REGULATORY FEDERALISM AND DEVELOPMENT OF ELECTRIC TRANSMISSION: A BREWING STORM?

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Synopsis: As in many areas of law, the Nation's system of federalism—laid out in our constitutional and statutory framework—provides for power-sharing between federal and state governments with respect to electricity sector regulation. Congress' original allocation of responsibility for regulating aspects of the electric transmission grid remains fundamentally unaltered since 1935, even in the face of major industry changes—integration of transmission infrastructure across utility and state boundaries, competitive regional power markets, digital technologies, and new domestic energy resources. An aging and congested grid infrastructure requires expansions and upgrades. This article reviews recent examples of state actions that could impede or obstruct the development of needed transmission infrastructure and highlights examples of states' constructive engagement in regional planning processes to drive mutually acceptable outcomes. In order for the Nation to realize the full benefits of transmission grid modernization, a balanced approach is needed that recognizes both a state's unique interest in issues of local concern and also the regional and national interest in developing transmission infrastructure that addresses the needs of consumers in all regions and markets. The article concludes with recommended steps for moving toward this balanced approach and avoiding state-to-state or state-federal power struggles that could significantly impede progress on well-planned grid development and thereby harm consumers.

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"The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation . . . . The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago."[1]

"Can't we all just get along?"[2]

Our federal system of laws enshrines an elaborate power-sharing arrangement between national and state interests. It is not new. It is an article of the American democratic faith and a source of economic security and innovation. Equally important, federalism can all too often be a source of inexhaustible debate or inertia that can frustrate productivity, create risk, and stave off change and modernization. This article identifies current tensions within our approach to regulation of the electricity transmission grid during this unusual period of operational, corporate, technological, and policy changes in the electric industry.

No consensus currently exists about the future of this critical business, and our federal system of electricity laws has yielded solutions rather slowly. Part II of the Federal Power Act (FPA),[3] enacted in 1935, distinguished state government roles from federal government roles in regulating the then-existing electric utility industry. Congress assigned oversight of transmission and

1. United States v. Morrison, 529 U.S. 598, 655 (2000) (Souter, J., dissenting).

2. *Rodney King* (CNN television broadcast May 1, 1992), *available at* http://www.youtube.com/watch?v=1sONfxPCTU0.

3. 16 U.S.C. §§ 824-824w (2012).

wholesale sales of electricity to federal regulators.[4] Responsibility for oversight of all other aspects of service by load-serving utilities—the vast majority of electric utility activities at the time—remained the province of state and local authorities under a decentralized regulatory system.[5] High-voltage transmission was, and remains, the least costly of integrated utility functions, and offering transmission service to third-party customers was almost incidental to the local utility operations in the 1930s when the FPA was enacted. The highly integrated multi-state high-voltage transmission grid that we know today, composed of transmission facilities owned by many utilities, is a relatively new phenomenon. Regional power markets, independent generators and transmission providers, and the commoditization of electricity were unforeseen by the drafters of the FPA.

The FPA's original allocation of responsibility for regulating the grid has not been significantly modified in the face of the subsequent evolution of the industry toward large regional power markets, which require supporting regional transmission grid infrastructures. But over the past two decades, the Federal Energy Regulatory Commission (FERC) has responded to such changes by pursuing an updated industry model that is more competitive and regionally-focused than existed under the monopoly structures of the mid-20th century. This development, known generally as "electricity restructuring," has strained the federal-state sharing of regulatory responsibility by unsettling the business and policy landscape. In the process, state electricity regulators have been subjected to unique pressures to synch up their long-standing retail service regulation with new developments in wholesale markets. States retain broad authority to grant or deny authorization to construct new electric facilities (and use eminent domain), as well as to oversee utility rates for retail service (including transmission where services are "bundled"). Not surprisingly, some state public utility commissions were troubled by the FERC's transmission open access reforms in Order No. 888[6] because they perceived an erosion of states' authority over the transmission service component of retail electric utility operations.[7] Today, despite the FERC's expressed willingness to defer to State

4. *Id.* § 824(a).

5. *Id.*

6. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,036, 61 Fed. Reg. 21,540 (1996) [hereinafter Order No. 888], *order on reh'g*, Order No. 888-A, F.E.R.C. STATS. & REGS. ¶ 31,048, 62 Fed. Reg. 12,274 (1997) [hereinafter Order No. 888-A], *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in relevant part sub nom.* Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *cert granted sub nom.* New York v. FERC, 535 U.S. 1 (2002).

7. *New York v. FERC*, 535 U.S. 1. State regulators reacted even more negatively to the FERC's sweeping 2002 Standard Market Design proposal, wherein the FERC proposed to exercise jurisdiction over the transmission component of bundled retail sales, and over resource adequacy matters. *See* Notice of Proposed Rulemaking, Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, 67 Fed. Reg. 55,452, 55,477, 55,511 (Aug. 29, 2002) [hereinafter SMD NOPR]. In response to the negative reaction of state regulators, the FERC issued a streamlined Wholesale Power Market Platform White Paper in 2003 that excluded the SMD NOPR's exercise of jurisdiction over retail transmission and resource adequacy. FED. ENERGY REGULATORY COMM'N, WHOLESALE POWER MARKET PLATFORM (2003), *available at* http://www.ferc.gov/media/news-releases/2003/2003-2/White_paper.pdf. Following further negative reaction, the FERC terminated the rulemaking in 2005 without adopting a standard market

and regional preferences, some states have expressed apprehension, if not downright anger, about elements of the FERC's recent Order No. 1000,[8] including complaints that the FERC has reached beyond its jurisdictional limits in the realms of transmission planning, cost allocation, and competition in transmission development.[9] Moreover, as discussed below, there are other case-specific indications of growing state-federal tensions.

How will regulators and the regulated industry respond to these storm clouds on the horizon? The pending tumult, if unaddressed, threatens to blow the economic and environmental benefits of new transmission development off course. But the issues can be constructively addressed in the interest of averting costly litigation, inefficient short-term regulatory choices, and intergovernmental distrust and hard feelings.

This article explores the pressure points where the state and federal tensions most often arise with respect to transmission grid investment and development. Fundamentally, a well-functioning, robust regional transmission grid is needed to support reliable electric supply, competitive and cost-saving wholesale power markets, deployment of advanced technology, and power-related policy initiatives. Well-planned transmission investment will support power flows, generation development, and technology deployment for decades to come. The continued oversight and coordinated support of federal and state regulators, as well as regional cooperation among policymakers in individual states, will be needed to cost-effectively develop and maintain a robust transmission infrastructure. But the framework within which we now regulate transmission development presents all regulators and policy makers with challenges and a compelling need to revitalize federalism in this context. The concerns and pressures may be greatest where a state faces economic impacts and opportunities that are dependent on actions in other jurisdictions, such as states with economic generation resources to export, or states with customer loads hungry for access to cheaper or cleaner supplies. However, a more collaborative and regional approach to grid development and its regulatory oversight offers to "lift all boats." How regulators choose to employ their longstanding authorities in this evolving framework will be a significant factor in determining whether the Nation and its electricity consumers will get the grid investment that they deserve.

Part I of this article reviews the rise of regional transmission planning and development in recent years. Part II examines areas of state and federal regulatory responsibility over developers and development of transmission

design. *See* Order Terminating Proceeding, *Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, 112 F.E.R.C. ¶ 61,073 (2005).

8. Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,323, 76 Fed. Reg. 49,842 (2011) [hereinafter Order No. 1000], *order on reh'g*, Order No. 1000-A, 139 F.E.R.C. ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 F.E.R.C. ¶ 61,044 (2012), *appeal pending sub nom.* South Carolina Pub. Serv. Auth. v. FERC, No. 12-1232 (D.C. Cir. Mar. 5, 2013).

9. *See, e.g.*, NAT'L ASS'N OF REGULATORY UTIL. COMM'RS, RESOLUTION REGARDING STATE AUTHORITY OVER PUBLIC UTILITY RESOURCE PLANNING (July 24, 2013), *available at* http://www.naruc.org/Resolutions/Resolution%20Regarding%20State%20Authority%20over%20Public%20Utility%20Resource%20Planning.pdf ("*Order 1000* can be construed to interfere with States' ability to fully execute their jurisdictional responsibilities.").

facilities. Part III considers examples of state regulatory and legislative actions that could have the effect of impeding or obstructing regional grid development. Part IV reviews models for constructive engagement by state regulators with each other and with regional transmission organizations on grid expansion. Part V concludes with recommendations on how to ensure that regulators avoid working at cross purposes and support needed grid investment.

I. THE RISE OF REGIONAL TRANSMISSION PLANNING AND DEVELOPMENT

A. The Need for Transmission Planning and Development Across Service Territory and State Borders

Until the regulatory reforms at the end of the 20th century, virtually all transmission facilities were constructed by vertically integrated utilities, generally for the purpose of moving power from central service station generators owned by the local utility to load served by that same utility. New sources of generation and load were interconnected in a piecemeal fashion, and upgrades to the existing grid were identified and constructed by the utility where necessary. Transmission planning was largely limited to utility-specific planning overseen by the state utility commission. The resulting grid was a loose conglomeration of localized networks, with limited interconnections between utilities. Such a network was not designed to facilitate the robust markets for wholesale power that emerged toward the end of the last century.

The emergence of non-utility generation during the 1970s and 1980s, encouraged by federal policies like the Public Utility Regulatory Policies Act (PURPA),[10] meant that for the first time, electricity was being generated at scale by entities other than the local utility. These new entities required access to markets in order to sell their output.

The Energy Policy Act of 1992 granted the FERC the authority to approve applications for wheeling services under sections 211 and 212 of the FPA.[11] Procedural limitations, however, made processing transmission requests unwieldy and failed to eliminate the ability of transmission providers to exercise undue discrimination in the provision of transmission service.

In 1996, the FERC issued Order No. 888, mandating non-discriminatory open access to transmission facilities owned, operated or controlled by public utilities.[12] Order No. 888 and the FERC's *pro forma* Open Access Transmission Tariff (OATT) established rudimentary requirements for the planning and development of transmission facilities necessary to serve network and long-term firm point-to-point transmission customers[13] but stopped short of requiring utilities to engage in joint and regional transmission planning with other utilities and customers.[14] The development of the transmission grid largely remained a local, utility-specific endeavor.

10. Public Utility Regulatory Policies Act of 1978 § 210, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 16 U.S.C § 824a-3).

11. 16 U.S.C. §§ 824j-824k (2012).

12. Order No. 888, *supra* note 6.

13. *See id.* app. D §§ 3.5, 15.4, 27, 28.2.

14. Order No. 888-A, *supra* note 6, at 30,311.

B. A New Model: Regional Planning, Competitive Developer Selection, and the Transco Business Model

1. The Rise and Expansion of Regional Transmission Planning and Cost Allocation

In the decade that followed the FERC's landmark Order No. 888, transmission-owning utilities in major regions of the country turned over functional control of their transmission facilities to regional transmission organizations (RTOs) and independent system operators (ISOs) to be operated under regional tariffs. The nascent regional transmission planning processes that developed in the RTO/ISO regions paved the way for later FERC reforms.

The FERC issued Order No. 890 in 2007 to address remaining obstacles to competition in wholesale energy markets for transmission-dependent market participants, particularly in those regions outside the RTOs and ISOs.[15] Among the shortcomings identified by the FERC was the potential for undue discrimination in the planning of transmission facilities, which remained in many areas a rather opaque exercise conducted unilaterally by the incumbent utility.[16] Accordingly, Order No. 890 mandated that public utility transmission providers adopt transmission planning processes designed to broaden the scope of transmission planning in terms of both geographic coverage and intended beneficiaries.[17] The planning processes were required to incorporate the following elements: "coordination, openness, transparency, information exchange, comparability, dispute resolution, regional participation, economic planning studies, and cost allocation for new projects."[18]

In response to Order No. 890, RTO and ISO transmission providers refined regional planning processes that were already in place while public utility transmission providers outside the RTOs and ISOs were required for the first time to adopt formal processes featuring customer participation and some degree of regional coordination. Order No. 1000 further cemented regional planning and cost allocation, requiring utilities outside of the existing RTOs and ISOs to join regional planning entities and develop open and nondiscriminatory regional transmission plans, including regional cost allocation for certain projects.[19]

2. Competitive Selection of Transmission Developers

Another recent development was the introduction of competition as a force for selecting the most beneficial transmission expansion projects and the most cost-effective developer of those projects. Order No. 1000 required RTOs and ISOs that had rights of first refusal (ROFRs) in their tariffs or organizational

15. Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, F.E.R.C. STATS. & REGS. ¶ 31,241, 72 Fed. Reg. 12,266 (2007) [hereinafter Order No. 890], *order on reh'g*, Order No. 890-A, FERC STATS. & REGS. ¶ 31,261, 73 Fed. Reg. 2984, *order on reh'g and clarification*, Order No. 890-B, 73 Fed. Reg. 39,092, 123 F.E.R.C. ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 F.E.R.C. ¶ 61,228, 74 Fed. Reg. 12,540, *order on clarification*, Order No. 890-D, 129 F.E.R.C. ¶ 61,126, 74 Fed. Reg. 61,511 (2009).

16. Order No. 890, *supra* note 15, at P 425.

17. *Id.* at PP 435-36.

18. *Id.* Appendix C (Pro Forma Open Access Transmission Tariff, Attachment K).

19. Order No. 1000, *supra* note 8, at PP 148-51.

documents (which gave an incumbent transmission owner a right to build any new transmission asset within its footprint) to remove those ROFRs.[20] The effect is that the regional processes are not to discriminate between incumbent transmission owners and others with respect to proposing or developing major transmission projects.

Some regions have gone a step further and incorporated formal competitive project selection or competitive developer selection processes in their larger planning process. For example, in the PJM Interconnection (PJM), ISO New England (ISO-NE), and New York Independent System Operator (NYISO) regions, developers compete at the project design phase to propose innovative solutions to an identified transmission need.[21] The winning developer then has the right to construct and own its proposed design.[22] In the California Independent System Operator (CAISO), Midcontinent Independent System Operator (MISO), and Southwest Power Pool (SPP) regions, the ISO or RTO identifies both the need and the solution, and then developers compete for the right to finance, build, own, and operate the solution.[23]

3. Emergence of the Transco Model

The evolving regional model for transmission development, including the implementation of competitive project selection in some regions, has created new opportunities for transmission-only utilities (transcos) to construct, own, and operate transmission infrastructure. Like the independent power producers that materialized in response to the FERC's pro-competition policies of the last century, transcos have formed in response to this century's transmission development opportunities.

Transcos were initially formed in response to utility restructuring policies at the state level that encouraged divestiture of transmission assets by the local utility.[24] In Wisconsin, the utilities that owned transmission assets transferred

20. *Id.* at P 313. The FERC policy on eliminating ROFRs contains a number of exceptions. For example, ROFRs may be retained for "local transmission facilities" whose costs are not regionally allocated, or for upgrades to the incumbent utility's existing facilities. *Id.* at PP 318-19.

21. *See* Johannes Pfeifenberger et al., Brattle Grp., Presentation at EUCI—Transmission Policy: A National Summit: Competition in Transmission Planning and Development 8 (Jan. 31, 2014) [hereinafter Pfeifenberger], *available at* http://www.brattle.com/system/publications/pdfs/000/004/977/original/Competition_in_Transmission_Planning_and_Development.pdf?1391196850; *see generally* ISO NEW ENGLAND INC., ISO-NE OPEN ACCESS TRANSMISSION TARIFF § II Attachment K (2013), *available at* http://www.iso-ne.com/regulatory/tariff/sect_2/oatt/sect_ii.pdf; N.Y. INDEP. SYS. OPERATOR, INC., OPEN ACCESS TRANSMISSION TARIFF Attachment Y (2014), *available at* http://www.nyiso.com/public/markets_operations/documents/tariffviewer/index.jsp; PJM INTERCONNECTION, L.L.C., PJM OPERATING AGREEMENT Schedule 6 (2014), *available at* http://www.pjm.com/~/media/documents/agreements/oa.ashx.

22. Pfeifenberger, *supra* note 21.

23. *Id.* at 8; *see generally* CAL. INDEP. SYS. OPERATOR CORP., FIFTH REPLACEMENT FERC ELECTRIC TARIFF § 24 (2014), *available at* http://www.caiso.com/Documents/Section24_ComprehensiveTransmissionPlanningProcess_Apr1_2014.pdf; MIDCONTINENT INDEP. SYS. OPERATOR, FERC ELECTRIC TARIFF Attachment FF (2014), *available at* https://www.misoenergy.org/Library/Tariff/Pages/Tariff.aspx; SW. POWER POOL, INC., OPEN ACCESS TRANSMISSION TARIFF SIXTH REVISED VOLUME NO. 1 Attachment O (2014), *available at* http://www.spp.org/publications/spp_tariff.pdf.

24. *See, e.g.*, S.B. 937, 90th Leg., Reg. Sess. § 10w (Mich. 2000); A.B. 133, 1999 Leg., Reg. Sess. (Wis. 1999) (vetoed in part).

ownership of those assets to American Transmission Co., LLC (ATC), a for-profit transmission company created by Wisconsin law, in exchange for equity ownership interests in the new company.[25] ATC's sole task was to own and operate the existing transmission facilities and plan for and develop new transmission assets.[26] Similarly, public utilities in Michigan formed Michigan Electric Transmission Company (METC) and International Transmission Company (ITC) and spun off their existing transmission assets to the newly formed companies.[27] ITC Holdings later combined the METC and ITC assets under the same corporate structure.[28]

In other situations, companies have made a corporate business decision to divest transmission assets to an independent transmission company. For example, several transmission-owning utilities in the Midwest have divested all of their transmission assets to transmission-focused entities.[29] Recently, Entergy sought to divest the transmission assets of its operating affiliates in several different states to ITC Holdings.[30]

More recently, transcos have been formed to develop discrete regional projects whose costs are broadly allocated across a multi-utility footprint (e.g., through an RTO or ISO tariff). Trans-Allegheny Interstate Line Company, a subsidiary of Allegheny Energy Inc., is an example of this type of transco that has recently built a new 500-kilovolt (kV) transmission line (Trans-Allegheny Interstate Line (TrAIL)), extending from Southwestern Pennsylvania through West Virginia to Northern Virginia.[31] Numerous other project-specific companies have been created to develop transmission assets throughout the country. These project-specific companies may or may not involve joint ventures with incumbent utilities or affiliates of incumbent utilities. Project-specific transcos have also been formed to develop new merchant transmission facilities.[32] The use of transcos is likely to become even more common as the regions implement Order No. 1000 and expand the use of competitive processes for the selection of transmission project developers.

II. THE INTERTWINED AUTHORITIES OF STATE AND FEDERAL REGULATORS OVER TRANSMISSION DEVELOPMENT

As responsibility for transmission planning and development shifts from the autonomous local utility to regional transmission planning organizations and transcos, the FERC's vision of efficient regional transmission development will

25. *Edison Sault Elec. Co.*, 93 F.E.R.C. ¶ 61,146, at p. 61,460 (2000).

26. *Id.*

27. *Trans-Elect, Inc.*, 98 F.E.R.C. ¶ 61,142 (2002).

28. *ITC Holdings Corp.*, 116 F.E.R.C. ¶ 61,271 at P 1 (2006).

29. *See, e.g.*, *ITC Holdings Corp.*, 121 F.E.R.C. ¶ 61,229 at P 1 (2007).

30. *ITC Holdings Corp.*, 143 F.E.R.C. ¶ 61,256 at P 2. ITC Holdings and Entergy later terminated their proposed transaction. *See* Notice of Termination of Transaction, *ITC Holdings Corp.*, FERC Docket No. EC 12-145-000 (Dec. 13, 2013).

31. *Trans-Allegheny Interstate Line Co.*, 124 F.E.R.C. ¶ 61,075 at P 1 n.1 (2008).

32. *E.g.*, *Plains & E. Clean Line LLC*, 140 F.E.R.C. ¶ 61,187 at P 2 (2012); *Hudson Transmission Partners, LLC*, 135 F.E.R.C. ¶ 61,104 at PP 2-4 (2011); *Neptune Reg'l Transmission Sys., LLC*, 96 F.E.R.C. ¶ 61,147, *order on reh'g*, 96 F.E.R.C. ¶ 61,326 (2001), *order on clarification*, 98 F.E.R.C. ¶ 61,140 (2002), *order on modification & clarification*, 103 F.E.R.C. ¶ 61,213 (2003).

only succeed to the extent it can coexist with the regulation of transmission by the states. Federal and state regulators each exercise jurisdiction—sometimes overlapping, sometimes exclusive—over the development of transmission facilities and associated cost recovery through electric rates. Most of the current federal and state statutory framework governing transmission regulation was enacted in the early 20th century, with the transmission development model of the early 20th century in mind, i.e., transmission developed by a vertically integrated utility for use by that utility.

One of the key questions in this area is whether the federal model of deferring to state action in areas of local interest (e.g., on issues such as retail service rate structures, net metering policy, or distribution system investment) should or should not apply to transmission infrastructure. As Justice Brandeis opined: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country."[33] However, high voltage transmission grids are (with the exception of the Electric Reliability Council of Texas (ERCOT)) a multi-state endeavor, supporting multi-state power markets, even when discrete facilities are physically located in a single jurisdiction. At least with respect to regional transmission projects, there is the possibility that tensions among states, and tensions between federal and state interests, could result in problematic outcomes and underinvestment in the grid.

This section reviews the roles of federal and state regulators in transmission planning and development. As this review shows, both federal and state regulatory authorizations are needed to permit new transmission infrastructure development. While the federal government ultimately has the leverage of preemption in the face of outright conflict of law,[34] FERC action is bounded by its existing statutory authority.[35] Thus, both federal and state regulators have substantial influence to shape transmission development outcomes.

33. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *But see* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 26-27 (2008) (noting that "[e]xperimentation of this sort is an instrumentality, useful only when the subunits share a single goal. It is not particularly relevant to subunits whose goals are different from each other. . . . Individual subunits will have no incentive to invest in experiments that involve any substantive or political risk; they will instead prefer to be free riders and wait for other subunits to generate them."). In other words, freedom to experiment may result in a misallocation of the economic benefits and free-rider market failures.

34. The Supremacy Clause of the Constitution provides that laws enacted by Congress are "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. *See also* California v. FERC, 495 U.S. 490, 506 (1990) ("A state measure is 'preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)); Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) ("[W]e have long recognized that state laws that conflict with federal law are 'without effect.'" (quoting Maryland v. Louisiana, 451 U. S. 725, 746 (1981)); Wyeth v. Levine, 555 U.S. 555, 576 (2009) ("[A]n agency regulation with the force of law can pre-empt conflicting state requirements.").

35. Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002) ("As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'" (quoting Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

A. Jurisdiction over Transmission Planning

The practice of transmission planning has historically occurred at the state level, often as a component of integrated resource planning.[36] Transmission planning at the state level is focused on the local transmission requirements of the utility or utilities franchised in the state, rather than on regional transmission needs. Beginning with Order No. 890, and as reinforced by Order No. 1000, the FERC has required public utility transmission providers to participate in open and transparent transmission planning at the regional and interregional level. The FERC has emphasized that such planning requirements are not intended to infringe on those "substantive matters traditionally reserved to the states, including integrated resource planning."[37] The FERC's "focus" in Order No. 1000 "is on the set of transmission facilities that are evaluated at the regional level and selected in the regional transmission plan for purposes of cost allocation."[38] Utilities may continue to rely on "bottom-up" planning for local facilities through integrated resource planning or other existing practices, and the elimination of ROFRs from FERC-jurisdictional agreements and tariffs is not required with respect to such local facilities.[39]

B. Split Jurisdiction over Transmission Cost Recovery

Whether a transmission project is developed by an incumbent utility or a transco, the developer will need to recover its investment plus a fair return through customer rates. Under the current regulatory framework, jurisdiction over the developer's cost recovery as between a state commission or the FERC will depend on the circumstances.

Section 201(b) of the FPA gives the FERC regulatory jurisdiction over "the transmission of electric energy in interstate commerce."[40] The FERC is charged with ensuring that the rates, terms, and conditions of transmission service provided by public utilities[41] in interstate commerce are just and reasonable, and not unduly discriminatory or preferential, under sections 205 and 206 of the FPA.[42] The FERC's authority in this regard is exclusive,[43] and states may not second-guess or collaterally attack determinations of the reasonableness of filed rates, terms, and conditions of transmission in interstate commerce.[44]

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36. *See, e.g.*, ALA. CODE § 37-1-49 (2014) (giving Alabama Public Service Commission authority to oversee the transmission planning process); FLA. STAT. § 366.04(5) (2013) (charging the Florida Public Service Commission with the "planning, development, and maintenance of a coordinated electric power grid").

37. Order No. 1000, *supra* note 8, at P 107.

38. *Id.* at P 318.

39. *Id.*

40. 16 U.S.C. § 824(b)(1) (2012).

41. The FERC has only limited jurisdiction over transmission service provided by municipal utilities, Rural Electrification Act-financed electric cooperatives, and other "non-jurisdictional" entities described in section 201(f) of the FPA. *Id.* § 824(f).

42. *Id.* §§ 824d-824e.

43. *See, e.g.*, Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963-66 (1986); Federal Power Comm'n v. Southern Cal. Edison Co., 376 U.S. 205 (1964); Public Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927).

44. *See, e.g.*, Mississippi Power & Light Co. v. Mississippi *ex rel* Moore, 487 U.S. 354, 374-75 (1988); Gulf States Utils. Co. v. Alabama Power Co., 824 F.2d 1465, 1471-72, *amended*, 831 F.2d 557 (5th Cir. 1987).

In contrast, the FERC "has no power to prescribe the rates for retail sales of power companies," and hence the regulation of retail sales of electricity is reserved for the states.[45] The FERC considers the transmission component of a bundled retail sale of electricity sold at a single price to an end user to be an "integral component of a retail sale,"[46] and has accordingly declined to assert jurisdiction over the transmission component of bundled retail sales.[47] The Supreme Court held in *New York v. FERC* that that approach by the FERC represented a "statutorily permissible policy choice," without deciding on the merits whether the FERC's jurisdiction would in fact extend to the transmission component of bundled retail sales if the FERC were to decide to exercise such authority.[48] Justice Thomas' dissenting opinion questioned the Court's deference to the FERC's "policy choice," noting that "although FERC draws a jurisdictional line between transmission used in connection with bundled and unbundled retail sales, the statute makes no such distinction."[49] Thus, in addition to authority to regulate unbundled transmission services, the FERC likely has authority to regulate rates, terms, and conditions of transmission services currently bundled in retail rates, if it chose to exercise it. The FERC has not sought to exercise such authority.

State utility commissions, therefore, set the rates, terms, and conditions of retail electricity service, including the transmission component of retail electricity service where such service is provided as a single, bundled product. To the extent that transmission service is provided directly by a vertically integrated retail provider, the costs of that transmission service to be included in the bundled retail rate are determined by the state utility commission. Where, however, the retail service provider purchases transmission service from a third party at FERC-regulated rates (including that purchased from an RTO or ISO), state utility commissions cannot second-guess the FERC-determined transmission rate.[50]

However, states do have significant discretion when setting overall retail rates, for which there are many cost inputs, and "an increase in FERC-approved . . . rates need not lead to an increase in retail rates."[51] For example, if third-party transmission charges under a FERC-jurisdictional tariff increase, but distribution operation and maintenance (O&M) decreases or accumulated depreciation outpaces investment on generation or distribution facilities, the overall bundled retail rate may not increase. Often, retail rate cases are resolved with "black box" settlements, so that it is not possible to determine the relationship between individual cost components and the final rate. The upshot of this regulatory structure is that many states continue to wield significant influence with respect to the transmission costs that are passed on to retail

45. Federal Power Comm'n v. Conway Corp., 426 U.S. 271, 276 (1976).

46. New York v. FERC, 535 U.S. 1, 15 (2002) (internal quotation marks omitted).

47. *Id.* at 27.

48. *Id.* at 28 (citations omitted).

49. *Id.* at 31, 37 (Thomas, J., dissenting).

50. *See, e.g.*, Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 965 (1986) (In the context of wholesale power purchased at FERC-determined rates, states "must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price.").

51. *Id.* at 967.

customers through bundled retail rates and the effective return that utilities are able to earn on transmission investment.

C. States Hold the Reins on Transmission Facility Siting

The FPA does not require a FERC-issued certificate of public convenience and necessity in order to construct transmission facilities. Although the construction of a hydropower facility requires a FERC license under Part I of the Federal Power Act,[52] and the construction of an interstate gas pipeline requires a FERC certificate under the Natural Gas Act,[53] siting of new transmission lines is generally not a matter within the FERC's jurisdiction.[54]

Thus, "states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities."[55] Many states have enacted statutes related to energy facility siting that cover transmission facilities.[56] Under those authorities, state regulators or siting boards often determine, either under express statutory grants or de facto, whether a proposed project as a whole is in the public interest. A state permit to construct a transmission line often takes the form of a certificate of public convenience and necessity (CPCN).[57] Over forty states require permits and siting approval for high-voltage electric transmission lines within their borders.[58] In most of those states, the public utilities commission permits and sites transmission lines; a few states have dedicated facility siting agencies.[59]

The FERC does have transmission siting authority in certain limited circumstances. The FERC has jurisdiction over the siting of transmission lines that are part of federally licensed hydropower projects under Part I of the FPA.[60] Recognizing that state transmission siting proceedings utilized various, often inconsistent criteria and timelines which could indefinitely delay or effectively veto interstate projects, Congress adopted section 216 of the FPA in the Energy Policy Act of 2005, which grants the FERC limited "backstop" transmission siting authority. In particular, section 216 grants the FERC authority to permit and site transmission lines in "national interest electric transmission corridors,"

52. FPA § 23(b)(1), 16 U.S.C. § 817(1) (2012).

53. NGA § 7, 15 U.S.C. § 717f (2012).

54. *See, e.g.*, *PacifiCorp*, 69 F.E.R.C. ¶ 61,099, at p. 61,382 (the Commission stating that "the siting of new transmission facilities is a state matter in which we are not involved, and the [intervenor] should direct its comments on siting matters to the relevant state authorities"), *order on reh'g*, 69 F.E.R.C. ¶ 61,352 (1994); *see also PSI Energy, Inc.*, 55 F.E.R.C. ¶ 61,254, at p. 61,811, *reh'g denied*, 56 F.E.R.C. ¶ 61,237 (1991), *appeal denied sub nom.* Michigan Pub. Power Agency v. FERC, 963 F.2d 1574 (D.C. Cir. 1992).

55. Piedmont Envtl. Council v. FERC, 558 F.3d 304, 310 (4th Cir. 2009).

56. *See generally* EDISON ELEC. INST., STATE GENERATION & TRANSMISSION SITING DIRECTORY (2013), *available at* http://www.eei.org/issuesandpolicy/transmission/Documents/State_Generation_Transmission_Siting_Directory.pdf (providing summaries of the processes for state siting of transmission lines).

57. *See, e.g.*, *id.* at 11, 55.

58. *See id.* Eight states—Alabama, Alaska, Georgia, Indiana, Louisiana, Oklahoma, Tennessee, and Washington—do not under certain circumstances require state permitting and siting of transmission lines. *Id.* at 1, 3, 29, 41, 51, 101, 115, 129.

59. *Id.* at 1, 15, 23, 31, 103, 121, 125.

60. 16 U.S.C. § 797(e) (2012) (including the licensing of hydropower-associated transmission lines within the FERC's hydropower license authority).

as designated by the U.S. Department of Energy (DOE),[61] in circumstances where, for instance, the state regulatory body does not have authority to approve an application or the state regulatory agency with siting authority has "withheld approval for more than 1 year after the filing of an application."[62] The FERC broadly interpreted this latter phrase in Order No. 689 by construing "withheld approval" to include timely permit denials by state agencies.[63] The Fourth Circuit reversed, holding that Congress did not intend to grant the FERC transmission siting authority every time a state agency timely denies a siting permit in a public interest corridor, thereby limiting the FERC's backstop siting authority under this prong of the statute to instances where an agency fails to take action on an application for more than a year.[64] Thus, the FERC's siting authority under FPA section 216 has been narrowly construed by the courts, and states continue to have nearly exclusive jurisdiction over transmission siting.[65]

The Energy Policy Act also sought to promote interstate cooperation on transmission facility siting by authorizing states to form interstate compacts. FPA section 216(i) permits "three or more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies."[66] Such interstate siting compacts, once approved by Congress, may site transmission lines within the collective boundaries of the member states.[67] The FERC is precluded from employing its backstop siting authority to permit the construction of a transmission line within any state that is a member of such an interstate compact unless the "members of the compact are in disagreement" and approval has been withheld for more than one year.[68] This laudable attempt to encourage states to act together on multi-state transmission projects has been largely ignored; although, (as we discuss below) some state policy makers have recognized the potential merit of such arrangements.

Transmission developers are also subject to the full range of environmental statutes administered by federal agencies to the extent the permitting or regulatory requirements of such statutes are triggered by the construction of a given transmission project. Major federal permits or approvals that may be

61. 16 U.S.C. § 824p.

62. *Id.* § 824p(b)(1)(C).

63. Order No. 689, *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors*, F.E.R.C. STATS. & REGS. ¶ 31,234 at P 26, 71 Fed. Reg. 69,440 (2006) (codified as amended at 18 C.F.R. pts. 50, 380), *reh'g denied*, 119 F.E.R.C. ¶ 61,154 (2007), *rev'd in part sub nom.* Piedmont Envtl. Council v. FERC, 558 F.3d 304, 310 (4th Cir. 2009).

64. *Piedmont Envtl. Council*, 558 F.3d at 313 ("We conclude that FERC's interpretation is contrary to the plain meaning of the statute. Simply put, the statute does not give FERC permitting authority when a state has affirmatively denied a permit application within the one-year deadline.").

65. The FERC's limited siting authority suffered another blow in 2011 when the Ninth Circuit vacated the DOE's national interest electric transmission corridor designations because the DOE had failed to consult with state regulators and failed to consider the environmental impact of the designation of such corridors under the National Environmental Policy Act (NEPA). California Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1107 (9th Cir. 2011). The DOE has yet to re-designate national interest corridors.

66. 16 U.S.C. § 824p(i)(1).

67. *Id.*

68. *Id.* § 824p(i)(4); *see also id.* § 824p(b)(1)(C).

required include right-of-ways across land under federal management,[69] Endangered Species Act compliance,[70] Clean Water Act section 401, 402, or 404 permits,[71] air space permits under the Federal Aviation Administration Act,[72] section 106 consultation under the National Historic Preservation Act of 1966,[73] and permits to excavate cultural resources under the Archaeological Resources Protection Act of 1979.[74] The National Environmental Policy Act may also require agency preparation of an environmental assessment or environmental impact statement.[75]

However, given the FERC's limited jurisdiction in this area, states have considerable leverage with respect to transmission development through facility siting. By withholding authority to construct for a disfavored project or developer, states can erect barriers to regional transmission development.[76] State utility commissions may also have significant influence over the ability of new entities to construct transmission projects within a state by restricting access to public utility status, which in turn is often a prerequisite for obtaining a CPCN and associated eminent domain authority.[77] For example, the Arkansas Public Utility Commission (APSC) determined that Plains and Eastern Clean Line, LLC did not meet the statutory definition of a "public utility" under Arkansas law because it would not be serving any customers in the state, and therefore was ineligible for a CPCN under state law.[78]

D. Concurrent Jurisdiction over Utility Asset Sales and Transfers

The development of new transmission facilities is not limited to greenfield construction. Existing transmission facilities and right-of-ways are often incorporated into the design. Where development of a project requires the transfer of these existing assets from an incumbent utility to the developer of a project, regulatory authorization for the asset transfer will often be needed from the FERC and the regulator in the state where the asset is located.

69. Federal Land Policy and Management Act, Pub. L. No. 94-579, §§ 501-511, 90 Stat. 2743, 2776-2782 (1976) (codified as amended at 43 U.S.C. §§ 1761-1771).

70. Endangered Species Act, Pub. L. No. 93-205, §§ 2-17, 87 Stat. 884, 884-903 (1973) (codified as amended at 16 U.S.C. §§ 1531-1543).

71. Clean Water Act of 1972 §§ 401-402, 404, 33 U.S.C. §§ 1341-1342, 1344 (2012).

72. Federal Aviation Administration Act, Pub. L. No. 97-449, § 1(b), 96 Stat. 2413 (1983) (codified as amended at 49 U.S.C. § 106).

73. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. § 470).

74. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. §§ 470aa-mm).

75. National Environmental Policy Act, Pub. L. No. 91-190, § 2, 83 Stat. 852, 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347).

76. *See* Drew Thornley, Ctr. for Energy Policy & the Env't, *Regulatory Barriers to a National Electricity Grid*, ENERGY POL'Y & ENV'T REP., Sept. 2010, *available at* http://www.manhattan-institute.org/pdf/eper_06.

77. *Id.*

78. Application of Plains and Eastern Clean Line LLC for a Certificate of Public Convenience and Necessity to Construct, Own and Operate As an Electric Transmission Public Utility in the State of Arkansas, Order No. 9, Docket No. 10-041-U, at 9-11 (Ark. P.S.C. Jan 11, 2011).

The FERC has jurisdiction over the sale of transmission facilities by public utilities and mergers involving public utilities that own such facilities. Section 203(a)(1) of the FPA requires public utilities to seek Commission authorization before they "sell, lease, or otherwise dispose of" transmission facilities or "merge or consolidate, directly or indirectly, such facilities or any part therefore with those of any other person."[79] The FERC's jurisdiction over such transactions involving the sale or consolidation of transmission facilities is not exclusive.[80] States often have concurrent jurisdiction over such transactions,[81] and many (but not all) state public utility statutes require prior approval by state utility commissions for utility merger or asset sale transactions.[82]

III. STATE REGULATORY IMPEDIMENTS TO TRANSMISSION DEVELOPMENT—A BREWING STORM?

The foregoing sections of this article describe how the transmission sector is subject to regulation at both the state and federal level. As the planning and development of major transmission projects become increasingly subject to the FERC's regional planning and cost allocation policies, the different or competing state and federal interests in the grid also become more evident. This section reviews recent state regulatory and legislative actions that illustrate this tension and the concerns some states have with respect to regionalization, transcos, and non-incumbent transmission development.[83] It is important to acknowledge that most states have *not* erected barriers to, for instance, the development of regional projects or the development of new transmission by

79. 16 U.S.C. § 824b(a)(1)(A)-(B) (2012).

80. Northern Pa. Power Co. v. Pennsylvania Pub. Util. Comm'n, 200 A. 866, 874-75 (Pa. Super. Ct. 1938) (rejecting arguments that Congress intended section 203 to provide exclusive jurisdiction over mergers to the FPC (now the FERC)), *rev'd on other grounds*, 5 A.2d 133 (1939).

81. *See, e.g.*, *Northern Pa. Power Co.*, 200 A. at 875 (Mergers involve a "dual interest," whereby the FERC would consider whether the merger harmed the "general [FPA] plan for the interconnection and coordination of facilities" and the state would consider whether it "will not prove injurious to the interests of the local consumer.").

82. *See, e.g.*, CAL. PUB. UTIL. CODE § 851 (2013); MICH. COMP. LAWS § 460.6q (2013); NEV. REV. STAT. § 704.329 (2013).

83. Some State commissions have expressed great concern with elements of Order No. 1000. *See, e.g.*, Petition for Review, *South Carolina Pub. Serv. Auth. v. FERC*, No. 12-01232 (D.C. Cir. May 25, 2012); *see generally* Comments of the Nat'l Ass'n of Regulatory Util. Comm'rs at 2, FERC Docket No. RM10-23 (Sept. 29, 2010) ("NARUC is concerned that the rule may infringe on State jurisdiction and existing processes."). The issue that has attracted the greatest attention is the controversy over the cost allocation for regional projects and the notion that a utility could be required to bear a share of project costs where the region determines that a project benefits the utility and its customers. Comments of the Nat'l Ass'n of Regulatory Util. Comm'rs at 7-8, FERC Docket No. RM10-23 ("The new rule . . . appears to demote the States from an essential aspect of any cost allocation scheme to simply one of the stakeholders with whom the transmission utility should consult . . . . The rule should recognize the unique and indispensable role State commissions play in the ultimate approval of the transmission facility . . . ." (internal footnote omitted)). Several states are among the parties challenging the authority of the FERC to adopt these and other requirements in Order No. 1000 in the Court of Appeals. *See* Petition for Review, South Carolina Pub. Serv. Auth. v. FERC, No. 12-01232 (D.C. Cir. May 25, 2012). While the regulatory tensions outlined in this article may be exacerbated by the trends toward regionalism and competitive developer selection advanced by Order No. 1000, the instances of conflict reviewed below are not the direct result of Order No. 1000 implementation. These growing tensions must be addressed regardless of the outcome of the ongoing litigation concerning Order No. 1000.

transcos.[84] The selected cases below are described to show the potential for serious problems and frictions, not to make the case that the current power sharing system is irretrievably broken.

A. State Law Barriers to Certain Projects or Project Developers

In several cases, transcos have encountered limitations where state law was interpreted so as not to authorize treatment of transcos, or certain transcos, as utilities. For instance, the Public Service Commission of Kentucky (KYPSC) construed Kentucky law such that an entity that did not have state-regulated rates could not qualify as a utility within the state.[85] AEP Kentucky Transmission Company, Inc. applied to the KYPSC for a CPCN authorizing it to operate as a transmission-only utility within the state.[86] The KYPSC issued an order denying the application, ruling that the transco would not be providing utility service subject to the KYPSC's jurisdiction.[87] The KYPSC reasoned that under Kentucky law, a utility must file with the PSC a tariff setting forth all the rates and conditions of service that are subject to the KYPSC's jurisdiction,[88] and while AEP Kentucky Transmission asserted that aspects of its service would be subject to KYPSC jurisdiction in addition to FERC oversight, the KYPSC ruled that in the absence of a tariff on file with the commission, the transco would not be performing a "regulated activity" within the parameters of the KYPSC's jurisdiction.[89] The result was that the transco was not eligible for a CPCN or the eminent domain that comes with a CPCN.[90]

The Arkansas Public Service Commission (APSC) construed state law to provide that an entity that is not serving customers within Arkansas cannot qualify as a utility eligible for a CPCN (and eminent domain) in the state. Plains and Eastern Clean Line, LLC (Plains and Eastern) filed an application for approval of a certificate seeking authority to operate as a public utility in the State of Arkansas.[91] Because Plains and Eastern would be regulated by the

84. To be sure, a number of transmission-only companies have been formed to develop or own transmission facilities. In only a small percentage of these cases have state regulators actually declined needed authorizations. While many states have been able to work through any perceived issues with the formation of transmission-focused companies, there are a handful of cases where state reluctance to approve such transactions has caused significant problems.

85. Application of AEP Kentucky Transmission Company, Inc. for a Certificate of Public Convenience and Necessity Pursuant to KRS 278.020 to Provide Wholesale Transmission Service in the Commonwealth, Case No. 2011-00042, at 7-8 (Ky. P.S.C. June 10, 2013) (order).

86. *See* Application, *Application of AEP Kentucky Transmission Co. for CPCN*, Case No. 2011-00042 (Ky. P.S.C. Feb. 7, 2011).

87. *Application of AEP Kentucky Transmission Co. for CPCN*, Case No. 2011-00042, at 7-9 (Ky. P.S.C. June 10, 2013) (order).

88. *Id.* at 7.

89. *Id.* In a dissenting opinion, Vice Chairman Gardner said he would grant AEP Kentucky Transmission a certificate. *Id.* at 11 (Gardner, V. Chairman, dissenting). The Vice Chairman disagreed with majority's ruling that "[b]ecause we can't regulate all aspects of this proposed transmission company, we won't regulate any of it." *Id.*

90. *Id.* at 11.

91. Application, Application of Plains and Eastern Clean Line LLC for a Certificate of Public Convenience and Necessity to Operate as an Electric Transmission Public Utility in the State of Arkansas, Docket No. 10-041-U (Ark. P.S.C. May 13, 2010).

FERC—and it was unclear whether Plains and Eastern would interconnect with the transmission system in Arkansas or deliver any electricity in Arkansas—PSC Staff argued that Plains and Eastern was not offering jurisdictional utility service and would not be a public utility subject to the APSC's jurisdiction.[92] Staff noted that there was no evidence that Plains and Eastern's transmission services were required in Arkansas.[93] Therefore, Staff said that "to issue a [CPCN] to Clean Line, it appears that the Commission would have to look beyond whether the public convenience and necessity require the operation of Clean Line's transmission facilities in Arkansas and consider broader public policy goals."[94]

The APSC issued an order ruling that Plains and Eastern did not meet the statutory definition of a "public utility" entitled to a certificate to provide public utility service in the state.[95] Although the APSC found Plains and Eastern's case to be strong on policy considerations,[96] it found that the "public utility" definition requires "owning or operating in this state equipment or facilities for . . . transmitting . . . power to or for the public for compensation."[97] Because Plains and Eastern had no contracts for public utility service with any utility and there was not any present transmission of power, the APSC said it could not approve the Plains and Eastern application.[98] The APSC noted that it "is not opposed to independent transmission construction," but it could not grant public utility status to Plains and Eastern based on its present lack of plans to serve customers within the state.[99]

Clean Line's Rock Island project has faced similar opposition in Iowa, where state legislators recently introduced a bill that would limit the exercise of eminent domain in Iowa to transmission projects where "a minimum of twenty-five percent of the electricity transmitted over or by the transmission line or other facility will be used or consumed within [the] state."[100]

In Missouri, legislators introduced a bill[101] in early 2014 intended to block the development of a facility identified in SPP's 2008-2017 transmission expansion plan.[102] The 56-mile project would connect two substations in Arkansas, with the route crossing for a 25-mile stretch across the border into Missouri. The proposed bill would strip the Missouri PSC of its authority to

92. Staff Pre-Hearing Brief at 3, *Application of Plains and Eastern Clean Line for CPCN*, Docket No. 10-041-U (Ark. P.S.C. Oct. 19, 2010).

93. *Id.* at 4.

94. *Id.* at 5.

95. *Application of Plains and Eastern Clean Line for CPCN*, Order No. 9, Docket No. 10-041-U, at 9-11 (Ark. P.S.C. Jan 11, 2011) (order).

96. *Id.* at 9.

97. *Id.* at 8 (citing ARK. CODE ANN. § 23-1-101(9)(A) (2013)).

98. *Id.* at 11.

99. *Id.*

100. H.F. 2056, 85th Gen. Assemb., 2014 Sess. (Iowa 2013); *see* James Q. Lynch, *Iowa GOP Lawmakers Propose Limits on Eminent Domain, Rock Island Clean Line*, GAZETTE (Jan. 10, 2014, 3:00 PM), http://thegazette.com/2014/01/10/iowa-gop-lawmakers-propose-limits-on-eminent-domain-rock-island-clean-line.

101. H.B. 1622, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

102. SW. POWER POOL, SPP TRANSMISSION EXPANSION PLAN 2008-2017, at 4-5 (2007), *available at* http://www.spp.org/publications/2007%20SPP%20Transmission%20Expansion%20Plan%2020080131_BOD_Public.pdf.

approve a route for that particular project.[103] Missouri State Rep. Scott Fitzpatrick, one of the co-sponsors of the bill, expressed concern about the project's apparent inability to deliver power to Missouri consumers, noting the lack of a "substation or anything of that nature being built. It's a line to nowhere, as far as Missouri is concerned."[104]

B. State Laws Limiting Competition to Build New Transmission Facilities

In Order No. 1000, the FERC concluded that there was a need to eliminate from FERC-filed tariffs and contracts ROFRs for incumbent utilities to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation.[105] The FERC did not, however, require public utility transmission providers to eliminate a federal ROFR for "local" transmission facilities or upgrades to existing transmission facilities owned by the incumbent transmission provider.[106] Thus, the FERC's policy of eliminating federal ROFRs was narrowly tailored to enable competition in the development of transmission projects planned at the regional level, with broad, regional benefits and corresponding regional cost allocation.

The FERC also specified that Order No. 1000 requires the elimination of ROFRs from FERC-jurisdictional tariffs and agreements, but that "[n]othing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."[107] Order No. 1000 did not preempt ROFRs established in state law.[108]

Lawmakers in several states have responded to Order No. 1000 by enacting state laws establishing a right for incumbent utilities to build certain transmission lines within the state. Some of these laws are consistent with FERC policy where, for example, the state law ROFRs are limited to facilities interconnected to the incumbent utilities and rated below a specified voltage. Indiana enacted a statute in 2013 that gives incumbent utilities a ROFR to construct a "local reliability electric transmission facility that connects to an electric transmission facility owned by the incumbent electric transmission owner" and "[u]pgrades to an existing electric transmission facility owned by the incumbent electric transmission owner."[109] The statute defines "local reliability electric transmission facility" to include only those facilities rated between 100 kV and 300 kV.[110] The Indiana ROFR law does not apply to transmission facilities that are "required by a regional transmission organization primarily to address

103. *See* Mo. H.B. 1622.

104. Andra B. Stefanoni, *Panel's Silence Indicates Approval of Arkansas Power Line: Missouri Legislator Files Bill Designed to Block Steps*, JOPLIN GLOBE (Feb. 19, 2014), http://www.joplinglobe.com/topstories/x129173414/Panel-s-silence-indicates-approval-of-Arkansas-power-line.

105. Order No. 1000, *supra* note 8, at P 253.

106. *Id.* at P 357. Nor did the Commission's reforms alter in any way the use and control of an existing right of way by the incumbent transmission provider.

107. *Id.* at P 253 n.231.

108. *Id.* at P 227.

109. IND. CODE § 8-1-38-9(a)(1)-(2) (2013).

110. *Id.* § 8-1-38-3(a)(1) to (a)(2).

nonreliability drivers."[111] Similarly, Oklahoma enacted legislation in 2013 that provides incumbent utilities "the right to construct, own and maintain a local electric transmission facility that has been approved for construction in a Southwest Power Pool transmission plan and will interconnect to facilities owned by that incumbent electric transmission owner."[112] Local electric transmission facilities include facilities rated between 69 kV and 300 kV.[113]

In several other states, however, legislatures have chosen to adopt state ROFRs that are broader than what would be permitted in a FERC-filed tariff or agreement under the FERC's ROFR policy, giving incumbent utilities the first right to construct any new transmission asset, regardless of voltage or purpose. In 2012, the Minnesota legislature enacted a law that grants a state law ROFR to incumbent utilities to build transmission lines that interconnect with transmission facilities owned by the incumbent utility, and requires such incumbent utilities either to build the transmission lines approved in the MISO process or explain to the satisfaction of the Minnesota Public Utilities Commission why such lines should not be built.[114] The Minnesota statute provides that an "incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner."[115] The definition of "electric transmission line" in the statute includes all transmission lines "with a capacity of 100 kilovolts or more and associated transmission facilities."[116] Where the new line connects to facilities owned by two or more incumbent Minnesota utilities, the right to construct "belongs individually and proportionally to each incumbent electric transmission owner, unless otherwise agreed upon in writing."[117] Similar expansive state ROFR laws have been enacted in several other states.[118]

State ROFR laws like those enacted in Oklahoma and Indiana do not pose significant obstacles to competition among developers for regional transmission projects—that is, projects selected for regional cost allocation by regional planning entities—because the ROFRs are limited to lower voltage facilities. Instead, projects subject to these state ROFRs are more likely to be "merely 'rolled up' and listed in a regional transmission plan without going through a needs analysis at the regional level (and therefore, not eligible for regional cost

111. *Id.* § 8-1-38-3(b).

112. H.B. 1932, 54th Leg., Reg. Sess. § 2(A) (Okla. 2013) (to be codified as OKLA. STAT. tit. 17, § 292).

113. *Id.* § 1(3) (to be codified as OKLA. STAT. tit. 17, § 291).

114. MINN. STAT. § 216B.246 (2013).

115. *Id.* subdiv. 2.

116. *Id.* subdiv. 1(b).

117. *Id.* subdiv. 2.

118. *See, e.g.*, N.D. CENT. CODE § 49-03-02.2 (2013) (the commission may not issue a certificate to an electric transmission provider for construction or operation of an electric transmission line that will interconnect with an electric transmission line owned or operated by an electric public utility if the electric public utility is willing and able to construct and operate a similar electric transmission line); S.D. CODIFIED LAWS § 49-32-20 (2013) ("Any incumbent electric transmission owner may construct, own, and maintain an electric transmission line that connects to facilities owned by the incumbent electric transmission owner."); *see also* L.B. 388, 103d Leg., 1st Sess. (Neb. 2013) (to be codified at NEB. REV. STAT. § 70-1014.2); S.B. 635, 2013 Gen. Assemb., 2013-2014 Sess. (N.C. 2013) (to be codified as N.C. GEN. STAT. §§ 62-100, -101(a)).

allocation)."[119] These "limited" state ROFR laws mirror federal policy on permissible ROFRs under Order No. 1000. State ROFR laws that are broader in scope, like those enacted in Minnesota, North Dakota, and other states where the state law ROFR extends to facilities with voltages above 300 kV, threaten to prevent, or significantly reduce, the competition that the FERC sought to establish in Order No. 1000 among multiple potential transmission developers for large regional projects.

C. State Utility Commissions Try to Shield Retail Ratepayers from FERC Jurisdictional Transmission Rates

1. State Concerns About Passing Through the Costs of New Regional Transmission Facilities to Retail Ratepayers

In Missouri, the Missouri Public Service Commission (MoPSC) staff expressed concern that if new transmission projects are built by FERC regulated transcos instead of the local load serving entities, ratepayers will face higher effective rates for such projects.[120] As a result, Greater Missouri Operations Company (GMO) and Kansas City Power & Light Company (KCP&L) agreed that with respect to new facilities located in their respective service territories that are constructed by affiliate Transource Missouri, the costs allocated (by SPP) to KCP&L or GMO and then charged to KCP&L's or GMO's retail customers would be adjusted in retail rates by an amount equal to the difference between the amount those retail customers would have paid for the facilities under Missouri ratemaking treatments and the amount those customers would pay under the FERC-authorized ratemaking treatments, including transmission rate incentives.[121] In effect, MoPSC will re-price transmission service to mimic the result Missouri retail ratepayers would have received under the traditional model.

In Virginia, the State Corporation Commission (SCC) denied a CPCN for AEP Appalachian Transmission Company (Virginia Transco) to construct a new transmission project, instead directing that Appalachian Power Company (APCo), the incumbent utility, construct the facility.[122] The SCC cited concerns about "negative effects, on APCo and its customers, of shifting credit-supportive investment away from APCo," and SCC Staff raised concerns in the proceeding about rate impacts if the project were developed by Virginia Transco and costs passed through under a FERC jurisdictional tariff.[123]

Another variation is state concern that retail ratepayers will not be able to continue capturing the difference between the state-allowed return and the

119. Order No. 1000, *supra* note 8, at P 226.

120. *See* Rebuttal Testimony of Charles R. Hyneman, Missouri Public Service Commission Staff at 42-43, Application of Transource Missouri, LLC for a Certificate of Convenience and Necessity Authorizing It to Construct, Finance, Own, Operate, and Maintain the Iatan-Nashua and Sibley-Nebraska City Electric Transmission Projects, File No. EA-2013-0098 (Mo. P.S.C. Jan. 30, 2013).

121. *Application of Transource Missouri, LLC for a Certificate of Convenience and Necessity*, File No. EA-2013-0098, at 27-28 (Mo. P.S.C. Aug. 7, 2013) (report and order).

122. Application of AEP Appalachian Transmission Company and Appalachian Power Company, Case No. PUE-2013-00036 (Va. S.C.C. Jan. 24, 2014) (final order).

123. *Id.* at 12.

FERC-allowed return through revenue crediting. The issue has arisen in the context of an ongoing dispute taking place before the Arkansas Public Service Commission (APSC) concerning whether it is in the public interest, and in particular, in the interests of Arkansas ratepayers, for new, zonal transmission facilities to be constructed by AEP Southwestern Transmission Company instead of Southwestern Electric Power Company (SWEPCO). The Arkansas Attorney General's consumer rates division (CURAD) favors continuation of the current treatment—inclusion of SWEPCO transmission investment in retail rate base (as well as in the rate base used for determining SWEPCO's revenue requirements under the SPP tariff)—coupled with crediting all of SWEPCO's transmission revenues from SPP against SWEPCO's retail revenue requirement.[124] CURAD argues that continuation of the current arrangement creates benefits for Arkansas retail ratepayers.[125] There is a question as to whether such approaches are vulnerable to constitutional challenge—i.e., whether a utility could successfully argue that the federal preemption doctrine precludes a state commission from taking action that limits the utility's effective return on new transmission investments so that such returns are less than those authorized by the FERC in the rate on file with the FERC.

Actions by state utility commissions that interfere with a utility's ability to recover expenses incurred under FERC-jurisdictional transmission tariffs could be subject to constitutional challenge under *Nantahala*. In one recent example, the MoPSC refused to allow GMO to pass through to ratepayers the transmission costs associated with transmitting power from a plant in Mississippi to Missouri ratepayers on facilities owned by Entergy.[126] The transmission-related costs of delivering power from the Mississippi plant, which were assessed under a FERC jurisdictional Entergy transmission tariff and which exceeded $5 million per year, were deemed unreasonable by MoPSC and were excluded from GMO's retail rates.[127] The Missouri Court of Appeals upheld MoPSC's decision, and a writ of certiorari has been requested in the U.S. Supreme Court.[128]

2. State Concerns About Ceding Rate Jurisdiction If Existing Transmission Assets Are Transferred Out of Retail Ratebase

In some cases, stakeholders or states have expressed concern about rate impacts of transferring transmission assets to transcos. Fair pricing of transferred assets is generally subject to a state's policy and regulatory controls as a transfer of assets typically requires prior state regulatory approval. Recent experience demonstrates that new market entrants can expect heightened state scrutiny of their proposed acquisition of incumbent utility assets. The following

124. Direct Testimony of William B. Marcus on Behalf of the Arkansas Attorney General, Application of AEP Southwestern Transmission Co., Inc. for Recognition as a Public Utility, Docket No. 11-050-U, at 12 (Ark. P.S.C. Nov. 15, 2011).

125. *Id.* at 10-11.

126. Missouri *ex rel.* KCP&L Greater Mo. Operations Co. v. Missouri Pub. Serv. Comm'n, 408 S.W.3d 153, 162-63 (Mo. Ct. App. 2013), *petition for cert. filed* (U.S. Dec. 30, 2013) (No. 13-787).

127. *Id.* at 162-63.

128. Petition for Writ of Certiorari, *Missouri ex rel. KCP&L Greater Mo. Operations Co.*, 408 S.W.3d 153 (No. 13-787), 2013 WL 6907747.

cases illustrate the potential impediments, legitimate or not, to changes in transmission ownership.

One dramatic recent example relates to ITC's proposal to acquire Entergy's transmission assets. On December 10, 2013, the Mississippi Public Service Commission (MPSC) rejected as inconsistent with the public interest Entergy Mississippi, Inc.'s (EMI) proposed transfer of transmission assets to subsidiaries of ITC Holdings Corp. (ITC), as part of Entergy's broader, multi-state divestiture transaction with ITC.[129] The MPSC found that the proposed transaction would result in increased costs for Mississippi ratepayers without any demonstrated incremental benefits that would not otherwise have resulted from EMI retaining its transmission assets and joining MISO as a transmission owner, which transaction the MPSC had already approved in a prior proceeding.[130]

In particular, the MPSC expressed concern that the proposed transfer of assets to an independent transco would "strip [the MPSC] of effective regulation of the transmission assets in Mississippi currently owned by EMI and transfer this authority to the federal government," which is inconsistent with its statutory mandate under the Mississippi Public Utility Act to regulate "EMI as a vertically integrated monopoly."[131] MPSC also found that the transfer would cause it to "permanently lose its most effective regulatory tools, control over retail transmission rates and the ability to determine prudency," resulting in higher transmission costs for ratepayers.[132] The MPSC estimated that ITC's reliance on what it termed the "FERC Rate Construct," which currently allows ITC subsidiaries in MISO to earn a return predicated on a 60% equity capital structure and 12.38% return on equity (ROE), would cost Mississippi ratepayers an additional $348 to $813 million over the next thirty years if the assets were transferred.[133] Instead, the MPSC found that EMI retaining ownership of the transmission assets and joining MISO as a transmission owner, which would allow the MPSC to retain authority over retail transmission rates under MISO's bundled load exemption, "presents an evolutionary model that has the potential to fairly balance the interests of regionalism with the local concerns held by each State and its citizens, to which each public service commission is answerable."[134] Three days after the MPSC decision was issued, ITC and Entergy Corp. announced that they were dropping pursuit of the spin-off transaction.[135]

The MPSC was not the only state regulator to greet Entergy's proposed transmission divestiture with hostility. In Texas, a three-member panel of administrative law judges submitted a "Proposal for Decision" (PFD) to the Public Utility Commission of Texas (PUCT) on July 8, 2013, finding that the

129. Joint Application for the Transfer of Ownership and Control of Entergy Mississippi Inc.'s Transmission Facilities and Assets Together with Related Certificates, Franchises and Other Property Rights to Transmission Company Mississippi, LLC and Approval of Subsequent Transfers of Ownership and Control, Docket No. 2012-UA-358 (Miss. P.S.C. Dec. 10, 2013) (final order).

130. *Id.*

131. *Id.* ¶¶ 8, 11.

132. *Id.* ¶ 15.

133. *Id.* ¶ 6.

134. *Id.* ¶ 14.

135. Press Release, Entergy, Entergy, ITC Discontinue Pursuit of Transmission Spin/Merger (Dec. 13, 2013), *available at* http://www.entergy.com/news_room/newsrelease.aspx?NR_ID=2817.

proposed transfer was not in the public interest.[136] Like the MPSC, the Texas PFD rested principally on fears of increased transmission costs for ratepayers and loss of PUCT jurisdiction over transmission assets, finding that "if the Transaction is approved, the [PUCT] will lose most of its regulatory authority over the transmission assets, as they will come under the rate-making jurisdiction of the [FERC]."[137] After the PFD was issued, the applicants re-filed their application in Texas seeking direct PUCT review.[138] However, before PUCT could act on the re-filed transfer application, the MPSC rejected the transfer in Mississippi and the applicants withdrew the PUCT request.[139] ITC Chief Financial Officer Cameron Bready, in discussing the ultimate failure of the Entergy transaction, noted that "the impediment ended up being this tension that clearly exists between FERC regulation and interstate transmission and state rate regulation within their borders—and obviously the tension that is created in that situation in trying to move these transmission assets from state rate regulation to federal rate regulation."[140]

State concerns can also arise where transmission-owning utilities seek to transfer assets to an affiliate for purposes of a particular project. For example, the MoPSC expressed concern about the pricing of transferred assets in a proceeding where KCP&L and GMO sought authority to transfer transmission property to Transource Missouri, an affiliated transco, at cost.[141] Parties filed a settlement in which Transource Missouri agreed to pay the higher of $5.9 million or the net book value for certain existing right-of-ways that have been previously included in the rate base and reflected in the retail rates of KCP&L and GMO customers.[142] KCP&L and GMO agreed to book a regulatory liability reflecting the value of this payment to the extent it exceeds net book value, thereby providing costs savings to retail customers as a result of the transfer of assets to the transco.[143]

136. Proposal for Decision, Application of Entergy Texas, Inc., ITC Holdings Corp., Mid South Transco LLC, Transmission Company Texas, LLC, and ITC Midsouth LLC for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery Approvals, and Related Relief, Docket No. 41223 (Tex. P.U.C. July 9, 2013).

137. *Id.* at 3.

138. Application, Updated Application of Entergy Texas, Inc., ITC Holdings Corp., Mid South Transco LLC, Transmission Company Texas, LLC, and ITC Midsouth LLC for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, and Related Relief, Docket No. 41850 (Tex. P.U.C. Sept. 23, 2013).

139. Joint Motion to Withdraw Application, *Updated Application of Entergy Texas*, Docket No. 41850 (Tex. P.U.C. Dec. 13, 2013).

140. Dan Testa, *ITC Views Transmission 'Tension' Between States, FERC As Key to Entergy Deal Failing*, SNL (Dec. 13, 2013, 5:55 PM).

141. Application of Transource Missouri, LLC for a Certificate of Convenience and Necessity Authorizing it to Construct, Finance, Own, Operate and Maintain the Iatan-Nashua and Sibley-Nebraska City Electric Transmission Projects, File No. EA-2013-0098 (Mo. P.S.C. Aug. 7, 2013) (report and order).

142. *Id.* app. 4, ¶ 4 n.76.

143. *Id.*

IV. CONSTRUCTIVE PARTICIPATION BY STATES IN REGIONAL TRANSMISSION DEVELOPMENT

While the prior section illustrates points of friction between state and federal regulators, some states have embraced regionalism and availed themselves of the opportunity to protect ratepayers' interests through active participation, individually and collectively, in RTOs and ISOs. RTOs and ISOs were organized in various parts of the country and currently operate in thirty-four states and the District of Columbia.[144]

The RTOs and ISOs conduct stakeholder processes for every significant action undertaken by the organization, including transmission planning, transmission cost allocation, and any change to organizing documents and tariffs.[145] State representatives can participate as stakeholders in all of these processes.[146]

Moreover, in the multi-state RTO/ISOs, a committee of the state regulators often participates directly in the RTO/ISO activities. For example, the Organization of MISO States, Inc. (OMS) is a non-profit, self-governing organization of representatives from each state with regulatory jurisdiction over entities participating in MISO.[147] The purpose of the OMS is to "coordinate regulatory oversight among the states, including recommendations to MISO, the MISO Board of Directors, the FERC, other relevant government entities, and state commissions as appropriate."[148] The Organization of PJM States, Inc. (OPSI) "is an inter-governmental organization of utility regulatory agencies of fourteen jurisdictions . . . [that] are wholly or partly in the service area of PJM."[149] "OPSI's activities include, but are not limited to, coordinating data/issues analyses and policy formulation related to PJM, its operations, its Independent Market Monitor, and related FERC matters."[150] In SPP, the "SPP Regional State Committee (RSC) provides collective state regulatory agency input on matters of regional importance related to the development and operation of bulk electric transmission."[151]

Certain of these state organizations have special decision making roles or other "special" status. For example, in MISO, OMS specifies section 205 filing rights under a settlement related to the Entergy integration into MISO.[152] In SPP, the RSC has primary responsibility for determining regional proposals and the transition process in the following areas:

144. *About the IRC*, ISO/RTO COUNCIL, http://www.isorto.org/About/default (last visited Apr. 10, 2014).

145. *See, e.g.*, STAKEHOLDER AFFAIRS DEP'T, PJM, PJM MANUAL 34: STAKEHOLDER PROCESS (2013), *available at* http://www.pjm.com/~/media/documents/manuals/m34.ashx.

146. *Id.* at 3, 6-7. States have at times bristled when it was suggested that they are mere "stakeholders" in these RTO/ISO processes.

147. ORG. MISO STATES, http://www.misostates.org/ (last visited Apr. 10, 2014).

148. *Id.*

149. ORG. PJM STATES, INC., http://www.opsi.us/ (last updated Jan. 21, 2014).

150. *Id.*

151. *Regional State Committee*, SOUTHWEST POWER POOL, http://www.spp.org/committee_detail.asp?commID=35 (last visited Apr. 10, 2014).

152. *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 F.E.R.C. ¶ 61,165 at PP 30-31 (2013).

> (a) whether and to what extent participant funding [will] be used for transmission enhancements; (b) whether license plate or postage stamp rates will be used for the regional access charge; (c) FTR allocation, where a locational price methodology is used; and (d) the transition mechanism to be used to assure that existing firm customers receive FTRs equivalent to the customers' existing firm rights.[153]

In addition, with respect to transmission planning, the RSC has authority to "determine whether transmission upgrades for remote resources will be included in the regional transmission planning process and the role of transmission owners in proposing transmission upgrades in the regional planning process."[154]

State regulators have even greater influence in the single-state RTOs—New York ISO, California ISO, and ERCOT. In CAISO, for example, state agencies have had the role of selecting among competing CAISO project developers in certain circumstances.[155]

Overall, states have an evolving, not a diminishing, role as the framework for transmission facility development changes to place more emphasis on regional planning and the establishment of competitive project and developer selection. States maintain their longstanding autonomy on issues of transmission facility siting and environmental permitting. State public utility commissions (PUCs) also continue to oversee utility transmission planning for lower voltage, local need-driven transmission projects. It is only for higher voltage projects solving broad-based regional needs where regional planning bodies are taking the lead. Even within regional planning efforts, states strongly influence whether their individual needs and interests are being efficiently and cost-effectively addressed.

V. CONCLUSION AND RECOMMENDATIONS

While one can make persuasive arguments for a sweeping rationalization of the respective state and federal regulatory roles concerning transmission grid development, such realignment is very unlikely to be legislated by Congress in the near future, despite concern among policymakers about the state of the Nation's infrastructure. The history of the electric power industry and the compelling interest that consumers have in both its vitality and the affordability of electricity suggest that states will always have legitimate economic and environmental interests to protect and that that role will retain its importance. Nevertheless, as the power markets transition to more competitive and regional operations, state regulation of rates, terms, and conditions of retail service and the environment will need to adapt to accommodate new grid-related technologies, policies, and utility business models.

The federal role in ensuring that the Nation's interconnected interstate transmission grid is developed in the broad public interest of all ratepayers across state boundaries will also endure. There is a distinctive set of reliability, economic, environmental, and other policy concerns that drive regional and

153. *Southwest Power Pool, Inc.*, 106 F.E.R.C. ¶ 61,110 at P 219 (2004).

154. *Id.* at P 220.

155. *California Indep. Sys. Operator Corp.*, 145 F.E.R.C. ¶ 61,221 at P 2 (2013). Outside RTO/ISOs, organizations of states may also play a significant role in Order No. 1000 planning regions. For example, the Northern Tier Transmission Group (NTTG) has proposed to create a committee of state commission representatives to make cost allocation decisions. *PacifiCorp*, 143 F.E.R.C. ¶ 61,151 at P 32 (2013).

interregional transmission planning processes, and these clearly implicate interstate commerce and require regulation with a multi-state or national perspective. However, concerns about aging infrastructure, lack of access to new energy resources, costly congestion, and the physical and cyber vulnerabilities of the grid, to name a few, require that both state and federal policymakers take the broader, long-term view of grid infrastructure development.

Transmission-related disagreements between state and federal regulators may be less problematic than disputes and competition among the states themselves. For instance, states with substantial wind or solar generation potential may be frustrated if access to markets for those resources is thwarted by neighboring state resistance to bolstering grid infrastructure.[156] States with energy-hungry loads should not be deprived of access to less expensive or more diverse power resources by regulatory obstacles to transmission expansion in adjoining states.[157]

As we seek to demonstrate, both federal and state regulatory approvals (often from multiple states) are needed to move transmission projects forward. Frustrated federal or state regulators may be tempted to drive their preferred outcomes single-mindedly. States could, for instance, deny any certificate authorization for entities seeking to develop regional projects, irrespective of the regional benefit of those projects, or adopt ROFR policies that make the privileges of incumbency a foregone conclusion, irrespective of project cost impacts. For their part, Congress or federal agencies (within the bounds of their statutory authority) could resort to federal preemption to disregard the policy preferences or traditions of uncooperative states. The FERC, for instance, could react to state actions that frustrate FERC incentive rate policies by simply preempting state transmission rate jurisdiction over bundled retail service, as *New York v. FERC* enables it to do.[158] However, regulators should not casually make use of such authorities to effectively veto grid projects or otherwise frustrate federal or state policy. Indeed, in practice, such "nuclear options" are likely to prove detrimental to the goal of expanding the Nation's transmission infrastructure. There are better options. If the FERC and the states can work together effectively, preemptive actions and litigation will not be necessary.

What, then, can be done to ameliorate the barriers to needed transmission development and to manage the coming re-development of the grid on behalf of the public interest? The best near-term approach would entail active cooperation

156. *See* NAT'L GOVERNORS ASS'N, STATE STRATEGIES FOR ACCELERATING TRANSMISSION DEVELOPMENT FOR RENEWABLE ENERGY 12-13 (2012), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1201ENERGYTRANSMISSIONWP.PDF ("The process of siting and permitting transmission lines requires many steps, each of which takes time and is likely to lengthen when a line crosses more than one state or region. . . . Because higher capacity renewable resources, which have a lower generation cost, are not necessarily located in states where the power they produce will be sold, more new transmission will need to cut across state boundaries to connect resources to load.").

157. Application of Southern California Edison, Decision No. 69638, Docket No. L-00000A-06-0295-00130 (Ariz. Corp. Comm'n June 6, 2007) (order denying a Certificate of Environmental Compatibility) (rejecting a proposed transmission line in part because it would benefit California ratepayers rather than Arizona ratepayers).

158. New York v. FERC, 535 U.S. 1, 18 (2002).

between regions, state regulators, and federal regulators to move regional grid expansion forward. At this juncture, we can at least suggest elements of a cooperative approach.

- *Develop a shared vision for the power grid.* It is said that "unless you know where you are going, any road will get you there." It is clear that not all industry participants, regulators, and stakeholders have bought into the vision of competitive regional power markets that is manifest in federal policy. The fundamental lack of an articulated consensus makes individual projects, asset transfers, regional grid management, and policy initiatives significantly more difficult. A winning strategy instead entails greater mutuality and understanding about the end-state of the industry's transformation—operationally, economically, and in terms of business operations. A shared view of possible end-states is therefore needed, first and foremost. The U.S. Department of Energy, in launching its Quadrennial Energy Review with an initial emphasis on transmission infrastructure investment,[159] can contribute to helping articulate the future toward which the electric system is hurtling.[160] Despite the different interests and perspectives of federal and state regulators and policymakers, a common vision for the grid would be an essential starting point.
- *Respect regulatory roles.* Policymakers should consciously drive for greater mutuality and acceptance of each other's regulatory roles and interests. This would include federal acceptance and respect for state interests in environmental protection, addressing local siting concerns, and ensuring fair distribution of transmission grid costs among the retail consumers of electricity in the various states. It would also include state support for a network of transmission infrastructure that provides the greatest shared economic benefits to consumers over large multi-state regions.
- *Defer to states where local interests predominate; defer to regions with respect to need for major investments.* The determination of need for large new transmission project investments should be resolved in the appropriate regional (or inter-regional) transmission planning process. The FERC and the regions should continue to defer to State prerogatives over transmission projects of particular local interest and significance through, for example, integrated resource planning. In all cases, it will be critical to the legitimacy of analyses that they are based, to the greatest degree possible, on shared processes and methodologies in order

159. Presidential Memorandum, President Barack Obama, Establishing a Quadrennial Energy Review (Jan. 9, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/09/presidential-memorandum-establishing-quadrennial-energy-review.

160. After studying the industry's move toward integration of centralized and distributed energy resources, the Electric Power Research Institute's ultimate portrayal of an integrated grid emphasizes the importance of enabling policy and regulatory decision making. ELEC. POWER RESEARCH INST., THE INTEGRATED GRID: REALIZING THE FULL VALUE OF CENTRAL AND DISTRIBUTED ENERGY RESOURCES 5, 7 (2014), *available at* http://www.epri.com/abstracts/Pages/ProductAbstract.aspx?ProductId=3002002733&Mode=download.

to guarantee a sound analysis of all transmission benefits and beneficiaries.[161]

- *State engagement in the regional planning process, both individually and collectively.* With respect to planning for larger regional transmission projects, states should actively participate in the identification of transmission needs and projects to address these identified needs, both inside and outside of their borders, in the regional planning processes. The FERC and the regional planning organizations (especially the regions outside the established RTOs and ISOs) should encourage active state-to-state coordination and active participation by multi-PUC groups in the regional planning process. In SPP and MISO, for example, these collaborations among state policymakers have proven their value in support of regional grid planning.
- *Acting in concert, states can strengthen the interstate grid consistent with regional perspectives.* Conflicting state laws and priorities are at least as problematic for development of multi-state transmission projects as state-federal conflicts, perhaps more so. In 2005, Congress expressly recognized the potential problem and authorized States to form interstate compacts to address siting of new transmission facilities.[162] Interstate compacts have been used effectively in other situations to solve problems that individual States cannot reasonably address themselves.[163] Although regional compacts typically require participating states to cede some aspect of their jurisdiction over an activity to a regional body of their own making, the Council of State Governments has tried to develop a very modest approach that could be palatable to a group of states working on the same projects or markets.[164] This avenue should be more seriously explored.
- *Consider updating state statutes to address new business models.* As discussed above, transmission-only utilities have confronted statutes in some states that do not allow for, or have been interpreted not to allow for, issuance of a CPCN to transcos with no retail customers in the state or projects that do not interconnect to the grid in the state. State legislatures should consider reviewing state regulatory statutes to, for

161. *See generally* JUDY CHANG, JOHANNES PFEIFENBERGER & J. MICHAEL HAGERTY, BRATTLE GRP., THE BENEFITS OF ELECTRIC TRANSMISSION: IDENTIFYING AND ANALYZING THE VALUE OF INVESTMENTS (2013), *available at* http://cleanenergytransmission.org/uploads/WIRES%20Brattle%20Rpt%20Benefits%20Transmission%20July%202013.pdf (a WIRES report).

162. 16 U.S.C. § 824p(i) (2012). No interstate compacts have been formed under this authority.

163. *See, e.g.*, Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, 99 Stat § 1909 (1985) (providing Congressional consent to seven interstate compacts for the management of low-level radioactive waste); *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/laws/lawsdigest/compact.html (last visited Apr. 17, 2014) (listing twenty-six congressionally approved interstate water apportionment compacts); *see generally Understanding Interstate Compacts*, COUNCIL ST. GOV'TS, http://www.cglg.org/projects/water/compacteducation/understanding_interstate_compacts--csgncic.pdf (last visited Apr. 10, 2014) (noting that the average state is a party to twenty-five different interstate compacts).

164. Crady deGolian, *CSG West Meeting to Highlight Transmission Line Siting Compact*, KNOWLEDGE CENTER (July 19, 2013, 2:26 PM) ("The agreement would be triggered on a regional basis and pertain only to those states that are both members of the compact and affected by the proposed line.").

instance, ensure that they can enable healthy competition and accommodate new corporate models, leaving transmission project certificate matters to be resolved on their merits.

- *If parochial or anti-competitive interests are driving regulatory action, pause to seek constructive alternatives.* In many cases, legitimate regulatory concerns may lead to questions about whether a certificate for a new transmission line is in the public interest or how to craft appropriate mitigation conditions. On occasion, however, state regulators or policymakers may refuse to authorize a new or upgraded transmission facility simply because the project would permit low-cost power to flow to an adjacent jurisdiction for the benefit of its consumers.[165] Similarly, states may be asked to consider expansive state ROFR proposals that protect incumbents and thwart competition, with adverse cost consequences for a region. Policymakers should pause when such narrow, short-sighted considerations appear to be motivating action and consider constructive alternatives.
- *Structured federal-state collaboration.* If more structured coordination between the FERC and PUCs would be helpful, there is authority in section 209 of the Federal Power Act for both consultation between the FERC and state commissions with flexible procedures[166] and formal referral of matters to joint boards made up of FERC commissioners and state PUC designees that may conduct fact-finding and policy-making proceedings.[167] A structure for regular regional consultations, whether under section 209(b) or otherwise, could be helpful; joint decision-making, as contemplated under section 209(a), involves real power-sharing and thus would be a much greater challenge to implement.

Changes in the transmission development arena—regionalism, competition, and new types of developers like transcos—are likely to disrupt the past practices of both industry players and regulators. Our expectation is that policy changes and industry responses to those changes can lead to significant, well-planned, cost-effective grid investments and a transmission grid that achieves its multiple purposes efficiently. But regulatory friction or inertia could inhibit or undermine needed grid investment, and if developers cannot find innovative solutions to overcome such obstacles, consumers and the Nation's economy will bear the costs. Such problems may drive policy makers and stakeholders to seek more forceful federal legislative or regulatory action to get needed transmission infrastructure built. Given growing concern about the adequacy and resilience of our high-voltage transmission system, time may be growing short.

165. *E.g.*, Application of Southern California Edison, Decision No. 69638, Docket No. L-00000A-06-0295-00130, at 8-9 (Ariz. Corp. Comm'n June 6, 2007) (order denying a Certificate of Environmental Compatibility).

166. 16 U.S.C. § 824h(b).

167. *Id.* § 824h(a).