

Comments

National Interest Electric Transmission Corridors: Will State Regulators Remain Relevant?

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I. INTRODUCTION

Electric transmission lines transport much needed energy to homes and businesses across the United States.¹ Electric utilities traditionally provided electric transmission service in a market regulated primarily by state authorities.² An important part of such state regulation included approving or disapproving utilities' applications to site new electric transmission infrastructure.³ New transmission lines are needed, for example, to accommodate increased generation capacity meant to satisfy consumer demand or to replace antiquated equipment.⁴

Interestingly, as the electricity industry drastically changed throughout the 1980s and 1990s, siting regimes remained largely the same.⁵ States continued to dictate whether utilities could proceed with a project.⁶ In making such decisions, some states would only permit transmission line construction if the primary beneficiaries of the line were citizens of that state.⁷ Other states developed more liberal plans, designed to consider regional benefits flowing from the proposed project in addition to intrastate benefits.⁸

In 2005, Congress took a step toward changing the state-dominated regulatory scheme of electric transmission line siting.⁹ Congress was

1. *See generally* Facilitating the Transition to a Smart Electric Grid: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce, 110th Cong. (2007) (statement of Kevin Kolevar, Director, Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy). "Today, the availability of and access to electricity is something that most Americans take for granted, even though it is vital to nearly every aspect of our lives, from powering our electronics and heating our homes to supporting commerce, transportation, finance, food and water systems, and national security." *Id.*

2. *See infra* Part III.A.

3. *See* Jim Rossi, *Transmission Siting in Deregulated Wholesale Power Markets: Re-Imagining the Role of Courts in Resolving Federal-State Siting Impasses*, 15 DUKE ENVTL. L. & POL'Y F. 315, 315 (2005); *see also infra* Part III.A.

4. *See* Press Release, U.S. Dep't of Energy, Office of Pub. Affairs, DOE Provides up to \$51.8 Million to Modernize the U.S. Electric Grid System (June 27, 2007) (on file with author). U.S. Department of Energy ("DOE") Secretary Samuel Bodman has stated that "[m]odernizing our . . . electric grid—through the development of advanced, new technologies—is vital to delivering reliable and affordable power to the American people. . . ." *Id.*

5. *See e.g.*, Ashley C. Brown & Damon Daniels, *Vision Without Site: Site Without Vision*, THE ELECTRICITY. J., Oct. 2003, at 23, 24 ("While policy has promoted competition in regional bulk power markets and removal of entry barriers, the siting laws and eminent domain statutes have continued for the most part in a time warp, unchanged from the days of local monopolies.").

6. *See infra* Part III.A.

7. *See infra* Part IV.B.

8. *See infra* Part IV.D.

9. *See* Energy Policy Act of 2005 § 1221(a), 16 U.S.C.A. § 824p (West 2008) ("2005 EPACT").

primarily concerned with ensuring grid reliability.¹⁰ States that dealt with transmission line siting applications parochially could not contribute to the goal of energy reliability in a grid system that was largely integrated across state boundaries and in a market that was evolving toward regional organization.¹¹ Federalization held the promise of ensuring that the “big picture” was taken into account when considering an application to construct a new transmission facility.¹² The 2005 EPACT gave the United States Department of Energy (“DOE”) the power to identify areas of the national electric grid with problematic reliability and designate such areas as National Interest Electric Transmission Corridors (“NIETCs” or “National Corridors”).¹³ Such a designation effectively allows the DOE to consider the big picture if a particular state will not.¹⁴ Where grid reliability is the most tenuous, the federal government now has jurisdiction to step in, under certain conditions, and decide the appropriateness of an application to site

10. The claim that Congress passed § 1221(a) of the Energy Policy Act of 2005 intending to ensure grid reliability is based on the plain language of the statute. Section 1221(a) permits the Secretary of Energy (“Secretary”) to “designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.” *Id.* § 824p(a)(2). In determining whether to designate a National Interest Electric Transmission Corridor, the Secretary may consider whether, *inter alia*, “economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy. . . .” *Id.* § 824p(a)(4)(B)(i). For a detailed discussion of particular sections of the 2005 EPACT, *see infra* Part III.A.

11. *See* Richard J. Pierce, Jr., *Environmental Regulation, Energy, and Market Entry*, 15 DUKE ENVTL. L. & POL’Y F. 167, 180 (2005) (“State parochialism has a devastating effect on the prospects of approval for most proposed transmission capacity expansion projects.”). Linking transmission capacity to energy reliability, Pierce reports that inadequate transmission infrastructure was a major contributor to the northeast power blackout of 2003. *Id.* at 177. For a discussion on the integration of the electricity market, *see* Steven J. Eagle, *Securing a Reliable Electricity Grid: A New Era in Transmission Siting Regulation?*, 73 TENN. L. REV. 1, 3-7 (2005); Richard J. Pierce, Jr., *Realizing the Promise of Electricity Deregulation: Completing the Process of Restructuring the Electricity Market*, 40 WAKE FOREST L. REV. 451, 468-80 (2005).

12. *See* Richard D. Cudahy, *Full Circle in the Formerly Regulated Industries?*, 33 LOY. U. CHI. L.J. 767, 778 (2002) (stating federal regulatory authority over the electric power system logically follows from deregulation and competition, which depend on “widespread access to the transmission network”); Pierce, *supra* note 11, at 183 (“The conflict between state . . . regulation of transmission lines and pursuit of national energy goals is already costing consumers many billions of dollars per year. . . . The conflict can be eliminated by conferring on a federal agency . . . authority to override the decisions of state governments when those decisions interfere with pursuit of national energy policy goals.”); Rossi, *supra* note 3, at 316 (“Ultimately, FERC may need authority to preempt state siting laws. . . .”).

13. *See supra* note 10; *see also infra* Part III.B.

14. Specifically, if a state is within a National Corridor designated by the DOE, and that state’s vision regarding electric transmission capacity issues extends only to its own borders, then the Federal Energy Regulatory Commission may have jurisdiction to effectively preempt the state’s siting regime. *See infra* Part IV.B, IV.E.

transmission line infrastructure.¹⁵ Accordingly, the regulatory paradigm in this area has changed; states will now share authority with the federal government.

When the DOE recently signaled its intention to designate areas of the nation as NIETCs for the first time, there was a large public outcry.¹⁶ Some parties argued that the DOE's designation of NIETCs, and the power granted to the Federal Energy Regulatory Commission ("FERC") pursuant to such designation, preempts state authority.¹⁷ The DOE, however, has explicitly maintained that a National Corridor designation and the resultant jurisdiction granted to FERC does not constitute federal preemption of state siting authority.¹⁸ This Comment will analyze this debate, with the ultimate goal of determining the degree to which states' siting authority will be preempted by an NIETC designation.

Assessing whether and to what extent the 2005 EPACT amounts to federal preemption of state siting authority is important for several reasons. First, state siting officials might want to know precisely how their authority has been or may be circumscribed. Second, utilities may want a clear picture of the current regulatory system in order to inform their planning and strategies regarding the siting of new transmission facilities.

This Comment concludes that National Corridor designations will, practically speaking, amount to federal preemption only in certain states.¹⁹ FERC jurisdiction over transmission line siting under a National Corridor designation will often exist in states where parochialism dominates the transmission line siting calculus.²⁰ FERC's § 1221(a) authority will have the effect of preempting dominantly parochial state siting regimes because in these jurisdictions state law stands in the way of Congress's purpose of ensuring regional grid reliability.²¹ Conversely,

15. See *infra* notes 104-107 and accompanying text.

16. For example, two bills were introduced in Congress that would alter various parts of the 2005 EPACT dealing with NIETCs. See National Interest Electric Transmission Corridor Clarification Act, H.R. 829, 110th Cong. (2007); Protecting Communities from Power Line Abuse Act, H.R. 810, 110th Cong. (2007). Another bill is pending that would completely repeal the portions of the 2005 EPACT giving the DOE authority to designate National Corridors. See H.R. 809, 110th Cong. (2007).

17. See *Federal Electric Transmission Corridors: Consequences for Public and Private Property: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Government Reform*, 110th Cong. (2007) (statement of Elizabeth Merritt, Deputy General Counsel, National Trust for Historic Preservation) ("The designation of specific National Corridors will have draconian results, including the potential effect of overriding or preempting reviews by state and local governments. . . .").

18. See Draft National Interest Electric Transmission Corridor Designations Notice, 72 Fed. Reg. 25839 (May 7, 2007).

19. See *infra* Part IV.E.

20. See *infra* Part IV.B.

21. See *infra* Part IV.E.

FERC jurisdiction over transmission line siting under a National Corridor designation will rarely exist in states where intrastate concerns are equivalent to regional concerns.²² In these states, federal preemption is unlikely because FERC's presence will likely be minimal, as state law is not a barrier to Congressional purpose as articulated in § 1221(a) of the 2005 EPACT.²³ Therefore, the effects of § 1221(a) will not be uniform throughout the country but will depend largely on the customary practices of state siting officials prior to a particular state being designated within a National Corridor.²⁴

Part II will begin by providing an overview of the electric grid. This overview is followed by a brief discussion of the evolution of the electric industry. Then, the section explains some of the problems currently afflicting the national electric grid. Part III first analyzes the state of transmission line siting regulation prior to the enactment of § 1221(a) of the 2005 EPACT and then discusses how this legislation changed the regulatory landscape. Part III concludes by examining the DOE's actions pursuant to its authority under Section 1221(a). Particular attention is paid to the DOE's August 2006 Congestion Study and its subsequent designation of two NIETCs—the Mid-Atlantic Area NIETC and the Southwest Area NIETC. Finally, Part IV will investigate the environment of transmission line siting regulation in the wake of the 2005 EPACT, the 2006 Congestion Study, and the recent designation of two NIETCs.

II. BACKGROUND ON ELECTRIC TRANSMISSION

A. *Overview of the Electric Grid*

America is addicted to electricity.²⁵ Electricity is the flow of electrical power or charge.²⁶ It is known as a secondary energy source

22. See *infra* Part IV.D.

23. See *infra* Part IV.E; see also *supra* notes 9-12 and accompanying text.

24. As used herein, reference to the "customary practices" of state siting officials merely means how regulators in a particular state review an application requesting permission to site an electric transmission line. Essentially, a given state's "customary practice" in this regard could fall under any of three categories: (1) dominant parochialism, (2) intermediate parochialism, and (3) loose parochialism. See generally *infra* Part IV.

25. According to the DOE, America's 131 million electricity customers spend approximately \$250 billion per year on electricity. To meet this demand, there is over \$800 billion invested in the U.S. electric grid, making it one of the largest and most capital-intensive sectors of the economy. See U.S. DEP'T OF ENERGY, OFFICE OF ELECTRICITY DELIVERY & ENERGY RELIABILITY, OVERVIEW OF THE ELECTRIC GRID, <http://www.energetics.com/gridworks/grid.html> [hereinafter GRID OVERVIEW].

because it is created by the conversion of other sources of energy such as coal, natural gas, or oil.²⁷ In 1940, ten percent of primary energy consumption in the United States was used to produce electricity.²⁸ In 1970, this number increased to 25%, and today it stands at 40%.²⁹ Part of America's addiction to electricity is attributable to the "information revolution,"³⁰ as electricity is uniquely able to transport both energy and information.³¹ It logically follows that, as our attachment to personal computers, televisions, cell phones, and other electronics capable of bearing information increases, so too will our reliance on the domestic electric grid.

The U.S. electric grid can be conceptualized as three separate yet interconnected parts: generation, transmission, and distribution.³² Electricity generation and distribution are beyond the scope of this Comment; however, brief coverage of each is necessary for a complete understanding of electricity transmission.

Electricity is generated at power plants by the conversion of mechanical or chemical energy.³³ The conversion process is driven by a turbine, engine, or similar device.³⁴ Today, more than 10,000 power

26. U.S. DEP'T OF ENERGY, OFFICE OF ELECTRICITY DELIVERY & ENERGY RELIABILITY, THE ELECTRICITY DELIVERY SYSTEM (2006), <http://www.energetics.com/gridworks/pdfs/factsheet.pdf> [hereinafter DELIVERY SYSTEM].

27. *Id.* As of 2003, coal was the most widely used primary resource for electricity generation. *Id.*

28. See GRID OVERVIEW, *supra* note 25.

29. *Id.*

30. See generally RICHARD O. HUNDLEY ET AL., THE GLOBAL COURSE OF THE INFORMATION REVOLUTION: RECURRING THEMES AND REGIONAL VARIATIONS (2003). "Advances in information technology (IT) are affecting most segments of business, society, and government today in many if not most regions of the world. The changes that IT is bringing about in various aspects of life are often collectively called the 'information revolution.'" *Id.* at xxiii.

31. GRID OVERVIEW, *supra* note 25.

32. *Id.*; see also Samuel Brumberg, Note, *Getting the Camel Out of the Tent: Behind the Federal Energy Regulatory Commission's Rise to Power and the Importance of States' Continued Regulatory Oversight*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 691, 695 (2006). In addition to these conceptual divisions, the grid is in fact separated into three independent networks: the Eastern Interconnect, the Western Interconnect, and the Texas Interconnect. Western Area Power Administration, Frequently Asked Questions about Transmission, <http://www.wapa.gov/about/faqtrans.htm>. In other words, there is no national power grid. *Id.* Within each interconnect, power flows through alternating current ("AC") lines, so all generators are tightly synchronized to the same sixty hertz ("Hz") cycle. See Eric Lerner, *What's Wrong with the Electric Grid?*, THE INDUSTRIAL PHYSICIST, Oct./Nov. 2003, at 8. The interconnects are linked by direct current ("DC") lines. *Id.*

33. DELIVERY SYSTEM, *supra* note 26.

34. *Id.* As mentioned above, turbines, engines, and water wheels are powered by primary energy sources like coal, oil, nuclear fission, hydroelectric, etc. See *supra* note 27 and accompanying text.

plants are operated in the United States.³⁵ Given that many of the current electric generation facilities are quite old, and because of continuing population and economic growth, construction of new power plants will be necessary to meet the rising demand for electricity.³⁶

The electric transmission system connects power plants with areas of consumption, or loads.³⁷ At the power plant, the voltage³⁸ of the produced electrical energy is increased in order to accommodate long distance travel.³⁹ Extra-high-voltage (“EHV”) lines then transmit the EHV energy to a distant substation.⁴⁰ Through a series of step-down substations, the original EHV energy is reduced, and eventually arrives at a distribution substation.⁴¹

Distribution lines emanate from each distribution substation as overhead or underground lines.⁴² It is these lines that we often see along our local roads. Attached to these lines are several “step-down” transformers that further reduce the voltage of the transmitted energy to levels suitable for end-user consumption.⁴³

Under the Federal Power Act of 1935 (“FPA”),⁴⁴ FERC exercises primary regulatory authority over the transmission system.⁴⁵ FERC’s statutory authority permits it to:

35. GRID OVERVIEW, *supra* note 25.

36. DELIVERY SYSTEM, *supra* note 26.

37. See George G. Karady, *Concept of Energy Transmission and Distribution*, in ELECTRIC POWER ENGINEERING HANDBOOK § 8.0 (Leonard L. Grigsby ed., 2d ed., 2007). The term “load” refers to a “device or collection of devices that draw energy from the power system.” Andrew Hanson, *Basic Electric Power Utilization—Loads, Load Characterization and Load Modeling*, in ELECTRIC POWER ENGINEERING HANDBOOK, *supra*, at § 26.0.

38. Voltage is defined as the potential to do work; it is the ratio of energy available to the charge, expressed in volts. ELECTRICAL ENGINEERING DICTIONARY (Phillip A. Laplante ed., 2000).

39. Karady, *supra* note 37, § 8.4.

40. *Id.* Substations serve three primary functions. A “step-up” transmission substation receives low-voltage electricity and increases it. See U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., ILLUSTRATED GLOSSARY: SUBSTATIONS, www.osha.gov/SLTC/etools/electric_power/illustrated_glossary/substation.html (last visited Sept. 13, 2008). A “step-down” transmission substation receives high-voltage electricity and decreases it to a subtransmission voltage, typically sixty-seven kilovolts (“kV”). *Id.* Distribution substations are located near end-users and change the transmission voltage to a lower level for use by consumers. *Id.*

41. Karady, *supra* note 37, § 8.4.

42. *Id.*

43. *Id.*

44. 16 U.S.C. § 791a (2000).

45. U.S. DEP’T OF ENERGY, ENERGY INFO. ADMIN., THE CHANGING STRUCTURE OF THE ELECTRIC POWER INDUSTRY 2000: AN UPDATE, at 14 (2000), http://www.eia.doe.gov/cneaf/electricity/chg_stru_update/update2000.pdf [hereinafter THE CHANGING ELECTRIC INDUSTRY].

- regulate wholesale electricity rates and services for wholesale transactions,
- approve sale or leasing of transmission facilities,
- approve mergers and acquisitions between [investor-owned utilities], and
- exercise jurisdiction over the interstate commerce of electricity.⁴⁶

FERC has jurisdiction over approximately 75% of the domestic transmission system.⁴⁷ The remainder is government owned or owned by cooperative utilities, and, therefore, outside the scope of FERC's authority.⁴⁸

B. *The Electric Power Industry*

In the early 1900s, vertically integrated electric utilities⁴⁹ produced approximately two-fifths of the nation's electricity.⁵⁰ Utilities were franchised entities which operated in exclusive territories.⁵¹ Concomitant with a utility service area designation was the responsibility to serve all consumers within that territory.⁵² Utility service area designations ushered in state regulation of privately-owned utilities, in which state entities had the authority to, *inter alia*, franchise, regulate rates, and establish accounting systems.⁵³ The Federal Government became a market participant during the 1920s, constructing and owning several massive hydroelectric facilities.⁵⁴ By the end of 1941, public power contributed 12% of total utility generation.⁵⁵ During the 1930s, rural electric cooperatives emerged with the assistance of the federal government.⁵⁶ These organizations brought much needed electricity to the sparsely populated areas of the country.⁵⁷

The monopolistic electric industry flourished and remained largely unchanged for several decades.⁵⁸ Then, in 1978, Congress passed the

46. *Id.*

47. *Id.*

48. *Id.*

49. A vertically integrated utility generates, transmits, and distributes electrical energy. *See id.* at 5 n.1.

50. *Id.* at 5 (“The early structure of the electric utility industry was predicated on the concept that a central source of power supplied by efficient, low-cost utility generation, transmission, and distribution was a natural monopoly.”).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 6.

55. *Id.* at 7.

56. *Id.* at 8.

57. *Id.*

58. *Id.*

Public Utility Regulatory Policies Act (“PURPA”),⁵⁹ which catalyzed competition in the electric supply industry by allowing nonutility facilities to enter the wholesale market.⁶⁰ The Energy Policy Act of 1992 (“1992 EPACT”)⁶¹ further injected nonutilities into the market by creating a new category of power producers.⁶² Today, the industry is continuing its transition from a regulated monopoly to a deregulated industry where generators of electricity compete for customers.⁶³

C. Problems Facing the Electric Grid

The DOE stated in its 2006 Congestion Study⁶⁴ that “congestion” occurs when “actual or scheduled flows of electricity on a transmission line or related piece of equipment are restricted below desired levels—either by the physical or electrical capacity of the line, or by operational restrictions created and enforced to protect the security and reliability of the grid.”⁶⁵ Understanding congestion requires appreciation of the term “transmission constraint,” which the Congestion Study defined as a piece of equipment that physically limits electricity flow or an operational limit imposed to protect reliability.⁶⁶ Stated simply, the DOE construes congestion as the “denial of desired transmission service over a transmission path” and understands constraint as the “chokepoint on the transmission system that causes such denial of desired transmission service.”⁶⁷

59. 15 U.S.C. §§ 79 - 79z-6 (2000) (repealed 2005).

60. See THE CHANGING ELECTRIC INDUSTRY, *supra* note 45, at 8. Electric utilities are defined as “either privately owned companies or publicly owned agencies that engage in the supply (including generation, transmission, and/or distribution) of electric power. Nonutilities are privately owned companies that generate power for their own use and/or for sale to utilities and others.” *Id.* at 9 n.15.

61. 42 U.S.C.A. § 13201 (West 2008).

62. THE CHANGING ELECTRIC INDUSTRY, *supra* note 45, at 8.

63. *Id.* at 9.

64. U.S. DEP’T OF ENERGY, OFFICE OF ELECTRICITY DELIVERY & ENERGY RELIABILITY, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY (2006) [hereinafter CONGESTION STUDY]. See *infra* Part III.C for a discussion of the DOE’s Congestion Study.

65. CONGESTION STUDY, *supra* note 64, at 3. In a subsequent statement reporting the Congestion Study’s definition of congestion, the DOE suggested that congestion is the “condition that occurs when transmission capacity is not sufficient to enable safe delivery of all scheduled or desired wholesale electricity transfers simultaneously.” Draft National Interest Electric Transmission Corridor Designations Notice, 72 Fed. Reg. 25,843 (May 7, 2007).

66. See CONGESTION STUDY, *supra* note 64, at 3.

67. Draft National Interest Electric Transmission Corridor Designations Notice, 72 Fed. Reg. at 25,843.

The DOE has determined that constraints are problematic for electricity consumers.⁶⁸ When a constraint prevents the delivery of electricity across a line, several events often occur.⁶⁹ First, electricity generation may be “redispatched,” i.e., output from a generator on the consumer’s side of the constraint is increased while electricity generation on the other side of the constraint is reduced.⁷⁰ Second, previously planned wholesale purchases of electricity, intended to meet demand at lower cost, may be cancelled.⁷¹ Third, deliveries of electricity to consumers may have to be reduced.⁷² The two former events increase consumers’ electricity costs because the ad hoc purchasing of demand-side generation is typically more expensive than consumption of energy purchased wholesale in advance.⁷³ Of course, the third event, i.e., having to reduce electricity delivery to customers, directly concerns energy reliability.

Reliability problems exist when congestion creates a situation in which there is too little supply relative to demand.⁷⁴ Areas of particular risk include major cities, such as New York.⁷⁵ The DOE has referred to New York as a “load pocket,” or an area where demand largely exceeds local generating capacity, thus requiring the importation of electricity via transmission from neighboring regions.⁷⁶ Congestion results when the city cannot import as much low-cost energy as it demands.⁷⁷ If demand inside the pocket grows quickly without being adequately addressed, customer delivery will suffer.⁷⁸

68. CONGESTION STUDY, *supra* note 64, at 4.

69. *Id.* at 3.

70. *Id.*

71. *Id.* A wholesale customer is likely to be a utility with little or no generating capacity that purchases power to supplement its own generation or for economic reasons. U.S. DEP’T OF ENERGY, ENERGY INFO. ADMIN., ELECTRIC TRADE IN THE UNITED STATES 1996, at 1 (1998), <http://www.eia.doe.gov/cneaf/electricity/etus/etus.pdf>.

72. CONGESTION STUDY, *supra* note 64, at 3.

73. *Id.* In March of 2006, PJM Interconnection (“PJM”), a regional transmission organization (“RTO”), asked the DOE to designate two electrical paths as NIETCs in the Mid-Atlantic region. *Id.* The Allegheny Mountain path would have extended from the West Virginia panhandle region southeastward and would have served the Baltimore and Washington load centers. *Id.* The Delaware River path would have extended from the West Virginia panhandle region east and would have served load centers around Philadelphia and in New Jersey and Delaware. *Id.* PJM stated that the national interest designation of the transmission paths is needed to, *inter alia*, maintain reliability and achieve economic benefits for consumers. *Id.* In support of the latter, PJM reported that in 2005, transmission congestion costs on the Allegheny path totaled \$747 million and \$464 million on the Delaware River path. *Id.* at 4 n.4.

74. *Id.* at 4.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 3.

The DOE has proposed three ways to alleviate chronic congestion and increase grid reliability.⁷⁹ First, a power plant can be built within the load pocket.⁸⁰ Second, new transmission lines can be built or preexisting lines upgraded to facilitate the importation of electricity from distant generation-rich areas.⁸¹ Third, electricity demand can be reduced by increasing energy efficiency.⁸² Congress addressed the second option when it enacted the Energy Policy Act of 2005, and, more recently, the DOE implemented this legislation by designating two zones of the country as National Interest Electric Transmission Corridors.⁸³

III. THE ENERGY POLICY ACT OF 2005

A. *Transmission Siting Before the 2005 EPACT*

Traditionally, state and local regulatory entities coordinated the siting of transmission lines.⁸⁴ State rather than federal regulation made sense because the electricity market emerged as, and for a long time remained, a “bundled, highly balkanized, and locally based industry.”⁸⁵ When countenancing proposed electricity projects, the inquiry for state regulators has been two-fold: is the proposed infrastructure needed and what are its environmental ramifications?⁸⁶ The focus is largely parochial, i.e., local needs and realities are emphasized and little attention is paid to the regional benefits potentially flowing from the siting process or exercise of eminent domain.⁸⁷ As briefly discussed in Part II, many aspects of the structure and governance of the electricity industry have changed; however, the siting regime has largely remained the same.

79. *Id.* at 4.

80. *Id.*

81. *Id.*

82. *Id.*

83. Order Designating Mid-Atlantic Area National Interest Electric Transmission Corridor and Southwest Area National Interest Electric Transmission Corridor, 72 Fed. Reg. 56,992 (Oct. 5, 2007).

84. See EDISON ELECTRIC INSTITUTE, STATE-LEVEL ELECTRIC TRANSMISSION LINE SITING REGULATIONS DIRECTORY (2001), http://www.eei.org/industry_issues/energy_infrastructure/transmission/siting_directory.pdf (“The siting of electric power transmission lines traditionally has been regulated at the state level.”); Rossi, *supra* note 3, at 315.

85. Denise L. Desautels, *Who Should Regulate the Siting of Electric Transmission Lines Anyway? A Jurisdictional Study*, THE ELECTRICITY J., May 2005, at 11; see also *supra* Part II.B.

86. Brown & Daniels, *supra* note 5, at 24.

87. *Id.* at 26.

B. 2005 EPACT

Congress passed the 2005 EPACT⁸⁸ on July 29, 2005, and President Bush signed it into law on August 8, 2005.⁸⁹ Referred to as a “smorgasboard,” the 2005 EPACT seeks to streamline permits for oil wells and power lines on public lands.⁹⁰ The legislation also includes approximately \$85 billion worth of subsidies and tax breaks for most forms of energy, including electricity.⁹¹ A potentially far-reaching provision of the legislation is the repeal of the Public Utility Holding Company Act of 1935 (“PUHCA”),⁹² which traditionally foreclosed mergers in the electric industry.⁹³ Some viewed the repeal of PUHCA as a way to raise the capital necessary to build transmission lines and generating plants.⁹⁴ Generally, the legislation was touted as a comprehensive national energy plan which would put America on the path to reducing its dependence on foreign oil.⁹⁵ However, critics of the 2005 EPACT have argued that it fails to decrease America’s dependence on foreign oil because it does not set standards for automobile fuel efficiency, squanders federal funds by giving fossil fuel and nuclear energy industries unjustified subsidies, and, by repealing PUHCA, caters to the profit interests of corporations at the expense of consumers.⁹⁶

Of concern here is § 1221(a) of the 2005 EPACT, which added a new section, § 216, to the Federal Power Act.⁹⁷ The Secretary of Energy (“Secretary”)⁹⁸ is required, in consultation with “affected States,” to

88. Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 7, 10, 15, 16, 22, 25, 26, 30, 33, 42, and 43 U.S.C.).

89. See President George W. Bush, Address at Sandia National Laboratory: President Signs Energy Policy Act (Aug. 8, 2005), available at www.whitehouse.gov/news/releases/2005/08/20050808-6.html [hereinafter President Signs Policy Act].

90. Michael Grunwald & Juliet Eilperin, *Energy Bill Raises Fears About Pollution, Fraud: Critics Point to Perks for Industry*, WASH. POST, July 30, 2005, at A1.

91. *Id.*

92. 15 U.S.C. § 79 - 79z-6 (2000) (repealed 2005); see *supra* note 59 and accompanying text.

93. Grunwald & Eilperin, *supra* note 90, at A1.

94. *Id.*

95. President George W. Bush, commenting on Congress’s work on the 2005 EPACT, stated: “They recognized that we need a comprehensive approach to deal with the situation we’re in. In other words, we need to conserve more energy; we need to produce more energy. We need to diversify our energy supply, and we need to modernize our energy delivery.” President Signs Energy Policy Act, *supra* note 89, para. 12.

96. See Public Citizen, *Learn More About the Energy Bill*, http://www.citizen.org/cmep/energy_enviro_nuclear/electricity/energybill/2005/ (last visited Feb. 2, 2008).

97. See 16 U.S.C.A. § 824p (West 2008).

98. The terms “Secretary,” “Department,” and DOE will be used interchangeably throughout this Comment.

conduct a study of electric transmission congestion.⁹⁹ The Secretary was responsible for completing an initial congestion study within one year of the 2005 EPACT's enactment, that is, before August 8, 2006.¹⁰⁰ The statute requires the DOE to issue additional studies every three years.¹⁰¹

Based on the results of the congestion study, and after considering alternatives and recommendations from interested parties, the Secretary must issue a report which *may* "designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor."¹⁰² In determining whether to designate a NIETC, 16 U.S.C. § 824p(a)(4) provides that the Secretary may consider whether:

- the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;
- economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy and a diversification of supply is warranted;
- the energy independence of the United States would be served by the designation;
- the designation would be in the interest of national energy policy; and
- the designation would enhance national defense and homeland security.¹⁰³

A reading of the 2005 EPACT suggests that a NIETC designation has the effect of potentially involving the federal government in the business of electric transmission siting decisions. Specifically, the statute gives FERC jurisdiction, under certain conditions, to approve permits requesting permission to site new transmission infrastructure or modify existing infrastructure.¹⁰⁴ FERC jurisdiction exists when: (1) the state does not have authority to site the project or cannot consider the interstate benefits of the project;¹⁰⁵ (2) the applicant does not qualify for

99. § 824p(a)(1). *See supra* Part II.C for a discussion of transmission congestion.

100. § 824p(a)(1). The DOE issued its first congestion study on August 8, 2006. *See infra* Part III.C for a discussion of the study's findings.

101. § 824p(a)(1).

102. § 824p(a)(2).

103. §§ 824p(a)(4)(A)-(E).

104. § 824p(b).

105. § 824p(b)(1)(A). *See infra* Part IV.B for an example of when a state lacks the authority to approve an electric transmission siting project or when a particular state cannot consider the interstate benefits of such a project.

a state permit because it does not serve end-use customers in the state;¹⁰⁶ or (3) the state has withheld approval for more than one year or has conditioned its approval in such a manner that the project will not significantly reduce congestion or it is not economically feasible.¹⁰⁷ The statute explicitly notes that it does not prohibit any individual from constructing or modifying any transmission facility pursuant to state law.¹⁰⁸

The DOE's position is that a National Corridor designation does not constitute federal preemption of state siting authority.¹⁰⁹ The DOE argues a NIETC designation does not imply a preference for transmission construction.¹¹⁰

A National Corridor designation is not a siting decision; it does not dictate the route of any transmission project. If a transmission project is proposed in a National Corridor, it will be the State siting authorities, and potentially FERC if certain conditions are met, that will determine the specific route of that project.¹¹¹

Thus, as characterized by the DOE, the 2005 EPACT does not give the DOE the power traditionally wielded by states to determine if and where transmission infrastructure is necessary to address congestion and constraint problems.

Many parties disagree with the DOE's position that a National Corridor designation does not constitute federal preemption.¹¹² For example, Representative William DeWeese, Majority Leader of the Pennsylvania House of Representatives, commented that § 1221(a) "forsakes the rights of states and their political subdivisions to adopt, administer, and manage land use policies and decisions that conflict with the ambitions of profit seeking corporations seeking to locate and construct high voltage transmission lines."¹¹³ In addition, Paul Tonko,

106. § 824p(b)(1)(B).

107. § 824p(b)(1)(C). Sections 824p(b)(2)-(6) place further conditions on FERC's ability to issue a permit: the facilities will be used for the transmission of electric energy in interstate commerce; the project is consistent with the public interest; the project will significantly reduce congestion and protect or benefit consumers; the project is consistent with national energy policy and will enhance energy independence; and the project maximizes, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

108. *Id.* § 824p(g).

109. Draft National Interest Electric Transmission Corridor Designations Notice, 72 Fed. Reg. 25843 (May 7, 2007).

110. *Id.*

111. *Id.*

112. *See supra* note 17 and accompanying text.

113. *Section 1221 of the Energy Policy Act of 2005: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Government Reform*, 110th Cong. (2007) (testimony of Rep. William DeWeese) ("If FERC is permitted to use its

Member of the New York State Assembly, stated that in his 15 years as Energy Committee Chairman “few issues have given rise to the concern and sense of disempowerment that the potential exercise of federal preemption regarding transmission line siting has created.”¹¹⁴

C. *The 2006 Congestion Study and 2007 NIETC Designations*

Under 16 U.S.C. § 824p, the Secretary must conduct a nationwide survey of electric transmission congestion.¹¹⁵ In response to the law, the DOE issued a congestion study in August 2006.¹¹⁶ The study found three classes of congestion areas: critical congestion areas, congestion areas of concern, and conditional congestion areas.¹¹⁷ With respect to the critical congestion areas, the DOE maintains that it is critically important to remedy existing or growing congestion problems.¹¹⁸ The Atlantic coastal area from metropolitan New York through northern Virginia and southern California were deemed critical congestion areas.¹¹⁹ The congestion areas of concern—New England, the Phoenix/Tucson area, the Seattle/Portland area, and the San Francisco Bay area—have or may have large-scale congestion problems.¹²⁰ The DOE found that more analysis is needed to determine the extent of the problems and any appropriate solutions.¹²¹ Conditional congestion areas were determined to have some congestion which would increase significantly if any substantial generation capacity were built.¹²²

After identifying these classes of congestion areas, the DOE stated its intention to consider designating the critical congestion areas as NIETCs.¹²³ The DOE received public comments regarding the designation of the NIETCs and, in May 2007, the DOE published a notice issuing and soliciting comments on two draft National Corridor designations for the two critical congestion areas identified in the

congressionally conveyed authority to commandeer and usurp the traditional role of states and their administrative agencies to review and approve the location and construction of high voltage transmission lines, Pennsylvania, not unlike every other state, would have no control, no say, and no recourse other than expensive litigation. . . .”).

114. *Id.* (testimony of Rep. Paul Tonko).

115. *See supra* notes 95-97 and accompanying text.

116. CONGESTION STUDY, *supra* note 64.

117. *Id.* at viii-ix.

118. *Id.* at viii.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at ix.

123. *Id.* at x.

congestion study.¹²⁴ The draft Mid-Atlantic Area National Interest Electric Transmission Corridor included portions of New York, Pennsylvania, New Jersey, West Virginia, Maryland, Delaware, the District of Columbia, Virginia, and Ohio.¹²⁵ The draft Southwest Area National Interest Electric Transmission Corridor included portions of southern California, Nevada, and Arizona.¹²⁶ In October 2007, the DOE finalized the draft designations.¹²⁷ In December 2007, the DOE issued orders granting rehearings for the orders designating the Mid-Atlantic Area National Corridor and the Southwest Area National Corridor.¹²⁸

IV. TRANSMISSION SITING AFTER THE 2005 EPACT

One of the major controversies surrounding the recent designation of the two NIETCs is whether such designations take siting power away from state authorities and give it to FERC.¹²⁹ As discussed below, a NIETC designation will undoubtedly affect traditional electric transmission siting practices. Some states will be affected very little; FERC involvement will likely be minimal.¹³⁰ Other states, however, will be profoundly affected if they fall within a National Corridor; FERC involvement in electric transmission line siting decisions in these states will likely be high.¹³¹ How much a given state will have to share its siting authority with FERC will depend largely on the state's traditional siting practices.

As previously discussed, parochialism has been a major factor in state regulation of transmission line siting.¹³² However, some states emphasize local concerns more than others.¹³³ Brown and Daniels have identified three categories of states along the "parochialism spectrum."¹³⁴

124. Draft National Interest Electric Transmission Corridor Designations Notice, 72 Fed. Reg. 25,840 (May 7, 2007).

125. *Id.* at 25,908.

126. *Id.* at 25,922.

127. Order Designating Mid-Atlantic Area National Interest Electric Transmission Corridor and Southwest Area National Interest Electric Transmission Corridor, 72 Fed. Reg. 56,992 (Oct. 5, 2007).

128. Order Granting Rehearing for Further Consideration, 72 Fed. Reg. 69,202 (Dec. 7, 2007).

129. *See supra* notes 109-14 and accompanying text.

130. *See* discussion *infra* Part IV.D.

131. *See* discussion *infra* Part IV.B.

132. *See supra* Part III.A.

133. Brown & Daniels, *supra* note 5, at 25.

134. *Id.* Ashley Brown is Executive Director of Harvard University's Electricity Policy Group, a program of the Center for Business and Government at Harvard's Kennedy School of Government. In 2003, when Brown and Daniel's siting analysis was published, Damon Daniels was a third-year student at Harvard Law School and a law clerk at the Harvard Electricity Policy Group. *Id.* at 23. Brown and Daniel's article was meant to focus on "states' consideration of regional and overall competitive benefits in

This Comment argues that where a particular state falls along this spectrum will likely suggest the extent to which its siting authority will wane with the rise of FERC jurisdiction.¹³⁵ Thus, in the following pages, particular states will be identified by reference to their location on the parochialism spectrum. These states will then serve as examples illustrating how a state's traditional siting practices will determine the future relevancy of state siting officials under potential National Corridor designations.

A. *The Preemption of State and Local Laws*

Article VI of the United States Constitution provides that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land."¹³⁶ Thus, if a state or local law conflicts with a federal law, the state or local law is said to be "preempted" by the federal law.¹³⁷ In *Gade v. National Solid Wastes Management Association*, the U.S. Supreme Court suggested:

Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption . . . and conflict pre-emption, where . . . state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.¹³⁸

In the context of the regulation of electric transmission line siting, preemption might be found where a state's regulatory scheme conflicts or interferes with Congress's objective of ensuring grid reliability by easing transmission line congestion.¹³⁹

B. *Dominant Parochialism*

Brown and Daniels identified the first category of states to include those where parochialism dominates decision-making.¹⁴⁰ In these states,

the context of the exercise of eminent domain and siting certificate determinations." *Id.* at 26.

135. See *infra* Parts IV.B-E.

136. U.S. CONST., art. VI cl. 2.

137. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992).

138. *Id.* at 98 (citations omitted).

139. See *supra* note 10 and accompanying text.

140. Brown & Daniels, *supra* note 5, at 25.

eminent domain or siting authority is granted only where the project is necessary to service in-state customers.¹⁴¹ A NIETC designation will most profoundly affect states with this predominantly parochial outlook. This is because FERC jurisdiction is generally triggered under a NIETC designation when a state's primary concern is local and state siting officials cannot or likely will not consider the interstate benefits of the project.¹⁴²

For example, FERC jurisdiction would likely have existed with respect to developers seeking to site new transmission facilities within Mississippi if that state had been encompassed within the recently designated National Corridors.¹⁴³ In *Mississippi Power & Light Company v. Conerly*, Mississippi Power & Light Company ("MP&L") sought to serve end-users in Louisiana by constructing a 500 kilovolt ("Kv"), 51 mile transmission line from a substation in Franklin County, Mississippi.¹⁴⁴ MP&L first applied for a certificate of public convenience and necessity ("CPCN") from the Mississippi Public Service Commission ("MPSC"), as required by state law.¹⁴⁵ MPSC granted the CPCN and MP&L then sought to acquire the necessary right-of-way.¹⁴⁶ Because several affected property owners would not agree on the purchase and sale of their property, MP&L filed petitions for condemnation with the Special Court of Eminent Domain.¹⁴⁷ The landowners, appellees, moved to dismiss, arguing, *inter alia*, that MP&L sought to construct the transmission line to carry electricity interstate from a generating station in Mississippi to Louisiana facilities.¹⁴⁸ The Special Eminent Domain Court granted the landowners' motion and dismissed all condemnation proceedings.¹⁴⁹ The Mississippi Supreme

141. *Id.*

142. *See supra* notes 104-07 and accompanying text.

143. *See supra* Part III.C for a description of the DOE's recent designation of two NIETCs. Under 16 U.S.C. § 824p(a)(1), the DOE must issue a congestion study every three years. Therefore, although Mississippi was not included in the most recent corridor designations (which, as discussed in Part III, were largely determined by the results of the August 2006 Congestion Study), it may in the future fall within such a designation.

144. *Mississippi Power & Light Co. v. Conerly*, 460 So.2d 107, 108 (Miss. 1984).

145. *Id.* at 108.

146. *Id.*

147. *Id.*

148. *Id.* Appellees contended that the "allegation by [MP&L] of incidental benefit to MP&L customers is a masquerade to justify constructing the interconnecting high power line." *Id.* Appellees further argued that the line "was not for public use or public necessity as those terms apply to the utility and its consumers in the State of Mississippi." *Id.* Appellees maintained that "the purpose of the line is 'interstate' rather than 'intrastate', as was stated in the MPSC order attached and made a part of the condemnation proceedings." *Id.*

149. *Id.* at 109.

Court affirmed¹⁵⁰ and held that the proposed transmission line's primary purpose was to benefit regional electricity transmission service rather than to serve Mississippi customers.¹⁵¹ Because the Mississippi Constitution¹⁵² and related legislation¹⁵³ requires that condemnation of property be for "public use," the Mississippi Supreme Court concluded that the MPUC did not have jurisdiction to grant a CPCN where the certificate was primarily sought for interstate benefits.¹⁵⁴

If a factual scenario similar to *Conerly* emerged in the future, and if at that time Mississippi were located within a National Corridor, FERC jurisdiction would be likely. FERC would have jurisdiction under 16 U.S.C. § 824p(b)(1)¹⁵⁵ if a utility such as MP&L sought to construct a transmission line primarily to bring greater stability and reliability to the regional grid because of MPUC's predominantly parochial focus.

Traditionally, as *Conerly* suggests, such a proposed project would have been automatically rejected by state siting officials as outside of MPUC's authority.¹⁵⁶ The effect of FERC jurisdiction under a NIETC designation would mean that the project would at least be considered rather than rejected out of hand. FERC could consider the utility's proposal and reject it, leading to the same result, or FERC could approve the project and the utility would be permitted to site a transmission line within the state even though it would not primarily serve in-state customers.¹⁵⁷ Of course, unless the state withheld approval for more than one year, the state regulatory body would retain its jurisdiction, unencumbered by FERC, with respect to applications for projects meant to serve in-state customers.¹⁵⁸

150. *Id.* at 113. The Mississippi Supreme Court explained:

The eminent domain court judge held that the granting of the certificate of public convenience and necessity exceeded the statutory authority and jurisdiction of the Mississippi Public Service Commission and violated constitutional rights provided in [the Mississippi Constitution]. The reasoning for this holding was the language in the opinion to the effect that the primary purpose of the 500 Kv line was to carry electricity interstate from [Mississippi] to Louisiana.

Id. at 112-13.

151. *Id.*

152. MISS. CONST. art. III, § 17.

153. MISS. CODE ANN. § 11-27-15 (West 2007).

154. *Conerly*, 460 So.2d at 113. The court agreed with the trial court judge "that the terms 'public necessity' and 'public use' as set out in the statutes that regulate the duties of the MPSC, contemplate use by the citizens of [Mississippi]." *Id.*

155. *See supra* notes 105, 106, and accompanying text.

156. *See supra* note 154 and accompanying text.

157. *See supra* note 104 and accompanying text.

158. *See* 16 U.S.C.A. § 824p(b)(1)(C) (West 2008).

C. *Intermediate Parochialism*

The second category of states along the parochialism spectrum identified by Brown and Daniels include those that sometimes see beyond service to in-state customers.¹⁵⁹ Brown and Daniels suggest that in the area of eminent domain, state courts in this category may construe the statutory requirement of public benefit to include benefits to the state flowing from benefits to the regional grid.¹⁶⁰ That is, the “relevant state authorities have chosen to reduce the evidentiary burden that the *intrastate* public interest requirement imposes on the party proposing the electricity project.”¹⁶¹

The result of a NIETC designation in an intermediately parochial state will be the same as the result in either a dominantly parochial state or a loosely parochial state. In other words, either FERC involvement will be quite frequent, making state regulators less relevant, or rather infrequent, in which case the plenary jurisdiction of state regulators over electric transmission line siting will continue unchanged. With respect to intermediately parochial states, it is the courts, not the relevant regulatory authorities, that may lower the “evidentiary burden that the *intrastate* public interest requirement imposes on the party proposing the electricity project.”¹⁶²

Of course, it is typically a state’s public utility commission that first reviews an application requesting permission to site transmission lines, not the state’s courts.¹⁶³ Therefore, if a particular state’s public utility commission approaches siting applications parochially, then a utility company whose application is rejected because the project will not primarily benefit in-state customers would likely turn to FERC.¹⁶⁴ The utility would be much less likely to appeal the commission’s decision to the state’s appellate court, regardless of the high likelihood that the commission’s decision would be overturned. Instead of engaging in litigation, the utility could apply to FERC for the permit, saving the time and expense that comes with a decision to litigate. Accordingly, even if

159. Brown & Daniels, *supra* note 5, at 25.

160. *Id.* at 26.

161. *Id.* at 29.

162. *Id.*

163. For example, in Pennsylvania, it is the Pennsylvania Public Utility Commission (“PaPUC”) that is responsible for considering applications to locate and construct transmission lines. See 52 PA. CODE § 57.71 (1999) (“Upon the application of a public utility for authorization to locate and construct a HV transmission line or any portion thereof, upon approval of the application by the Commission first had and obtained, and upon compliance with existing laws, it shall be lawful for a public utility to commence construction of the HV transmission line or portion thereof.”).

164. As mentioned in Part IV.B, *supra*, FERC would likely have jurisdiction under 16 U.S.C. § 824p(b)(1).

a state's courts are willing to interpret a statutory requirement of public benefit broadly to include benefits flowing to the regional grid, if that state's regulators have a parochial outlook, FERC involvement will likely be just as frequent as in dominantly parochial states.

Conversely, if an intermediately parochial state's public utility commission approaches siting applications in a loosely parochial fashion,¹⁶⁵ then a utility's application is much less likely to be rejected on the basis of a finding of meager benefit to in-state customers.¹⁶⁶ If state regulators take this stance then just as in loosely parochial states FERC involvement is likely to be quite infrequent.¹⁶⁷

D. *Loose Parochialism*

The final category of states along the parochialism spectrum include those that have been willing to consider the regional benefits of a proposed project as equivalent to intrastate benefits.¹⁶⁸ These states differ from intermediately parochial states because the states in this category "have statutorily authorized siting officials to assess regional considerations in assessing the need for an electricity project."¹⁶⁹

A NIETC designation will have little effect on states with this kind of outlook. FERC's narrow jurisdiction under § 1221(a) is generally

165. See *infra* Part IV.D.

166. Pennsylvania is an example of a state where regulators and courts place little emphasis on evidence of in-state service. In *Dunk v. Pennsylvania Public Utility Commission*, 232 A.2d 231, 232 (Pa. 1967), the PaPUC approved the Philadelphia Electric Company's application for the exercise of eminent domain by the utility in acquiring a right of way for the construction, operation, and maintenance of an electric transmission line. The affected landowners appealed the decision, arguing, *inter alia*, that the appropriation of their property was not for the "corporate use" of the utility under state law. *Id.* at 234. In other words, the appellant landowners argued that the utility did not satisfy the requirement of public need, a condition precedent to the exercise of eminent domain, because the proposed line would primarily serve customers outside of Pennsylvania. *Id.* The court affirmed the loosely parochial decision of the PaPUC, stating its agreement with the utility that:

[O]ne of the principal considerations of public convenience and necessity is the need for integration of the bulk power transmission systems of electric utilities. Interconnections enable participants to obtain greater economies of operation, as well as allowing, each system to meet, adequately and safely, its varying and growing load demands, and to maintain constant voltage, frequency stability and reliability of service. In addition, there is the important element of need for additional power supply routes in the event of a national emergency. If the integration of bulk transmission systems is in the public interest, such integration surely must be consistent with and regarded as necessary for the corporate use of the individual participating utilities.

Id. at 234-35.

167. See *infra* Part IV.D.

168. Brown & Daniels, *supra* note 5, at 26.

169. *Id.* at 32.

triggered in cases where state authorities do not or can not consider regional benefits when considering a transmission siting proposal.¹⁷⁰ Because loosely parochial states regularly consider the interstate benefits of a particular project in addition to its intrastate benefits, FERC involvement will likely be minimal.

Wisconsin is an example of a state that has authorized siting officials to assess regional considerations in assessing the need for an electricity project.¹⁷¹ Wisconsin law prescribes certain plans regarding regional transmission planning.¹⁷² The Wisconsin Public Service Commission must conduct a study on “identifying and relieving any constraint on an intrastate or interstate electric transmission system that adversely affects the reliability of transmission service provided to electric customers in [Wisconsin].”¹⁷³

Ohio law is similar; siting decisions include consideration of whether “the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economic and reliability.”¹⁷⁴ By permitting state officials to consider the interstate effects that may result from a particular siting proposal, these states are positioned such that few situations for FERC involvement will occur.

E. Federal Preemption of State Transmission Line Siting Within NIETCs

The practical effect of § 1221(a) of the 2005 EPACT will be to change the national regulatory scheme of the siting of electric transmission lines from one dominated by states to one of interstitial regulation.¹⁷⁵ State regulators will remain relevant in loosely parochial and, in certain cases, intermediately parochial states, as situations triggering FERC jurisdiction under 16 U.S.C. § 824p(b) will be relatively rare. State regulators may become less relevant in dominantly parochial

170. See *supra* notes 104-107 and accompanying text.

171. Brown & Daniels, *supra* note 5, at 32.

172. WIS. STAT. ANN. § 196.494 *et seq.* (WEST 2007).

173. § 196.494(2).

174. OHIO REV. CODE ANN. § 4906.10(A)(4) (West 2007). Note that Ohio currently falls within the Mid-Atlantic Area National Interest Electric Transmission Corridor. See *supra* note 125 and accompanying text.

175. See Desautels, *supra* note 85, at 19 (asking, “what type of federal preemption, if any, is desirable” and suggesting three options: interstitial regulation, state involvement in a federal proceeding, or complete federal preemption). Desautels does not define her understanding of “interstitial regulation.” As used herein, a system of interstitial regulation is one in which the federal government has a major presence in the regulation of electric transmission line siting and state regulators fill in the gaps, or interstices.

and, in some cases, intermediately parochial states, as FERC jurisdiction will be triggered in many instances.

Section 1221(a) did not contemplate complete federal preemption. Instead, the process articulated by § 1221(a)—conducting congestion studies every three years, carefully selecting National Corridors, and limiting FERC jurisdiction to particular circumstances¹⁷⁶—envisioned federal preemption in few cases with state regulators filling in the interstices. As the foregoing discussion was meant to illustrate, it will be dominantly parochial states whose authority will be federally preempted.¹⁷⁷ These siting regimes conflict with Congress's objective of easing electric transmission congestion to ensure regional, and ultimately national, grid reliability.¹⁷⁸ Loosely parochial states, on the other hand, have siting regimes that recognize the integrated nature of the electric transmission system and can therefore work in a complementary fashion with FERC to relieve some of the problems facing the national grid.

V. CONCLUSION

Parochialism hinders utilities' ability to adequately address congestion and ensure electricity service reliability.¹⁷⁹ States with predominately parochial electric transmission line siting regimes that are now located within NIETCs will either have to liberalize their outlook or face federal preemption. On the other hand, states with less parochial tendencies have already embraced the reality of regional electricity markets. These states, such as Wisconsin and Ohio, have modern electric transmission siting laws that recognize the integrated nature of the nation's electric grid and are effective in addressing some of the problems facing the grid.¹⁸⁰ State regulators in these states will remain relevant as potentially more and more areas of the country fall within National Corridor designations.

176. *See supra* notes 99-108 and accompanying text.

177. *See supra* Part IV.B.

178. *See supra* note 10 and accompanying text; *see also supra* note 103 and accompanying text.

179. *See supra* note 11 and accompanying text.

180. *See supra* Part IV.D.