

*Energy Policy Act of 2005: Pseudo-Fed for Transmission  
Congestion*

Alexander K. Obrecht\*

ABSTRACT

*Increasing federal involvement in the wholesale electricity market, and the ever-important emphasis on renewable energy resources, exposed the inadequacies of the existing transmission infrastructure. The Energy Policy Act of 2005 (EPAAct 2005) attempted to address the transmission problems but failed to adequately consolidate federal power over transmission siting. The resulting atmosphere presents an unsustainable dichotomy in which federal involvement encourages generation dependent upon transmission access, while state control over transmission siting impedes the necessary investment and capital improvement. Despite the efforts of EPAAct 2005, a coherent and effective national energy policy remains unobtainable without the ability to incentivize generation and guarantee access to transmission by facilitating its development across state lines.*

*This note proceeds in two sections. First, the background section provides a brief history of federally mandated deregulation in the wholesale electricity market. A brief summary of EPAAct 2005 then explains Congress's attempt to encourage transmission investment by allowing limited federal jurisdiction over the siting process. Second, the note analyzes the current pressures exerted on the transmission grid by renewable energy and inadequate state siting processes. The analysis then addresses the judicial interpretations of EPAAct 2005 and how the United States Courts of Appeals*

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\* Candidate for J.D., University of Wyoming, 2013. Editor-in-Chief, *Wyoming Law Review*, 2012–13. I would like to thank Alexandra Malatesta and the fantastic Editorial Board and Staff at the *Pittsburgh Journal for Environmental and Public Health Law* for their help throughout the publication process, Professor Sam Kalen for his guidance, and Rachel Ryckman for her patience.

*delayed federal jurisdiction over transmission siting for the foreseeable future.*

## I. INTRODUCTION

Historically, the electricity market consisted of vertically integrated monopolistic utilities regulated at the state level.<sup>1</sup> The Federal Government took the first steps in wresting control of the electricity market from the states with the deregulation of the wholesale electricity market.<sup>2</sup> Deregulation resulted in clashes between monopolistic utilities restricting access to existing transmission networks and new non-utility wholesale generators seeking access to transmission infrastructure.<sup>3</sup> Congress attempted to alleviate the clash by passing legislation mandating equal access to transmission capacity.<sup>4</sup> The new transmission capacity demands of the deregulated wholesale electricity market exposed the inadequacies and dilapidated condition of the existing transmission infrastructure.<sup>5</sup> An increasing emphasis on renewable energy resources further strains transmission due to the long distances electricity must travel from generation to consumption.<sup>6</sup>

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<sup>1</sup> See *infra* notes 12–19 and accompanying text (discussing the early development of the electricity industry).

<sup>2</sup> See *infra* notes 31–50 and accompanying text (describing federal intervention in the wholesale electricity markets).

<sup>3</sup> See *infra* notes 38–54 and accompanying text (outlining federal attempts to mandate open access to transmission).

<sup>4</sup> See *infra* notes 38–54 and accompanying text (discussing federal statutes and policies aimed at reducing discrimination in transmission access to merchant power producers).

<sup>5</sup> See *infra* notes 73–101 and accompanying text (describing pressures on the transmission infrastructure created by an increase in merchant power generator and renewable energy resources).

<sup>6</sup> See *infra* notes 76–101 and accompanying text (discussing the unique pressures of renewable energy resources on the existing transmission infrastructure).

Federal deregulation of the wholesale electricity market and renewable energy development create the need for investment in a nationally focused transmission infrastructure. Unfortunately, localities and states retain primary control over permitting transmission lines.<sup>7</sup> The state siting process impedes potential investment by allowing parochial and protectionist policies to pander to local concerns, effectively trumping larger regional and national benefits of new transmission lines.<sup>8</sup> The dichotomy between federal deregulation of the wholesale electricity market and state control of transmission siting starved the transmission infrastructure of the necessary investment. Accordingly, without federal control of both the wholesale market and transmission siting the infrastructure languished under increasing congestion, reliability, and security strains.

Congress passed the Energy Policy Act of 2005 (EPAAct 2005), in part, to alleviate the increasing congestion in existing infrastructure by creating potential federal authority over transmission line siting.<sup>9</sup> However, the attempt failed to adequately address the substantial barriers state control creates.<sup>10</sup> Furthermore, judicial interpretations limit EPAAct 2005's effectiveness going forward.<sup>11</sup> Although EPAAct 2005 took the correct step to increase federal control over the siting process, the program proved woefully inadequate to

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<sup>7</sup> See *infra* notes 102–54 and accompanying text (detailing the problems with traditional state siting processes for transmission lines).

<sup>8</sup> See *infra* notes 109–51 and accompanying text (analyzing the inadequacies with the state system for transmission line siting and the possibility for abuse by state authorities).

<sup>9</sup> See *infra* notes 55–72 and accompanying text (outlining the provisions of EPAAct 2005).

<sup>10</sup> See *infra* notes 102–54 and accompanying text (detailing the problems with traditional state siting processes for transmission lines).

<sup>11</sup> See *infra* notes 160–214 and accompanying text (following the judicial interpretations of EPAAct 2005 and how the courts have limited any potential federal authority).

consolidate federal power to modernize the United States' transmission grid. The increasingly regional and national electricity marketplace requires federal jurisdiction over both wholesale generation and sales and the necessary means to modernize the American transmission infrastructure.

This note proceeds in two sections. First, the background section provides a brief history of federally mandated deregulation in the wholesale electricity market. A summary of EPAct 2005 explains Congress's attempt to encourage transmission investment by allowing limited federal jurisdiction over the siting process. Second, the note analyzes the current pressures exerted on the transmission grid by renewable energy and inadequate state siting processes. The analysis also addresses the judicial interpretations of EPAct 2005 and how the United States Courts of Appeals delayed federal jurisdiction over transmission siting for the foreseeable future.

## II. BACKGROUND

### A. THE ADVENT OF FEDERAL REGULATION IN THE ELECTRICITY SECTOR

Throughout the twentieth century, the American electric grid developed around privately-owned and vertically integrated utilities.<sup>12</sup> Locally based utilities faced large upfront capital costs to construct generation and transmission infrastructure, but after completion, the facilities' operated at low cost.<sup>13</sup> The inhibitive capital costs made the utility business risky from the outset, but provided the potential for rewarding cash flow after the

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<sup>12</sup> Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1018 (2009).

<sup>13</sup> THE ELEC. ENERGY MKT. COMPETITION TASK FORCE, REPORT TO CONGRESS ON COMPETITION IN WHOLESALE AND RETAIL MARKETS FOR ELECTRIC ENERGY, at 17 (2007), available at <http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf> [hereinafter FERC Competition Study].

infrastructure came online.<sup>14</sup> Due to the upfront risks, investors sought assurances the utility would operate long enough to repay the debt.<sup>15</sup> The resulting market structure closely resembled a regulated monopoly, in which the state granted exclusive generation and transmission rights and assurances of an adequate return on investment.<sup>16</sup> In return for the exclusive rights, the state imposed a duty to serve the customers within the utility's territory.<sup>17</sup> The model incentivized the utility to expand its transmission network to market its own electricity generation, rather than to allow other producers access to the grid.<sup>18</sup> The monopolistic model provided ninety-five percent of America's power needs until problems arose in the 1970s.<sup>19</sup>

Changes during the 1970s and 80s created a veritable "perfect storm" of economic, political and societal pressure on Congress and individual states to question the regulated utility model.<sup>20</sup> First, American electricity demand increased 7.5% per year through the end of the 1960s, but costly generation improvements gradually began to erode the economies of scale enjoyed throughout the early twentieth century.<sup>21</sup> The periods of rising inflation and interest rates increased the cost of capital to add generation capacity.<sup>22</sup> The larger generation facilities no longer produced significant decreases in the

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<sup>14</sup> *See id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See id.*

<sup>17</sup> *Id.* at 18; *see also* Transmission Access Policy Study Group v. F.E.R.C., 225 F.3d 667, 681 (D.C. Cir. 2000) (addressing the historical nature of public utilities and the pressure from current market trends), *aff'd sub nom.* New York v. F.E.R.C., 535 U.S. 1 (2002).

<sup>18</sup> Rossi, *supra* note 12, at 1018.

<sup>19</sup> FERC Competition Study, *supra* note 13, at 10.

<sup>20</sup> *Id.* at 19–23.

<sup>21</sup> *See id.* at 19.

<sup>22</sup> *Id.*

marginal cost of electricity.<sup>23</sup> Opponents of the regulated utility model criticized the ability of monopolistic utilities to pass inefficient costs to the consumer.<sup>24</sup> Second, the reliability of the traditional generation model faced serious questions. The Arab Oil Embargo inflated fossil fuel prices, which squeezed generation margins and raised questions about the availability of inputs.<sup>25</sup> The 1965 Northeast blackout highlighted the inadequacies of bulk power agreements between utilities.<sup>26</sup> New environmental regulation threatened traditional methods of generation.<sup>27</sup> The Three Mile Island incident in 1979 created significant regulation of the nuclear sector.<sup>28</sup> Finally, social sentiment favored a decrease in foreign energy reliance and an increase in environmental awareness.<sup>29</sup> This "perfect storm," culminated in congressional attempts to address the underlying issues.

Congress reacted to the turmoil of the 1970s and 1980s by increasing federal involvement in the energy sector.<sup>30</sup> The increased involvement led to numerous pieces of legislation addressing energy inputs, wholesale electricity generation and industry competition. However, the electricity market did not morph dramatically until after the Public Utilities Regulatory Policies Act of

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<sup>23</sup> *Id.* at 19–20.

<sup>24</sup> *Id.* at 19.

<sup>25</sup> FERC Competition Study, *supra* note 13, at 20.

<sup>26</sup> *Id.*

<sup>27</sup> *See id.* at 19.

<sup>28</sup> *Id.* at 20.

<sup>29</sup> *See id.*

<sup>30</sup> *Id.*; see Sam Kalen, *Replacing a National Energy Policy with a National Resource Policy*, 19 NAT. RESOURCES & ENV'T No. 3, at 12–13 (Winter 2005) (discussing the federal government's attempts to coordinate a national energy policy, which seemingly caught traction in the 1970s).

1978 (PURPA).<sup>31</sup> PURPA attempted to increase energy conservation and alternative energy sources, while simultaneously decreasing the demand for foreign energy.<sup>32</sup> PURPA required regulated utilities to interconnect with, and potentially purchase power from, nontraditional generation facilities classified as qualifying facilities (QFs).<sup>33</sup> This provision unintentionally opened the door for non-utility owned generators to enter the wholesale electricity market.<sup>34</sup> Applications for QF status with the Federal Energy Regulatory Commission (FERC) increased from just twenty-nine in 1980, representing 704MW, to 979 in 1986, representing roughly 18,000MW, and the trend only increased through 1990.<sup>35</sup> By 1991, non-utilities owned six percent of the electricity generation capacity in the United States.<sup>36</sup> PURPA marked the beginning of federal involvement in the electricity market challenging the traditional state regulated monopoly model.

Congress took PURPA's authorization of nontraditional generation facilities further in passing the Energy Policy Act of 1992 (EPAAct 1992).<sup>37</sup> EPAAct 1992 established a new category of generation facilities completely exempt from the regulated monopoly model.<sup>38</sup> Entities owning generation facilities selling power exclusively in the wholesale market qualified for classification as an exempt wholesale generator (EWG).<sup>39</sup> The creation of

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<sup>31</sup> FERC Competition Study, *supra* note 13, at 20; Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978).

<sup>32</sup> *See* FERC Competition Study, *supra* note 13, at 20–21.

<sup>33</sup> *Id.* at 20.

<sup>34</sup> *Id.* at 21.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 22.

<sup>37</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 721–26, 106 Stat. 2776 (1992) [hereinafter EPAAct 1992].

<sup>38</sup> FERC Competition Study, *supra* note 13, at 23–24.

<sup>39</sup> *Id.* at 23.



EWGs significantly reduced barriers to non-utilities entering the wholesale power market and the advent of non-utilities created a major challenge to the existing transmission system.<sup>40</sup> The traditional regulated utilities controlled access to the transmission infrastructure, effectively blocking the growth of EWGs.<sup>41</sup> EPAct 1992 established FERC's power to order transmitting utilities to carry non-utilities' wholesale power sales, subject to certain conditions.<sup>42</sup> FERC attempted to implement the expanded federal power over wholesale transmission, but faced serious procedural constraints to the program's effectiveness.<sup>43</sup>

Unsatisfied with the effectiveness of EPAct 1992, FERC issued Order No. 888 to prevent regulated utilities from abusing their transmission facility monopoly.<sup>44</sup> FERC cited discrimination and anti-competitive practices from

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<sup>40</sup> *Id.* at 23–24; see Debbie Swanstrom & Meredith M. Jolivert, *DOE Transmission Corridor Designations & FERC Backstop Siting Authority: Has the Energy Policy Act of 2005 Succeeded in Stimulating the Development of New Transmission Facilities?*, 30 ENERGY L.J. 415, 422 (2009) (discussing the regulatory changes in 1992 allowing FERC to control some transmission decisions on regulated utilities' infrastructure).

<sup>41</sup> FERC Competition Study, *supra* note 13, at 23.

<sup>42</sup> *Id.* at 24; EPAct 1992, *supra* note 37, at §§ 721–26. EPAct 1992 sought to ensure that FERC would only issue an order to accommodate wholesale transactions if the utility could do so under the conditions that the “rates, charges, terms, and conditions” are economically feasible, not inconsistent with retail marketing areas, and not a “sham.” EPAct 1992, *supra* note 37, at § 722.

<sup>43</sup> FERC Competition Study, *supra* note 13, at 24. In general, the orders were only on a case-by-case application forcing FERC to engage in a cumbersome process without broad application. *Id.*

<sup>44</sup> *Id.*; see *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. §§ 35

the regulated monopolies as the most significant barriers to a competitive wholesale electricity market.<sup>45</sup> They also initiated further federal intervention to advance the deregulation started under PURPA.<sup>46</sup> Order No. 888 required transmission owners transmitting electricity in interstate commerce to file open access transmission tariffs (OATTs) with FERC, thereby forcing public utilities to treat wholesale power generators the same as traditional customers for transmission access.<sup>47</sup> FERC's intervention in electricity generation eroded powers to regulate monopolistic utilities that were traditionally delegated to the states, but the ineffectiveness of EPCA 1992, Order No. 888 and changing market conditions necessitated further federal involvement to best serve the ultimate consumers of the electricity.<sup>48</sup>

Facing continuing complaints of discrimination in transmission access, FERC further attempted to consolidate power over transmission with Order No. 2000.<sup>49</sup> Order No. 2000 authorized the creation of regional transmission organizations (RTOs) to eliminate transmission rate differentials between territories, increase regional stability and eradicate any discriminatory practices still employed by regulated public utilities.<sup>50</sup> Although a step in the

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& 385 (1996), 61 Fed. Reg. 21540–01 (May 10, 1996) [hereinafter Order No. 888].

<sup>45</sup> FERC Competition Study, *supra* note 13, at 24; Order No. 888 at 21540–01.

<sup>46</sup> FERC Competition Study, *supra* note 13, at 2, 20, 24.

<sup>47</sup> *Id.*

<sup>48</sup> *See* Swanstrom & Jolivert, *supra* note 40, at 418–20 (addressing the unprecedented power grab by FERC in Order No. 888).

<sup>49</sup> FERC Competition Study, *supra* note 13, at 30; *see Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 810 (Jan. 6, 2000), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), 18 C.F.R. § 35 (2000), *aff'd*, *Public Utility District No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) [hereinafter Order No. 2000].

<sup>50</sup> FERC Competition Study, *supra* note 13, at 30.

right direction, RTOs are voluntary organizations and do not actually own any transmission facilities.<sup>51</sup> Accordingly, RTOs only reach those markets willing to participate. Much of the Southeast, West (excluding California) and Midwest appear hesitant to relinquish local control over the process.<sup>52</sup>

### **B. ENERGY POLICY ACT OF 2005**

Upset with the continued frustration of investment and improvement of the transmission infrastructure, Congress attempted to further consolidate federal authority through the enactment of the Energy Policy Act of 2005 (EPAct 2005). Congress passed EPAct 2005 to provide a comprehensive national energy policy emphasizing domestic energy production, conservation and efficiency to enhance energy security and decrease demand for foreign energy.<sup>53</sup> To improve efficiency and energy security, EPAct 2005 sought to enhance electricity transmission, especially the deteriorating condition of the transmission infrastructure and the inefficiencies in the current siting process.<sup>54</sup> The outdated transmission infrastructure required billions in investment dollars to ensure adequate reliability, security and capacity for the rapidly evolving electricity market.<sup>55</sup> Congress found that inefficiencies in the traditional state level siting process often led to delays and outright rejections of vital interstate transmission projects.<sup>56</sup> EPAct 2005

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<sup>51</sup> *Id.* at 31.

<sup>52</sup> *Id.* at 32.

<sup>53</sup> S. REP. NO. 109-78, at 1 (2005); *see generally* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) [hereinafter EPAct 2005].

<sup>54</sup> S. REP. NO. 109-78, at 5 (2005); H.R. REP. NO. 109-215, at 171 (2005).

<sup>55</sup> S. REP. NO. 109-78, at 7 (2005); H.R. REP. NO. 109-215, at 171 (2005).

<sup>56</sup> S. REP. NO. 109-78, at 7 (2005); H.R. REP. NO. 109-215, at 171 (2005).

attacked the problem by attempting to increase federal jurisdiction in the transmission siting process.<sup>57</sup>

Congress recognized the need to assess the capacity, operation and reliability of the current transmission grid, highlighted by the massive blackouts that struck the Northeast and Midwest in 2003.<sup>58</sup> EPLA 2005 mandated the Department of Energy (DOE), in consultation with states, to perform electric transmission congestion studies.<sup>59</sup> After considering input from the interested parties, DOE may create a national interest electric transmission corridor (NIETC) in any geographic area with transmission capacity constraints or congestion adversely impacting consumers.<sup>60</sup> The designation of a NIETC depends on DOE's determination of five factors: 1) the negative economic effects of overpriced power in the corridor; 2) the constraints on growth due to a lack of diversity in electricity supply; 3) it serves the energy independence of the United States; 4) it is in the interest of national energy policy; and, 5) it furthers national defense.<sup>61</sup>

Once DOE designates a NIETC, the potential exists for increased federal involvement in the transmission line siting process by creating a federal backstop.<sup>62</sup> If the state process fails to permit a transmission line project, the developer may petition FERC to permit the project in certain limited

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<sup>57</sup> S. REP. NO. 109-78, at 48 (2005); see Michael Diamond, Note, "Energized" Negotiations: Mediating Disputes Over the Siting of Interstate Electric Transmission Lines, 26 OHIO ST. J. ON DISP. RESOL. 217, 227 (2011) (discussing the increase in potential federal jurisdiction over the siting process after EPLA 2005).

<sup>58</sup> H.R. REP. NO. 109-215, pt. 1, at 171 (2005).

<sup>59</sup> 16 U.S.C. § 824p(a)(1) (2010).

<sup>60</sup> *Id.* at § 824p(a)(2).

<sup>61</sup> *Id.* at § 824p(a)(4).

<sup>62</sup> See generally *id.* at § 824p(b) (listing the requirements for FERC siting authority); see Swanstrom & Jolivert, *supra* note 40, at 422.

conditions.<sup>63</sup> A transmission line developer may petition FERC in five circumstances: 1) the state process lacks the authority to permit the project; 2) the state authority cannot consider the interstate benefits of the project; 3) the developer is a transmitting utility according to federal law, but does not qualify for the same status under state law because the developer does not serve end-use customers in the state; 4) the state authority has withheld approval for more than one year; or, 5) the state has conditioned its approval upon unduly burdensome requirements.<sup>64</sup> The FERC permitting process creates a federal backstop to the traditional state transmission line siting process.<sup>65</sup> A federal permit authorizes the use of eminent domain on private land to facilitate the construction of the project.<sup>66</sup>

In sum, EPAct 2005 created a potential, but limited, federal backstop authority to site transmission lines.<sup>67</sup> First, the DOE must designate a congested area as a NIETC.<sup>68</sup> Second, if the state permitting process fails to approve a transmission project within a NIETC, the developer may petition FERC to permit the project.<sup>69</sup> Since the enactment of EPAct 2005, FERC has

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<sup>63</sup> *Id.* at § 824p(b)(1).

<sup>64</sup> *Id.* at §§ 824p(b)(1)(A)–(C). The FERC must also find that: 1) the transmission project will be used in interstate commerce; 2) the proposed project is consistent with the public interest; 3) the project will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers; 4) the construction is consistent with sound energy policy and will enhance energy independence; and, 5) the project will maximize the transmission capabilities of existing towers. *Id.* at §§ 824p(b)(2)–(6).

<sup>65</sup> S. REP. NO. 109-78, at 48 (2005).

<sup>66</sup> 16 U.S.C. § 824p(e); *see also* S. REP. NO. 109-78, at 48 (2005).

<sup>67</sup> *See* S. REP. NO. 109-78, at 49; *see generally* 16 U.S.C. § 824p.

<sup>68</sup> *Id.* at § 824p(a).

<sup>69</sup> *See generally id.* at § 824p(b).

received only one siting request, which the company subsequently withdrew.<sup>70</sup>

### III. ANALYSIS

Increasing federal involvement in the wholesale market and the ever-important emphasis on renewable energy resources exposed the inadequacy of the capacity, security and reliability of the existing transmission infrastructure. While EAct 2005 attempted to address the transmission problems, it failed to adequately consolidate federal jurisdiction over transmission siting. The resulting atmosphere has presented an unsustainable dichotomy in which federal involvement encourages transmission dependent generation, while state control over transmission siting impedes the necessary development. In sum, a coherent and effective national energy policy remains unobtainable without the ability to incentivize generation and guarantee access to transmission by facilitating its development across state lines.

The analysis proceeds by first articulating why the electricity market no longer supports state authority over transmission line siting. In particular, this note highlights renewable energy resources strain the transmission infrastructure more than traditional fossil fuels. Second, the note discusses the inefficiencies inherent to the state siting process and its impediment to the development of new transmission infrastructure. Finally, the analysis explains the judicial limitations placed on EAct 2005's attempt to expand federal authority over transmission siting.

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<sup>70</sup> See, e.g., Diamond, *supra* note 57, at 235 (referencing Southern California Edison's (SCE) withdrawn application for FERC siting authority). The proposed SCE line only connected two states, but still faced restraints to its completion. See notes 108–30 and accompanying text (discussing the details of the SCE proposal).

**A. THE TRANSMISSION SECTOR NO LONGER SUPPORTS STATE  
AUTHORITY**

The 1970s to 2000s were a turbulent time for the electricity sector, with significant changes in the regulatory and economic aspects of the marketplace. The Federal Government consolidated its power in the traditionally state regulated model in an attempt to ensure the functionality of a holistic, nationally focused electricity market.<sup>71</sup> Federal involvement in the wholesale power markets increased electricity generation from non-utilities to 28.2% of total generation capacity in 2004, while regulated utilities decreased from a peak of 97% in 1979 to 63.1% in 2004.<sup>72</sup> The increase in non-utility wholesale generators dramatically expanded the demand for transmission access.<sup>73</sup> The now competitive wholesale market, coupled with new pressures from renewable energy resources, highlights the inadequacies of the existing transmission infrastructure. In order to develop interstate transmission infrastructure, the federal government must consolidate federal regulation, not only over competition, but over transmission siting as well.

**1. RENEWABLE ENERGY PRESSURES ON THE CURRENT  
TRANSMISSION INFRASTRUCTURE**

Although not necessarily new, renewable energy resources sit at the forefront of electricity generation movements.<sup>74</sup> Initiatives from the Obama Administration and individual states encourage the development and use of

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<sup>71</sup> See Swanstrom & Jolivert, *supra* note 40, at 419–20 (addressing changes in the electricity sector and the beginnings of FERC’s consolidation of regulatory power).

<sup>72</sup> FERC Competition Study, *supra* note 13, at 35 (major federal involvement in the electricity sector was implemented through PURPA, EPAct 1992 and Order Nos. 888 and 2000).

<sup>73</sup> *Id.* at 24–31.

<sup>74</sup> See Diamond, *supra* note 57, at 217–18 (acknowledging America's four decades of struggle for clean, reliable energy).

renewable resources to diversify energy dependence and clean energy profiles.<sup>75</sup> Unfortunately, two major systematic issues with large-scale renewable generation prevent its effective use in the marketplace.<sup>76</sup> First, the geographic locations of the states demanding renewable generation are generally distant from the isolated parts of the nation generating the power.<sup>77</sup> Second, due to the distance between supply and demand, the nation requires new interstate transmission infrastructure to adequately handle the increase in production.<sup>78</sup> In effect, the renewable energy mandates create demands upon transmission infrastructure, which directly clash with the traditional regulated utility model. Increased federal jurisdiction over transmission siting best facilitates the infrastructure renewable energy development requires.

As of January 2012, thirty states and the District of Columbia had adopted renewable portfolio standards (RPSs) mandating a certain amount of energy generated from renewable resources.<sup>79</sup> California sets the trend with an ambitious rule requiring electric utilities to derive thirty-three percent of generation from renewable resources.<sup>80</sup> California's population demands an

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<sup>75</sup> See *id.* (discussing various initiatives of the Obama Administration); Rossi, *supra* note 12, at 1017.

<sup>76</sup> See Diamond, *supra* note 57, at 217–18 (highlighting the geographic location of renewable resources generation compared to the location of demand); Rossi, *supra* note 12, at 1017.

<sup>77</sup> See Diamond, *supra* note 57, at 217–18 (highlighting the geographic location of renewable resources generation compared to the location of demand); Rossi, *supra* note 12, at 1017.

<sup>78</sup> See Swannstrom & Jolivert, *supra* note 40, at 421–22 (addressing the need for further investment in the nation's transmission infrastructure).

<sup>79</sup> *Id.* at 462–63; U.S. ENERGY INFORMATION ADMINISTRATION, MOST STATES HAVE RENEWABLE PORTFOLIO STANDARDS (Feb. 3, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=4850>.

<sup>80</sup> See generally U.S. ENERGY INFORMATION ADMINISTRATION, MOST STATES HAVE RENEWABLE PORTFOLIO STANDARDS (Feb. 3, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=4850>.



enormous amount of energy, nearly 8.5% of the total consumption in the United States.<sup>81</sup> Other large metropolitan areas face similar constraints as renewable energy resources are located in geographically remote and sparsely populated areas.<sup>82</sup> Although most transmission of renewable energy must cross state lines, intrastate transmission inefficiencies impede renewable development as well.<sup>83</sup> For example, oil tycoon T. Boone Pickens scaled down ambitious plans for the world's largest wind farm in the Texas Panhandle because the existing transmission infrastructure made the sale to Dallas and Houston economically unfeasible.<sup>84</sup> The primary consumers of renewable energy are in states and metropolitan markets far from geographically remote generation facilities, without new transmission infrastructure clean energy cannot reach consumers.

In addition to the geographic location of renewable energy, the stationary characteristics of renewable energy resources further complicate the issue.<sup>85</sup> Renewable resources, unlike coal and natural gas, depend entirely

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[www.eia.gov/todayinenergy/detail.cfm?id=4850](http://www.eia.gov/todayinenergy/detail.cfm?id=4850) (listing the progressive renewable portfolio standards set by California).

<sup>81</sup> U.S. ENERGY INFORMATION ADMINISTRATION, CALIFORNIA (Mar. 15, 2012), <http://www.eia.gov/state/state-energy-profiles-data.cfm?sid=CA#Consumption>.

<sup>82</sup> Sandeep Vaheesan, *Preempting Parochialism and Protectionism in Power*, 49 HARV. J. ON LEGIS. 87, 96–98 (2012) (listing various metropolitan areas that face transmission restrictions to renewable energy resources); *see also* Diamond, *supra* note 57, at 218 (highlighting the geographic location of renewable resources generation compared to the location of demand); Rossi, *supra* note 12, at 1017.

<sup>83</sup> *See* Vaheesan, *supra* note 82, at 97 (discussing the lack of transmission within Texas).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

upon the geographic location for their generation capabilities.<sup>86</sup> Generators may transport fossil fuels in raw form to power plants close to the load demand; but wind turbines cannot be transported to metro San Francisco or Chicago in mass scale.<sup>87</sup> The best prospects for wind energy generally fall in the corridor spanning the Dakotas to North Texas and parts of the Mountain West, with attractive offshore potential off the Atlantic and Pacific Coasts.<sup>88</sup> Solar and geothermal potential similarly exists in the Mountain West and Southwest.<sup>89</sup> The fundamental characteristics of renewable energy resources create an exigent need for transmission lines to facilitate their development.<sup>90</sup> Conservatively, the United States requires hundreds of miles of interstate transmission infrastructure.<sup>91</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*; see Rossi, *supra* note 12, at 1029 (discussing the need for extra transmission infrastructure for North Dakota wind generation to power Chicago).

<sup>88</sup> Vaheesan, *supra* note 82, at 97; U.S. DEPT. OF ENERGY NATIONAL RENEWABLE ENERGY LABORATORY, WIND RESOURCES AND TRANSMISSION LINES (Apr. 19, 2007), [http://www.nrel.gov/wind/systemsintegration/images/home\\_usmap.jpg](http://www.nrel.gov/wind/systemsintegration/images/home_usmap.jpg).

<sup>89</sup> Vaheesan, *supra* note 82, at 97; U.S. DEPT. OF ENERGY NATIONAL RENEWABLE ENERGY LABORATORY, GEOTHERMAL RESOURCE OF THE UNITED STATES (Oct. 13, 2009), [http://www.nrel.gov/gis/images/geothermal\\_resource2009-final.jpg](http://www.nrel.gov/gis/images/geothermal_resource2009-final.jpg); U.S. DEPT. OF ENERGY NATIONAL RENEWABLE ENERGY LABORATORY, PHOTOVOLTAIC SOLAR RESOURCE OF THE UNITED STATES (Oct. 20, 2008), [http://www.nrel.gov/gis/images/map\\_pv\\_national\\_lo-res.jpg](http://www.nrel.gov/gis/images/map_pv_national_lo-res.jpg).

<sup>90</sup> See Vaheesan, *supra* note 82, at 97 (discussing the pressures on the transmission grid).

<sup>91</sup> See *id.* (declaring that hundreds of miles of interstate transmission lines will need to be constructed to service RPSs).

Improving transmission infrastructure requires capital investment.<sup>92</sup> Unfortunately, investment decreased from roughly \$5 billion per year between 1974 and 1983 (in 2005 dollars), to a low of \$2.5 billion from 1993 to 1994.<sup>93</sup> Investment ticked up to \$5.8 billion in 2005, and estimates project an increase to \$8 billion in the coming years.<sup>94</sup> Even if the investment projections prove true, these numbers make up a miniscule component of an industry with \$800 billion in capital and estimations of a further \$200 billion to be raised between 2009 and 2012.<sup>95</sup>

The current market landscape presents an interesting conundrum. Federal deregulatory efforts spurred the advent of wholesale power markets, which allowed non-utility generators to sell bulk power into a traditionally monopolistic market place regulated by the states.<sup>96</sup> The increase in wholesale power necessitated access to existing transmission lines, which FERC addressed by mandating open access.<sup>97</sup> Now non-utility generators face incentives to invest in renewable energy resources but lack the necessary

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<sup>92</sup> See ELECTRICITY ADVISORY COMMITTEE, KEEPING THE LIGHTS ON IN A NEW WORLD 16 (Jan. 2009), [http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/adequacy\\_report\\_01-09-09.pdf](http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/adequacy_report_01-09-09.pdf) (discussing the lagging investment in the transmission) [hereinafter KEEPING THE LIGHTS ON]; Vaheesan, *supra* note 82, at 115 (referencing the stagnation in transmission investment).

<sup>93</sup> KEEPING THE LIGHTS ON, *supra* note 92, at 16; see Swanstrom & Jolivert, *supra* note 40, at 421 (discussing boom and bust in transmission investment).

<sup>94</sup> KEEPING THE LIGHTS ON, *supra* note 92, at 16.

<sup>95</sup> *Id.*

<sup>96</sup> See FERC Competition Study, *supra* note 13, at 23–35 (outlining federal moves in the electricity markets that have consolidated federal jurisdiction).

<sup>97</sup> See *id.* (discussing EPAct 1992 and Order Nos. 888 and 2000).

infrastructure to use the clean energy.<sup>98</sup> The state siting process forms the primary barrier forcing capital to remain on the sideline.<sup>99</sup> Since state control impedes interstate transmission infrastructure investment and development, increased federal jurisdiction over wholesale markets exposed a major flaw with state control over transmission siting.

## 2. FUNDAMENTAL PROBLEMS WITH STATE TRANSMISSION SITING

Congress took a much needed, but wholly inadequate step to consolidate federal power over transmission siting with EPCRA 2005.<sup>100</sup> The electricity market has morphed into a national patchwork of competitive wholesale generators demanding access to and investment in new transmission lines.<sup>101</sup> Investors appear willing to fund new transmission projects, but the state siting process creates arbitrary obstacles to interstate investment.<sup>102</sup> Three funda-

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<sup>98</sup> See Vaheesan, *supra* note 82, at 96–98 (listing various metropolitan areas that face transmission restrictions to renewable energy resources); see also Diamond, *supra* note 57, at 217–18 (highlighting the geographic location of renewable resources generation compared to the location of demand); Rossi, *supra* note 12, at 1017.

<sup>99</sup> Vaheesan, *supra* note 82, at 115 (discussing state barriers to transmission investment); KEEPING THE LIGHTS ON, *supra* note 92, at 16–17 (listing interstate concerns in the siting process).

<sup>100</sup> See generally Vaheesan, *supra* note 82, at 123–24 (highlighting the inadequacies of EPCRA 2005).

<sup>101</sup> See generally Drew Thornley, *The Federal Government's Authority to Site Interstate Electric Transmission Lines: How the Meaning of "Withheld" is Withholding Clarity for Transmission Development*, 6 TEX. J. OIL GAS & ENERGY L. 385, 385 (2010–2011) (discussing the aging network of transmission lines and the inadequacy of patchwork system).

<sup>102</sup> KEEPING THE LIGHTS ON, *supra* note 92, at 16)17 (listing interstate concerns in the siting process); see, e.g., Vaheesan, *supra* note 82, at 115 (discussing state barriers to transmission investment).

mental problems exist with the state siting process for transmission lines. First, most state siting processes include a need determination based on the in-state benefits of a transmission project.<sup>103</sup> Unfortunately, the geographic nature of renewable energy resources and power exporting states in general, force transmission lines to cross numerous state lines.<sup>104</sup> Second, political pressures force state officials to skew a cost-benefit balancing test in a way that favors their constituents, often ignoring the greater regional and national benefits.<sup>105</sup> Finally, the overall state system remains grounded on an outdated regulatory model that frustrates innovative and necessary market participation from key non-utility players.<sup>106</sup>

State siting processes and eminent domain need determinations rarely allow state officials to consider regional or national benefits to new transmission projects.<sup>107</sup> Although some states allow the consideration of out-of-state benefits, it only takes one intrastate focused siting authority to

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<sup>103</sup> See, e.g., Rossi, *supra* note 12, at 1019–20 (discussing the basis for state need determinations).

<sup>104</sup> See generally Vaheesan, *supra* note 82, at 96–98 (listing various metropolitan areas that face transmission restrictions to renewable energy resources); see also Diamond, *supra* note 57, at 218 (highlighting the geographic location of renewable resources generation compared to the location of demand).

<sup>105</sup> See generally Vaheesan, *supra* note 82, at 115–23 (describing the various pressures on state officials that are not balanced against the overall benefit of the transmission project).

<sup>106</sup> See Matthew J. Agen, *Transmission Tug-of-War*, PUB. UTIL. FORT. 46, 50–51 (Nov. 2011) (describing the problems the Maryland Public Service Commission faced in permitting the Potomac-Appalachian Transmission Highline (PATH)).

<sup>107</sup> See Ashley C. Brown & Damon Daniels, *Vision Without Site; Site Without Vision*, 16 ELECTRICITY J. 23, at 26–27 (Oct. 2003) (specifically referencing Mississippi code as forbidding the state PSC from considering out-of-state benefits).

impede development.<sup>108</sup> The inconsistencies in the individual state siting processes effectively Balkanizes a national transmission program.<sup>109</sup> For example, in 2005, Southern California Edison (SCE) began the process of permitting a 225-mile high voltage transmission line from Arizona into California.<sup>110</sup> The majority of the transmission line was located on existing rights-of-way in federally approved corridors, but approval from both the California and Arizona Public Service Commissions (PSC) were necessary to move forward with the project.<sup>111</sup> California approved the line in 2007, but Arizona denied the permit.<sup>112</sup> The lack of in-state benefits proved key to Arizona's denial of the project.<sup>113</sup> SCE estimated the project would have resulted in \$650 million in costs to California ratepayers, but cumulative savings of \$1.1 billion over the life of the line.<sup>114</sup> Arizona ratepayers would incur \$242 million in costs over the life of the line and an approximate five percent increase in spot prices at the Palo Verde hub.<sup>115</sup> Arguably, the five to one ratio of benefits to the region, compared to the local costs to Arizona,

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<sup>108</sup> *Id.* at 26–28; see Thornley, *supra* note 101, at 385.

<sup>109</sup> See Brown & Daniels, *supra* note 107, at 26–28; see Thornley, *supra* note 101, at 385 (referencing the patchwork transmission system as an effective Balkanization of the grid).

<sup>110</sup> See Swanstrom & Jolivert, *supra* note 40, at 450–52 (discussing SCE's efforts to permit the Devers-Palo Verde 2 line (Devers PV2)); Vaheesan, *supra* note 82, at 116–17 (referencing the SCE line).

<sup>111</sup> See Swanstrom & Jolivert, *supra* note 40, at 450–52 (referencing the approvals necessary to permit the project, although SCE claimed the majority of it ran through federal rights-of-way).

<sup>112</sup> See Swanstrom & Jolivert, *supra* note 40, at 451.

<sup>113</sup> See *S. Cal. Edison Co.*, 2007 WL 2126365 1–3 (Ariz. Corp. Comm'n June 6, 2007) (listing the Arizona PSC's concerns about the economic, reliability and environmental impacts of the new transmission lines).

<sup>114</sup> *Id.* at 2.

<sup>115</sup> *Id.*

supports the construction of the power line, but the Arizona PSC focused on the detriment to their rate base almost irrespective of the regional benefits.<sup>116</sup>

In addition to costs, SCE presented estimates of \$213 million in net benefits to the Arizona ratepayers through increased construction jobs, better access to renewable energy and an improvement in the investment climate in the area.<sup>117</sup> The Arizona PSC dismissed the possible benefits as speculative and irrelevant to the factors PSC can weigh under its governing statute.<sup>118</sup> The Arizona PSC might have made the "best" decision for its ratepayers, but it did so in a way that completely discounted and ignored the regional benefits to the electricity market.<sup>119</sup> The attitude of the Arizona PSC can be summed up by one commissioner's comment that the Devers-PV2 line amounted to nothing more than an "extension cord" to the California power sink.<sup>120</sup>

Arguably the Arizona PSC made the correct decision, assuming the only thing to be considered is the cost of a new transmission line to in-state ratepayers.<sup>121</sup> The nature of transmission projects produces large benefits to regional markets, but creates large costs and negative externalities for states and localities.<sup>122</sup> The typical economic costs consist of the recovery of the upfront investment and a reasonable return on investment, which are borne by

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Vaheesan, *supra* note 82, at 116.

<sup>120</sup> *Id.*; Paul Davenport, *Arizona Regulators Reject New Electric Line to California*, SAN DIEGO UNION-TRIBUNE, May 30, 2007, <http://legacy.signonsandiego.com/news/state/20070530-1728-wst-sharingpower.html>.

<sup>121</sup> *See* Vaheesan, *supra* note 82, at 110 (describing the problems with often regional benefits and local costs of transmission lines).

<sup>122</sup> *Id.*

local ratepayers.<sup>123</sup> Continuing with the SCE example, Arizona ratepayers faced a substantial increase in their electricity costs, even though the savings were predominantly in California.<sup>124</sup> A larger emphasis may be placed on intrastate environmental and aesthetic concerns.<sup>125</sup> High voltage transmission lines require a large right-of-way and often stand over 100-feet tall.<sup>126</sup> Understandably, landowners that oppose the construction of transmission lines refer to them as aerial junkyards.<sup>127</sup> These concerns are not unfounded as transmission rights-of-way can result in decreased property values, interfere with existing uses and potentially harm local tourism.<sup>128</sup> Thus, the local costs vest state residents with an interest in combating almost any transmission line project, especially ones with predominantly regional benefits.<sup>129</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> *See S. Cal. Edison Co.*, 2007 WL 2126365 1–3 (Ariz. Corp. Comm’n June 6, 2007) (listing the Arizona PSC’s concerns about the economic, reliability and environmental impacts of the new transmission lines).

<sup>125</sup> *See Vaheesan*, *supra* note 82, at 111–13 (discussing the eye sore transmission lines create and the possible noise disturbances).

<sup>126</sup> *Id.* at 111.

<sup>127</sup> *Id.*

<sup>128</sup> *See Diamond*, *supra* note 57, at 225–26 (referencing the negative impact of transmission lines on property may top a 15% decrease in extreme circumstances); *Vaheesan*, *supra* note 82, at 112 (stating that affected parties are often willing to pay for improved transmission towers with lower profiles).

<sup>129</sup> *See Vaheesan*, *supra* note 82, at 118–20 (discussing the political pressures that can be exerted on state siting officials).



The political arena provides the logical outlet for public outcry in the state transmission line siting process.<sup>130</sup> Elected state officials recognize they answer only to their constituents, the very same people facing increased costs due to a transmission project.<sup>131</sup> The affected local groups generally bear a higher per capita cost in comparison to the regionally dispersed per capita gain.<sup>132</sup> The disparity in the per capita allocation creates a situation in which local cost bearers are more likely to organize and lobby their political representatives than the beneficiaries.<sup>133</sup> Even if the regional beneficiaries were to organize, no proper political venue exists for their voice to be heard, because they cannot vote in the opposing state.<sup>134</sup> The current political system skews any cost-benefit analysis at the state siting level against the regional benefits.<sup>135</sup>

These political pressures even arise in intrastate transmission siting.<sup>136</sup> For example, the New York Regional Interconnection (NYRI) sought to carry power from upstate New York to the New York City Metropolitan Area.<sup>137</sup> Due to significant congestion in transmission capacity to New York City,

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<sup>130</sup> *See id.* (describing political pressures exerted on local and state officials).

<sup>131</sup> *Id.* at 118.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See generally id.* (recognizing that “Not in My Backyard” movements arise at the local and state levels, generally the locations at which political control over transmission siting exists); *see* Diamond, *supra* note 57, at 226 (referencing NIMBY movements blocking transmission line development).

<sup>135</sup> Vaheesan, *supra* note 82, at 119.

<sup>136</sup> *See id.* at 117–120 (outlining the struggle to site the New York Regional Interconnection).

<sup>137</sup> *Id.* at 118.

millions of consumers were forced to purchase higher priced electricity from localized generators.<sup>138</sup> The project seemingly had considerable intrastate benefits to millions of people, but it faced staunch opposition from certain residents along the proposed route.<sup>139</sup> Prominent New York politicians including Senator Schumer and former Senator Clinton vowed to fight against the NYRI project at multiple levels.<sup>140</sup> Ultimately, the centralized political opposition concentrated among the minority bearing the loss overcame the massive benefit to millions of New York residents.<sup>141</sup> Therefore, even if states have the possibility to consider regional benefits in the siting process, the political process coupled with parochial and "not in my backyard" (NIMBY) concerns often outweigh the aggregate benefits.<sup>142</sup>

Assuming states may properly consider the interstate benefits of transmission lines and are not subject to political pressures, many states still implement archaic definitions of what type of entity may apply for a permit.<sup>143</sup> In general, states limit the entities that may apply for transmission development to "public utilities," which creates problems for non-utilities attempting to site a transmission project through the state.<sup>144</sup> For example, various entities attempted to permit the Potomac-Appalachian Transmission Highline (PATH) carrying power from Pennsylvania and West Virginia to the suburbs of Washington D.C.<sup>145</sup> The proposed project spanned 275 miles

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 119.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See Agen, *supra* note 106, at 50 (acknowledging that many states face constraints on what type of entity may apply for transmission permits).

<sup>144</sup> *Id.* at 150.

<sup>145</sup> See generally *id.*; Vaheesan, *supra* note 82, at 117.

through the former Mid-Atlantic Area NIETC.<sup>146</sup> The Maryland PSC refused to consider the portion of the project running through the state, because the PSC could only issue a certificate of public convenience and necessity to an "electric company."<sup>147</sup> The definition of "electric company" reaches back to the outdated concepts of regulated monopolies. In order to qualify the company must be "a person who physically transmits or distributes electricity in the State to a retail electric customer."<sup>148</sup> The Maryland PSC found that PATH Allegheny Transmission did not qualify as an electric company and refused to rule on the permit.<sup>149</sup>

The PATH example further highlights the clashing nature of FERC's deregulated wholesale market and the traditional state siting process.<sup>150</sup> Non-

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<sup>146</sup> Agen, *supra* note 106, at 50; Vaheesan, *supra* note 82, at 117; *see generally* California Wilderness Coalition v. U.S. Dept. of Energy, 631 F.3d 1072 (9th Cir. 2011) (throwing out NIETC designations in the Southwest and Mid-Atlantic for failures to consult with local governments and lacking environmental analysis).

<sup>147</sup> Agen, *supra* note 106, at 50; MD. CODE ANN., PUB. UTIL. COS. § 1-101(h) (West 2012).

<sup>148</sup> MD. CODE ANN., PUB. UTIL. COS. § 1-101(h).

<sup>149</sup> Agen, *supra* note 106, at 50; *see* Vaheesan, *supra* note 82, at 117 (discussing resistance to transmission line construction projects). Potomac Edison later re-submitted a permit to the Maryland PSC to permit the project, which the Maryland PSC accepted because Potomac Edison qualified as an electric company while its subsidiary PATH Allegheny Transmission did not. Agen, *supra* note 106, at 50.

<sup>150</sup> As of February 28, 2011 the PATH project was suspended indefinitely due to the Mid-Atlantic RTO's (PJM) desire to further study the need for the transmission project. *PATH Seeks to Withdraw Application for Electric Transmission Project: Regional Grid Operator Directs Suspension of PATH Project* (Feb. 28, 2011), <http://www.pathtransmission.com>. Notably, this suspension came a few days after the Mid-Atlantic NIETC was dissolved

utility entities are encouraged to provide competition in the wholesale power market and guaranteed access to the woefully inadequate transmission infrastructure, but they cannot expeditiously build extra infrastructure to improve the problem. The inability for the state transmission siting process to consider regional and national benefits, the political pressures to favor localized costs and the outdated regulatory models employed by states all support the case for stronger federal jurisdiction in the transmission siting process.<sup>151</sup> Congress attempted to alleviate these concerns with EPAct 2005, but failed to effect any meaningful change.<sup>152</sup>

#### **B. JUDICIAL LIMITATIONS OF FERC'S AUTHORITY UNDER EPACT 2005**

FERC's potential backstop authority to site transmission lines occurs only within a limited geographic area, and even then, only pursuant to overly specific conditions.<sup>153</sup> First, DOE must conduct an electric transmission congestion study.<sup>154</sup> In areas subject to congestion, DOE may designate the geographic region as a NIETC.<sup>155</sup> If transmission projects in a NIETC are unable to obtain the required state siting permits because of undue delay, onerous conditions or a lack of authority, then transmission developers can

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by the Ninth Circuit, but the press release does not mention a connection between the two events.

<sup>151</sup> See Vaheesan, *supra* note 82, at 124–28 (calling for complete federal control over transmission line siting).

<sup>152</sup> See *id.* at 123–24 (acknowledging the woeful inadequacies of EPAct 2005's transmission authority); Swanstrom & Jolivert, *supra* note 40, at 455–56 (discussing the failure of EPAct 2005 to spur investment in transmission); Rossi, *supra* note 12, at 1033 (questioning how much authority FERC actually has under EPAct 2005 after judicial limitations).

<sup>153</sup> See 16 U.S.C. §§ 824p(a)-(b) (2012) (listing the requirements in order to invoke FERC backstop authority).

<sup>154</sup> See *id.* at § 824p(a)(1).

<sup>155</sup> See *id.* at § 824p(a)(2).

apply for FERC permitting.<sup>156</sup> These overly limiting conditions coined the term "backstop" authority for FERC's jurisdiction.<sup>157</sup> Nevertheless, EPAct 2005 attempted to increase, at least the threat of, federal preemption to the state siting process.<sup>158</sup>

Unfortunately, the judiciary exhibited reluctance to accept FERC's newly created authority.<sup>159</sup> In *California Wilderness Coalition v. United States Department of Energy*, the Ninth Circuit invalidated DOE's two electricity congestion studies, upon which the only NIETCs were based.<sup>160</sup> The rejection of the NIETC designations calls into question DOE's ability to designate a geographic area for federal transmission siting authority.<sup>161</sup> The Fourth Circuit further complicated the issue in *Piedmont Environmental Council v. Federal Energy Regulatory Commission* by limiting FERC's

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<sup>156</sup> See *id.* at § 824p(b).

<sup>157</sup> Swanstrom & Jolivert, *supra* note 40, at 415 (referring to FERC's transmission siting authority as "backstop"); Diamond, *supra* note 57, at 219 (taking the "backstop" reference to its obvious metaphor, with the comparison to the backstop on a baseball diamond).

<sup>158</sup> Vaheesan, *supra* note 82, at 123–24.

<sup>159</sup> See *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072 (9th Cir. 2011) (throwing out NIETC designations in the Southwest and Mid-Atlantic for failures to consult with local governments and lacking environmental analysis); *Piedmont Env'tl. Council v. F.E.R.C.*, 558 F.3d 304 (4th Cir. 2009) (rejecting FERC authority if a state lawfully denies a transmission line project).

<sup>160</sup> See *Wilderness Coalition*, 631 F.3d at 1095–96 (vacating congestion studies and accordingly, the NIETCs that based upon them).

<sup>161</sup> See Agen, *supra* note 106, at 49 (noting that the *Wilderness Coalition* case has placed FERC's jurisdiction in limbo); Swanstrom & Jolivert, *supra* note 40, at 436–40 (referring to the then pending litigation in *Wilderness Coalition* and its potential impacts to any FERC authority).

ability to site transmission lines if a state denies approval.<sup>162</sup> The practical result of the Fourth Circuit's holding severely hinders FERC's potential authority.<sup>163</sup> Judicial challenges and the courts' opinions dealt EAct 2005 a serious setback by limiting DOE's ability to designate NIETCs and further gutting any threat of FERC's "backstop" authority by allowing states to circumvent triggering FERC's jurisdiction.<sup>164</sup>

### 1. CONGESTION STUDIES, NIETC DESIGNATIONS, AND THE NINTH CIRCUIT'S *WILDERNESS COALITION* DECISION

The factual background in the Ninth Circuit's *Wilderness Coalition* decision dates back to the enactment of EAct 2005. In response to EAct 2005 DOE began studying transmission line congestion.<sup>165</sup> Pursuant to the statutory mandate, DOE was required to "consult with the affected States" in completing the congestion study and allow the affected states to comment before designating a NIETC.<sup>166</sup> To accomplish this end, DOE sought

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<sup>162</sup> *Piedmont*, 558 F.3d at 320 (holding that a state's legal denial of a transmission permit does not trigger FERC jurisdiction).

<sup>163</sup> *See* Thornley, *supra* note 101, at 396–97 (stating that FERC's authority remains an open question).

<sup>164</sup> *See* Agen, *supra* note 106, at 49 (noting that the *Wilderness Coalition* case has placed FERC's jurisdiction in limbo); Swanstrom & Jolivet, *supra* note 40, at 436–40 (referring to the then pending litigation in *Wilderness Coalition* and its potential impacts to any FERC authority); Thornley, *supra* note 101, at 396–97 (stating that FERC's authority remains an open question).

<sup>165</sup> *Wilderness Coalition*, 631 F.3d at 1080–81; 16 U.S.C. § 824p(a) (2012).

<sup>166</sup> *Wilderness Coalition*, 631 F.3d at 1080–81; *see* 16 U.S.C. § 824p(a)(1)–(2) (2012) (requiring consultation with the affected States in the congestion study and an opportunity to comment as to the possible alternatives and recommendations to the designation of a NIETC).

comments from the public through a notice on February 2, 2006 and held an open technical conference in March 2006.<sup>167</sup> No states received an invitation to the closed list conference in May 2006.<sup>168</sup> The underlying data behind the congestion studies was not provided to the states.<sup>169</sup> DOE published the final congestion study in August 2006 and requested comments on the study and the ensuing designation of NIETCs.<sup>170</sup> Two major concerns emerged among the comments.<sup>171</sup> The first category expressed concern that DOE failed to "consult" with the states during the congestion studies, contrary to the heightened mandate required.<sup>172</sup> The second concern addressed DOE's failure to conduct the environmental review required by the National Environmental Policy Act (NEPA).<sup>173</sup> DOE formally designated two NIETCs on October 5, 2007, the Mid Atlantic and Southwest Corridors, despite the negative comments.<sup>174</sup> Unhappy with the procedural aspects of the congestion study and both NIETC designations, various environmental groups and states filed thirteen petitions for review, which the Ninth Circuit consolidated into one case.<sup>175</sup>

Petitioners advanced the fundamental arguments expressed in the comments, that DOE failed to consult with the affected states and completely

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<sup>167</sup> *Wilderness Coalition*, 631 F.3d at 1080–81.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1089–90.

<sup>170</sup> *Id.* at 1080–81.

<sup>171</sup> *See generally id.* at 1081–83 (expressing the comments' concern that DOE did not "consult" with the states and did not conduct the appropriate NEPA review).

<sup>172</sup> *Id.* at 1081–82; 16 U.S.C. § 824p(a)(1) (requiring consultation).

<sup>173</sup> *Wilderness Coalition*, 631 F.3d at 1082–83; *see generally* 42 U.S.C. §§ 4321–35 (2012) (codifying NEPA).

<sup>174</sup> *Wilderness Coalition*, 631 F.3d at 1083.

<sup>175</sup> *Id.*

skipped any NEPA analysis.<sup>176</sup> DOE countered they solicited comments multiple times and held an open conference for additional conversation.<sup>177</sup> The Ninth Circuit settled on the first prong of the *Chevron* deference, claiming the statutory language unambiguously expressed congressional intent that DOE consult with the affected states.<sup>178</sup> The court weighed DOE's opportunities to comment against the plain meaning and case law interpretations of "consultation," coupled with the withheld data underlying the congestion studies.<sup>179</sup> Ultimately, the Ninth Circuit held DOE failed to meet the heightened standard of consultation, by allowing only an opportunity to comment.<sup>180</sup>

The court then turned to the crucial issue of whether the failure to consult amounted to more than a harmless error.<sup>181</sup> The opinion explained DOE's conduct adversely affected the congestion study and NIETC designations in three ways.<sup>182</sup> First, "consultation requires an exchange of ideas and opinions before an agency makes a decision" and the comment periods failed to allow the same opportunity.<sup>183</sup> Second, due to the

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<sup>176</sup> See generally *id.* at 1085–107 (following the court's analysis through the consultation and environmental arguments).

<sup>177</sup> *Id.* at 1085–86.

<sup>178</sup> *Id.* at 1083–85 (applying *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); see 16 U.S.C. § 824p(a)(1) (2012) ("the Secretary of Energy . . . in consultation with affected States, shall conduct a study of electric transmission congestion").

<sup>179</sup> *Wilderness Coalition*, 631 F.3d at 1087–90.

<sup>180</sup> *Id.* at 1086.

<sup>181</sup> *Id.* at 1090–95. According to Ninth Circuit precedent, a harmless error requires a finding that an error had no impact on the procedure followed or the determination's substance. *Id.* at 1092.

<sup>182</sup> *Id.* at 1093–95.

<sup>183</sup> *Id.* at 1093.



discretionary nature of DOE's decision, consultation would have provided an effective tool for lobbying by the affected states.<sup>184</sup> Third, the court reasoned "that consultation would likely have resulted in a different study."<sup>185</sup> The combination of the three adverse effects resulting from the failure to consult culminated in the court's holding that DOE's actions amounted to more than harmless error.<sup>186</sup> To remedy DOE's failure to consult, the court vacated the congestion studies and consequently the NIETC designations for the Southwest and Mid-Atlantic Corridors.<sup>187</sup> Thus, DOE and FERC were thrown back to square one in implementing siting authority under EPAAct 2005; the *Wilderness Coalition* decision destroyed nearly six years of work.<sup>188</sup>

The *Wilderness Coalition* court took its holding one step further in addressing the petitioner's environmental claims.<sup>189</sup> Even though the inadequate congestion studies nullified the NIETC designations, the studies would have been vacated because of DOE's failure to conduct the proper environmental analysis.<sup>190</sup> DOE attempted to argue the NIETC designations were too speculative to warrant NEPA analysis.<sup>191</sup> However, the Ninth Circuit rejected DOE's assertions because the conclusory analysis performed by the department failed to provide a "hard look" at the potential environmental impacts of NIETC designation.<sup>192</sup> The court's decision effectively mandated

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<sup>184</sup> *California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1093-95 (9th Cir. 2011).

<sup>185</sup> *Id.* at 1094-95.

<sup>186</sup> *Id.* at 1095.

<sup>187</sup> *Id.* at 1095-96.

<sup>188</sup> *Id.*; Agen, *supra* note 106, at 49 (recognizing that *Wilderness Coalition* returned DOE and FERC to the enactment of EPAAct 2005).

<sup>189</sup> *Wilderness Coalition*, 631 F.3d at 1096.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1098.

<sup>192</sup> *Id.*

the completion of an environmental analysis (EA) or environmental impact statement (EIS) for every NIETC designation.<sup>193</sup>

*Wilderness Coalition* returns any potential FERC authority over transmission siting back to square one.<sup>194</sup> DOE must conduct congestion studies with a heightened standard of consultation, the contours of which remain uncertain.<sup>195</sup> FERC's potential authority erodes further because NIETC designations require the completion of time consuming NEPA analysis.<sup>196</sup> Thus, the trigger for potential FERC authority will be delayed, possibly by years.<sup>197</sup> Even if a NIETC were to be designated, it is doubtful that FERC will be able to assert jurisdiction contrary to the state's wishes.<sup>198</sup>

## 2. DENIAL OF STATE PERMITTING REQUESTS, CIRCUMVENTING FERC JURISDICTION, AND THE FOURTH CIRCUIT'S *PIEDMONT* DECISION

The Fourth Circuit dealt EPAct 2005 another fatal blow by severely limiting the potential for FERC backstop authority over transmission siting.

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<sup>193</sup> *Id.* at 1098–106 (finding that NIETC designations are major federal actions that raise significant environmental impacts).

<sup>194</sup> *See Agen, supra* note 106, at 49 (recognizing that *Wilderness Coalition* “returned DOE and FERC to the enactment of EPAct 2005”).

<sup>195</sup> *Wilderness Coalition*, 631 F.3d at 1081–106; *Agen, supra* note 106, at 49 (analogizing *Wilderness Coalition* to a complete rejection of DOE/FERC authority).

<sup>196</sup> *Wilderness Coalition*, 631 F.3d at 1081–106; *Agen, supra* note 106, at 49 (stating that FERC authority is in limbo).

<sup>197</sup> *See Agen, supra* note 106, at 49 (questioning the applicability of EPAct 2005 to any transmission line that was before a state PSC before the *Wilderness Coalition* decision).

<sup>198</sup> *See id.* at 48 (recognizing that FERC authority can be circumvented by the state process).

Transmission line developers may petition for FERC backstop authority within a NIETC if the state PSC lacks the authority to permit the project, withholds a decision for more than one year or conditions its approval upon overly onerous conditions.<sup>199</sup> FERC interpreted a state's denial of a permit to trigger the one year withholding period for potential FERC authority.<sup>200</sup> Unhappy with FERC's interpretation, various PSCs and community interest groups petitioned for review, with the case being consolidated in the Fourth Circuit.<sup>201</sup> In *Piedmont*, the petitioners challenged Order No. 689's interpretation of "withheld approval" as including the lawful denial of a transmission siting request.<sup>202</sup> The Fourth Circuit held the plain meaning of "withhold" did not include a denial, as withholding implied a continuous act while denial was definite and final.<sup>203</sup> The court bolstered its adherence to the plain meaning of "withhold" in the context of the statute by interpreting FERC's potential authority to only be in limited circumstances.<sup>204</sup> If the court accepted FERC's interpretation, it thought that PSCs would lose jurisdiction, unless they approved every siting permit.<sup>205</sup> The court could not accept such a sweeping grant of federal jurisdiction and overturned FERC's interpretation.<sup>206</sup>

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<sup>199</sup> 16 U.S.C. § 824p(b) (2010).

<sup>200</sup> See, e.g., *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Order No. 689, 18 C.F.R. § 50 (2006); Agen, *supra* note 106, at 48 (interpreting FERC Order No. 689).

<sup>201</sup> See generally 558 F.3d 304 (4th Cir. 2009) (rejecting FERC authority if a state lawfully denies a transmission line project).

<sup>202</sup> *Id.* at 311.

<sup>203</sup> *Id.* at 313.

<sup>204</sup> *Id.* at 313–14.

<sup>205</sup> *Id.* at 314.

<sup>206</sup> *Id.* at 315.

In his dissent, Judge Traxler emphasized the overarching goal of EAct 2005 to allow FERC intervention to site transmission lines.<sup>207</sup> The dissent claimed not equating a denial to withholding approval allows one state to derail a multistate line, which EAct 2005 sought to prevent.<sup>208</sup> Under Judge Traxler's interpretation, approval of a permit is withheld every day a permit is not issued, which continues to run after denial as approval is still withheld.<sup>209</sup> The dissent would accept FERC's interpretation and give effect to the underlying congressional intent to expedite transmission line siting.<sup>210</sup>

*Piedmont* created a loophole in FERC's potential jurisdiction.<sup>211</sup> If the denial of a transmission siting permit does not trigger the one-year withholding provision, then a state only needs to legally deny a permit to avoid the threat of FERC jurisdiction.<sup>212</sup> The Fourth Circuit essentially gutted any potential threat of FERC jurisdiction and nullified EAct 2005's reach to only the dullest of PSCs who cannot find a valid reason to deny a transmission line siting permit.<sup>213</sup> Judicial challenges in the Ninth and Fourth Circuits severely limited any potential for EAct 2005 to have a meaningful impact on the transmission line siting process.

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<sup>207</sup> 558 F.3d at 323–26 (Traxler, J., dissenting).

<sup>208</sup> *Id.* at 324.

<sup>209</sup> *Id.* at 323.

<sup>210</sup> *Id.* at 325–26.

<sup>211</sup> See Vaheesan, *supra* note 82, at 124 (recognizing that a state only needs to deny approval to circumvent FERC authority).

<sup>212</sup> See, e.g., *id.*; Agen, *supra* note 106, at 48; Thornley, *supra* note 101, at 396.

<sup>213</sup> See, e.g., Vaheesan, *supra* note 82, at 124; Agen, *supra* note 106, at 48; Thornley, *supra* note 101, at 396.

#### IV. CONCLUSION

Although the threat of federal transmission siting authority may remain on the books, this aspect of EPAct 2005 lacks any potential for use in the near future. Federal intervention created the first and largest strains on the existing transmission infrastructure. Renewable energy resources further burden an outdated transmission grid. State control over transmission line siting forms the primary obstacle to investment and construction of new lines. To ensure regional and national coordination, the federal government must consolidate its power over not only transmission access, but transmission siting as well. EPAct 2005 attempted to take a step in the right direction, but ultimately proved ineffective. As long as the individual states control interstate transmission siting, congestion, poor reliability and security, and a dearth of investment will plague the United States' transmission grid.