrastate benefits. In order to approve an interstate project, the courts must find at least substantial intrastate benefits arising from it. The courts in recent years have been increasingly confronted, however, with proposals in which the facilities are mainly needed for the regional energy market and few if any direct benefits accrue within the state. Even if the proposed construction is in a critical regional electricity bottleneck and is needed for reasons of national security, the court must find substantial intrastate benefits arising from the proposal or it cannot approve the use of the state's eminent domain power.

Courts first were presented with this problem in the 1960s, and began to issue decisions on the extent to which eminent domain could be used in the acquisition of rights-of-way for transmission facility projects with significant regional impacts. The requirements the courts have placed upon such uses of the power vary, from requiring the primary beneficiaries of the project to be in-state citizens, to merely requiring that a substantial benefit accrue to in-state citizens.¹²² The focus in these cases seems to be on whether

¹²⁰ See, e.g., *Adams v. Greenwich Water Co.*, 83 A.2d 177, 182 (Conn. 1951) (rejecting the argument that the right of eminent domain should be limited to the portion of a project that is required for the citizens within the state).

¹²¹ See *Grand Canyon Trust v. Arizona Corp. Comm'n*, 107 P.3d 356 (Ariz. Ct. App. 2005) (holding that utility customers included wholesale customers whose retail users were not necessarily in Arizona); *Cross-Sound Cable Co., LLC v. Rocque*, 2003 WL 1900775 (Conn. Super. Ct., 2003) (balancing regional needs and environmental issues) (not reported in A.2d); *Neb. Pub. Power Dist. v. Johnson*, 1998 WL 765718 (Neb. Ct. App. 1998) (not reported in N.W.2d) (noting the utility's obligations as a member of the Mid-Continent Area Power Pool).

¹²² See *Adams v. Greenwich Water Co.*, 83 A.2d 177, 182 (Conn. 1951) (requiring substantial and direct benefits); *Grover Irrigation & Land Co. v. Lovella Ditch, etc., Co.*, 131 P. 43, 55 (Wyo. 1913)

it is constitutional to allow the power of eminent domain to be used for purposes that benefit citizens of other states to various degrees. Benefits to other states, rather than being one factor supporting the use of eminent domain, are generally a barrier. However, some states have been imaginative in departing from the *Conerly* view, deciding to one extent or another that benefits to regional energy markets are positive factors in determining whether a project constitutes a public use.

To a certain extent, courts could interpret in-state benefits broadly, such as by including within “public use” the concept of “public advantage.” In *Square Butte Elec. Coop. v. Hilken*,¹²³ a group of rural electricity cooperatives entered into an agreement with a Minnesota electric company to provide it with electric power in return for financing for the construction of new facilities.¹²⁴ The group then sought the use of eminent domain to construct a transmission line from the facilities to the Minnesota company’s plant.¹²⁵ This taking was challenged by the affected landowners for lack of a valid public use. The trial court refused to take into account the advantage that increased reserve and emergency power supplies would confer upon the state. The Supreme Court of North Dakota held this to constitute error, and that the proper test was whether the alleged benefits of the proposed facility would provide “either singly or in unison, a substantial and direct benefit to North Dakota.”¹²⁶ The court decided that increased reserve and emergency power supplies, a stabilizing effect of the proposed line on the existing system, the possibility of electricity being provided to North Dakota consumers in the future, and reduced future power costs, although insufficient individually, satisfied that test in combination.¹²⁷ A

(finding indirect benefits insufficient); *Clark v. Gulf Power Co.*, 198 So.2d 368, 371 (Fla. App. 1967) (holding that the required public use must be well-defined and within the control of the state); *Gralapp v. Miss. Power Co.*, 194 So.2d 527, 531 (Ala. 1967) (“private property may not be condemned unless it is to be subjected to a recognized public use, affording benefits which are not vague, indefinite or restrictive.”).

¹²³ 244 N.W.2d 519, 525 (N.D. 1976).

¹²⁴ *Id.* at 521-22.

¹²⁵ *Id.*

¹²⁶ *Id.* at 525.

¹²⁷ *Id.* at 525-31.

strong concurrence held that the benefits were clearly indirect, but that only indirect benefits are required to constitute a constitutionally valid public use.¹²⁸

Several other courts have issued similar pragmatic decisions that took regional benefits into account.¹²⁹ This more progressive, regional approach, with its lower standard for finding a public use for electric transmission lines, appears to be more prevalent in the Western states.¹³⁰ Perhaps in part because of this Western legal tradition, the Western Governor's Association has been a leading opponent of the proposed changes in siting authority. It has insisted that the western states have a long history of cooperation and of approving necessary interstate projects in a reasonable time.¹³¹ The Wyoming PSC has even suggested that RTOs are unnecessary because the Western states already constitute a single unified wholesale market.¹³² Because these states have large unpopulated land areas and significant amounts of federal lands, they have indeed been forced to cooperate to a greater extent than most Eastern states.¹³³ This may have played a role in the evolution of their eminent domain jurisprudence.

Another jurisdiction has gone so far as to rule that regional integration is itself a direct intrastate benefit. In *Stone v. Pennsylvania Public Utility Commission*, the Superior Court of Pennsylvania held that it was proper to use the state's power of eminent domain for the construction of a high-power transmission line connecting the electric grids of one

¹²⁸ *Id.* at 532-33.

¹²⁹ *See, e.g.*, *Oxendine v. Pub. Serv. Co. of Ind.*, 423 N.E.2d 612, 615-17 (Ind. App. 1980) (interpreting statutory language to include out-of-state wholesale customers in the definition of "the public"); *Montana Power Company v. Bokma*, 457 P.2d 769, 772 (1969) (finding the public's right to use power, if necessary, to constitute a public advantage sufficient for the exercise of eminent domain).

¹³⁰ *See, e.g.*, *Montana Power Company v. Bokma*, 457 P.2d 769, 772 (1969) ("the board [sic] view, essentially requires only a use conferring a "public advantage" or a "public benefit". Montana, as with many western states, has adhered to the broad view since 1895, presumably to promote general economic development.").

¹³¹ *Hearings, supra* note 53, at 216, 220-21 (statement of Bill Richardson, Governor of New Mexico, on behalf of the Western Governor's Association).

¹³² Bruce W. Radford, *Electric Transmission: Do State Regulators Still Have a Voice?*, 137 PUB. UTIL. FORT. 42, 44 (Nov. 1999).

¹³³ *See MEYER & SEDANO, supra* note 53, at E-19, E-37.

of its principal cities and that of another state.¹³⁴ The court stated that “[o]ne of the principal considerations of public convenience and necessity is the need for integration of the bulk power transmission systems of Philadelphia and Baltimore.”¹³⁵ The court cited the resulting benefits of greater economies of scale and improved grid reliability in holding that electric grid integration was itself a major benefit for Pennsylvania citizens.¹³⁶ The court also noted the public need for alternate sources of electric power in case of a national emergency.¹³⁷ The result in *Stone* has since been followed and reinforced in Pennsylvania.¹³⁸

Finally, one court adopted a position directly opposite the *Conerly* view. In *Gralapp v. Mississippi Power Company*,¹³⁹ the Supreme Court of Alabama ruled that it was appropriate to use the power of eminent domain for a transmission line connecting the Alabama and Mississippi electric grids where nearly all of the power sent over the line flowed out of Alabama. The company building and operating the line was a Mississippi corporation, not subject to the jurisdiction of the Alabama Public Service Commission, and to the extent that power flowed into Alabama it was only because of a contractual arrangement.¹⁴⁰ Thus, the state of Alabama had no right to control the line and no guarantee that it would receive any direct benefits going into the future. The court found that there was a public use nevertheless, essentially holding that *any* benefit to the citizens of the state of Alabama was sufficient to support the use of eminent domain.¹⁴¹ This result diametrically opposes the rule in *Conerly* that the primary beneficiaries of a project must be in-state citizens in order for the power of eminent domain to be granted. Under *Gralapp*, nearly any project could become eligible for use of eminent domain through the

¹³⁴ *Stone v. Pa. P.U.C.*, 162 A.2d 18, 19-22 (Pa. Super. Ct. 1960).

¹³⁵ *Id.* at 21.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See, e.g., Dunk v. Pa. P.U.C.*, 232 A.2d 231 (Pa. Super. Ct. 1967).

¹³⁹ *Gralapp v. Miss. Power Co.*, 194 So.2d 527, 530-31 (Ala. 1967).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

simple addition of a contractual arrangement with a state utility company, entitling it to a small amount of power. Other states vehemently have rejected basing public use on the allocation of small shares of power to in-state use.¹⁴²

Many courts have not made the leap to finding purely interstate transmission lines to give rise to sufficient public benefits for the use of eminent domain.¹⁴³ It is unclear to what extent there exists a trend towards a more liberal interpretation of what public use is, and a more liberal use of eminent domain for the siting of critical electric transmission facilities. There is no trend line, such that the oldest cases hew towards *Conerly* and the most recent towards *Gralapp*. Many of the definitive cases were decided more than 20 years ago. The importance of regional energy markets has grown dramatically since those decisions, yet they are not, for the most part, being reevaluated. However, eminent domain questions are mainly issues of constitutional interpretation or fundamental legal principles, and so are not influenced much by legislative or policy changes. It may be that eminent domain jurisprudence is simply not adaptive to changing circumstances. It seems unlikely that any dramatic changes will take place in this area of the law any time soon. If not, that is an important consideration in an industry desperately in need of large interstate transmission projects that surely will require the use of eminent domain.

C. Showing of Need and Public Use for Permitting Purposes

In addition to obtaining government authority for the condemnation of necessary rights of way, utility companies must obtain state approval for the construction of new transmission facilities or the expansion of existing ones.¹⁴⁴ This permitting process is generally delegated to a state utility commission and is conducted in accordance with statutory standards and procedures.¹⁴⁵

¹⁴² See, e.g., *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428, 430 (Fla. 2000) (finding that a contractual arrangement to provide 30 megawatts of a power plant's planned capacity of 514 megawatts to a local utility company was insufficient to show a state need for the power plant).

¹⁴³ See *Miss. Power & Light Co. v. Conerly*, 460 So. 2d 107, 112 (Miss. 1984); *Clark v. Gulf Power Co.*, 198 So.2d 368, 371 (Fla. App. 1967); *Brown & Daniels*, *supra* note 79 (collecting other cases).

¹⁴⁴ *MUCHOW & MOGEL*, *supra* note 88, at § 52.04(3).

¹⁴⁵ *Id.* See also *Fox-Penner*, *supra* note 46, at 13.

Typically, state commissions control entry into the public utility market through the grant of certificates of public convenience and necessity.¹⁴⁶ These certificates are revocable licenses intended to avoid unnecessary duplication of facilities by regulating competition between utilities within the same geographic area.¹⁴⁷ In order to gain approval, a utility typically must demonstrate that there is a public need for the planned expansion of transmission capacity, that it is “required by the present or future public convenience and necessity.”¹⁴⁸ This public necessity is determined by such factors as the proposal’s feasibility and the estimated demand for electrical service.¹⁴⁹

In the context of interstate transmission projects, this determination-of-need component of the permitting process is similar to that in eminent domain proceedings. In both, the main issue is whether substantial benefits accrue within the state. At the least, a determination of public need would require that a transmission facility accords state citizens some benefit. Courts often find a need wherever they find a benefit, in the form of lower prices, improved reliability, or the like.¹⁵⁰

In delineating the contours of the permissible exercise of eminent domain, legislative determinations are constrained by state and federal constitutional standards of “public use.” In administering the permitting process, however, constitutional limitations on legislative authority are less stringent. The U.S. Constitution is one of enumerated powers; all powers not delegated to the national government are reserved to the states. This includes protection of the public health, safety, and welfare, and the enactment of social and economic legislation, which is given deferential review in federal courts. The United

¹⁴⁶ MUCHOW & MOGEL, *supra* note 88, at § 2.05(1).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at § 2.05(1), 52.04(3); *see also* Fox-Penner, *supra* note 46, at 20-28; Bogardus, *supra* note 109, at 1706-07.

¹⁴⁹ MUCHOW & MOGEL, *supra* note 88, at § 2.05(1)

¹⁵⁰ *See, e.g.*, Re Sierra Pac. Power Co., 64 CPUC 2d 442, QQ (Cal. P.U.C. 1996); Re New England Elec. Transmission Corp., 48 P.U.R.4th 477, 484 (1982).

States Supreme Court has affirmed the right of the states to regulate private firms that are affected with a public interest, such as utilities.¹⁵¹

State regulation of the electric industry began early in the 20th century.¹⁵² At that time, power stations were located in cities and needed to run distribution lines through public thoroughfares to reach their retail customers.¹⁵³ Because of this and the enormous public demand for electricity, state governments concluded that the provision of electricity was impressed with a public interest and required regulation.¹⁵⁴ Early on, state legislatures regulated the industry directly, but soon found this approach to be inefficient.¹⁵⁵ Gradually this method was replaced by the formation of regulatory commissions, which are the bodies responsible for utility regulation today.¹⁵⁶

Originally, the purpose of regulation was to prevent excessive profits stemming from the natural monopoly an electric utility company has over its service area.¹⁵⁷ Over time, “the scope of regulation has broadened to include consideration of environmental, financing, service and economic subjects.”¹⁵⁸ The public interest and general welfare, as prerequisites for permitting approval, are almost wholly in the legislative domain.

Although the determination of public need in the permitting process may not be arbitrary, it is flexible and responsive to changing political and economic conditions.

Nevertheless, there are many permitting processes that still do not take into account regional benefits to the extent that the *Gralapp* court did in the context of eminent domain proceedings 40 years ago.¹⁵⁹ Some permitting processes, in making a determina-

¹⁵¹ *Munn v. Ill.*, 94 U.S. 113, 126 (1877); *see also* MUCHOW & MOGEL, *supra* note 88, at § 2.03.

¹⁵² MUCHOW & MOGEL, *supra* note 88, at § 52.02.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ MUCHOW & MOGEL, *supra* note 88, at § 52.02.

¹⁵⁸ *Id.*

¹⁵⁹ *Compare* *Gralapp v. Miss. Power Co.*, 194 So.2d 527 (Ala. 1967) *with* *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000).

tion of public need, also do not consider reasonable future expectations of need in the community or contractual agreements between the company proposing the new project and state utilities.¹⁶⁰ Yet these factors are often considered by courts in the context of eminent domain.¹⁶¹

For example, in *Point of Pines Beach Association v. Energy Facilities Siting Board*,¹⁶² the Supreme Judicial Court of Massachusetts overturned a decision to grant approval for a new power facility on the basis of a power purchase agreement.¹⁶³ The Board had decided that a contractual agreement with a local utility to purchase power generated by the new facility was prima facie evidence of need within the Commonwealth of Massachusetts.¹⁶⁴ The court disagreed, holding that there had to be actual evidence that the commonwealth would need the power generated by the facility at the time that it opened.¹⁶⁵ It decided that the statistical forecasts provided could not prove whether the commonwealth would need additional power and that the contract was not the product of market forces. It therefore reversed the board's decision.¹⁶⁶ Although it deemed the case a matter of statutory interpretation, the actual language of the relevant statute required only that the new facility "provide a necessary energy supply for the common-

¹⁶⁰ See, e.g., *Point of Pines Beach Ass'n v. Energy Facilities Siting Bd.*, 644 N.E.2d 221, 223-24 (Mass. 1995).

¹⁶¹ See *Oxendine v. Pub. Serv. Co. of Ind.*, 423 N.E.2d 612, 616 (Ind. App. 1980); *Square Butte Elec. Co-op. v. Hilken*, 244 N.W.2d 519, 527-30 (N.D. 1976) (considering projected energy needs in determining whether a public use exists and finding a public use partially on the basis of a contractual arrangement with a local utility); *Gralapp v. Miss. Power Co.*, 194 So.2d 527, 530-31 (Ala. 1967) (holding a contractual arrangement for a local company to purchase power was sufficient to support a finding of public use); *Miss. Power & Light Co. v. Conerly*, 460 So. 2d 107, 112 (Miss. 1984) (noting the lack of a contractual arrangement with an intrastate utility in rejecting the use of eminent domain).

¹⁶² 644 N.E.2d 221.

¹⁶³ *Id.* at 222, 224.

¹⁶⁴ *Id.* at 222.

¹⁶⁵ *Id.* at 223.

¹⁶⁶ *Id.* at 223-24.

wealth.”¹⁶⁷ This type of interpretation, where courts decide that only specified intrastate needs meet the statutory requirements, is not uncommon.¹⁶⁸

It is important to note, however, that the Massachusetts legislature two years later enacted new legislation that did away with the necessity requirement, replacing it with an explicit benefits analysis similar to that customarily found in eminent domain proceedings.¹⁶⁹ The law takes into account regional benefits inasmuch as they contribute to the reliability of the energy supply of Massachusetts.¹⁷⁰ This legislative flexibility and evolution is impressive and bolsters the idea that state permitting processes can adapt to changing conditions.

Furthermore, approval processes in general seem more liberal than eminent domain determinations. For example, in *Re Sierra Pacific Power Co.*, the California Public Utilities Commission approved construction of a new high-voltage transmission line, even though it provided only indirect benefits to California citizens.¹⁷¹ Over 92% of the proposed transmission line’s load would be attributable to the state of Nevada.¹⁷² The commission held that no weight could be given to the utility’s increased import capacity resulting from the new transmission line, but that some weight could be given to the role of the project in providing new transmission capacity for citizens of other states.¹⁷³

In addition, the court took notice of the importance of regional energy markets and the need to mitigate the difficulties the transmission grid is facing today. Noting that there had been several blackouts in California resulting from problems in Nevada and an overloaded grid, the Commission held that the possible facilitation of future interconnection and “modest” improvements in the reliability of service to California residents were

¹⁶⁷ *Id.* at 224 (quoting MASS. ANN. LAWS ch. 164, § 69J (LexisNexis 2005)).

¹⁶⁸ *See, e.g.,* Tampa Elec. Co. v. Garcia, 767 So. 2d 428, 435-36 (Fla. 2000).

¹⁶⁹ MASS. ANN. LAWS ch. 164, § 69J 1/4 (LexisNexis 2005).

¹⁷⁰ *Id.*

¹⁷¹ *Sierra Pac. Power*, 64 CPUC 2d 442, QQ (1996).

¹⁷² *Id.*

¹⁷³ *Id.*

sufficient to show public necessity for the project.¹⁷⁴ In finding public necessity, the commission considered many factors, including the following: community values, recreational and park areas, historical and aesthetic values, and influence on the environment.¹⁷⁵ Because the commission was given broad discretion in making its determination, it seems to have been able to take into account changing markets and corresponding needs in a way that courts considering the eminent domain power cannot. This is particularly apparent in the board's assertion that it gives weight to benefits provided to citizens of other states.

The New Hampshire Public Utilities Commission has taken an even broader view, equating regional benefits to intrastate ones in siting approval. In the case of *In Re New England Electric Transmission Corp.*, a utility applied for a certificate of site and facility to construct a new transmission line that would create energy and cost savings in the entire New England region, mainly outside of New Hampshire.¹⁷⁶ The Public Utilities Commission noted that this case was the first to come before it that proposed a transmission line designed mainly to more efficiently convey electric power already in the regional grid and not associated with any specific generator.¹⁷⁷ The main New Hampshire utility was a member of NEPOOL, a voluntary cooperative energy pool that ran many New England utilities in concert to achieve cost savings.¹⁷⁸ The commission decided that, because of the interconnectedness between the New Hampshire and New England electric grids, benefits to New England were necessarily benefits to New Hampshire.¹⁷⁹ The commission found that evidence that the project would reduce the cost of electric power and improve the ability of utilities to deliver electric power in the New England area would be sufficient to fulfill the statutory requirement that it was "required to meet the

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *New England Elec.*, 48 P.U.R.4th 477, 478, 482 (1982).

¹⁷⁷ *Id.* at 482.

¹⁷⁸ *Id.* at 483.

¹⁷⁹ *Id.* at 484.

present and future demand for electric power.”¹⁸⁰ Several years later, this same commission would condition approval of a similar project on evidence that it would not jeopardize the reliability of other grid systems in the Northeast, even though it posed no danger to New Hampshire or New England.¹⁸¹

The fact that some states have taken the step of equating, or almost equating, regional and state benefits, is very significant. This effectively internalizes those benefits for the purposes of electric transmission permitting and encourages an efficient level of new development. Although most jurisdictions have not gone that far,¹⁸² this shows that a responsive legislature and court system can successfully adapt to the new reality of interconnected and interdependent regional transmission grids.¹⁸³

Nevertheless, a grid capacity crisis is developing now, and whatever changes are being made at the state level, the problem is only getting worse.¹⁸⁴ The question of whether state courts will be able to adequately account for regional benefits in the approval of future electric transmission facility projects is a critical one if the current siting regime is maintained.

D. Local Legislative Determinations

Many state and local government agencies, officials, and organizations have staunchly opposed any change in the current system that would divest them of any siting authority,¹⁸⁵ citing in part their unique ability to weigh the impact of transmission pro-

¹⁸⁰ *Id.* at 484, 491.

¹⁸¹ *Re New England Hydro-Transmission Corp.*, 71 N.H.P.U.C. 727, 773 (1986) (interpreting statutory language that required a project to not adversely affect system stability).

¹⁸² *See, e.g.*, MEYER & SEDANO, *supra* note 53, at E-13.

¹⁸³ *See also*, *In re Exemption Application by Minn. Power for a 345/230 kV High Voltage Transmission Line Known as the Arrowhead Project*, No. C4-01-1022, 2002 Minn. App. LEXIS 46, *9 (Jan. 15, 2002) (considering reliability improvements to both Minnesota and Wisconsin citizens); OHIO REV. CODE ANN. § 4928.12 (Anderson 2005) (“The commission shall negotiate and enter into agreements or compacts with agencies of other states for cooperative regulatory efforts”).

¹⁸⁴ *See, e.g.*, 2003 BLACKOUT REPORT, *supra* note 63, at Ch. 4, p. 32.

¹⁸⁵ *See* MEYER & SEDANO, *supra* note 53, at E-16; Fox-Penner, *supra* note 46, at 14.

jects on local communities.¹⁸⁶ Insofar as siting decisions with purely local or intrastate impact are concerned, local officials may be best situated to balance local economic, environmental, and similar needs. In fact, local officials may be better able to measure local impact precisely because they are steeped in what might broadly, and non-pejoratively, be termed local politics. To the extent that localities and individual states internalize the effects of their own siting decisions, they have an incentive to authorize an optimal pattern of new transmission infrastructure.

However, many state siting boards are not authorized to take into account interstate benefits. One study has indicated that 22 states, localities can block interstate transmission expansion projects.¹⁸⁷ Also, by their nature, local and state decisionmaking bodies attempt to internalize the gains resulting from their decisions and externalize the corresponding costs. This leads to a correlative lack of responsibility and concern for regional and national transmission needs. At present there is widespread disagreement over whether this responsibility should belong to a local, state, or national entity.¹⁸⁸

1. NIMBYism and Environmental Concerns

Even if regional considerations are valid factors in a state's transmission siting decision process, the local governmental bodies with siting authority are unlikely to give them equal weight with local concerns.¹⁸⁹ Because local officials are directly or indirectly answerable to the community that they serve, they are bound by law or prudence to give local concerns greater weight than they objectively would warrant.

[E]ven when the regional or national benefits are well understood, facility siting opposition is almost universally driven by concern over the impacts on local resi-

¹⁸⁶ See, Dang, *supra* note 80, at 335; *Hearings*, *supra* note 53, at 13-16 (statement of David A. Svanda, President, National Association of Regulatory Utility Commissioners, and Commissioner, Mich. Pub. Svc. Comm'n); Ronald E. Russell, *Toward Federal/State Regulatory Harmony: Perspective of a State Regulator*, 9 CONN. J. INT'L L. 869, 875 (1994); MEYER & SEDANO, *supra* note 53, at E-21; Fox-Penner, *supra* note 46, at 14.

¹⁸⁷ Jim Rossi, *Moving Public Law Out Of The Deference Trap In Regulated Industries*, 40 WAKE FOREST L. REV. 617, 647 (2005).

¹⁸⁸ Eisen, *supra* note 59, at 557.

¹⁸⁹ HIBBARD, *supra* note 4, at 17.

dents. In effect, local residents are more often than not unwilling [to] accept what are perceived as significant impacts on their community and way of life in order to provide cost, reliability and environmental benefits to regional or national populations.¹⁹⁰

This NIMBYism can prevent any new transmission line project from succeeding, no matter how dramatic its benefits.¹⁹¹ Even when the new infrastructure not only improves reliability and lowers prices, but also is necessary for national security and replaces older, more polluting facilities, attempts to site it may end in failure.¹⁹² These failures can occur in any jurisdiction, to any developer, regardless of its competence and the effort it makes to satisfy the local residents impacted by the proposed project.¹⁹³

The magnitude of the NIMBY problem has increased in recent years with the decrease in available land, the growing necessity of infrastructure close to existing populations, and the level and organization of local opposition.¹⁹⁴ These days:

[T]he reasons for approval or denial of major energy facility infrastructure appears to have less to do with carrying out explicit national and state energy policies or with agency jurisdiction than with a combination of political support or opposition, choice of location, the strength and organization of local opposition, the quality of decisions and siting process execution on the part of project developers, regional market economics, and the rapidly changing nature of short-term reactionary politics.¹⁹⁵

The emphasis on aesthetics and electromagnetic fields (EMF) in local siting decisions may be evidence of this parochialism. Local outrage over aesthetics and EMF are a major factor in siting decisions and can derail even greatly needed transmission expansion.¹⁹⁶ EMF are often an issue in certification proceedings, in which opponents typically

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 19.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 17.

¹⁹⁵ HIBBARD, *supra* note 4, at 21.

¹⁹⁶ *See City of Norwalk v. Connecticut Siting Council*, 2004 WL 2361540 (Conn. Super. Ct. 2004) (debating unsightliness at length in spite of great local need) (not reported in A.2d); *San Diego Gas & Electric Co. v. Superior Court*, 920 P.2d 669 (Cal. 1996) (mentions EMF levels as a siting factor);

argue that the proposed line is unsafe because it exposes nearby residents to EMF and demand that the line be re-designed or re-routed.¹⁹⁷ EMF exposure also gives rise to inverse condemnation claims from nearby landowners, who assert that the new transmission line has reduced the value of their property because of widespread public fear of EMF, and personal injury claims.¹⁹⁸

In addition, many state regulatory bodies have responded to these concerns by mandating an EMF policy, a favorite standard being that of “prudent avoidance.”¹⁹⁹ Although not well defined, this standard is essentially a common-sense approach that EMF exposure should be avoided where it is inexpensive in comparison with the concerns of the citizenry.²⁰⁰ Nevertheless, EMF expenses in the electric utility industry resulting from design and route changes and from litigation, research, and regulatory compliance exceeded \$1 billion annually a decade ago.²⁰¹

Although there is some evidence to the contrary, published studies have shown no link between EMF levels and cancer incidence.²⁰² Nevertheless, fear of EMF and concern over the unsightly nature of transmission lines has led to a very significant “not in

Florida Power Corp. v. State of Florida, Siting Bd., 513 So. 2d 1341 (Fla. Dist. Ct. App. 1987) (denied because of EMF concerns); In re Narragansett Elec. Co., 544 A.2d 121 (R.I.1988) (holding scenic development of the region to be a major siting factor); Sierra Pac. Power, 64 CPUC 2d 442 (1996) (page numbers unavailable) (expecting up to 4% of total project cost to be spent on EMF mitigation and requiring a 300-foot right-of-way around the line to reduce EMF exposure); Barendfeld v. Penn. Pub. Util. Comm’n., 624 A.2d 809, 811 (referring approvingly to an administrative judge’s holding that EMF effects of a proposed line needed to be studied and could jeopardize the siting application); Vt. Elec. Power Co. v. Bandel, 375 A.2d 975 (Vt. 1995) (holding that the exercise of eminent domain for a transmission line would have “interfered unduly with scenic preservation”).

¹⁹⁷ Bogardus, *supra* note 109, at 1707.

¹⁹⁸ *Id.* at 1708-09.

¹⁹⁹ *Id.* at 1711-12.

²⁰⁰ *Id.* at 1712.

²⁰¹ Bogardus, *supra* note 109, at 1724-25.

²⁰² See, e.g., NATIONAL RESEARCH COUNCIL, POSSIBLE HEALTH EFFECTS OF EXPOSURE TO RESIDENTIAL ELECTRIC AND MAGNETIC FIELDS 195 (1997), available at <http://www.nap.edu/books/0309054478/html/195.html>.

my back yard” (NIMBY) effect.²⁰³ Notably, the analogous federal statute regulating the siting of wireless telephone towers forbids localities from taking into account the EMF effects of facilities designed and constructed to Federal Communications Commission approved specifications.²⁰⁴ Other local environmental concerns may also be given undue weight.²⁰⁵

Although local opposition to new transmission lines on the basis of environmental concerns is often dismissed as a NIMBY phenomenon (possibly as a result of the scientifically unjustified furor over EMF), these lines can have a significant impact on local environments.²⁰⁶ “The mere fact that there is opposition to siting a particular facility does not necessarily signify parochialism or NIMBY at work.”²⁰⁷

Some have suggested that the widespread opposition to the siting of new transmission facilities is in truth grassroots energy-related activism, questioning the social costs of deregulation and the rise of merchant power plants.²⁰⁸ Supporting this view is the fact that most of these battles are fought not by powerful national environmental organizations, but by coalitions of smaller local groups with names like “A People’s Energy Campaign”, “Citizens for the Hudson Valley”, and “Vermonters for Clean Energy.”²⁰⁹ This may be because organizations with a broader view often don’t want to get caught up in disputes that seem to involve NIMBY-driven opposition to newer, cleaner, more reliable plants and facilities.²¹⁰ National environmental organizations are more concerned

²⁰³ Dang, *supra* note 80, at 332; Rossi, *supra* note 187, at 646.

²⁰⁴ 47 U.S.C. § 332(c)(7)(B)(iv) (2000).

²⁰⁵ See, e.g., Fla. Power Corp. v. Dep’t of Env’tl. Regulation, 638 So. 2d 545, 549-53 (Fla. Dist. Ct. App. 1994) (rejecting a proposal because of vague environmental concerns, including worries that maintenance might prevent herbaceous wetland from returning to forested wetland in 30-50 years).

²⁰⁶ Brown & Daniels, *supra* note 79, at 26; Chris Deisinger, *The Backlash Against Merchant Plants and the Need for a New Regulatory Model*, 13 ELEC. J. 51 (Dec. 2000).

²⁰⁷ Brown & Daniels, *supra* note 79, at 26.

²⁰⁸ Deisinger, *supra* note 206, at 51-52.

²⁰⁹ *Id.* at 52-53.

²¹⁰ *Id.* at 53.

with the global-warming and air-pollution effects of generation than the localized visual and possible health impacts of transmission.²¹¹

Yet although these local groups perhaps inordinately emphasize local land values and concerns, in some cases these national groups may be missing an opportunity to press their larger agendas on significant policy issues.²¹² The difficulty may be in separating the true policy wheat from the NIMBY chaff in a confrontation that is being played out in hundreds of small towns across the nation.

2. Parochialism and Corporate Favoritism

State and local businesses often wield a powerful influence over the political process that puts out-of-state competitors, often seeking to build interstate facilities, at a disadvantage.²¹³ Local authorities tend to favor local businesses that hire local workers and provide local benefits. This preference may translate to political difficulties for competing businesses and projects and even to legislative action explicitly discouraging new investment. Several states, including Florida, have adopted moratoria on the construction of new merchant generators or have allowed them to be constructed only by in-state utilities.²¹⁴

In *Tampa Electric Co. v. Garcia*,²¹⁵ the Supreme Court of Florida reviewed the decision to grant a determination of need for a proposed electric power plant. The plant was to be a joint project between New Smyrna, a Florida public utility, and Duke Energy, a North Carolina based, investor-owned wholesale utility company.²¹⁶ Under the proposal, the plant was to generate 514 megawatts, 30 megawatts of which, under the agreement between the companies, Duke would sell to New Smyrna at a discount rate.²¹⁷

²¹¹ See HIRST, *supra* note 6, at 11.

²¹² See Deisinger, *supra* note 206, at 53.

²¹³ Brown & Daniels, *supra* note 79, at 24

²¹⁴ Rossi, *supra* note 187, at 671; *Nervous of NOx*, *supra* note 92.

²¹⁵ 767 So. 2d 428 (Fla. 2000).

²¹⁶ *Id.* at 430.

²¹⁷ *Id.*

The remainder of the plant's capacity was to be sold by Duke on the wholesale market, primarily within Florida.²¹⁸

A determination of need was initially granted by the Florida Public Service Commission on the basis of an interpretation of "regulated electric companies" that included companies regulated by the FERC and not the state of Florida.²¹⁹ This ruling was appealed by several Florida public utility companies.²²⁰ The court reversed this decision and this interpretation, finding that the statutory provision²²¹ allowed a determination of need to be granted only to those companies regulated by Florida law.²²² According to the court, the Florida legislature intended, in 1973 legislation, to restrict the meaning of need to "demonstrated specified needs of... Florida customers" and to exclude "[t]he projected need of unspecified utilities throughout peninsular Florida" by rejecting wholesale utilities as applicants for determinations of need.²²³ The court also dismissed an argument that the statute as interpreted was in violation of the Dormant Commerce Clause.²²⁴ It noted that Congress explicitly left power plant siting and need determinations to the states in the 1992 Energy Policy Act.²²⁵

A dissent called this a "strained and artificial construction of various provisions of the legislative scheme that have little bearing on the issue before us today."²²⁶ In any case, this is an example of a state government putting out-of-state competitors at a disad-

²¹⁸ *Id.*

²¹⁹ *Id.* at 432.

²²⁰ *Id.* at 430.

²²¹ Fla. Stat. § 403.519 (2005) ("On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act.").

²²² *Tampa Elec.*, 767 So. 2d at 434. The court found that, under § 403.503(4), an applicant may be any "electric utility", and utilities are defined in § 403.503(13) as "regulated electric companies".

²²³ *Id.* at 435-36 (brackets added).

²²⁴ *Id.* at 436

²²⁵ *Id.*

²²⁶ *Id.* at 436.

vantage, refusing to give them siting approval even though they plan to provide power primarily within the state.

Considering the federal interest in competitive wholesale markets, such legislation may face substantial Dormant Commerce Clause challenges in the future. Recently, in *Granholm v. Heald*,²²⁷ the U.S. Supreme Court struck down state laws that discriminated against out-of-state wineries in spite of the broad power accorded States to regulate alcoholic beverages by the 21st Amendment.²²⁸ The Court noted that it has always held that state laws violate the Commerce Clause if they mandate “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”²²⁹

Another illustration of the influence of local utilities over the approval of competitors’ projects can be seen in the Cross-Sound transmission line project between New York and Connecticut. A local company, serving mostly Connecticut residents, had a competing cross-sound line and sought to improve its own line rather than allow competition. Although Connecticut cited environmental defects in the project in delaying its approval, some have seen the defects to be minor and consider the Connecticut utility to have exercised significant influence.²³⁰ Soon after the line was completed, Connecticut passed a moratorium on transmission lines across the Sound,²³¹ leaving the new line inoperable for more than a year.²³² Only a threatened regulatory decision on a related matter by the FERC brought the parties to the table to negotiate a resolution.²³³

²²⁷ 125 S.Ct. 1885 (2005).

²²⁸ *Id.* at 1907.

²²⁹ *Id.* at 1895 (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994)).

²³⁰ See Rossi, *supra* note 187, at 645-46.

²³¹ *Conn. Governor Signs Moratorium on Grid Projects, Keeping Cross Sound in Limbo*, POWER MARKETS WK., June 30, 2003, at 31.

²³² Rossi, *supra* note 187, at 646.

²³³ See Bruce Lambert, *New York and Connecticut Agree to End Cable Dispute*, N.Y. TIMES, June 25, 2004, at B6.

An argument put forward by proponents of the existing siting system is that only local authorities can take into account the myriad concerns of local citizenry.²³⁴ The claim is that, for example, a federal committee located in Washington, D.C. would not be able to consider such factors as a transmission line's impact on historical monuments, park and recreational areas, and the local environment, including such details as the ecological balance of local wetlands and the viability of endangered species, as state and local governments do.²³⁵

Yet, it is not at all clear that these considerations would not be entertained by a regional or national entity. Surely the same local authority making siting decisions now, or at least a similar one, would be assisting the new decision-making body by advising it of local concerns. The fear may be that these concerns would be dismissed by a regional entity. However, a regional process set up by the states it has authority over would have to be responsive to local concerns in order to function.

Such a process would likely be sensitive to local politics even if it takes a broader view and is allowed to consider interstate benefits in approving new projects.²³⁶ Even executive agencies such as the FERC are in some way responsive to constituents. Considerable political influence can be brought to bear by national organizations and interests, including lobbying groups for local and state governments. In addition, federal backstop authority would likely encourage negotiated agreements between the parties and might only rarely have to be used, considering the effectiveness of FERC pressure even now.²³⁷

In any event, the danger of bias seems far greater when siting decisions are being made at a local level. Significant externalities may be introduced in the siting process if

²³⁴ MEYER & SEDANO, *supra* note 53, at E-21.

²³⁵ See Dang, *supra* note 80, at 337.

²³⁶ MEYER & SEDANO, *supra* note 53, at E-21.

²³⁷ See Rossi, *supra* note 187, at 670.

local governments give inordinate weighting to local factors at the expense of benefits provided to consumers nationwide.²³⁸

E. Interstate Disagreements

Another major difficulty faced by utilities seeking to construct new interstate transmission facilities is the lack of coordination between the various state and federal agencies from which they must obtain approval.²³⁹ Each jurisdiction and agency has its own independent approval process to which a proposal is subject.²⁴⁰

Interstate transmission siting approvals are among the most complex and lengthy permitting processes anywhere.... many counties or localities along the path of the line require local approvals, and these communities have an important political voice in the state approval process as well. If the line crosses any federal lands or waterways, a number of federal approvals may be needed from a disparate set of agencies. In some cases, permits must be applied for and received in sequence.²⁴¹

Because each state and agency has its own priorities and is not necessarily concerned with the effects of the proposal on the other parties involved, conflicts can develop during this process.²⁴² One of the functions of the approval process is usually to analyze alternatives to the proposal and to determine the method that provides the most benefit at the lowest cost.²⁴³ If the parties are not considering the benefits and costs of the various proposals to all the parties involved, they are likely to come to disparate conclusions regarding the appropriateness of various alternatives. In the end, the utility must come up with a proposal that satisfies each party involved, but because of the lack of coordination between parties, that can involve considerable time and expense. One state may approve the initial proposal, then a different state or federal agency may require

²³⁸ See Carl J. Levesque, *Regulators' Forum: Can FERC and States Unite?*, 139 PUB. UTIL. FORT. 14, 20 (Nov. 2001) (statement of Thomas Welch, Chairman, Maine Public Utilities Commission).

²³⁹ See MEYER & SEDANO, *supra* note 53, at E-16, E-18.

²⁴⁰ Fox-Penner, *supra* note 46, at 13.

²⁴¹ *Id.*

²⁴² MEYER & SEDANO, *supra* note 53, at E-8, E-45; MUCHOW & MOGEL, *supra* note 88, at § 81.01(5).

²⁴³ MEYER & SEDANO, *supra* note 53, at E-5, E-32.

changes to the design that have to be taken back to the initial state and approved all over again.²⁴⁴

This problem of obtaining siting approval from multiple states can be amplified by parochial local concerns. If a proposed project would transmit power from an area with plentiful electric power to one where power is more expensive, but the transmission line would have to pass through a third state, obtaining approval from the third state would be nearly impossible.²⁴⁵ It has been routinely held that transmission lines running through a state but not providing electricity directly to the state's citizens provide no direct benefit to the state and cannot be granted the use of the state's power of eminent domain.²⁴⁶ Similarly, delays caused by political grandstanding in one locality could hold up an entire multi-state electric transmission facility project because all parties must approve a single proposal before construction can begin.

Although there are many examples of the delays and expense faced by projects seeking approval in multiple states,²⁴⁷ there are undoubtedly even more instances where new construction was never pursued in the first place because of the expectation of problems in the approval process.²⁴⁸ When deciding whether to pursue the construction of a new transmission line crossing several states as well as passing over various federal lands, a utility must weigh the costs and benefits of the new line, including the cost of obtaining the necessary approval and the possibility that approval will be denied. At the margin, the increased cost of negotiating approval independently with all of these various interests must deter the construction of new transmission facilities when compared with a

²⁴⁴ *Id.* at E-37.

²⁴⁵ Carl J. Levesque, *Stringing Transmission Lines, Untangling Red Tape*, 139 PUB. UTIL. FORT. 46, 51 (2001) (statement of Tim Gallagher, manager of technical services at FERC).

²⁴⁶ *See* Miss. Power & Light Co. v. Conerly, 460 So. 2d 107, 109-13 (Miss. 1984) (finding a transmission line solely for transferring power out of state to not be a public use); Clark v. Gulf Power Co., 198 So.2d 368, 371 (Fla. App. 1967) (holding that a one-way transmission line from Florida into Georgia did not constitute a public use).

²⁴⁷ MEYER & SEDANO, *supra* note 53, at E-9, E-15, E-19, E-38.

²⁴⁸ *Id.* at E-12 to 13; Brown & Daniels, *supra* note 79, at 26.

single, streamlined one-stop approval process of lesser expense. The empirical evidence is that new transmission construction is not keeping up with the growing demand.²⁴⁹

III. THE ENERGY POLICY ACT OF 2005 AND TRANSMISSION SITING OVERSIGHT

A. Background

The Energy Policy Act of 2005,²⁵⁰ in addition to its better-known features,²⁵¹ contains an important new section on the siting of electric transmission lines. Proposals to reform the process of electric transmission facility siting are not new. Industry experts have been pushing for a greater role for the FERC for over a decade.²⁵² Until recently, those efforts had gained little traction. However, in the aftermath of the September 11, 2001, terrorist attack, the current administration has emphasized the need to reconsider energy policy.²⁵³ This largely consisted of pushing lawmakers to overcome the difficulty of dealing with the many special interests in the energy industry.²⁵⁴

The Act's passage was subject to substantial criticism,²⁵⁵ largely from environmental groups.²⁵⁶ The Sierra Club declared that "this bill funnels billions of taxpayer dol-

²⁴⁹ MEYER & SEDANO, *supra* note 53, at E-1.

²⁵⁰ 2005 Act, *supra* note 47.

²⁵¹ *Infra*, at Section III.B.

²⁵² *See* Rossi, *supra* note 187, at 668.

²⁵³ *See Id.* at 669.

²⁵⁴ *Id.* at 668-69 (discussing the political problems in getting a comprehensive energy bill passed, including collective action [special interest], pork, and agenda setting problems).

²⁵⁵ *See, e.g.*, Michael Grunwald and Juliet Eilperin, *Energy Bill Raises Fears About Pollution, Fraud; Critics Point to Perks for Industry*, WASH. POST, July 30, 2005, at A01; Peter Z. Grossman, Editorial, *If you Like Pork, You'll Love the New Energy Bill*, INDIANAPOLIS STAR, Aug. 9, 2005, at 8A; Opinion, *Big Oil's Big Break; Bill Both Insulates, Rewards Thriving Industry*, SAN DIEGO UNION-TRIBUNE, Aug. 10, 2005, at B-8.

²⁵⁶ *See* SUMMARY OF THE HARMFUL PROVISIONS IN THE ENERGY BILL, July 28, 2005, available at http://www.sierraclub.org/globalwarming/bush_plan/energybill_bad_provisions7_28_05.pdf; Richard W. Stevenson, *Bush Signs an Energy Bill That Had Been a Longtime Priority*, N.Y. TIMES, Aug. 9, 2005, at A12; Chen, *supra* note 49; Mike Soraghan, *No Drilling Rev-Up in Rockies Bush's Signature on Energy Bill Eases Permit Process, But Industry Already Going as Fast as It Can, Faster Approval*

lars to polluting energy industries, and opens up our coastlines and wildlands to destructive oil and gas activities.”²⁵⁷

B. General Provisions of the New Act.

According to the Conference Report preamble, the purpose of the Act is “to ensure jobs for our future with secure, affordable, and reliable energy.”²⁵⁸

The principle purposes of the Act are:

- ◆ To provide incentives for energy conservation, including new energy efficiency standards for appliances, and renewables such as hydroelectric facilities and ethanol.
- ◆ To provide billions of dollars for research and development on new energy technologies, including clean coal and hydrogen.
- ◆ To improve the reliability of the transmission grid and the efficiency of the electricity market through the establishment of an independent organization to enforce mandatory reliability standards and the expansion of FERC authority to ensure open access to transmission lines and to punish market manipulation.
- ◆ To encourage the development of nuclear power through new loan and insurance programs.²⁵⁹

for Gas Wells is Among the Law's Regulatory Changes and Energy Initiatives., DENVER POST, Aug. 9, 2005, at A-01.

²⁵⁷ Carl Pope, Executive Director, Sierra Club, *America Needs Real Energy Solutions* (July 27, 2005), <http://www.sierraclub.org/pressroom/releases/pr2005-07-28.asp>.

²⁵⁸ Conference Report to accompany H.R. 6, 109th Cong. 1st Sess. Report 109-190.

²⁵⁹ SUMMARY OF POLICY PROVISIONS OF THE ENERGY POLICY ACT OF 2005 CONFERENCE REPORT (July 2005), *available at* http://www.house.gov/commerce_democrats/energy/Energy_highlights.pdf; ICF Consulting Identifies the U.S. Energy Act's Implications for the Global Energy Sector (August 2005), <http://www.icfconsulting.com/Newsroom/energy-bill-2005.asp>.

C. Act Section 1221 — Siting of Interstate Electric Transmission Facilities

In *New York v. Federal Energy Regulatory Commission*,²⁶⁰ the United States Supreme Court recognized that the Interstate Commerce Clause²⁶¹ gives the federal government the right to assert jurisdiction over the entire transmission grid, “all the way to a consumer’s toaster.”²⁶² This decision is consistent the Supreme Court’s well known 1942 holding in *Wickard v. Fillburn*.²⁶³ Recently, in *Gonzales v. Raich*,²⁶⁴ the Court declared that “[i]f Congress decides that the “total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”²⁶⁵

Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce. As we stated in *Wickard*, “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”²⁶⁶

Extending this logic to transmission lines, it is clear that a transmission line, no matter how local, affects the supply of electricity in some area and therefore the market price of electricity. Therefore the federal government must have the authority to regulate the siting and construction of electric transmission lines.

²⁶⁰ 535 U.S. 1 (2002).

²⁶¹ U.S. CONST. Art. I, § 8, cl. 3 (“The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States....”).

²⁶² Eisen, *supra* note 59, at 572.

²⁶³ *Wickard v. Fillburn*, 317 U.S. 111, 127-29 (1942) (holding that the production of wheat for one’s own personal consumption affects interstate commerce and can be regulated by the federal government).

²⁶⁴ 125 S.Ct. 2195 (2005) (upholding under the Commerce Clause federal regulation of marijuana grown and used non-commercially within California for medical purposes).

²⁶⁵ *Id.* at 2197 (quoting *Perez v. United States*, 402 U.S. 146, 154-55 (1971)).

²⁶⁶ *Id.* at 2205-06, quoting *Wickard*, 317 U.S. at 125, and citing *Wickard*, at 128-29 and, *Perez*, 402 U.S., at 151.

1. The Problem of Federal vs. State Jurisdiction Over Transmission.

Since 1935, Section 201 of the Federal Power Act (“FPA”)²⁶⁷ has given the Federal Power Commission, and now the FERC, broad authority over “transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce,” including rate setting and regulation of terms and conditions of service.²⁶⁸ However, the FPA also states that federal regulation extends only to those matters that are not subject to regulation by the states.²⁶⁹ States historically have exercised exclusive jurisdiction over transmission siting.²⁷⁰ Therefore, the FPA preserves that jurisdiction and transfers no transmission siting authority to the FERC.²⁷¹

In addition, Congress added to the FPA a specific reservation of jurisdiction for the states for facilities that generated electricity and transmitted it locally, in intrastate commerce, or consumed it themselves.²⁷² Courts have interpreted this section to indicate a Congressional intent to preserve state regulatory control over purely state-wide facilities, even ones that affected interstate commerce (as all do to some extent).²⁷³ These limitations on the power of the federal regulatory commission are a clear indication that Congress intended for the FPA to maintain the existing scope of state authority.²⁷⁴ The FPA was enacted only “to fill the gap in state regulatory authority that the Supreme Court had created by holding that no state could regulate interstate wholesales of electricity.”²⁷⁵

²⁶⁷ 16 U.S.C. § 824(a).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *See Dang, supra* note 80, at 336.

²⁷¹ *Id.*

²⁷² 16 U.S.C. § 824(b)(1).

²⁷³ *Mateer, supra* note 12, at 781.

²⁷⁴ *See Dang, supra* note 80, at 336.

²⁷⁵ *Pierce, supra* note 8, at 466.

Therefore, under the Federal Power Act, the FERC does not have the power to regulate purely intrastate generating facilities or transmission siting. However, the FERC's control over transmission *transactions* is near complete.

[T]he Supreme Court has interpreted the FERC's exclusive and non-delegable jurisdiction over interstate transactions to include intrastate wholesale transactions on transmission lines connected to an interstate grid. If the electric power conceivably flows in interstate commerce, the FERC may assert jurisdiction. Even when both of the contracting parties and the electrical pathway between them are within one state, if the system is interconnected and capable of transmitting power across a state boundary, the FERC has asserted jurisdiction. Because transmission lines in all states except Alaska and Hawaii are connected to an interstate grid, there is often little opportunity for state regulation of transmission transactions.²⁷⁶

This dichotomy of regulatory authority has been seen by some as a major obstacle to the successful restructuring of the electricity market.²⁷⁷ “[T]he vision of a competitive wholesale market is being advanced by federal authorities who lack siting jurisdiction, while siting authorities may well lack statutory authority with the same vision.”²⁷⁸

The 2005 Energy Policy Act's siting provisions address this issue. The Act provides for federal backstop siting authority for transmission projects in critical regions where one of the states involved is not authorized to consider regional benefits. These provisions are intended to streamline the process of siting critical regional transmission lines and facilities, thus ensuring that the national electricity transmission grid has adequate capacity and increased reliability. The Act also should make it easier for various agencies and jurisdictions to coordinate their efforts and avoid conflicting decisions and provides strong incentives for states to work together in regional organizations. Any analysis of the siting provisions of the Act must consider whether they will in fact achieve their objective of increased national transmission grid capacity and reliability.

²⁷⁶ MUCHOW & MOGEL, *supra* note 88, at § 81.04(3).

²⁷⁷ *See, e.g.*, Pierce, *supra* note 8, at 466; Brown & Daniels, *supra* note 79, at 24.

²⁷⁸ Brown & Daniels, *supra* note 79, at 24.

2. National Interest Electric Congestion Corridors and Federal Siting Authority

The Energy Policy Act of 2005 makes several important additions regarding siting to the Federal Power Act.²⁷⁹ The main change begins with the institution of a study of electric transmission congestion, conducted every three years by the Secretary of Energy in consultation with affected states.²⁸⁰ The Secretary, upon reviewing this study, is to designate geographic areas experiencing congestion as “national interest electric congestion corridor[s]” if that designation would benefit national defense, energy independence or policy, or regional economic development.²⁸¹ The FERC could then issue permits for the construction of transmission facilities in such areas if a state involved is not authorized to take interstate benefits into account, the permit applicant cannot qualify for a permit because it doesn’t serve end-users in the state, or the state siting authority has unnecessarily delayed or conditioned permit approval.²⁸² Additionally, in order to get permitting approval from the FERC, the project would have to be interstate in nature, be consistent with public interest, significantly reduce transmission congestion, and maximize the use of existing facilities to minimize its aesthetic and environmental impact.²⁸³ The bill is careful to note that all affected parties will have an opportunity to present their view of any proposal that is before the Commission for permitting.²⁸⁴

The provisions also bestow upon the federal permit holder the right to use the federal power of eminent domain to obtain necessary easements for which negotiations have failed, and to conduct the eminent domain proceedings in federal court.²⁸⁵ However, the federal courts are required in such cases to adopt the procedure used by the state court where the property is located, where possible.²⁸⁶ When the federal power of eminent do-

²⁷⁹ 16 U.S.C. 824 et seq.

²⁸⁰ 2005 Act, *supra* note 47, at § 216(a).

²⁸¹ *Id.* at § 216(a)(4).

²⁸² *Id.* at § 216(b)(1).

²⁸³ *Id.* at § 216(b)(2)-(6).

²⁸⁴ *Id.* at § 216(d).

²⁸⁵ *Id.* at § 216(e)(1).

²⁸⁶ *Id.* at § 216(e)(3).

main is exercised, the utility must compensate the owner for any resulting loss in value of the owner's remaining property in addition to the value of the property taken.²⁸⁷

3. Streamlined Federal Authorization and Environmental Review

In addition, these additions allow for streamlined, one-stop federal authorization of all transmission projects and for coordination with other entities whose authorization is necessary.²⁸⁸ The Department of Energy is to act as the lead agency in coordinating all federal authorizations and environmental reviews of transmission facility proposals.²⁸⁹ The Secretary of Energy ("Secretary") will coordinate this federal authorization process with other necessary parties and sets binding milestones and deadlines for the federal process and any other entity that is willing to combine its efforts in this respect.²⁹⁰ In addition, the Secretary, in conjunction with affected agencies, is to prepare a single environmental review document to serve as the basis for all federal decisions regarding the proposal.²⁹¹ The goal is timely and efficient decisions; the federal authorization must be completed within one year unless preempted by another federal law.²⁹²

A 60-day pre-approval process will allow prospective applicants to determine the likelihood of obtaining approval from the necessary agencies, and the key issues involved, without subjecting itself to the full expense of the actual permitting process.²⁹³ In case of the denial of a necessary federal authorization or a missed deadline, the provisions authorize a presidential review.²⁹⁴ Upon the filing of an appeal, the President must make a decision within 90 days to either issue the authorization or deny the applica-

²⁸⁷ 2005 Act at § 216(f)(2).

²⁸⁸ *Id.* at § 216(h)(1)-(9).

²⁸⁹ *Id.* at § 216(h)(2).

²⁹⁰ *Id.* at § 216(h)(3)-(4).

²⁹¹ *Id.* at § 216(h)(5)(A).

²⁹² *Id.*

²⁹³ 2005 Act at § 216(h)(4)(C).

²⁹⁴ *Id.* at § 216(h)(6)(A).

tion.²⁹⁵ In carrying out these federal authorizations, the Secretary is to consult regularly with the FERC and with reliability and transmission organizations approved by the Commission.²⁹⁶

The Act also provides for the implementation of the streamlined federal authorization process. Within 18 months of the Act's passage, the Secretary is to "issue any regulations necessary."²⁹⁷ Within one year of passage, the Secretary and the heads of all the Federal agencies with authorization authority are to enter into a memorandum of understanding to ensure the streamlined permitting and environmental review processes.²⁹⁸ Multistate entities, Indian tribes, and State agencies may also join in this memorandum.²⁹⁹ In addition, the head of each agency with authorization authority is to allocate funds and designate a senior official for implementation of the Secretary's regulations and the memorandum of understanding.³⁰⁰

4. Regional Transmission Siting Agencies

The new provisions also support the formation of regional transmission siting agencies. One addition specifically allows for the formation, by three or more contiguous states, of such an agency for the purpose of carrying out those states' transmission facility siting responsibilities.³⁰¹ Such an agency will have permitting authority for the siting of transmission facilities, even in national interest electric transmission corridors.³⁰² The commission would have no authority to issue a permit for a facility within a participating

²⁹⁵ *Id.* at § 216(h)(6)(B)-(C).

²⁹⁶ *Id.* at § 216(h)(9).

²⁹⁷ *Id.* at § 216(h)(7)(A).

²⁹⁸ *Id.* at § 216(h)(7)(B)(i).

²⁹⁹ 2005 Act at § 216(h)(7)(B)(ii).

³⁰⁰ *Id.* at § 216(h)(7)(C).

³⁰¹ *Id.* at § 216(i)(1).

³⁰² *Id.* at § 216(i)(3).

state unless it is on federal land or the states in the agency are in disagreement and the proposal otherwise meets the requirements for federal permitting.³⁰³

D. Analysis

1. Federal Permitting

At first glance, the new federal siting authority provided for in the Act appears to have the potential to fix several of the siting problems plaguing the industry today. It allows the federal government to step in and approve the construction of new electric transmission facilities where a state involved is not authorized to take into account interstate benefits or is discriminating against an out-of-state company or otherwise unnecessarily delaying or conditioning permit approval.³⁰⁴ Those are all situations that arise frequently and in which important transmission facilities are presently having difficulty obtaining siting approval. However, limitations are placed on the use of this newly granted federal power. The power can only be used in an area identified as a “National Interest Electric Congestion Corridor” (“Congestion Corridor”). To be federally permitted, the project must be “interstate in nature” and “significantly reduce transmission congestion.”³⁰⁵ Exactly how liberal the Secretary and the Commission will be in designating such corridors and in interpreting those project requirements is an element of uncertainty. Notably, however, a Congestion Corridor can be designated anywhere that it would benefit regional economic development.³⁰⁶ That language may give the Secretary the flexibility to designate *any* area a Congestion Corridor. Although these limitations likely will allow some important projects to slip through the cracks, they seem to do little to take away from the significance of the new federal authorization powers.

Although these provisions make it easier for critical interstate transmission facilities to obtain siting approval, it is important to note that permitting and the use of eminent domain are separate issues. The power of eminent domain often does not flow from the

³⁰³ *Id.* at § 216(i)(3)-(4).

³⁰⁴ *Id.* at § 216(b)(1).

³⁰⁵ 2005 Act at § 216(b)(2)-(6).

³⁰⁶ *Id.* at § 216(a)(4).

granting of a siting permit. The Act provides for the use of federal eminent domain power, but only for projects that are federally permitted.³⁰⁷ Therefore it is still possible for a proposal to be granted a state siting permit but denied the use of eminent domain power. This Act does nothing to resolve that issue.

The Act also allows states to avoid the possibility of federal preemption in transmission siting if they cede their siting authority to a regional entity. In that case, federal siting authority would be limited to those occasions where the members of that entity are in disagreement.³⁰⁸ The threat of federal backstop siting authority will undoubtedly encourage states to form regional entities with siting authority so as to avoid the possibility of federal pre-emption, and that may be the main purpose behind the federal permitting provisions. In any case, this doesn't take away any of the impact away from the Act. The permitting provisions appear intended to avoid a situation where states fail to internalize all of a project's benefits in making a siting decision or discriminate against out-of-state companies. These are concerns that most likely would be mooted if siting authority were vested within a regional agency, depending somewhat upon the agency's composition.

2. Streamlined Authorization and Cooperation

Having dealt with permitting problems and inter-state discrimination with the federal permitting provisions, the Act attempts to resolve inter-state disagreements and the length, complexity, and expense of the siting process with its new streamlined federal authorization process. Requiring all the affected federal agencies to work in concert to create a single environmental review should indeed reduce conflict and confusion in the approval process. Mandating binding milestones and requiring all federal authorizations to be completed within a year should go far towards reducing the length of the process. The pre-approval process also seems likely to reduce expense and delay, letting applicants know early on if there are major problems that need to be addressed. Coordinating all required federal authorizations under one lead agency seems to be a very salutary de-

³⁰⁷ *Id.* at § 216(e).

³⁰⁸ 2005 Act at § 216(i)(4).

velopment, and all these provisions in combination with the new regional siting agencies may well act to reduce time and expense as intended.

However, the implementation provisions are somewhat vague. With all of the new deadlines and procedures, it is important that agencies are still able to do their job and make appropriate, well-considered decisions to authorize or not authorize new transmission proposals. Therefore, the manner in which these streamlining provisions are implemented will be critical. The Act simply requires the Secretary to advance all necessary regulations within 18 months,³⁰⁹ for the involved agencies to enter a memorandum of understanding within 12 months,³¹⁰ and then for those agencies to devote whatever resources are necessary to successfully implementing the regulations and memorandum. Much will depend on what those regulations are and how they are carried out.

IV. PROPOSED SOLUTIONS

Will the 2005 Energy Policy Act mark the beginning of a new era of transparent, efficient, and effective transmission siting regulation, or is it too limited and vague to succeed? Will the Act help to overcome the barrier of parochialism and encourage renewed investment in critical transmission infrastructure, or will the transmission shortage crisis continue to worsen? Attempts to reform the siting process for wireless telecommunications towers have demonstrated that overly deferential, half-hearted measures providing process-based rather than substantive standards are ineffective.³¹¹ Of course it is too early to say for sure what the results will be, but it is apparent that while the 2005 Act is a step in the right direction, some significant transmission siting difficulties will remain. Some areas are adequately addressed by the Act, but others may require further legislation and/or regulation in order to alleviate the existing transmission shortage.

³⁰⁹ *Id.* at § 216(h)(7)(A).

³¹⁰ *Id.* at § 216(h)(7)(B)(i).

³¹¹ *See generally*, Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445 (2005) (referring to the “National Wireless Telecommunications Siting Policy” contained within the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) (2000), imposing federal procedural, but generally not substantive, standards for siting wireless telecommunications towers).

A. *Regional Benefits in Siting and Eminent Domain*

Many experts have called for a shift of transmission facility siting authority from states and localities to regional or national entities in order to appropriately account for regional benefits in the siting process.³¹² Many state and local governments and organizations oppose this move, asserting that adjustments made under the existing siting regime are sufficient to deal with any transmission problems and that such a move would trivialize the concerns of local communities.³¹³

Because a regional siting authority would eliminate externalities in the approval process by considering benefits over an interstate area, some local concerns likely would not be given the same weight they are by sometimes-parochial local governments. It is understandable that local organizations are unwilling to see their influence reduced and therefore oppose the proposed measures. However, maintaining inefficiencies does not seem like a compelling reason to keep the current system. Although progress has been made in the permitting processes of some states, many still do not allow for the appropriate weight to be given to interstate benefits.³¹⁴ With a growing national shortage of transmission infrastructure, the cost of allowing the states to continue tinkering slowly with their siting laws is probably greater than the cost of transitioning to some regional or federal siting regime. The 2005 Act addresses this concern by giving the FERC siting authority over interstate transmission projects proposed in Congestion Corridors when a state cannot account for interstate benefits in its approval process.³¹⁵

It may seem that this provision will allow critical transmission facilities adequately to be sited in states where that would otherwise be impossible. However, states vary a great deal in the weight they accord to regional benefits. Many states that do not flatly reject consideration of regional benefits nevertheless give them short shrift when

³¹² See Brown & Daniels, *supra* note 79, at 34; Fox-Penner, *supra* note 46, at 13; TAPS, *supra* note 112, at 21; HIRST, *supra* note 6, at 21; Dang, *supra* note 80, at 349.

³¹³ *Infra* at Section I.B.

³¹⁴ *Infra* at Section II.C

³¹⁵ 2005 Act, *supra* note 47, at § 216(b)(1)(A)(i).

they weigh them against costs within the state.³¹⁶ The states that do explicitly reject regional benefits will likely liberalize their legislation slightly rather than cede siting authority to the federal government, since states have generally opposed any loss of such authority. Therefore this provision is not in itself an answer to the parochialism inherent in the siting approval process in many states.

Congress also granted the FERC siting power in Congestion Corridors where the state authority has withheld approval for more than a year or conditioned its approval in such a way as to rob the project of its ability to relieve grid congestion.³¹⁷ This provision should ensure that critical transmission proposals are approved in a reasonable amount of time. If so, the provision relieves one major source of added expense and uncertainty in the industry.³¹⁸

The Act states specifically that the FERC may issue a siting permit for a proposed transmission project within a Congestion Corridor where a state has “withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law.” Can the FERC intervene only where the state has failed to act altogether, or also when the state has explicitly denied approval? This very important question is not clearly answered by the Act itself or by commentary. If a state has only to deny an application within one year to avoid federal jurisdiction, it could get around the provisions of the Act entirely simply by denying an application right before the deadline and allowing another application in the future. Yet Congress did not use the term “denied approval”, but rather “withheld approval” alone, and these terms have in the past been distinguished from one another in a public utilities context.³¹⁹

³¹⁶ *Infra* at Section II.C.

³¹⁷ 2005 Act at § 216(b)(1)(C)(i)-(ii).

³¹⁸ *Infra* at Section II.A

³¹⁹ *See* Re Pub. Serv. Co. of N.M., 211 P.U.R.4th 169, [32] (N.M.P.S.C. 2001) (“condition 15(e) is rewritten as follows: ‘PNM must agree that it will not challenge the Commission’s authority to withhold approval of the Western merger. PNM can only challenge a denial of approval based on the merits.’”); Central Kan. Elec. Co-op. Ass’n v. State Corp. Comm’n, 196 P.2d 212, 214 (Kan. 1948).

Neither legislative hearings nor legal commentary do much to resolve this matter. Mostly this issue has been ignored, but some commentators have described the federal backstop authority as being available only when a state “fails to act” within a year³²⁰ or that this authority provides incentives for “reaching decisions on siting applications within a year of filing.”³²¹ However, others have asserted that this new authority allows the FERC to override state entities and issue permits where the state has denied approval.³²² The latter is the more likely interpretation, as the former would eviscerate the provision. The term “withhold approval” probably means failure to act or outright denial of approval.

However, the fact that federal permitting exists may have the effect of increasing the number of permit applications denied by state and local boards. Some have speculated that a state utility commission, faced with a justified but unpopular proposal for a new transmission facility, may “pass the buck”, allowing the federal government to permit the

³²⁰ See STEPHEN ANGLE ET AL., VINSON & ELKINS, IMPLICATIONS OF THE ENERGY POLICY ACT OF 2005 2 (2005), <http://www.vinson-elkins.com/pdf/resources/EPAHandout081805.pdf>; see also *Hearings, supra* note 53, at 36, 213 (“having a ‘fallback’ right of eminent domain, as laid out in the House draft... would provide a motivation to ensure that state inaction does not occur.”) (“Federal backstop transmission line siting authority... where states have failed to act.”) (statements of John Anderson, Executive Director, Electricity Consumers Resource Council & Dr. Gregory Reed, Vice President, National Electrical Manufacturer’s Association).

³²¹ SKADDEN, ANALYSIS OF THE ENERGY POLICY ACT OF 2005 28 (2005), http://www.skadden.com/content/Publications/Publications1065_0.pdf.

³²² See SIMPSON THACHER, ENERGY POLICY ACT OF 2005: IMPLICATIONS FOR THE ELECTRIC UTILITY INDUSTRY 5 (2005) (“FERC will be able to override state authorities”), <http://www.stblaw.com/content/publications/pub519.pdf>; LEBOEUF LAMB, REPORT ON THE DOMENICI-BARTON ENERGY POLICY ACT OF 2005 6 (2005) (“if the State commissions do not approve a project... the Act gives FERC authority...”), <http://www.llgm.com/article.asp?article=1090>; GARDERE, MEMORANDUM RE: ENERGY POLICY ACT OF 2005 3 (2005) (“when state commissions do not provide approvals... FERC is granted limited authority to issue construction permits”), http://www.gardere.com/Content/hubbard/tbl_s31Publications/FileUpload137/1280/Domenici-Barton%20Memo.pdf; *Hearings, supra* note 53, at 16 (“the FERC will have authority to override state decision processes on transmission siting, if that state is not in an RESC.”) (statement of David A. Svanda, President, National Association of Regulatory Utility Commissioners (NARUC)).

facility and avoiding a political backlash.³²³ Such a trend would have the perverse effect of increasing permitting delays and complexity.

In addition, the Act allows the federal power of eminent domain to be used, but only for those projects issued federal permits.³²⁴ However, eminent domain and siting approval are two distinct processes.³²⁵ A project that has obtained state siting approval may nevertheless be unauthorized to take advantage of the state power of eminent domain. The Act also allows states to avoid the threat of federal pre-emption by joining a regional agency with siting authority (except in the case of disagreement among the members of the compact).³²⁶ While encouraging regional rather than state-based siting, this provision again ignores the necessity of eminent domain for the construction of electric transmission lines. A regional siting authority probably would not be vested by agreement with state eminent domain powers, and it is possible that even if states did agree to relinquish their power to a regional agency, state courts would find this delegation unconstitutional.³²⁷ Congress must ratify interstate compacts (which would be necessary to create a Regional Transmission Siting Agency) and could imbue regional siting agencies with federal eminent domain powers. However, no provision in the Act allows for this and so it is impossible to know whether it will happen or how the power would be constrained.

The Act in its current form does little to resolve the obstacle posed in some states by courts that are unwilling to consider regional benefits in eminent domain proceedings. A federal eminent domain provision parallel to the federal siting provision would be an improvement over the current act. Where state courts are unable to consider regional benefits for eminent domain purposes, the federal power of eminent domain should be

³²³ See MEYER & SEDANO, *supra* note 53, at E-21.

³²⁴ 2005 Act at § 216(e).

³²⁵ Brown & Daniels, *supra* note 79, at 24.

³²⁶ 2005 Act at § 216(i)(4).

³²⁷ At least one court has stated that the power of eminent domain can only be used for the benefit of state citizens. *Gralapp v. Miss. Power Co.*, 194 So.2d 527, 530-31 (Ala. 1967). See *supra* text accompanying notes 139-141.

available in Congestion Corridors. Eminent domain power held at the regional level would likely accomplish the same objective with less bureaucracy. However, granting eminent domain power to regional entities would have to be handled with care so as to avoid court challenges.

The backstop federal siting authority is a significant step in the right direction. It places a lot of pressure on states to give some weight to regional benefits to approve proposals promptly. If the Act is indeed interpreted as allowing the FERC to overturn state denials of siting approval in critical corridors, this is a powerful incentive for states to either approve projects within these corridors or to cede their siting authority to a regional body. If the Act is interpreted otherwise, it is weak and ineffectual and provides little incentive for states to change their regulatory behavior. In any case, the efficacy of the Act is strongly dependent on how the Act is implemented. How the Secretary will use the power to designate critical corridors and what deadlines will be set for the FERC permitting process are two big decisions the Act leaves for the future.

A better solution would be simply to mandate regional siting. Then there would be no concerns about the precise delineation of Congestion Corridors, states “passing the buck” to the federal government on siting decisions, or of regional benefits ever being given less than appropriate consideration. In addition, having all siting power concentrated at the regional level would make it easier to evaluate the cost-effectiveness of various transmission investments than the system of bifurcated responsibility that would be created by the Act.³²⁸ Faced with the stringent opposition of state organizations and officials, Congress has enacted provisions with vague wording and uncertain procedures for implementation, and their effectiveness, or lack thereof, will not be apparent for years to come.³²⁹

³²⁸ See *Hearings*, *supra* note 53, at 26 (statement of Gerald Norlander, Chairman, Electricity Committee, National Association of State Utility Consumer Advocates (NASUCA)).

³²⁹ Congress did something similar when it enacted new siting provisions for telecommunications towers in the Telecommunications Act of 1996. See *Eagle*, *supra* note 311, at 491, 495.

B. The NIMBY Phenomenon and State Parochialism

NIMBY opposition is becoming an increasingly large factor in the growing difficulty of siting electric transmission lines.³³⁰ Not much can be done about the source of this opposition, including the decline in available land and the proximity of necessary infrastructure to residential populations, so the phenomenon is likely to continue to grow.

Nevertheless, there are steps that can be taken to minimize the impact of this opposition, and of parochialism in general, on the successful siting of transmission capacity expansion projects. One suggestion for dealing with NIMBYism is a shift to federal siting authority, on the assumption that federal officials would likely be less influenced by parochial concerns than the local siting councils prevalent in the existing siting regime.³³¹ Efforts by siting agencies to educate developers on potential pitfalls would also help to ensure proposals that minimize the perceived affront to local residents.³³²

NIMBYism is a problem when small costs to a small group of vocal residents prevent infrastructure that provides large benefits spread over a very large group of people from being sited. Such an inefficient result can only result when the voice of the negatively affected residents is given disproportionate weight. A regional or federal siting authority would be less likely to yield to narrow local interests. However, the federal siting authority provided for by the 2005 Act is somewhat limited, while the NIMBY problem is widespread.

Federal permitting under the Act is possible only where the state cannot consider regional benefits or withholds its approval for more than a year. Regional siting is encouraged, but it is questionable whether states will actually cede their siting authority to regional agencies. The Act does have a provision designed to prevent parochial corporate favoritism. Federal permitting is also triggered if a utility does not qualify to apply for a permit or siting approval for the proposed project in a state because the applicant does not

³³⁰ *Infra* at Section II.D.1.

³³¹ See HIBBARD, *supra* note 4, at 22.

³³² *Id.*

serve end-use customers in the state.³³³ However, that provision addressed only one small aspect of the parochialism that pervades the current siting regime, albeit a particularly pernicious one. Universal regional siting would be a better solution for the problem of parochialism just as it is for the consideration of regional benefits in the approval process.

The Act also provides for streamlined one-stop federal authorization of transmission facilities with binding milestones and deadlines.³³⁴ All federal agencies are required to combine their authorizations into this new one-stop authorization process, and states and regional entities are allowed and encouraged to coordinate their efforts with this new process as well.³³⁵ The Act provides for an associated pre-approval process that identifies key issues a proposal will face and its likelihood of eventual success.³³⁶ If states joined in this process they could educate the developer early on as to what aspects of its proposal might create conflicts with local residents. The utility could craft its proposal in such a way as to minimize resulting opposition early in the process. Unfortunately, there is no way to know at this point whether states will be interested in joining with the federal government in this endeavor. It is unclear what, if any, effect these provisions will have on the problem of NIMBYism and state parochialism.

C. Interstate Disagreements

When many state and federal agencies must independently authorize the construction of an interstate transmission line, conflicts are bound to arise. Some large interstate proposals have encountered substantial resulting delays and added expenses.³³⁷ These disagreements are created by disparate priorities and standards and by the sheer number of decision-makers; therefore integration of the decision-making process under a central authority should resolve many of the existing problems.

³³³ 2005 Act, *supra* note 47, at § 216(b)(1)(B).

³³⁴ *Id.* at § 216(h)(3).

³³⁵ *Id.* at § 216(4)(A), (7)(B)(ii).

³³⁶ *Id.* at § 216(h)(4)(C).

³³⁷ *Infra* at Section II.A.

The 2005 Act attempts to reduce the conflict between various authorizing agencies by combining all federal authorizations into a single review process that state and regional agencies are permitted to join.³³⁸ This should be a very effective means of preventing disagreement between different agencies and, if they choose to join, states. Since there is only a single authorization, by definition the parties involved cannot disagree in the end. With a lead agency and binding deadlines,³³⁹ major delays should be a thing of the past. If a deadline is missed or authorization is refused, the applicant can appeal to the president, who must make a decision within 90 days.³⁴⁰

The major questions with this provision are how it will be implemented and, again, whether the states will choose to participate. The implementation provisions are quite vague, requiring only that the Secretary promulgate whatever regulations are necessary and that involved agencies enter a memorandum of understanding. Clearly the efficacy of this new streamlined authorization will depend to a large extent on what exactly these regulations are. Joining this process could make it much easier for the states to cooperate in the siting process, so they may be willing to do so.

If states in fact cede their siting responsibilities to Regional Transmission Siting Agencies as envisioned by the Act, that would substantially reduce interstate friction in the permitting process as well. With siting decisions made at a regional level, states would be forced to cooperate in coming to a decision. If all states join these agencies and the one-stop federal authorization is well implemented, interstate disagreement could be all but banished from the realm of transmission siting. If states choose not to participate in either development, state disagreements will still be a negative factor in transmission facility siting. Nevertheless, the situation should at least be improved, barring a complete bungling of the implementation of streamlined federal authorization, and if regional siting were mandated, conflicts would be reduced dramatically.

³³⁸ 2005 Act, *supra* note 47, at § 216(h)(1)-(9).

³³⁹ 2005 Act, *supra* note 47, at § 216(h)(2), (4)(A).

³⁴⁰ *Id.* at § 216(h)(6)(A)-(C).

V. CONCLUSION

“Modern society has come to depend on reliable electricity as an essential resource for... nearly all aspects of modern life.”³⁴¹

The shortage of electric transmission infrastructure in the United States is rapidly approaching crisis levels. Deregulation has created a thriving wholesale electricity market that threatens to overwhelm a transmission grid built in the days of monopoly utilities and isolated local power flows. Investment in new transmission capacity is presently deterred by archaic transmission facility siting regulation that makes it difficult to site interstate transmission lines.

The industry has clamored for legislation that would transfer siting authority from state and local governments to regional or national entities that can adequately account for the vast regional benefits of interstate transmission lines. State organizations and officials, on the other hand, have protested against any such measures, proclaiming that transmission siting is an inherently local concern.

In the 2005 Energy Policy Act, Congress has passed a compromise. The Act allows for federal siting authority, but only in areas where congestion on the electrical grid has become a national concern, and only in states that are not authorized to take into account regional benefits or have withheld their approval of a proposal for more than a year. The Act also offers no specifics as to the manner in which the federal siting process will be implemented. The Act encourages states to cede their siting authority to regional agencies, but the only incentive it provides is exclusion from its federal siting provisions. With the impact and extent of federal siting authority so uncertain, only time will tell how much pressure can be brought to bear on the states to approve critical transmission proposals in a timely fashion and to cede their siting responsibilities to regional entities. Regional siting authority would be an improvement, but if the Act is well implemented it has the potential to encourage investment in new transmission capacity and to stave off a catastrophic shortage.

³⁴¹ BLACKOUT REPORT, *supra* note 63, at Ch. 2, p. 5.