

State Power Project: Policymaker Summary

Addressing the Regulatory Holdout Problem in the Siting of Interstate Transmission Lines

Policymaker Summary of: Alexandra B. Klass and Jim Rossi, Revitalizing Dormant Commerce Clause Review for Interstate Coordination, *Minnesota Law Review* (forthcoming 2015)¹

Key Takeaways:

Issue: Building new high-voltage electric transmission lines is essential for maintaining reliability and integrating large-scale renewable energy projects. Each state controls the process for approving and siting the electric transmission lines within its borders. Projects spanning multiple states require the approval of each state, allowing a single state to halt a multi-state project.

Challenge: Public utility and property laws that govern the electric transmission line siting and construction process are often aimed at protecting in-state interests. While these laws address many valid local concerns, they can be overly broad or applied in a manner that inhibits approval and siting of interstate transmission lines that produce regional benefits. State siting laws and practices are particularly problematic when:

- 1) out-of-state companies are prohibited from constructing projects or using eminent domain authority;
- 2) regulators narrowly frame a line's benefits when determining whether there is a "need" for the project; or
- 3) eminent domain authority is limited to projects that meet restrictive definitions of "public use."

Such laws or practices authorize regulators in a single state to exclude out-of-state entities from the siting process and prevent a project based on parochial concerns. These regulatory holdouts may serve to protect in-state property interests, and can provide leverage for bargaining that is ultimately beneficial. However, many of these policies and procedures also can inhibit the development of energy infrastructure and violate the dormant Commerce Clause. This constitutional doctrine prevents a state from discriminating against out-of-state economic interests, regulating out-of-state transactions,² or unduly burdening interstate commerce.

Recommendations: State legislatures should examine statutes governing approval of transmission lines as well as laws about eminent domain. State regulators should also assess their practices under existing statutes that delegate discretion to them. To facilitate better regional coordination and to avoid dormant Commerce Clause violations:

- 1) siting laws and procedures should allow out-of-state transmission line companies to apply for siting certificates and eminent domain authority and otherwise participate in proceedings about transmission on the same or similar terms as incumbent in-state utilities;
- 2) siting proceedings should allow or require regulators to account for the regional benefits of new transmission line projects, in addition to benefits to native load customers; and
- 3) laws providing eminent domain authority should allow projects that provide regional benefits to qualify.

For a more in-depth legal discussion, please download the full version of this Policymaker Summary from <http://statepowerproject.org/Resources>.

¹ Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571926

² Note that while the dormant Commerce Clause doctrine prohibits regulation of out-of-state transactions, this issue has not yet arisen in the context of interstate transmission line siting.