

GONE WITH THE WIND: STATE PREEMPTIVE POWER

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“I sell here, sir, what all the world desires to have—power.”¹
– James Boulton (co-inventor of steam engine), England,
1776

I. IN THE WIND

Wind is the dominant form of new power generation installed every year for the past five years.² It is now part of the American’s energy future. Siting wind turbines becomes a matter of gaining approval traditionally for positioning power generation and its interconnection to the utility grid from municipal zoning and land-use authorities.³ There is no power that is more local than the police power; local communities have always been the primary exercisers of the police power to regulate what gets sited where.⁴ And many towns and cities are blocking or frustrating the siting of wind power turbines pursuant to the local police power over local

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¹ *James Watt*, SCOTTISH ENGINEERING HALL OF FAME, <http://www.engineeringhalloffame.org/profile-watt.html> (last visited Oct. 31, 2016).

² See *infra* fig.1.

³ See *Installing and Maintaining a Small Wind Electric System*, U.S. DEPT OF ENERGY, <http://energy.gov/energysaver/installing-and-maintaining-small-wind-electric-system> (last visited Apr. 8, 2016).

⁴ See STEVEN FERREY, ENVIRONMENTAL LAW 488 (6th ed. 2013).

land use.⁵ Half of the states are moving to preempt, pursuant to state constitutions and law, the local power over wind and/or new power generation siting. This is the new legal federalist confrontation regarding legal jurisdiction over energy, power, and renewable energy. A decision on energy federalism in 2016 was decided by the Supreme Court.⁶

There is no technology that matters more than electric power. Electric power was recently deemed, aside from the wheel, to be the second most important invention in history and the single most important invention during the last millennium.⁷ Nothing is more indispensable than electricity in the operation of the modern economy.⁸ And wind has been the primary new power source deployed in America, constituting 24% of all new generation.⁹

Wind power has substantially increased.¹⁰ In 2012, wind energy was the most deployed new United States electricity generation capacity, contributing 43% of all new electric generation.¹¹ In 2015, more than half of new generating capacity was wind energy.¹² It is expected to increase to 14,000 megawatts by 2020.¹³ With a delivered value in the United States of approximately \$375 billion annually,¹⁴ exceeding the total amount of corporate income taxes collected in the United States,¹⁵ electricity is critical.

⁵ See Troy A. Rule, *Renewable Energy and the Neighbors*, 2010 UTAH L. REV. 1223, 1223, 1227–28 (2010).

⁶ See *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 766 (2016).

⁷ See James Fallows, *The 50 Greatest Breakthroughs Since the Wheel*, ATLANTIC (Nov. 2013), <http://www.theatlantic.com/magazine/archive/2013/11/innovations-list/309536/>. Electricity finished behind only the movable type printing press. *Id.* Electricity is essential to operate seven other 'top 50' inventions of all time: The Internet, computers, air-conditioning, radio, television, the telephone, and semiconductors. *Id.*

⁸ FERREY, *supra* note 4, at 562.

⁹ See *Wind Energy Facts at a Glance*, AM. WIND ENERGY ASS'N, www.awea.org/Resources/Content.aspx?ItemNumber=5059 (last visited Apr. 6, 2016).

¹⁰ *Energy Dept. Reports: U.S. Wind Energy Production and Manufacturing Reaches Record Heights*, U.S. DEPT. OF ENERGY (Aug. 6, 2013, 8:00 AM), <http://energy.gov/articles/energy-dept-reports-us-wind-energy-production-and-manufacturing-reaches-record-highs>.

¹¹ *Id.*

¹² See Tim Shear, *Scheduled 2015 Capacity Additions Mostly Wind and Natural Gas; Retirements Mostly Coal*, U.S. ENERGY INFO. ADMIN. (Mar. 20, 2015), www.eia.gov/todayinenergy/detail.cfm?id=20292.

¹³ Michael Dotten, *Integrating Wind Energy into Power Planning: Lessons from the Pacific Northwest*, MARTEN LAW (July 21, 2011), <http://www.martenlaw.com/newsletter/20110721-wind-energy-power-planning>.

¹⁴ See *Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State, Year-to-Date through February 2011 and 2010*, PUB. POLICY INSTITUTE OF N.Y. STATE, <http://ppinys.org/reports/jtf/2011/employ/average-retail-price-of-electricity2010-11.htm> (last visited Apr. 6, 2016).

¹⁵ See *Amount of Revenue by Source*, TAX POLICY (Feb. 3, 2015), <http://www.taxpolicycenter>

This article analyzes how the federalist United States system of law, melded with state constitutional law, regulates and controls the siting of new renewable energy resources, focusing on the lead United States and world renewable energy source under development—wind turbines. This pierces the power of federal and/or state government to preempt the local police power of what energy uses get sited on local land. Energy moves at the speed of light, and preemption, as a matter of law, is constitutional. This article navigates the creases between Tenth Amendment local control over land, and constitutional preemption.

Section II sets the technical framework: It examines what is electric power, how it is different that every other form of energy, and how it is treated differently in the law than every other United States commodity. Federal law and the constitution divides authority over different aspects of electric power into discrete legal tranches of federal, state, and local authority.

From Section II's technical foundation, Section III reframes the structure of American energy law. It segregates federal authority under the Federal Power Act over transactions and movement of power, from exclusive state jurisdiction over the facilities and hardware which produce and move power, and from local police power jurisdiction with regard to land-use and necessary environmental permits. Federal FERC Orders 888, 2000, 2003, 764, and 1000, are analyzed as to their impact on the power industry. While the federal government exercises authority over off-shore wind projects, the unsuccessful recent federal attempt to exercise federal jurisdiction over siting of transmission lines on land is examined, as is the checkerboard of state regulation over new power facilities.

This United States federalist segregation of power authority has caused major conflict and friction in American law, which Section IV explores. Section IV analyzes whether local governments exercising their police powers and land-use ordinances, must cede power to the states to site energy projects, and particularly renewable wind energy projects. We examine the legal basis of municipal power, and the profound split among the states as to whether they do or do not attempt to preempt, under state constitutional authority, this local power over energy facilities. For detail and depth, Section IV focuses on one of the most sophisticated states, to examine the dual preemptive authority embedded in its

state statutes, and how the courts have interpreted this extension of power. Section IV then pivots to take a fresh look at the federalist scheme of federal, state, and local jurisdiction surrounding and competing regarding siting of the Cape Wind energy project.

Section V expands the analysis to a multi-state national dimension. We examine every state, dividing that half of the states that don't preempt local land-use authority regarding energy, and the half that do. The analysis contrasts the how and when state preemption is deployed and the different standards employed in different states. The section digs deep into how each of the state's implements and defends preemption, and how the courts adjudicate the decisions that the states make. This section examines energy siting preemption, and then extends to particularly focus on renewable wind energy and the energy future.

Section VI brings everything into focus on the second most important invention in history. First, in Section II, we create a technical power foundation.

II. WHERE WIND, ENERGY, AND THE LAW INTERSECT

The use of electricity is seemingly irreplaceable in the modern day.¹⁶ Indeed, the American economy itself runs on electricity.¹⁷ Power moves according to Kirchoff's Law¹⁸ almost at the speed of light on one interconnected energized grid, to which people can connect.¹⁹ The electric power grid must constantly balance supply

¹⁶ See STEVEN FERREY, *THE LAW OF INDEPENDENT POWER* §§ 2:1-2:2 (Thomson Reuters West, 38th ed. 2015) (the use of energy and electricity as the force elevating industry and commerce); see also Steven Ferrey, *Ring-Fencing the Power Envelope of History's Second Most Important Invention of All Time*, 40 WM. & MARY ENVTL. L. & POLY REV. 1, 9–10 (2015) [hereinafter *Ring-Fencing the Power Envelope*] (“There are no substitutes or alternatives to [electricity] use in the twenty-first century for operation of computers, the Internet, medical imaging, national defense and security, modern communication, and building size and climate control.”).

¹⁷ Michael Bruch et al., *Power Blackout Risks: Risk Management Options: Emerging Risk Initiative 4* (Markus Aichinger ed., 2011), <http://www.thecroforum.org/wp-content/uploads/2011/11/CRO-Position-Paper-Power-Blackout-Risks-.pdf>; see also *Ring-Fencing the Power Envelope*, *supra* note 16, at 9–10 (“Electric energy is the fundamental technology essential to power the developed American economy.”).

¹⁸ This law is also called Kirchoff's first law, Kirchoff's point rule, Kirchoff's junction rule, and Kirchoff's first rule. The principle of conservation of electric charge that at any point in an electrical circuit where charge density is not changing in time, the sum of currents flowing towards that point is equal to the sum of currents flowing away from that point. See *Kirchoff's Current Law (KCL)*, BUCKNELL, <http://www.facstaff.bucknell.edu/mastascu/elessonshtml/basic/Basic4Ki.html> (last visited Apr. 8, 2016).

¹⁹ See Steven Ferrey, *Inverting Choice of Law in the Wired Universe: Thermodynamics, Mass and Energy*, 45 WM. & MARY L. REV. 1839, 1914 (2004) (describing Kirchoff's law).

and demand to keep the grid operational.²⁰

Electricity and the legal stresses on the electric transmission system are unique. Unlike all other forms of energy, moving electrons cannot be efficiently stored as electricity for more than a second before the energy is lost as waste heat.²¹ Therefore, the supply of electricity must match the demand for electricity over the centralized utility grid on an instantaneous, constant, real-time, and ongoing basis, or else the electric system shuts down or expensive equipment is damaged.²² Either too much or too little power causes system instability on a second-by-second basis.²³ A loss of power would disrupt communication and transportation, heating and water supply, and hospitals and emergency rooms, depending on their amount of back-up generation.²⁴ A constant simultaneous balancing of supply and demand on the utility grid system is essential.²⁵

Everyone wants electric power, and it is the signature of a modern economy.²⁶ However, many persons and some communities do not appreciate the hardware of power.²⁷ Power is nothing without these interconnections. And here, the law creates a “police power” to regulate how we ensure electric supply and distribution.

Wind energy is a clean, renewable resource that can be produced domestically.²⁸ Wind turbines consist of two or three blades affixed to a rotor.²⁹ The rotor is mounted on a shaft that can be anywhere from one hundred to four hundred feet tall.³⁰ The wind causes the blades to spin, which turns the rotor.³¹ The rotor is attached to a generator, which creates electricity.³² Once a wind turbine is running it simply needs routine maintenance and repair.³³

²⁰ See FERREY, *supra* note 4, at 568.

²¹ *Id.*

²² *See id.*

²³ See Bruch et al., *supra* note 17, at 6.

²⁴ *See id.* at 12.

²⁵ Steven Ferrey, *Energy*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CLIMATE CHANGE 453, 459 (Joshua D. Sarnoff ed., 2016).

²⁶ See FERREY, *supra* note 4, at 562.

²⁷ *See id.* at 564.

²⁸ See *Wind 101: The Basics of Wind Energy*, AM. WIND ENERGY ASS'N, <http://www.awea.org/Resources/Content.aspx?ItemNumber=900&navItemNumber=740> (last visited Apr. 7, 2016).

²⁹ *Wind Energy Basics*, NAT'L RENEWABLE ENERGY LABORATORY, http://www.nrel.gov/learning/re_wind.html?print (last visited Apr. 8, 2016).

³⁰ *See id.*

³¹ *Id.*

³² *See id.*

³³ See generally Mary Grady, *Reaping the Wind in a Brand New Age*, CONSERVATION

The U.S. Department of Energy calculated that approximately 20% of wind power could be accommodated on the grid, which is about the amount of back-up reserve margin in regional power systems, without requiring additional storage or other mechanisms to accommodate intermittency.³⁴ And to make the interconnections between generators and the grid to deliver electric power, many states have granted regulated power companies, utilities which are privately-owned companies, the power to exercise eminent domain and take or use private property by easement and/or fees simple.³⁵

The network is the delivery of power. The high-voltage transmission network was recognized by engineers “as the most important engineering feat of the 20th century.”³⁶ A study by the United States Department of Energy forecasts that 39,000 miles of additional high-voltage transmission circuits will be constructed within the current decade before 2020.³⁷ Annual “[u]tility investment in transmission . . . [was] \$6 billion . . . in 1980 declined to \$3 billion annually in the late 1990s, and rose to about \$8 billion by 2007.”³⁸ One study “estimates that it may take as much as \$1.5 trillion to update the grid by 2030.”³⁹ By any measure, this is a large construction project at large cost.⁴⁰

However, recently, the structure of how and who accomplishes

MATTERS (Mar. 22, 2003), <http://www.thefreelibrary.com/Reaping+the+wind+in+a+brand+new+age%3A+to+some+New+Englanders,+wind.+a0105658439> (noting that wind turbines are maintained).

³⁴ See JENNIFER DECESARO & KEVIN PORTER, WIND ENERGY AND POWER SYSTEM OPERATIONS: A REVIEW OF WIND INTEGRATION STUDIES TO DATE 1, 4 (Dec. 2009). Wind, being at off-peak times in many locations, will tend to displace typical coal base-load power, while solar PV units will tend to displace typical on-peak gas-fired peaking generation units.

³⁵ See FERREY, *supra* note 4, at 517. Eminent domain vests in government the power to take or use privately owned property for a public purpose. See *id.* It is a legal mechanism both ingrained in, and restricted by, American law. See *id.*

³⁶ MASON WILLRICH, ELECTRICITY TRANSMISSION POLICY FOR AMERICA: ENABLING A SMART GRID, END-TO-END 5 (MIT Energy Innovation Working Paper Series, Paper No. 09-003, 2009).

³⁷ See N. AM. ELECTRIC RELIABILITY CORP., 2010 LONG-TERM RELIABILITY ASSESSMENT 23 (2010).

³⁸ Ferrey, *supra* note 25, at 459.

³⁹ U.S. DEPT OF ENERGY, SMART GRID SYSTEM REPORT viii (2009).

⁴⁰ For a more detailed discussion, see Steven Ferrey, *Efficiency in theRegulatory Crucible: Navigating 21st Century “Smart” Technology and Power*, J. ENERGY & ENVIRON. L. at 6 (Winter 2012):

New transmission systems, which will both strengthen the grid and support renewable power deployment, could cost \$100 billion. The Joint Coordinated System Plan, a study commissioned by several power pools and ISOs of transmission capacity, predicted that a five percent wind-generation component by 2024 would require roughly 10,000 miles of new extra-high voltage transmission lines constructed at an estimated cost of \$50 billion. A more aggressive twenty percent wind-penetration target would require 15,000 miles of extra-high-voltage transmission lines constructed at a cost of approximately \$80 billion.

Id.

these essential functions has changed fundamentally. Many of these states have taken their regulated utilities out of the business of generating power, in favor of purchasing it wholesale in the states' new deregulated market.⁴¹ This began to change with the enactment of the Public Utility Regulatory Policies Act of 1978.⁴² Beginning in 1998 in Massachusetts, Rhode Island, and then spreading to 13 states, competition and partial deregulation of retail power was adopted.⁴³

In a significant number of these 13 states, this resulted in the regulated monopoly utilities selling their generation units to independent power companies.⁴⁴ Now, independent power companies construct more new power generation each year than the regulated utilities.⁴⁵ And this trend is expected to continue.

III. JURISDICTIONAL AUTHORITY: FEDERAL OR STATE

A. *Federal Jurisdiction over Certain Transactions, Excepting Electric Facility Hardware*

There are significant limits to the exercise of any federal jurisdiction over the actual transmission hardware and facilities for producing or moving electric power. The federal government, through the Federal Energy Regulatory Commission (FERC), has exclusive legal authority over financial wholesale and interstate transactions carried forward on this hardware.⁴⁶ The Federal Power Act sections 205 and 206 empower FERC exclusively to regulate rates for the interstate wholesale sale of power and transmission of electricity.⁴⁷

The Federal Power Act directs FERC to regulate all interstate electricity transmission and to ensure the national electricity grid's reliability.⁴⁸ All transmission tariffs are exclusively within FERC jurisdiction rather than within state jurisdiction.⁴⁹ FERC case law

⁴¹ See STEVEN FERREY, *THE NEW RULES: A GUIDE TO ELECTRIC MARKET REGULATION* 238–39 (2000).

⁴² See 16 U.S.C. § 824a–3(n) (2014).

⁴³ See FERREY, *supra* note 41, at 234, 237.

⁴⁴ See *id.* at 238–39.

⁴⁵ See Richard A. Oppel Jr., *Independent Firms a Growing Factor in Latest Energy Crisis*, N.Y. TIMES, Jan. 23, 2001, http://www.nytimes.com/2001/01/23/business/23UTIL.html?page_wanted=all.

⁴⁶ 16 U.S.C. §§ 824d, 824e.

⁴⁷ See *Public Utility District No. 1 v. FERC*, 471 F.3d 1053, 1058 (9th Cir. 2006).

⁴⁸ 16 U.S.C. §§ 824a(a), 824a–2(b).

⁴⁹ See *Transmission Planning and Cost Allocation by Transmission Owning and Operating*

exerts exclusive jurisdiction over the “transmission of electric energy in interstate commerce” and over “all facilities for such transmission or sale of electric energy.”⁵⁰ Distribution of power is not the transmission of power⁵¹: The former is exclusively regulated by the states, while the latter is exclusively regulated at the federal level by FERC (pursuant to the Federal Power Act and court interpretation).⁵²

The hardware and facilities to produce power are treated differently legally than transactions involving those facilities. There is no federal authority over any siting of power generation,⁵³ except for hydroelectric facilities located on federally navigable waters.⁵⁴ Energy facility siting is jurisdictionally vested in the states plus 4 territories, all operating under their own very divergent laws. And in some of these states,⁵⁵ states cede this authority to localities by asserting no separate state siting authority in addition to variant land-use restrictions.

The U.S. Supreme Court held that Congress meant to draw a “bright line,” easily ascertained and not requiring case-by-case analysis, between state and federal jurisdiction.⁵⁶ When a transaction is subject to exclusive FERC jurisdiction and regulation, state regulation is preempted as a matter of federal law and the Constitution’s Supremacy Clause, according to a long-standing and consistent line of rulings by the U.S. Supreme Court.⁵⁷ However,

Public Utilities, Order No. 1000, 18 C.F.R. Part 35 49842 (2011).

⁵⁰ 16 U.S.C. § 824(b); *e.g.*, Aquila Merch. Servs., Inc., 125 F.E.R.C. 61,175, 17 (2008); Entergy Servs., Inc., 120 F.E.R.C. 61,020, 61,028 (2007); Midwest Indep. Transmission Sys. Operator, Inc., 106 FERC 61,337, 14 & 14 n.17 (2004); S. Cal. Edison Co., 106 F.E.R.C. 61,183, 14, 19 (2004); Virginia Elec. & Power Co., 103 F.E.R.C. 61,109, 6 (2003); Barton Village, Inc. v. Citizens Utility Co., 100 F.E.R.C. 61,244, 12 (2002); Niagara Mohawk Power Corp., 100 F.E.R.C. 61,019, 61,017 (2002); Armstrong Energy Limited Partnership, 99 F.E.R.C. 61,024, 61,104 (2002); Progress Energy, Inc., 97 F.E.R.C. 61,141, 61,628 (2001); Cent. Vt. Pub. Serv. Corp., 84 F.E.R.C. 61,194, 61,973-75 (1998); Conn. Light & Power Co., 70 F.E.R.C. 61,012, 61,030 (1995); N. Ind. Pub. Serv. Co., 66 F.E.R.C. 61,213, 61,488 (1994); Houlton Water Co. v. Me. Pub. Serv. Co., 60 F.E.R.C. 61,141, 61,515 (1992); Fla. Power & Light Co., 40 F.E.R.C. 61,045, 61,120-21 (1987); S. Co. Servs., Inc., 37 F.E.R.C. 61,256, 61,652 (1986); Penn. Power & Light Co., 23 F.E.R.C. 61,006, 61,018, (1983).

⁵¹ See FERREY, *supra* note 4, at 586; FERREY, *supra* note 41, at 23-24, 46.

⁵² FERREY, *supra* note 4, at 586.

⁵³ See *infra* Part III.

⁵⁴ See Jurisdictional Determination, FERC, <https://www.ferc.gov/industries/hydropower/gen-info/comp-admin/jur-deter.asp> (last visited Oct. 13, 2016).

⁵⁵ See *infra* Section IV.A.

⁵⁶ Federal Power Comm’n v. Southern Cal. Edison Co., 376 U.S. 205, 215-16 (1964).

⁵⁷ New England Power Co. v. New Hampshire, 455 U.S. 331, 338-39 (1982). The Supreme Court overturned an order of the New Hampshire Public Utilities Commission that restrained within the state, for the financial advantage of in-state ratepayers, low-cost hydroelectric energy produced within the state. It held this to be an impermissible violation of the

FERC does not regulate the construction of transmission facilities themselves, only economic tariffs for transactions moving power over them.⁵⁸

Barriers to wind farms can come from unexpected locations at the federal level as well.⁵⁹ First, the Federal Aviation Administration (“FAA”) requires that persons constructing structures 200 feet tall or higher submit a “Notice of Proposed Construction or Alteration.”⁶⁰ This federal rule resulted in blocking two proposed wind developments in the town of Yarmouth, Massachusetts.⁶¹

Another federal permitting requirement is an incidental take permit from the United States Fish and Wildlife Service.⁶² An incidental take permit is required when an activity will result in the take of a threatened or endangered species as defined by the

Dormant Commerce Clause of the U.S. Constitution, Article 1, Sec. 8, clause 3 and the Federal Power Act: “Our cases consistently have held that the Commerce Clause of the Constitution Article 1, Sec. 8, clause 3 precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.” *Id.* at 338 (citations omitted). *See also* Entergy La., Inc. v. Louisiana Public Serv. Comm’n, 539 U.S. 39, 47 (2003) (emphasizing that FERC determined utility rates are binding of state authorities (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986)); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988) (“States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair.”); *Nantahala Power & Light Co.*, 476 U.S. at 966 (maintaining that FERC has exclusive authority to determine utility rates); *Montana-Dakota Co. v. Public Serv. Comm’n*, 341 U.S. 246, 251 (1951) (arguing that it is not the prerogative of the Court to determine what is a reasonable rate for utility services as established by Congress).

⁵⁸ *See* Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 18 C.F.R. Part 35, 49891 (requiring nondiscriminatory access by all parties to transmission infrastructure). This pertains only to Commission-jurisdictional tariffs or agreements and does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements. *See id.* at 49885. FERC noted that Order 1000 does not address the prudence of investment decisions nor determine which particular entity should construct any particular transmission facility, but merely to allow more entities to be considered for potential construction responsibility. *Id.* at 49891.

⁵⁹ *See* 14 C.F.R. § 77.13 (2005); *Notification of Proposed Construction or Alteration on Airport Part 77*, FED. AVIATION ADMINISTRATION (2014), http://www.faa.gov/airports_air_traffic/airports/regional_guidance/central/construction/part77/.

⁶⁰ *See* 14 C.F.R. § 77.13; *Notification of Proposed Construction or Alteration on Airport Part 77*, *supra* note 59.

⁶¹ *See* U.S. DEP’T OF THE INTERIOR: OFFICE OF THE INSPECTOR GENERAL, INVESTIGATIVE REPORT—CAPE WIND ASSOCIATES, LLC (Jan. 8, 2010) [hereinafter INVESTIGATIVE REPORT]. The town initiated two different proposals to site wind turbines on a town landfill and on the grounds of a public school. MELISSA ELKINGTON & SALLY WRIGHT, WIND POWER IN YARMOUTH: SITING CONSIDERATIONS FOR WIND TURBINE 3 (U. Mass. Dep’t of Mechanical & Industrial Engineering 2007). The FAA denied both proposals because of the turbines’ distance from the Barnstable Municipal Airport and its resulting potential interference with flight space. INVESTIGATIVE REPORT, *supra*.

⁶² U.S. FISH & WILDLIFE SERVICE, PERMITS FOR NATIVE SPECIES UNDER THE ENDANGERED SPECIES ACT (Mar. 2013), <http://www.fws.gov/endangered/permits/permits.pdf>.

*Endangered Species Act.*⁶³

B. FERC Orders

Pursuant to the Federal Power Act of 1920, the federal government maintains regulatory jurisdiction over electricity transactions in its wholesale form, under the commerce clause, as the energy may potentially cross state lines.⁶⁴ In 1992, Congress enacted the Energy Policy Act (EPAAct), which began the process of deregulation of the energy sector in order to promote competition.⁶⁵ In 1996, FERC promulgated Order 888 mandating open-access transmission of electricity in interstate commerce.⁶⁶ In Order 888, FERC differentiated between the legal purposes of power transmission, whether it was the wholesale or retail sale of electricity determined state or federal jurisdiction,⁶⁷ but if the electricity was sold as retail, then the state regulations applied.⁶⁸

FERC Order 888 required utilities to make their monopoly transmission lines available for use by all parties on a nondiscriminatory basis.⁶⁹ In Order No. 888, the Commission established the foundation for the development of competitive bulk power markets: non-discriminatory open access transmission service by electric utilities.⁷⁰

In Order No. 2000, the Commission encouraged the development of Regional Transmission Organizations to form “competitive wholesale electric markets”⁷¹ that had to incorporate non-discriminatory transmission service.⁷² FERC Order 2003 extended this rule to the separate service of interconnection to the grid on a

⁶³ 16 U.S.C. § 1532(6) (2016). When applying for a permit a developer must submit a “habitat conservation plan” providing for the minimizing and mitigating of the impact of any incidental taking. U.S. FISH AND WILDLIFE SERVICE, *supra* note 62.

⁶⁴ See FERREY, *supra* note 41, at 23.

⁶⁵ See Background on Electricity Policy, SENATE ENERGY, UTILS. & COMMC'NS COMM., <http://seuc.senate.ca.gov/backgroundonelectricitypolicy> (last visited Oct. 15, 2016).

⁶⁶ See *History of FERC*, FERC, <https://www.ferc.gov/students/ferc/history.asp> (last visited Oct. 15, 2016).

⁶⁷ FERREY, *supra* note 4, at 587.

⁶⁸ *Id.*

⁶⁹ See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Standard Costs by Public Utilities and Transmitting Utilities, 75 F.E.R.C. 61,080, 61,238 (Apr. 24, 1996).

⁷⁰ See *id.*

⁷¹ Me. Pub. Utils. Comm'n v. FERC, 454 F.3d 278, 281 (D.C. Cir. 2006); Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 810, 819 (Dec. 20, 1999) (codified at 18 C.F.R. pt. 35).

⁷² See 18 C.F.R. § 35.34(k)(7) (2016).

similar nondiscriminatory basis. The federal courts determined that Rule 2003 forbids transmission owners from discriminating in their exercise of eminent domain power to the detriment of IPPs or to the advantage of their affiliates.⁷³ In Order No. 890, the Commission amended the Order No. 888 pro forma tariff to require transmission providers to plan for the needs of their customers on a comparable basis to planning for their own needs.⁷⁴

However, “[n]ew intermittent wind and solar renewable resources cannot reliably supply base load power, as they demonstrate a relatively low availability factor in the 10-40% range of hours during a week or month.”⁷⁵ Under FERC Order 888, generators who needed access to transmission additions had to pre-fund those additions subject to reimbursement by those transmission customers who later used the new facilities, which were typically utilities, pursuant to Open Access Transmission Tariffs filed by transmission providers.⁷⁶ Generators had to pay the peak level of transmission required to carry the generator’s load. Wind generators had difficulty meeting hourly schedules because of significant variations in generation output within an hour time period, which resulted from wind velocity changes.⁷⁷

In its Order 764, the FERC required that every transmission customer be given the ability to adjust its schedule at 15-minute intervals to reflect changing conditions.⁷⁸ FERC Order 764 requires that interconnecting DG generators pay for any incremental generation required, subject to reimbursement for generators who later interconnect to the increased transmission capacity. This promotes competition by supporting intermittent independent wind and solar technologies. Techniques that would integrate large

⁷³ Nat’l Assoc. of Regulatory Util. Comm’rs v. FERC, 475 F.3d 1277, 1279, 1283 (D.C. Cir. 2007).

⁷⁴ See N.Y. Reg’l Interconnect, Inc. v. FERC, 634 F.3d 581, 584 (D.C. Cir. 2011); Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. 12266, 12,435 (Mar. 15, 2007) (codified at 18 C.F.R. pts. 35, 36).

⁷⁵ Steven Ferrey, *Ring-Fencing the Power Envelope of History’s Second Most Important Invention of All Time*, 40 WM & MARY ENVTL. L. & POL’Y REV. 1, 48 (2015).

⁷⁶ See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888-A, 78 FERC 61,220, *1–2, *15 (Mar. 4, 1997).

⁷⁷ Michael Dotten, *New Developments Integrating Wind and Solar Power into the Power Grid*, MARTEN LAW (Apr. 14, 2014), <http://www.martenlaw.com/newsletter/20140415-integrating-wind-solar-power-grid> (“[W]ind generators’ plant factors on [the Bonneville Power Administration] system averaged 27.1%, but the generator, under the old standards, had to pay the peak level of transmission required to carry the generator’s load.”).

⁷⁸ See 18 C.F.R. Part 35 Integration of Variable Energy Resources, 139 FERC 61,246, *116 (June 22, 2012).

amounts of variable generation into the power system⁷⁹ include faster generator dispatch and scheduling,⁸⁰ and larger load balancing areas.⁸¹ Most transmission providers with significant amounts of wind energy on their systems conduct a centralized wind energy forecast. MISO, PJM, ERCOT, NYISO, and CAISO have implemented centralized wind energy forecasting, as has Southern California Edison.⁸²

The federal government has attempted to exert more jurisdiction over the siting of the necessary transmission hardware that traditionally is within state and local authority. Section 216 of the Energy Policy Act of 2005 directs the United States Department of Energy to study transmission congestion in consultation with the states and designate certain transmission-constrained areas as national interest electric transmission corridors (NIETCs).⁸³ Section 216 grants FERC the authority to issue permits to construct transmission facilities in these NIETCs under certain circumstances.⁸⁴

The federal push for NIETCs under the Energy Policy Act of 2005 confronted:

[M]ultiple states for failure to adequately assess GHG impacts involving NEPA, and Endangered Species Act

⁷⁹ See M. Milligan & B. Kirby, *Impact of Balancing Areas Size, Obligation Sharing, and Ramping Capability on Wind Integration* 38–39 (Nat'l Renewable Energy Lab., Conference Paper No. NREL/CP-500-41809, June 2007), <http://www.nrel.gov/docs/fy07osti/41809.pdf>.

⁸⁰ See ENERNEX CORP., FINAL REPORT AVISTA CORPORATION WIND INTEGRATION STUDY vii, x (Mar. 2007), <http://www.uwig.org/avistawindintegrationstudy.pdf> (finding that sub-hourly scheduling would greatly reduce variable energy resources (VER) integration costs and faster (sub-hourly) power system dispatch and scheduling would allow system operators to more quickly and efficiently respond to power system output variations). The study similarly found that wind integration costs would be reduced by 40-60% by moving from hourly to sub-hourly dispatch intervals. See *id.* at 47.

⁸¹ See Udi Helman, Remarks at FERC Technical Conference in Integrating Renewable Resources Into The Wholesale Electric Grid (Mar. 2, 2009), <http://www.ferc.gov/CalendarFiles/20090302091501-Helman,%20CAISO.pdf>; Praveen Kathphal, Prepared comments at FERC Technical Conference in Integrating Renewable Resources Into The Wholesale Electric Grid (Mar. 2, 2009) (arguing for greater cooperation or even consolidation among the roughly 125 existing balancing areas, as variable energy integration costs are greatly reduced if wind resources are geographically diverse as opposed to being concentrated in a small area and developing regional load following and ancillary services markets would also alleviate an individual balancing area's burden to provide all ancillary services from its own resources).

⁸² Audun Botterud et al., *Wind Power Forecasting in U.S. Electricity Markets*, 23 ELEC. J. 71, 73, 74 tbl.1 (2010).

⁸³ See 16 U.S.C. § 824p (2014).

⁸⁴ See *id.* In 2006, FERC issued Order No. 689 that created a cumbersome, multi-year process for obtaining a federal permit to construct transmission within a NIETC. See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,440 (Dec. 1, 2006) (codified at 18 C.F.R. pts. 50, 380).

challenges regarding failure to assess greenhouse gas (GHG) impacts. A federal appellate court blocked FERC from acting to “backstop” and grant a federal permit under Section 216 for a new transmission line, when the state had failed for twelve months to act on the permit. As long as the state took some action, including a denial of the permit, FERC’s Section 216 authority to intercede was not triggered. In 2011, the Ninth Circuit ruled that the U.S. Department of Energy (DOE) failed to properly consult with affected states in preparing the Congestion Study required by Section 216, and further ruled that the DOE failed to consider the environmental effects of designating NIETCs under the National Environmental Policy Act for corridors in mid-Atlantic and Southwestern states.⁸⁵

These opinions effectively eliminated any contingent FERC authority over traditional state decisions to site electric transmission lines.

FERC recently turned a corner and attempted to regulate *who* is permitted to build new transmission capacity on an equal plane with incumbent utility transmission providers, although FERC still does not regulate the transmission hardware itself. FERC approves all Regional Transmission Organization (RTO) and Independent System Operator (ISO) terms of service and their financial tariffs.⁸⁶

FERC Order 1000 introduced competitive bidding into the construction process for transmission facilities.⁸⁷ FERC found that Order 1000 reforms were required to reflect new industry developments and “to address remaining deficiencies in transmission planning and cost allocation processes so that the transmission grid can better support wholesale power markets”⁸⁸ The North American electric reliability corporation concluded that an additional 39,000 circuit miles of new transmission capacity

⁸⁵ Steven Ferrey, *Pentagon Preemption: The 5-sided Loss of State Energy and Power*, 2014 J. L., TECH. & POL’Y 393, 423 n.251 (citations omitted); see *Cal. Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1089–90, 1106 (9th Cir. 2011).

⁸⁶ See FERREY, *supra* note 41, at 48, 49–50.

⁸⁷ Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842, 49,899 (Aug. 11, 2011) (codified under 18 C.F.R. 35). See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 32,184, 32,200 (May 17, 2012) (codified under 18 C.F.R. 35); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 64,890, 64,898 (Oct. 18, 2012) (codified under 18 C.F.R. 35).

⁸⁸ Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. at 49,849.

would need to be constructed during the next ten years to maintain long-term reliability of the grid and to integrate intermittent additional renewable power generation.⁸⁹

FERC Order No. 1000 creates obligations for transmission owners to engage in regional and interregional transmission planning.⁹⁰ FERC Order 1000 also requires incumbent transmission providers, utilities, and the RTOs which manage regional multi-state transmission access to the grid, to remove rights-of-first-refusal (ROFRs) from FERC-approved transmission tariffs.⁹¹ It addresses the difference between an obligation to build in one's transmission zone and a federal ROFR: "[W]e do not believe that [the] obligation [to build] is necessarily dependent on the incumbent transmission provider having a corresponding federal right of first refusal to prevent other entities from constructing and owning new transmission facilities located in that region."⁹² Failure of RTOs and ISOs to consider and evaluate independent non-incumbent transmission projects could violate the FERC Order 890 planning principle of "openness" in transmission planning.

As long as they did not contain ROFRs, Order 1000 does not require removal from Commission-jurisdictional tariffs or agreements references to 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.⁹³ On the ground, despite many competitors making proposals, the state rather than FERC, retains the ultimate decision to permit a specific application for transmission facility construction. Under such direct and indirect state control: "Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."⁹⁴

The District of Columbia Circuit Court of Appeals unanimously

⁸⁹ N. AM. ELECTRIC RELIABILITY CORP., *supra* note 37, at 23.

⁹⁰ Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. at 49,844–45.

⁹¹ *See id.* at 49,846. For an excellent treatment of this, see Rishi Garg, *What's Best for the States: A Federally Imposed Competitive Solicitation Model or a Preference for the Incumbent?*, NAT'L REGULATORY RES. INST. iv (Briefing Paper No. 13–04, Apr. 2013).

⁹² Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. at 49,887.

⁹³ *See id.* at 49,885 n.231; Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. at 32,244.

⁹⁴ Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. at 49,885 n.231.

rejected challenges to FERC's Order 1000, finding the allegations that Order 1000 would harm system reliability were "unpersuasive."⁹⁵ The court held that FERC had sufficient authority under the Federal Power Act to require removal of federal ROFR provisions from federally mandated transmission tariffs "upon determining they were unjust and unreasonable practices affecting rates."⁹⁶ A federal circuit court struck the FERC order that would require all RTO members to equally share in the cost of building any large transmission lines, whether or not they benefited from the investment.⁹⁷ The court held that local utilities should not have to pay for transmission lines to transport power outside the region which would widely socialize costs to all ratepayers, not just to those that benefited.⁹⁸

The federal circuit court of appeals, in a unanimous opinion written by Judge Richard Posner, upheld FERC approval of independent electric power system operator allocation of the terms and costs of transmission of renewable energy to all consumers in the ISO.⁹⁹ Judge Posner and the circuit court cited a law review article by Professor Ferrey as authority for the federal and state legal and constitutional requirements determining electric power regulation of renewable energy policy,¹⁰⁰ and noted that states cannot discriminate against out-of-state renewable energy. The Seventh Circuit declared unconstitutional state unequal treatment of in-state low-carbon renewable generation compared to out-of-state renewable energy, as a violation of the Commerce Clause: "[It] trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy."¹⁰¹

⁹⁵ S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 48 (D.C. Cir. 2014).

⁹⁶ *Id.* at 48–49.

⁹⁷ *See* Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 474, 478 (7th Cir. 2009).

⁹⁸ *See id.* at 477.

⁹⁹ *See* Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 777, 781 (7th Cir. 2013).

¹⁰⁰ *See id.* at 776.

¹⁰¹ *Id.* (citing *Or. Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 100–01 (1994); *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 (1992); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595–96 (7th Cir. 1995)). Michigan actually initiated the issue of in-state electric power discrimination in its RPS program as a demonstration that out-of-state powered transmitted to it was not recognized as of the same value as in-state electricity, therefore Michigan should not pay a share of power line tariffs transmitting power from out of state that did not have equal recognition and benefit. Instead of supporting its position, this assertion caused Judge Posner to respond to this assertion, even though it was not the tariff issue before the Court.

C. Federal Control of Wind Projects in Offshore Waters

The federal government, the adjacent states and other nations all share jurisdiction over ocean waters to varying degrees. Federal authority over the coastline extends 200 nautical miles out to sea. The first 12 nautical miles are considered U.S. territorial seas.¹⁰² The 1982 United Nations Convention on the Law of the Sea (UNCLOS) gives a coastal nation sovereignty over the air space, water, seabed, and subsoil within its territorial seas.¹⁰³ The next 24 miles after the territorial seas is the United States contiguous zone.¹⁰⁴ The United States Exclusive Economic Zone extends 200 nautical miles from the shore baseline.¹⁰⁵ According to UNCLOS III, a later embellishment of UNCLOS, the United States can exercise sovereign rights to explore, exploit, conserve and manage this zone for natural resources of the sea-bed, subsoil, and the super adjacent waters.

Prior to 2005, the Army Corps of Engineers had jurisdiction over the federal permitting process for offshore wind turbines under the Rivers and Harbors Act of 1899.¹⁰⁶ The Energy Policy Act of 2005 transferred this permitting authority to the Minerals Management Service (MMS) within the Department of the Interior.¹⁰⁷ The Minerals Management Service already exercised jurisdiction over the permitting and leasing for offshore oil drilling, and this expanded it to “environmentally responsible renewable energy development activities” including wind.¹⁰⁸ The MMS is the lead federal agency in the review of the environmental impact of these offshore developments, including coordinating federal, state and local agencies, leases and grants of permits, overseeing plans including site assessment, construction and operations, plan approval and environmental and safety monitoring and inspections.

¹⁰² Proclamation 5928 of December 27, 1988, 54 Fed. Reg. 777, 777 (Jan. 9, 1989).

¹⁰³ United Nations Convention on the Law of the Sea, at 1272, U.N. Doc. A/CONF.62/122 (Dec. 10, 1982).

¹⁰⁴ Proclamation 7219 of August 2, 1999, 64 Fed. Reg. 48,701, 48,701 (Sept. 8, 1999).

¹⁰⁵ Proclamation 5030 of March 10, 1983, 48 Fed. Reg. 10,605, 10,605 (Mar. 14, 1983).

¹⁰⁶ 33 U.S.C. § 407 (2016).

¹⁰⁷ The Outer Continental Shelf Lands Act of 1953 as Amended August 8, 2005. 43 U.S.C. § 1331–1356. Under the Energy Policy Act, the Minerals Management Service was authorized to establish a program to grant “leases, easements, and rights-of-way for energy and related purposes” on the Outer Continental Shelf. 43 U.S.C. § 1337(p).

¹⁰⁸ See *About BOEM*, BUREAU OF OCEAN ENERGY MANAGEMENT, <http://www.boem.gov/About-BOEM/> (last visited Oct. 19, 2016); *The Reorganization of the Former MMS*, BUREAU OF OCEAN ENERGY MANAGEMENT, <http://www.boem.gov/Reorganization/> (last visited Oct. 19, 2016).

Although the MMS coordinates the EIS process, the United States Army Corps of Engineers is still required to approve numerous aspects of an offshore wind generation project. Section 10 of the Rivers and Harbors Act of 1899 prohibits the unauthorized obstruction or alteration of any navigable water of the United States.¹⁰⁹ Approval from the United States Army Corps of Engineers is needed in federal waters where a project would alter the navigable waters.¹¹⁰ Section 404 of the federal Clean Water Act prohibits the discharge of dredge or fill materials into waters of the United States without a permit from the United States Army Corps of Engineers.¹¹¹

The United States Coast Guard exercises regulatory jurisdiction over developments located in the navigable waters of the United States.¹¹² The United States Coast Guard does not approve a development, but makes a recommendation to the MMS regarding the effect of the project on the navigation of the surrounding waters.¹¹³ This will be monitored in the Coastal Zone Management Act Federal Consistency Review.¹¹⁴ Additional federal acts which must be followed when applying for a federal permit in navigable waters include the Endangered Species Act, the Marine Mammal Protection Act, the Magnuson-Stevens Fishery Conservation and Management Act, the Migratory Bird Treaty Act and Migratory Bird Executive Order 13186.¹¹⁵

A state has coincident jurisdiction over the waters extending three miles from its coastline under the Submerged Lands Act of 1953.¹¹⁶ This gives states the authority to manage ocean energy resources and structures located in these three-mile coastal zones.¹¹⁷ The federal government still retains coincident jurisdiction over rights to navigation, commerce or foreign affairs in state waters.¹¹⁸ The Coastal Zone Management Act requires that it be the national policy “to preserve, protect, and develop and where possible to restore or enhance, the resources of the nation’s coastal

¹⁰⁹ 33 U.S.C. § 401.

¹¹⁰ *See id.* § 403.

¹¹¹ *Id.* § 1344(a).

¹¹² 33 C.F.R. pt. 66.0, § 66.01–5 (2016).

¹¹³ *See* U.S. DEP’T OF HOMELAND SECURITY, NAVIGATION AND VESSEL INSPECTION CIRCULAR NO. 02-07, at 2 (Mar. 9, 2007).

¹¹⁴ *See* ENVTL. LAW INST., MARINE SPATIAL PLANNING IN U.S. WATERS 9–10 (Dec. 2009).

¹¹⁵ *See* NAT’L OCEAN COUNCIL, LEGAL AUTHORITIES RELATING TO THE IMPLEMENTATION OF COASTAL AND MARINE SPATIAL PLANNING 10, 14, 17 (2011).

¹¹⁶ 43 U.S.C. § 1312 (2016).

¹¹⁷ *Id.* § 1311(a)(2).

¹¹⁸ *Id.* § 1311(d).

zone.”¹¹⁹ States administer coastal zone management plans pursuant to federal law, which requires that activities within state coastal zones be consistent with those plans.

IV. STATE CONTRASTED WITH LOCAL SITING AUTHORITY

A. *Traditional Municipal Zoning Power*

Electric generation siting and power distribution is a traditional land-use responsibility of local government.¹²⁰ Municipalities are creatures of state government.¹²¹ It is well-settled that zoning for land use is among the “police powers” that municipalities retain under local authority, unless explicitly excepted by state statute.¹²² States still exercise critical decisions on new transmission infrastructure within their borders.¹²³ States still control, under state authority and municipal land-use law, whether non-utilities have right to eminent domain power for transmission facilities, which can be essential for siting.¹²⁴ State supreme courts have held that no transmission lines could be certified nor any eminent domain for construction exercised unless the primary beneficiaries of the line were in-state ratepayers.¹²⁵

In Massachusetts, where the state’s zoning provisions do not explicitly supersede local by-laws, cities and towns remain free to establish their own zoning in a way that designates land uses throughout the town in the way that local governments determine will create the most favorable blend of living conditions, commercial climate and industrial opportunity.¹²⁶

¹¹⁹ 16 U.S.C. § 1452 (2016).

¹²⁰ See ENVTL. LAW INST., STATE ENABLING LEGISLATION FOR COMMERCIAL-SCALE WIND POWER SITING AND THE LOCAL GOVERNMENT ROLE 13 (2011).

¹²¹ See *State & Local Government*, WHITE HOUSE, <https://www.whitehouse.gov/1600/state-and-local-government> (last visited Oct. 21, 2016).

¹²² See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

¹²³ See Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927, 981 (2015).

¹²⁴ See Abigail M. Jones, *Wind Energy Development and Eminent Domain in Wyoming: Who Has the “Power”?* 2 (2011), <http://buddfalen.com/wp-content/uploads/2013/10/Article-Wind-Energy-Development-and-Eminent-Domain-in-Wyoming.pdf>.

¹²⁵ See, e.g., *Miss. Power & Light Co. v. Conerly*, 460 So.2d 107, 112–13 (Miss. 1984). Courts in the same state a few years earlier had held that PURPA amendments to the Federal Power Act were an unconstitutional exercise of the Commerce Clause and a violation of the Act. See *FERC v. Mississippi*, 456 U.S. 742 (1982).

¹²⁶ Massachusetts is a “home rule” state. See Teresa Rohwedder, *Regulation of Zoning Nonconformities in Massachusetts: The “Difficult and Infelicitous” Language of Section 6, Chapter 40A, Massachusetts Zoning Act*, 28 NEW ENG. L. REV. 1123, 1123 n.2 (1994). There is not a default presumption against state preemption in the absence of explicit

Regulation at the state level varies greatly from state to state. Currently only three states, California, Nevada, and Wisconsin, have legislation that always preempt local ordinances to promote small wind power development and streamline the regulatory process.¹²⁷ Many states have addressed wind power by enacting net metering statutes, tax incentives and grants for project development.¹²⁸ Other states, like Washington have streamlined procedures by creating state level organizations to evaluate proposed energy sites with the authority to preempt local ordinances.¹²⁹

Over 25,000 municipalities in the U.S. have zoning jurisdiction. Within the vast majority of jurisdictions there are no specific rules governing wind-generating facilities. Consequently, challenges to wind development are rooted in archaic rules and governing structures dating back to the 1926 Department of Commerce model enabling act “A Standard Zoning Enabling Act.”¹³⁰

Strict height restrictions appear to represent the greatest barrier that a town can erect to prevent wind energy projects.¹³¹ The American Wind Energy Association’s model zoning ordinance makes this clear as it provides for no height limitations on wind turbines that are located on property greater than one acre.¹³² It only restricts turbines to eighty feet tall on properties between one-half and one acre.¹³³ The model zoning ordinance is aimed at towns wishing to promote small-scale turbines.¹³⁴ It allows “small wind energy systems,” defined as one turbine with not more than 100 kilowatts generating capacity, in all zoning districts where

statutory language as there would be under the common law tradition of “Dillon’s Rule.” Town zoning in the Commonwealth is limited in many ways by state law, mostly embodied in Mass. Ann. Laws ch. 40A and its corollaries. *See id.* at 1123.

¹²⁷ *See* Erik Lange, *Local Control of Emerging Energy Sources: A Due Process Challenge to Disparate Treatment by States*, 64 CASE W. RES. L. REV. 619, 653 (2013); ENVTL. LAW INST., *supra* note 120, at 22.

¹²⁸ *See* Steven Ferrey, *Virtual “Nets” and Law: Power Navigates the Supremacy Clause*, 24 GEO. INT’L ENVTL. L. REV. 267, 270, 308 (2012) (discussing state net metering practices); Steven Ferrey, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OIL, GAS & ENERGY L. 59, 60 (2012) (discussing state renewable portfolio standards).

¹²⁹ *See* ENVTL. LAW INST., *supra* note 120, at 16, 25.

¹³⁰ *See* J. GREEN & M. SAGRILLO, ZONING FOR DISTRIBUTED WIND POWER—BREAKING DOWN BARRIERS 2 (2015).

¹³¹ *See, e.g.*, TOWN OF TRURO ZONING BYLAW SIGN CODE § 40.4(B)(3.1) (2014), http://www.truro-ma.gov/sites/truroma/files/file/file/trurozoningby-lawssign_code-2009_0.pdf.

¹³² *See* AWEA MODEL ZONING ORDINANCE: PERMITTED USE REGULATION FOR SMALL WIND TURBINES (2002), <http://www.awea.org/smallwind/documents/modelzo.html>.

¹³³ *Id.*

¹³⁴ *See id.*

“structures of any sort are allowed.”¹³⁵

Local zoning regulations also present a barrier to wind energy development when they do not specifically address wind turbines. Failure to specifically address the issue may deter potential commercial developers because of the unclear state of the law. It can also dissuade individuals who are interested in building a residential-scale turbine because of the uncertainty about the expense and time entailed in the permitting process and possible resulting court battles.¹³⁶ For example, a Dover, Massachusetts resident applied and was issued a building permit for a wind turbine on his farm in 2001.¹³⁷ The town revoked his permit in response to complaints from neighbors.¹³⁸ The resident was ultimately re-issued the permit, but only after thirteen months and \$13,000 in legal fees.¹³⁹ While Truro’s zoning law mentioned above includes detailed and stringent requirements in order to obtain a turbine building permit, it does set out a step-by-process for permit approval.¹⁴⁰ The Truro law, therefore, at least ensures that a person seeking to build a turbine will know exactly what he is getting into and how much expense and time it will take before he starts out.¹⁴¹

Additionally, local zoning laws that do not specifically address wind turbines often contain low height restrictions that were enacted many years ago.¹⁴² “[L]ow height restrictions . . . often stemmed from the fact that fire trucks were unable to pump water higher than the specified height . . . at the time the zoning by-law was written.”¹⁴³ Persons seeking to construct a wind turbine in a town with this type of zoning restriction will have to seek a variance for the municipal zoning board.¹⁴⁴ This procedure requires time, investment, and an uncertainty of outcome that can deter interested persons from starting the process.

In a Wisconsin Court of Appeals decision, local citizens challenged a county adjustment board’s grant of a conditional permit and

¹³⁵ *Id.*

¹³⁶ *See* GREEN & SAGRILLO, *supra* note 130, at 1.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See* TOWN OF TRURO ZONING BYLAW SIGN CODE § 40.4 (2014).

¹⁴¹ *See id.*

¹⁴² *See* Mick Sgrillo, *Small Turbine Column: Residential Wind Turbine Tower Height and Zoning Hearings*, WINDLETTER, Jan. 2004, at 1.

¹⁴³ Steven Ferrey, *Converting Brownfield Environmental Negatives into Energy Positives*, 34 B.C. ENVTL. AFF. L. REV. 417, 443 (2007).

¹⁴⁴ *Id.*

variance for a wind project.¹⁴⁵ The court also noted that the record of the proceedings demonstrated the board appropriately addressed concerns about noise, ice-throws, and shadow-flicker effect.¹⁴⁶ Affirming the board's decision, the court noted that the board was acting in accordance with the Wisconsin statute for the promotion of renewable energy.¹⁴⁷

B. Can State Agencies Preempt Local Resistance or Challenges to Wind Development?

To address this question, this article looks first in detail at a particular state, and later in Section V, merges to a larger multi-state context.¹⁴⁸ Massachusetts is regarded as one of the most advanced state facility siting states.¹⁴⁹ Massachusetts' permitting process under the Energy Facility Siting Board is considered one of the most efficient models,¹⁵⁰ notwithstanding that its Cape Wind project has not yet succeeded to be constructed. Massachusetts ranks thirty-first in the nation in terms of wind energy production, with 107 MW of wind energy production from forty-four wind projects and eighty-three wind turbines.¹⁵¹ What also makes Massachusetts the example for our detailed inquiry, is beginning in 1998 in Massachusetts, and then spreading to thirteen states, competition and partial deregulation of retail power was adopted by Massachusetts.¹⁵²

The Massachusetts Constitution via the 1966 "Home Rule Amendment" delegates a broad range of powers to municipalities in order to adopt local laws for the protection of public health, safety,

¹⁴⁵ *Roberts v. Manitowoc Cty. Bd. of Adjustment*, 2006 WI App 169, ¶ 1, 295 Wisc. 2d 522, 721 N.W.2d 499. Local citizens argued the board failed to consider setbacks and safety considerations and the board's decision was arbitrary and capricious. *Id.* ¶¶ 5, 12. The board's decision to grant the permit was rooted local Manitowoc County, Wisconsin Code section 24.09(2) (2005) and Wisconsin Statute section 985.07 (2003-04). *Id.* ¶ 2. Plaintiffs argued that the board violated setback rules and failed to consider relevant safety concerns regarding ice throws, noise nuisance, and light-flicker nuisance. *Id.* ¶ 29.

¹⁴⁶ *Id.*

¹⁴⁷ WIS. STAT. § 66.0401(1m) (2015); *Roberts*, ¶¶ 17, 36.

¹⁴⁸ *See infra* Part V.

¹⁴⁹ *See* Kenneth Kimmell & Dawn Stolfi Stalenhoef, *The Cape Wind Offshore Wind Energy Project: A Case Study of the Difficult Transition to Renewable Energy*, 5 GOLDEN GATE U. ENTL. L.J. 197, 212 (2011).

¹⁵⁰ *See id.*

¹⁵¹ *Massachusetts Wind Energy*, AM. WIND ENERGY ASS'N, <http://www.awea.org/resources/statefactsheets.aspx?itemnumber=890> (last visited Apr. 7, 2016).

¹⁵² *See* FERREY, *supra* note 41, at 237–39 (2000); *see supra* fig. 1.

and welfare.¹⁵³ While the Supreme Judicial Court has interpreted this provision to apply to local zoning laws, the grant of power to municipalities is not absolute.¹⁵⁴ The “Home Rule Amendment” provides that the state legislature “shall have the power to act in relation to cities and towns” as long as the statute will apply to at least two towns or more.¹⁵⁵ The Court has interpreted this to mean that “[t]he Legislature’s zoning power may be used ‘where the interests of the public require such action and where the means employed are reasonably necessary for the accomplishment of the purpose.’”¹⁵⁶

Local zoning laws do not commonly account for wind siting.¹⁵⁷ In recognition of the fact that a major barrier to developing wind projects is local zoning laws, the Massachusetts Executive Office of Environmental Affairs and the Division of Energy Resources published a model zoning ordinance that, if adopted by local communities, would allow wind facilities to be sited by special permit.¹⁵⁸ Allowing wind turbines by special permit enables communities to continue to make case-by-case determinations about projects, but the rules of the game are clearer for all involved.

Massachusetts towns that have enacted or are considering restrictive zoning laws appear particularly concerned about preventing larger, commercial-scale wind energy projects.¹⁵⁹ A number of municipalities in Massachusetts have enacted zoning laws which set low height restrictions on wind turbines and require a complex permitting process thus suggesting that their purpose is to restrict future wind turbine construction.¹⁶⁰

For example, the Town of Hancock which is located near the Massachusetts-New York border, rejected a proposal in town

¹⁵³ MASS. CONST. art. II, § 6; *Bd. of Appeals v. Hous. Appeals Comm. in Dep’t of Cmty. Affairs*, 294 N.E.2d 393, 409 (Mass. 1973).

¹⁵⁴ *See id.*

¹⁵⁵ MASS. CONST. art. II, § 8.

¹⁵⁶ *Bd. of Appeals*, 294 N.E.2d at 424 (quoting *Simon v. Needham*, 42 N.E.2d 516, 517 (Mass. 1942)).

¹⁵⁷ MASS. DIV. OF ENERGY RES. & MASS. EXEC. OFFICE OF ENVTL. AFFAIRS, COMPANION DOCUMENT TO MODEL AMENDMENT TO A ZONING ORDINANCE OR BY-LAW: ALLOWING WIND FACILITIES BY SPECIAL PERMIT 1, http://www.mass.gov/envir/smart_growth_toolkit/bylaws/wind-by-permit-companion.pdf (last visited Apr. 8, 2016).

¹⁵⁸ MODEL AMENDMENT TO A ZONING ORDINANCE OR BY-LAW: ALLOWING CONDITIONAL USE OF WIND ENERGY FACILITIES § 3.2 (MASS. DIV. OF ENERGY RES. & MASS. EXEC. OFFICE OF ENVTL. AFFAIRS, June 2011), <http://www.mass.gov/eea/docs/doer/gca/wind-not-by-right-by-law-june13-2011.pdf>.

¹⁵⁹ *See, e.g.*, TOWN OF TRURO ZONING BYLAW SIGN CODE § 40.4(A) (2014).

¹⁶⁰ *See, e.g.*, TOWN OF ORLEANS, MASS., ZONING BYLAW § 164-35.1(D)(3) (2016); TOWN OF TRURO ZONING BYLAW SIGN CODE § 40.4(B)(3.1).

meeting to set a height limit of 120 feet on all towers designed for the commercial generation of electricity.¹⁶¹ The zoning laws in Truro require that all persons seeking to construct a wind turbine or wind monitoring tower obtain a special building permit.¹⁶² The special permit will only be issued if the project meets detailed design, environmental, and safety standards.¹⁶³ Standards for design include limitations on color, completion of a visual impact study, and enclosures for accessory equipment.¹⁶⁴ The town sets a 100 foot high limitation on turbines and a setback requirement of turbine height plus six feet.¹⁶⁵ As a wind turbine's generating capacity increases as it get taller because of access to stronger winds, the Truro zoning law indicates that the town wishes to prohibit all but the smallest, residential-scale turbines.¹⁶⁶

The Town of Orleans, Massachusetts, zoning law also aims at inhibiting development of larger, commercial-scale wind energy projects.¹⁶⁷ The zoning law categorizes commercial and non-commercial wind turbine developments separately.¹⁶⁸ Commercial projects are defined as "those facilities which have less than fifty percent (50%) of their electrical output used on site."¹⁶⁹ The law sets out detailed requirements for approval of all projects, but allows the zoning board to exempt non-commercial wind projects from any or all of the requirements.¹⁷⁰

1. Preemption of Local Wind Siting Authority

The state, through its legislative power, may create agencies and other entities and give them the power to override municipalities' zoning laws.¹⁷¹ Both the state Department of Public Utilities, and

¹⁶¹ Christopher Marcisz, *Turbine/Tower Plan Rejected in Hancock*, BERKSHIRE EAGLE (May 2, 2006), http://www.berkshireeagle.com/headlines/ci_3774828. Some town meeting members told news reporters that they rejected the proposed restriction because it would be irresponsible to attempt to hinder green energy production in light of current rising fuel costs. *Id.*

¹⁶² TOWN OF TRURO ZONING BYLAW SIGN CODE § 40.4(B)(1.2).

¹⁶³ *Id.* § 40.4(C)(1).

¹⁶⁴ *Id.* § 40.4(C)(2).

¹⁶⁵ *Id.* § 40.4(B)(3.1).

¹⁶⁶ *See id.*; Sagrillo, *supra* note 142, at 1.

¹⁶⁷ *See* TOWN OF ORLEANS, MASS., ZONING BYLAW § 164-35.1(C) (2004).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 164-35.1(D)(10).

¹⁷¹ *See* David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 39 (2001) ("The courts have shown some willingness to enforce the California Environmental Quality Act

the separate Energy Facilities Siting Board, in Massachusetts have separate statutory authority to preempt local land-use and zoning decisions.¹⁷² In Massachusetts, both the EFSB siting process for major generating facilities and the 40A § 3 exemption are justified, in their enabling legislation, by the critical public need for the facilities in question.¹⁷³

a. The Energy Regulatory Agency

Every state which has investor-owned public utilities to regulate (all states except Nebraska), regulates them through its public utilities commission (PUC).¹⁷⁴ PUCs are designed to protect rate-payers by regulating monopoly investor-owned utilities, to control costs and ensure the reliability of electricity service.¹⁷⁵ PUCs exercise different authority under disparate state law in different states.¹⁷⁶

In Massachusetts, the Department of Public Utilities (DPU) draws its authority from M.G.L. Chapter 40A, §§ 3, 10 which grants the DPU an exemption from local zoning laws if it determines it is “necessary for the convenience or welfare of the public” after a public hearing about which all interested parties have been notified.¹⁷⁷ Public utilities can petition directly to the DPU for zoning exemptions without having to first apply through local

requirement that municipalities produce an environmental impact report evaluating the effects of growth in water demand, including the impacts on an area from which water would be exported.”).

¹⁷² MASS. ANN. LAWS ch. 40A, § 3 (2016); Memorandum from Andrew Greene, Dir., Mass. Energy Facilities Siting Bd., to Kenneth Kimmel, Comm’r, Mass. Dep’t of Env’tl. Prot., et al. (Aug. 16, 2013), <http://www.env.state.ma.us/dpu/docs/siting/efsb13-1/81613efsbmem.pdf>.

¹⁷³ MASS. ANN. LAWS ch. 40A, § 3.

¹⁷⁴ Nebraska has no private utilities, and is the only state without a PUC. Different states have different names for this agency in their states.

¹⁷⁵ See Jonas J. Monast & Sarah K. Adair, *A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protection Goals*, 38 COLUM. J. ENVTL. L. 1, 10–11 (2013) (tracing history of Public Utilities Commissions).

¹⁷⁶ See *id.* at 12–14.

¹⁷⁷ MASS. ANN. LAWS ch. 40A, § 3 (“Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if . . . the department of public utilities shall, after notice . . . and public hearing . . . determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public.”). See also MASS. ANN. LAWS ch. 40A, § 10 (“The permit granting authority shall have the power after public hearing for which notice has been given by publication and posting as provided in section eleven and by mailing to all parties in interest to grant upon appeal or upon petition with respect to particular land or structures a variance from the terms of the applicable zoning ordinance or by-law . . .”).

municipalities.¹⁷⁸ When the DPU is deciding whether to grant an exemption, it is not required to determine if an alternative site for a project or transmission line would be best, but whether the chosen site is reasonably necessary for the convenience or welfare of the public.¹⁷⁹ Case law traces the DPU's adoption of its three-pronged 40A section 3 test:¹⁸⁰

The petitioner must establish that they are a "public service corporation" as contemplated by the statute.¹⁸¹ The petitioner must show that they "require" the requested zoning exemption.¹⁸² The facts entered into the record must demonstrate that the land use that is subject of the petition is "reasonably necessary for the public convenience or welfare."¹⁸³

In Massachusetts, a wind energy developer can petition the DPU for a public service corporation designation.¹⁸⁴ If the DPU considers

¹⁷⁸ Sager A. Williams, Jr., Comment, *Limiting Local Zoning Regulation of Electric Utilities: A Balanced Approach in the Public Interest*, 23 U. BALT. L. REV. 565, 600 (1994).

¹⁷⁹ See *Planning Bd. v. Dep't of Pub. Utils.*, 647 N.E.2d 1186, 1191 (Mass. 1995); *Martorano v. Dep't of Pub. Utils.*, 516 N.E.2d 131, 136 (Mass. 1987); *Wenham v. Dep't of Pub. Utils.*, 127 N.E.2d 791, 793 (Mass. 1955).

¹⁸⁰ MASS. ANN. LAWS ch. 40A, § 3. Chapter 40A Section 3 provides, in relevant part:

Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and cable or the department of public utilities shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public; provided however, that if lands or structures used or to be used by a public service corporation are located in more than one municipality such lands or structures may be exempted in particular respects from the operation of any zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications cable or the department of public utilities shall after notice to all affected communities and public hearing in one of said municipalities, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public.

Id.

¹⁸¹ *Petition of Russell Biomass at 11, D.T.E./D.P.U. 06-60*, (Mass. Dep't of Pub. Utils. Aug. 22, 2008).

¹⁸² *Id.*

¹⁸³ *Id.*; see *Bomba v. Zoning Bd. of Appeals*, 2005 WL 2106162, at *6 (Mass. Land Ct. 2005) (explaining what the term "public" means).

¹⁸⁴ See MASS. ANN. LAWS ch. 40A, § 3 (setting forth the Dover Amendment). The Dover Amendment describes subjects which zoning may not regulate. See Catherine Savoie, Regis v. Weston and Beyond: *The Burden of Landowners and Municipalities under the Dover Amendment*, PBL (2013), <http://www.pbl.com/uploads/23/doc/media334.pdf>. The amendment provides exemptions for "public service corporation[s]" and for solar power systems, but not for wind systems *per se*. See MASS. ANN. LAWS ch. 40A, § 3 In determining whether a wind energy corporation qualifies as a "public service corporation," courts will consider: "whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business; whether the corporation is subject to the requisite

the particular wind project a public service corporation, then the DPU has the authority to partially preempt certain local zoning regulations in order to facilitate the project getting built.¹⁸⁵

In Massachusetts, abutting residents challenged local impacts, including negative impact that the new, larger wind turbines would have on continued use and enjoyment of a public open space frequented by local hikers, bird watchers and dog walkers that sat adjacent to the turbine site. An individual citizen may have standing to sue to block construction of a wind turbine based on a concrete complaint of noise and safety concerns.¹⁸⁶ The local zoning board of appeals decided that the test towers were exempt from the local zoning by-law which restricted the heights of structures primarily because the test towers were considered “public buildings” and that the town decision was entitled to deference.¹⁸⁷

Two residents of Princeton, Massachusetts, brought suit against the Town’s Zoning Board of Appeals seeking to appeal the Board’s approval of a building permit for two wind testing towers, each standing at 165 feet and 130 feet tall on a nearby property.¹⁸⁸ A wind energy project consisting of eight one-hundred foot tall turbines had been on the nearby property for a number of years.¹⁸⁹ The successful plaintiff argued that the noise generated by the wind farm in its current state impacted his property;¹⁹⁰ the unsuccessful plaintiff merely argued that the wind turbines obstructed views from his property.¹⁹¹ The court ruled that aesthetic reasons are insufficient evidence to show standing unless the zoning law specifically provides.¹⁹²

degree of governmental control and regulation; and the nature of the public benefit to be derived from the service provided.” *Save the Bay, Inc. v. Dep’t of Pub. Utils.*, 322 N.E.2d 742, 753 (Mass. 1975) (holding that liquefied natural gas company qualified as “public service corporation”).

¹⁸⁵ See MASS. ANN. LAWS ch. 40A, § 3 (outlining various exceptions to the Massachusetts zoning law). Section 3 says that:

[L]ands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and cable or the department of public utilities shall, after notice given . . . and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public . . .

Id. (emphasis added).

¹⁸⁶ See *Bomba*, 2005 WL 2106162 at *4.

¹⁸⁷ *Id.* at *2 (noting that wind turbines do not fit neatly into any existing town zoning law).

¹⁸⁸ *Id.* at *1, *2.

¹⁸⁹ *Id.* at *1. The wind farm was constructed in 1984. *Id.*

¹⁹⁰ *Id.* at *2, *4.

¹⁹¹ *Id.* at *3, *3 n.5.

¹⁹² *Id.*

Ultimately, the DPU acknowledged that the aggregate impacts entered into the record were moderately adverse.¹⁹³ PMLD, the developer, had undertaken extensive engagement with the town, and the DPU decision noted that given the alternatives—buying more expensive power on the spot market or generating necessary supply from a non-renewable source that could contribute in a more detrimental way to local air and water quality—it was in “the general public interest [to] implement the PMLD wind turbine project [as it] would outweigh any adverse local impacts of the project.”¹⁹⁴ Renewable power, and wind power in particular, was given added benefits even for a 3.2 MW wind farm serving a small rural community to be weighed in the *Princeton* decision:

[P]roduction of electricity from in-state, renewable, non-emitting resources provides these benefits at a time when our region faces important economic and environmental challenges associated with dependence on depletable resources, increasing local impacts of energy infrastructure development, local air and water quality impacts, and the need to meet the climate change reductions of the Regional Greenhouse Gas Initiative. Because the proposed project would help to meet such multiple important challenges, moving the project forward without delay is again in the public interest, and further supports issuance of a comprehensive exemption.”¹⁹⁵

The judge held that the ZBA’s decision was made on legally untenable ground and found for the project’s opponents.¹⁹⁶

In a subsequent decision on another renewable energy project proposed in Massachusetts, the petitioner in *Russell* was an independent corporation which planned to construct and operate a 50 MW wood-fueled biomass generating facility.¹⁹⁷ The electricity would then be sold into the New England regional bulk power

¹⁹³ Petition of Princeton Mun. Light Dep’t at 30, D.T.E./D.P.U. 06-11 (Mass. Dep’t of Pub. Utils.). The DPU cited three favorable town meeting votes on the project, including two special sessions to discuss the zoning issues and mitigation of Local impact. *Id.* at 3, 10, 31. The company made several key concessions during that process, demonstrating grassroots familiarity with the nature and source of potential opposition. *Id.* at 31. The concessions included a company promise to suspend construction during autumn months when the area experienced an influx of tourist traffic for foliage viewing. *Id.* at 24.

¹⁹⁴ *Id.* at 31.

¹⁹⁵ *Id.* at 38.

¹⁹⁶ *Bomba*, 2005 WL 2106162 at *7–8 (disagreeing with ZBA’s analogy of a wind turbine to a public building).

¹⁹⁷ Petition of Russell Biomass at 3, 18, D.T.E./D.P.U. 06-60, (Mass. Dep’t of Pub. Utils. August 22, 2008).

market at wholesale, where utility companies with distribution franchises in the area could procure power for delivery to retail customers.¹⁹⁸ The DPU denied relief in *Russell* based on “serious local impacts,” including the effect on the town of the more than 150 truck trips per day that would be required to supply the facility with wood to fuel the plant.¹⁹⁹ The proposed facility would receive 2,000 tons of wood daily, supplied by an average of 150 to 160 tractor-trailer truck trips per day, five days a week.²⁰⁰ That volume of shipping traffic inspired the DPU to note that in spite of the project’s benefits, “the amount and type of traffic . . . would significantly and adversely affect the character of the town of Russell.”²⁰¹

The DPU went further to note that the guidance provided by *Save the Bay*—specifically the analysis of the presence of governmental control and regulation and consideration of public benefit—was not exhaustive.²⁰² The DPU noted that in demonstrating the “requirement for exemption,” the petitioner’s burden is, first, to identify the individual zoning provisions applicable to the project, and second to establish on the record that exemption from each of those provisions is required.²⁰³ The DPU noted the project “has the potential to provide energy benefits” in the form of added renewable energy resources, “downward pressure on the price of RECs in New England . . . , the potential lowering of wholesale prices in some hours[,] and [the provision of] a more diverse electricity supply which may provide a measure of protection against possible fuel supply disruption.”²⁰⁴ The Commission added that while their refusal to exempt the project from local zoning did not amount to a Department denial of siting, but was an invitation to resume local discussions toward potential resolution that would allow siting in Russell.²⁰⁵

Prong two of the test demands that a petitioner demonstrate **it** “requires exemption from the zoning ordinance or bylaw.” While

¹⁹⁸ *Id.* at 15.

¹⁹⁹ *See id.* at 1–2, 3.

²⁰⁰ *Id.* at 3.

²⁰¹ *Id.* at 43.

²⁰² *See id.* at 12. Rather, those questions should be asked in the context of many others to “ensure that the intent of G.L. c. 40A, § 3 will be realized, i.e., that a present or proposed use of land or structure that is determined by the [DPU] to be ‘reasonably necessary for the convenience or welfare of the public’ not be foreclosed due to local opposition.” *Id.*

²⁰³ *Id.* at 13.

²⁰⁴ *Id.* at 27.

²⁰⁵ *Id.* at 1.

this rule is reiterated word-for-word in the DPU's decisions, it is most often cited to the 2001 *Boston Gas Company* decision.²⁰⁶ The intervenor's argued that the company could not claim to "require exemption" from a zoning regime if it had yet to formally seek relief under local processes.²⁰⁷ The DPU ruled that "40A, § 3 does not require that a petitioner demonstrate it has exhausted its remedies on the local level prior to seeking relief . . ."²⁰⁸ The question remains an intensely fact-based one, conducted on a case-by-case basis.

In 2002's *Tennessee Gas Company* adjudication, a gas pipeline company was denied "blanket exemption" from local zoning for a proposed gas chromatograph building on an existing company site.²⁰⁹ The company was granted exemption from the town's by-laws governing the specific agricultural overlay district in question, given that "[b]ased upon a review of the express language of . . . the zoning ordinance, it cannot reasonably be argued that the Company's proposed chromatograph building is a permitted use in an agricultural district."²¹⁰ The DPU considered the exemption "required within the meaning of G.L. c. 40A, § 3."²¹¹ *Tennessee* sent a clear message that the DPU did not wish the 40A section 3 process to usurp legitimate exercise of local authority.²¹² Expressing the limits of its own willingness to expand 40A section 3 authority, the DPU wrote further in *Tennessee* that it "favors the resolution of local issues on a local level whenever possible to reduce local concern regarding any intrusion on Home Rule authority."²¹³

There are three elements within the third prong necessary for DPU preemption.

In *Massachusetts Electric*, the DPU considered the granting of

²⁰⁶ Petition of Boston Gas Co., D.P.U. 00-24 (Feb. 22, 2001), <http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=00-24%2f00-24order.pdf> (seeking relief from local zoning in a designated "highway corridor" to construct a natural gas take station); see Petition of Tenn. Gas Pipeline Co. at 4, DPU 01-57 (Apr. 17, 2002), <http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=01-57%2f01-57order.pdf>.

²⁰⁷ Petition of Boston Gas Co., D.P.U. 00-24.

²⁰⁸ *Id.* Asserting that because "zoning bylaws in different municipalities may contain different standards than those applied by the Department; the Company seeks uniform treatment of its zoning petitions, which is more likely if all petitions are addressed to a single body." Petition of Tenn. Gas Pipeline Co. at 9.

²⁰⁹ *Id.* at 1.

²¹⁰ *Id.* at 8.

²¹¹ *Id.*

²¹² *Id.* at 11–12.

²¹³ *Id.* at 19.

zoning relief for a Massachusetts-franchised electric distribution utility to construct a new.²¹⁴ In weighing the evidence presented, the court determined that the public convenience or welfare test demanded examination of three sets of facts:

- “[T]he present or proposed use and any alternatives or alternative sites identified;”²¹⁵
- “[T]he need for, or public benefits of, the present or proposed use;”²¹⁶ and
- “[T]he environmental impacts or any other impacts of the present or proposed use.”²¹⁷

Every element of the analysis is fact-based, site and project-specific and often highly technical, scientific or expert-generated.²¹⁸ Also, wrinkles in the legal analysis of each component have deepened in past adjudications and appeals, further complicating the case-by-case examination.²¹⁹ One consistent trend is that interpretations of this portion of the test have almost unwaveringly been favorable from the development perspective, tipping the scales in the favor of general public interest and exemption from local zoning.²²⁰ The DPU does not even have an obligation to consider and reject every possible alternative site presented.²²¹

Historically, 40A section 3 petitioners have been gas and electric utilities with state franchises to serve a specific geographic territory, though more infrequent use of the statutory exemption

²¹⁴ Petition of Mass. Elec. Co. at 1, DPU 01-77 (Apr. 23, 2002), <http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=01-77%2f01-77order.pdf>.

²¹⁵ *Id.* at 6.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *See id.* at 26–30, 32 (analyzing the impacts of the proposed system on the wetlands, the visual impacts, and the importance of the public interest).

²¹⁹ *See* Petition of Boston Gas Co., D.P.U. 00-24 (Feb. 22, 2001), <http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=00-24%2f00-24order.pdf> (considering the effects on the local water supply, habitat, historic resources and outlining safety concerns); Petition of Tenn. Gas Pipeline Co. at 17, DPU 01-57 (Apr. 17, 2002), <http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=01-57%2f01-57order.pdf> (analyzing bill accuracy concerns).

²²⁰ *See id.* at 18 (deciding the proposed site would serve the public interest); *see also* Petition of Boston Gas Co., D.P.U. 00-24 (holding the proposed project is consistent with the public interest).

²²¹ Petition of Mass. Elec. Co. at 6 (“[T]he availability of alternative sites, the efforts necessary to secure them, and the relative advantages and disadvantages of those sites are matters of fact bearing solely upon the main issue of whether the preferred site is reasonably necessary for the convenience or welfare of the public.” (citing *N.Y. Cent. R.R. v. Dep’t of Public Utilities*, 199 N.E.2d 319, 324 (Mass. 1964), *aff’d by Martorano v. Dep’t of Pub. Utils.*, 516 N.E.2d 131, 136 (Mass. 1987))).

has been made by wholesale energy supply companies such as gas pipeline owners.²²² Traditionally, the general rule in Massachusetts was that the “State is immune from municipal zoning regulations, absent statutory provision to the contrary” when carrying out an essential government function.²²³ The courts will uphold the DPU’s decision as long as the DPU meets the reasonable necessary standard.²²⁴

In early 2009, Massachusetts Governor Patrick announced the intention to clear the way for development of more than 2,000 MW of wind power in the Commonwealth with the help of siting reform.²²⁵ To make the goal more attainable, the Wind Energy Siting Reform Act of 2009 was introduced. It seeks to preempt local zoning with a new, state-controlled and streamlined zoning process for wind projects.²²⁶ It did not gain legislative approval and was abandoned.²²⁷

b. In the Energy Siting Board

Massachusetts has a separate Siting Board to approve electric power facility and distribution line siting.²²⁸ In the Commonwealth of Massachusetts, the Energy Facilities Siting Board exists within, but is not under the control of the Massachusetts Department of Public Utilities.²²⁹ The Siting Board approval is based on the minimal environmental impact of the project, the construction plans

²²² See, e.g., Petition of Mass. Elec. Co. at 1.

²²³ Cnty. Comm’rs of Bristol v. Conservation Comm’n of Dartmouth, 405 N.E.2d 706, 639 (Mass. 1980) (quoting Medford v. Marinucci Bros. & Co., 181 N.E.2d 584, 588 (Mass. 1962)).

²²⁴ Gregory Tan, *Wading Through the Rhetoric of the Telecommunications Act of 1996: Uncertainty of Local Zoning Authority over Wireless Telecommunications Tower Siting*, 22 VT. L. REV. 461, 485 (1997).

²²⁵ See Press Release, Deval Patrick, Governor Patrick Sets New Goals for Wind Power (Jan. 13, 2009), https://votesmart.org/public-statement/409141/governor-patrick-sets-new-goals-for-wind-power#.Vwp_k2OYfBJ.

²²⁶ See Bill Text of S.B. 1504, 2009–2010 Leg., 186th Gen. Court (Mass. 2009) (“[I]t is necessary to establish clear standards and timely and predictable permitting procedures to encourage wind energy development in the commonwealth . . .”); *Siting Wind Projects in Massachusetts*, BOWDITCH & DEWEY (Nov. 9, 2009), <http://www.bowditch.com/news-publications-events/publications/siting-wind-projects-massachusetts>.

²²⁷ See Status of S.B. 1504, 2009–2010 Leg., 186th Gen. Court (Mass. 2009).

²²⁸ *About the Energy Facilities Siting Board*, EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/energy-utilities-clean-tech/energy-facilities-siting-board/about-the-energy-facilities-siting-board.html> (last visited Oct. 22, 2016).

²²⁹ *Id.* This simply stated goal of the Energy Facilities Siting Board is “to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.” MASS. GEN. LAWS ch. 164, § 69H (through Jan. 31, 2016). The Siting Board issues a decision approving or denying the permit within twelve months of the filing date and if rejected, an amended petition can be submitted within 180 days. *Id.* § 69J.

being consistent with current health and environmental standards, and the site description and selection process being described accurately.²³⁰ The Energy Facilities Siting Board reviews proposed energy projects to be sited within the Commonwealth based on the cost and the environmental impact of the facility.²³¹

To be covered, the proposed generating facility must have a capacity of more than 100 Mw of power, or a transmission line interconnection project that is 69 kV or greater that spans at least 1 mile or projects greater than 115 kV that span 10 or more miles.²³² No other state or local agency may approve a facility without prior authorization from the Energy Facilities Siting Board.²³³

The Board has the authority to override any local decisions that deny or place onerous conditions on an approval for electric, gas, or oil companies seeking to construct or operate energy facilities.²³⁴ Additionally, the Board is able to issue a comprehensive permit without requiring any other state or local government approval, and local governments are prohibited from passing any bylaws or ordinances that would delay construction or operation.²³⁵ The Siting Board can issue a preemptive permit²³⁶ which embodies all the necessary individual permits to begin constructing the new generating facility:²³⁷ “[I]ndividual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility.”²³⁸

A § 69K Certificate consists of any individual state and local permits, approvals, and authorizations necessary for the

²³⁰ See *id.* § 69J¼.

²³¹ *Id.* § 69H. The Siting Board is made up of the Secretary of Energy and Environmental affairs, who serves as chairman, the Secretary of Housing and Economic Development, the Commissioner of the Department of Environmental Protection, the Commissioner of the Division of Energy Resources, two commissioners of the Commonwealth Utilities Commission, and three public members who are appointed by the governor, who have experience in environmental issues, labor issues, and energy issues. THE ENERGY FACILITIES SITING HANDBOOK: AN OVERVIEW OF THE ENERGY FACILITIES SITING BOARD REVIEW PROCESS, EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/docs/dpu/siting/handbook.pdf> (last updated Feb. 2016).

²³² MASS. GEN. LAWS ch. 164, § 69G: “(2) a new electric transmission line having a design rating of 69 kilovolts or more and which is one mile or more in length on a new transmission corridor; (3) a new electric transmission line having a design rating of 115 kilovolts or more which is 10 miles or more in length on an existing transmission corridor except reconductoring or rebuilding of transmission lines at the same voltage” *Id.*

²³³ *Id.* § 69J.

²³⁴ *Id.* § 69K.

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ *Id.* § 69K.

²³⁸ MASS. ANN. LAWS ch. 164, § 69K.

construction and operation of a facility that would otherwise need to be obtained separately.²³⁹ The composite permit is binding on over all other agencies when the applicant met the standards pursuant to section 69K–O.²⁴⁰ Any appeals of the Board’s decisions are brought directly to the Massachusetts Supreme Judicial Court (SJC).²⁴¹ Once a facility properly invokes the Siting Board’s jurisdiction under section 69K, it will be issued a composite certificate comprised of all “[i]ndividual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility.”²⁴²

An electric company planning to construct or operate a facility falling under the Energy Facilities Siting Board’s jurisdiction authorizes the company to petition the Siting Board for a section 69K Certificate of Environmental Impact and Public Interest if the company is prevented from building the facility because of a single adverse state or local agency permitting decision or undue agency delay:²⁴³

- If a company is required to meet standards of constructing its facility with equipment that is above commercially available equipment;²⁴⁴
- A state or local agency unduly delays for any reason, including an environmental impact report;²⁴⁵
- If an agency’s ruling is inconsistent with resource use permits issued by other state or local agencies for the project;²⁴⁶
- If the agency is deciding on matters not within its jurisdiction, such as a non-regulatory issue (i.e. aesthetics), preventing approval of a permit;²⁴⁷

²³⁹ *All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 794 (Mass. 2010).

²⁴⁰ *See id.* at 799.

²⁴¹ MASS. ANN. LAWS ch. 164, § 69P; MASS. ANN. LAWS ch. 25, § 5.

²⁴² MASS. ANN. LAWS ch. 164, § 69K.

²⁴³ *Id.*

²⁴⁴ *Id.* (“[T]he electric, gas or oil company is prevented from building a facility because it cannot meet standards imposed by a state or local agency with commercially available equipment or because the processing or granting by a state or local agency of any approval, consent, permit or certificate has been unduly delayed for any reason, including the preparation and publication of any environmental impact report required by section sixty-two of chapter thirty.”).

²⁴⁵ *Id.*

²⁴⁶ *Id.* (“[T]he electric, gas or oil company believes there are inconsistencies among resource use permits issued by such state or local agencies.”).

²⁴⁷ *Id.* (“[T]he electric, gas or oil company believes that a nonregulatory issue or condition has been raised or imposed by such state or local agencies such as but not limited to

- If a state or local agency disapproval, condition or denial prevents construction of the facility;²⁴⁸ and
- A burdensome condition or limitation on a permit impacts the Siting Board's responsibilities to provide a reliable energy supply with minimum impact on the environment at the lowest possible cost.²⁴⁹

A § 69K Certificate allows the petitioning company to gather all requisite state and local permits and authorizations necessary for its construction and operation from the Energy Facilities Siting Board in the form of a composite permit.²⁵⁰ This streamlines the process of acquiring permits to one agency instead of each state or local agency individually. The Massachusetts Supreme Judicial Court has interpreted this section as requiring the Siting Board to assume all powers and obligations of the state or local authority that would originally authorize a required permit in order to grant approval through the Siting Board.²⁵¹ General law chapter 164 section 69K instructs the Siting Board to preempt any state or local agency that is inconsistent with its decision to issue a section 69K Certificate.²⁵² The Massachusetts Supreme Judicial Court recognized this preemption statute as keeping intact the Siting Board's original purpose of maintaining and providing reliable energy sources for the whole of Massachusetts's residents over competing local interest by ensuring local authorities do not exercise their jurisdictional powers over an approved facility.²⁵³

aesthetics and recreation.”).

²⁴⁸ *Id.* (“[T]he facility cannot be constructed due to any disapprovals, conditions or denials by a state or local agency or body, except with respect to any lands or interests therein, excluding public ways, owned or managed by any state agency or local government.”).

²⁴⁹ *Id.* (“[A]ny state or local agency has imposed a burdensome condition or limitation on any license or permit which has a substantial impact on the board's responsibilities as set forth in section sixty-nine H.”).

²⁵⁰ *See id.* (“A certificate, if issued, shall be in the form of a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility and that portion of the certificate which relates to subject matters within the jurisdiction of a state or local agency shall be enforced by said agency under the other applicable laws of the commonwealth as if it had been directly granted by the said agency.”).

²⁵¹ *All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 799 (Mass. 2010) (“[T]he siting board to stand in the shoes of any and all State and local agencies with permitting authority over a proposed ‘facility’—that is, a directive to assume all the powers and obligations of such an agency with respect to the decision whether to grant the authorization that is within the agency's jurisdiction, with regulatory enforcement thereafter returned to that agency.”).

²⁵² *See* MASS. ANN. LAWS ch. 164, § 69K.

²⁵³ *City Council of Agawam v. Energy Facilities Siting Bd.*, 776 N.E.2d 1002, 1007 (Mass. 2002) (“[E]nsure that local boards do not use their power over licenses and permits to thwart

A party petitioning for a section 69K Certificate must have made a good faith effort to obtain all state and local permits necessary for its construction prior to petitioning for a section 69K Certificate.²⁵⁴ A showing of good faith requires providing the Siting Board with information relating to a company's inability to comply with a state or local law or the denial, delay, or burdensome condition by a state or local authority in acquiring a permit or approval for the construction or operation of the facility.²⁵⁵ This ensures the petitioning company has in fact attempted to retrieve every required permit prior to invoking the Siting Board's jurisdiction. However, there remain statutory exceptions to this preemption. A court found such factors as aesthetics, and the diminution of property value, among other concerns,²⁵⁶ to be valid grounds for the boards' denials.²⁵⁷

The Massachusetts Supreme Judicial Court has interpreted this section of the statute as requiring the Siting Board to assume all powers and obligations of the state or local authority that would otherwise issue a required permit.²⁵⁸ The Board attempts to ensure local authorities do not exercise their jurisdictional powers over an approved facility.²⁵⁹ A showing of good faith requires providing the

the needs of the broader community for a reliable, affordable, and environmentally sound energy supply.”).

²⁵⁴ MASS. ANN. LAWS ch. 164, § 69L.

²⁵⁵ *See id.* (“[E]ither, a representation as to the inability, if any, of the applicant to comply with any law, ordinance, by-law, rule and regulation affecting the construction or operation of the facility; or a representation as to the applicant's inability to proceed with the construction or operation of the facility by reason of the denial, delay, or imposition of a burdensome condition in issuing specified licenses, permits or approvals.”).

²⁵⁶ *Boston Edison Co. v. Bd. of Selectmen of Concord*, 242 N.E.2d 868, 876 (Mass. 1968). The plaintiff claimed the request of certiorari was required because under M.G.L.A. 166 § 28, regarding electric transmission lines, a subsequent request to the Department of Public Utilities would be futile because the department can only preempt municipalities when a majority of the subject municipalities have approved the transmission line. *Id.* at 872. In this case, all three municipalities had rejected it. *See id.* at 870. The utility sought certiorari from the Supreme Judicial Court regarding town decisions to deny the utilities to cross those town's right of ways with a high voltage transmission line, and the Board was given a large degree of discretion as long as it was not arbitrary or unreasonable. *Id.* at 870, 871, 876, 877.

²⁵⁷ *Id.* at 877. It should be noted that board approval was required for any new transmission line of capacity greater than 69 kilovolts for a distance longer than a mile, and that no state agency shall issue a permit for such a facility without approval of the board. *See* MASS. ANN. LAWS ch. 164, §§ 69G, 69J.

²⁵⁸ *All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 799 (Mass. 2010) (“[T]he siting board to stand in the shoes of any and all State and local agencies with permitting authority over a proposed ‘facility’—that is, a directive to assume all the powers and obligations of such an agency with respect to the decision whether to grant the authorization that is within the agency's jurisdiction, with regulatory enforcement thereafter returned to that agency.”).

²⁵⁹ *See City Council of Agawam v. Energy Facilities Siting Bd.*, 776 N.E.2d 1002, 1007

Siting Board with information relating to an applicant's inability to comply with a state or local law or the denial, delay, or burdensome condition imposed by a state or local authority.²⁶⁰ This ensures the petitioning company has in fact attempted to obtain every required permit prior to invoking the Siting Board's jurisdiction.

The EFSB process provides for a public hearing where parties are "substantially and specifically affected."²⁶¹ To intervene on an EFSB hearing a party must show that there are specific, proximate, and direct impact. Economic or speculative environmental impacts are not enough for a party to be granted standing.²⁶² Massachusetts adjudicatory proceedings are headed by a presiding officer who is assigned by the Director of the Siting Board for a siting proceeding.²⁶³ If a party petitions and is admitted, interveners have rights similar to a party.²⁶⁴ In the *Tofias* decision the court pointed

(2002) ("[E]nsure that local boards do not use their power over licenses and permits to thwart the needs of the broader community for a reliable, affordable, and environmentally sound energy supply.").

²⁶⁰ See MASS. ANN. LAWS ch. 164, § 69L(A)(4) ("[E]ither, a representation as to the inability, if any, of the applicant to comply with any law, ordinance, by-law, rule and regulation affecting the construction or operation of the facility; or a representation as to the applicant's inability to proceed with the construction or operation of the facility by reason of the denial, delay, or imposition of a burdensome condition in issuing specified licenses, permits or approvals . . .").

²⁶¹ *Tofias v. Energy Facilities Siting Bd.*, 757 N.E.2d 1104, 1106 (Mass. 2001); see also MASS. ANN. LAWS ch. 30A, § 10(4) (2016) ("[A]llow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose, as the agency may order.").

²⁶² *Tofias*, 757 N.E.2d at 1110–11; cf. *Ginther v. Comm'r of Ins.*, 693 N.E.2d 153, 157 (Mass. 1998) ("Alleging '[i]njury alone is not enough; a plaintiff must allege a breach of duty owed to it by the public defendant.'" (quoting *Northbridge v. Natick*, 474 N.E.2d 551, 555 (Mass. 1985))). Injuries that are speculative, remote, and indirect are insufficient to confer standing. See *Town of Burlington v. Town of Bedford*, 628 N.E.2d 1280, 1282 (Mass. 1994); *Mass. Auto Body Ass'n v. Comm'r of Ins.*, 570 N.E.2d 147, 154 (Mass. 1991). "Not every person whose interests might conceivably be adversely affected is entitled to [judicial] review." *Group Ins. Comm'n v. Labor Relations Comm'n*, 408 N.E.2d 851, 855 (Mass. 1980) (citing *Shaker Cmty., Inc. v. State Racing Comm'n*, 190 N.E.2d 897, 899 (Mass. 1963)); see also *Am. Can Co. v. Milk Control Bd.*, 46 N.E.2d 542, 544 (Mass. 1943) ("Doubtless not every person whose interests may be in some remote way injuriously affected by a general order of the board is a person 'interested' or a person 'aggrieved.'"). Moreover, the complained of injury must be a direct consequence of the complained of action. See *Bos. Edison Co. v. Bos. Redevelopment Auth.*, 371 N.E.2d 728, 737 (Mass. 1977); *Slama v. Attorney Gen.*, 428 N.E.2d 134, 137 (Mass. 1981) ("To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury." (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974))).

²⁶³ See 980 MASS. CODE REGS. § 1.04(2)(a) (2015). When required by statute or deemed appropriate, public hearings will take place in all or some of the affected towns. See *id.* § 1.04(5).

²⁶⁴ See *id.* § 1.05(2). If a person wishes to participate as a limited participant, he or she

to the lack of evidence presented by the intervening party to show any impact of proposed adjacent power line installation and that the decision of the Board followed a pattern of “reasoned consistency.”²⁶⁵

Any party with full party status, not a limited participant, may appeal directly to the Supreme Judicial Court for review.²⁶⁶ The scope of this review is narrow and will only determine if the decision was made in conformity with the state and federal constitutions, the factors set out in applicable statute and the rules and regulations of the board.²⁶⁷

C. Cape Wind Facility Siting

The Cape Wind cases began in 2002, when the applicants, Cape Wind Associates, originally submitted a plan for two 115 kilovolt cables from the proposed wind generation facility located approximately 12 miles off the Massachusetts shore in Nantucket Sound to the shore in Barnstable, Massachusetts.²⁶⁸ The turbine location was in federal waters and subject to federal laws and regulation, as would be approximately half of the offshore transmission cables.²⁶⁹ It would be comprised of 130 turbines, each over 400 feet in height.²⁷⁰ The cables, upon reaching shore, would travel underground for approximately six miles to link in to the existing power grid.²⁷¹

must also make a written request, typically; participation in this limited capacity is limited to filing briefs or commenting. *Id.*

²⁶⁵ See *Tofias*, 757 N.E.2d at 1106, 1109, 1112. The plaintiff intervener claimed the EFSB abused its authority in not granting intervener status because of the economic and environmental impact of the electromagnetic field. *Id.* at 1108. The intervener’s claim failed because no evidence was presented to show any actual or potential damage from the power lines. *Id.* at 1109–10.

²⁶⁶ MASS. ANN. LAWS ch. 164, § 69P. MASS. ANN. LAWS ch. 164, § 69P, states in full:

Any party in interest aggrieved by a decision of the board shall have a right to judicial review in the manner provided by section five of chapter twenty-five. The scope of such judicial review shall be limited to whether the decision of the board is in conformity with the constitution of the commonwealth and the constitution of the United States, was made in accordance with the procedures established under section sixty-nine H to section sixty-nine O and with the rules and regulations of the board with respect to such provisions, was supported by substantial evidence of record in the board’s proceedings; and was arbitrary, capricious or an abuse of the board’s discretion under the provisions of section sixty-nine H to section sixty-nine O.

Id.

²⁶⁷ See *id.*

²⁶⁸ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 858 N.E.2d 294, 297 (Mass. 2006).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See *id.*

There was some precedent: Following its decision in *Tofias*, the Massachusetts Supreme Judicial Court struck down a challenge to undersea and underground electrical cable testing permit granted by the ESFB.²⁷² The Cape Cod Commission rejected the Cape Wind permit under the regional development of regional impact (DRI) process, the approval of which was a condition of the EFSA's earlier 2005 approval.²⁷³ In the cape wind matter, the interveners appealed an EFSA decision to conditionally permit undersea electrical transmission lines for a proposed off-shore wind generation facility.

Subsequent to the 2006 *Alliance* decision, the Cape Cod Commission rejected Cape Wind's development of regional impact, the approval of which was a condition of the board's 2005 approval.²⁷⁴ Cape Wind applied to the board for a "certificate of environmental impact and public interest" pursuant to Massachusetts General Law chapter 164 section 69K, which, as noted, would preempt the local rejection.²⁷⁵ The board granted the petition in 2009.²⁷⁶ Ultimately, the Siting Board granted Cape Wind a section 69K certificate which preempted the required DRI approval, four state permits, and four local permits necessary for the construction and operation of the transmission lines.²⁷⁷ Appeal was to the Massachusetts Supreme Judicial Court.²⁷⁸

The superior court dismissed the initial appeal, and the Commission, The Town of Barnstable, and the Alliance appealed to the Massachusetts Supreme Judicial Court, the state's highest court.²⁷⁹ The Cape Cod Commission and the Town of Barnstable

²⁷² See *id.* at 302.

²⁷³ See *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 791 (Mass. 2010).

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 791 (quoting MASS. ANN. LAWS ch. 164, § 69K (2016)).

²⁷⁶ *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 791.

²⁷⁷ *Id.* at 791, 807.

²⁷⁸ See *id.* at 791.

²⁷⁹ *Id.* at 795, 795 n.17.

Any party in interest aggrieved by a decision of the board shall have a right to judicial review in the manner provided by section five of chapter twenty-five. The scope of such judicial review shall be limited to whether the decision of the board is in conformity with the constitution of the commonwealth and the constitution of the United States, was made in accordance with the procedures established under section sixty-nine H to section sixty-nine O and with the rules and regulations of the board with respect to such provisions, was supported by substantial evidence of record in the board's proceedings; and was arbitrary, capricious or an abuse of the board's discretion under the provisions of section sixty-nine H to section sixty-nine O.
MASS. GEN. LAWS ch. 164, § 69P.

originally sought declaratory relief under Massachusetts General Law chapter 231A, claiming there to be a statutory conflict between the Cape Cod Act, and the Energy Facility Siting Board's enabling legislation.²⁸⁰ The appellants' unsuccessful challenge of Siting Board preemptive power was several-fold:

- Whether the Board could overrule a self-contained regional approval required by the Board's earlier decision;²⁸¹
- Whether the Board had jurisdiction over the local tidelands through which the required transmission line would pass;²⁸²
- That there should not be deference to the Board's decision that there would be a minimum impact on the environment;²⁸³ and

²⁸⁰ *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 795 n.17.

²⁸¹ *Id.* at 796. The appellants questioned the Board's jurisdiction in view of the perceived conflict of the Cape Cod Act, and argued the Board could not override the Cape Cod Commission. *Id.* The appellants questioned the validity of the Board's decision, and also the validity of a Department of Environmental Protection regulation that was at issue. *See id.* at 791. The appellants claimed that because the Cape Cod Act had an appeals provision, its decision was beyond the provisions of the Board's enabling legislation. *See id.* at 796. Through an analysis of statutory construction, the SJC declined this assertion, and instead chose to read the allegedly conflicting statutes as coexistent. *See id.* at 797. Accordingly, the court relied on the provisions of the subsequently passed enabling legislation of the Board's jurisdiction: "And § 69K directs that when the siting board issues a certificate, '[n]otwithstanding the provisions of any other law to the contrary . . . no state agency or local government shall impose or enforce any law, ordinance, by-law, rule or regulation nor take any action . . . which would delay or prevent the construction, operation or maintenance of such facility.'" *Id.* at 797 (quoting MASS. GEN. LAWS ch. 164, § 69K (2016)). Consequently, the Supreme Judicial Court found that the Board could preempt the finding of a local government commission, in this case, the Cape Cod Commission. *See id.* at 797.

²⁸² *See id.* at 798. The court rejected the assertion of the Cape Cod Commission that the tidelands that the transmission were to pass through, and the requisite permits to do so, were within the scope of the Board, despite the tidelands' status of being held in trust by the Commonwealth for the benefit its citizens. *See id.* at 798, 801.

²⁸³ *See id.* at 811. The court reviewed and analyzed two relevant statutes:

Section 690 (2) requires a finding with respect to the 'compatibility of the facility with considerations of environmental protection,' and § 690 (3) requires a finding that any exemption from conformance with State or local law be 'consistent with the implementation of the energy policies contained in this chapter to provide a necessary energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.'

Id. at 811 (quoting MASS. ANN. LAWS ch. 164, § 690). The Supreme Judicial Court found that it would defer to the Board's balancing. *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 812. The appellants attacked the substance of the Board's decision. *Id.* at 807. In reviewing the Board's decision, the Supreme Judicial Court noted that it was a well-established principle of administrative law to give great deference to the boards' expertise and decision, only to reverse it if an alternative conclusion from the board was a "necessary inference." *Id.* at 808 (first quoting *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 858 N.E.2d 294, 299 (Mass. 2006) and then quoting *Goldberg v. Bd. of*

- That Cape Wind did not make a good-faith effort to seek the requisite local permits as is required under M.G.L. c. 164 § 69L (A)(4).²⁸⁴

On the first count, the appellants claimed that because the Cape Cod Act had an appeals provision, their decision was beyond the provisions of the board's enabling legislation.²⁸⁵ Through an analysis of statutory construction, the Supreme Judicial Court declined this assertion, and instead chose to read the allegedly conflicting statutes as coexistent.²⁸⁶ Accordingly, the court relied on the provisions of the subsequently passed enabling legislation of the board's jurisdiction, and held:

And § 69K directs that when the siting board issues a certificate, “[n]otwithstanding the provisions of any other law to the contrary . . . *no* state agency or local government shall impose or enforce any law, ordinance, by-law, rule or regulation nor take any action . . . which would delay or prevent the construction, operation or maintenance of such facility.”²⁸⁷

The Supreme Judicial Court found that the board could preempt the finding of the Cape Cod Commission.²⁸⁸ On the second claim, the court rejected the assertion of the Cape Cod Commission that the tidelands that the transmission were to pass through, and the requisite permits to do so, were within the scope of the board, despite the tidelands status of being held in trust by the Commonwealth for the benefit its citizens.²⁸⁹ The Supreme Judicial Court noted that it was a well-established principle of administrative law to give great deference to the boards' expertise and decision, only to reverse it if an alternative conclusion from the board was a “necessary inference.”²⁹⁰

Health of Granby, 830 N.E.2d 207, 216 (Mass. 2005)).

²⁸⁴ *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 808. The Supreme Judicial Court, upon reviewing the record of the petition before the Cape Cod Commission, rejected this argument. *Id.*

²⁸⁵ *See id.* at 796.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 797 (quoting MASS. ANN. LAWS ch. 164, § 69K (2016)).

²⁸⁸ *See Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 797.

²⁸⁹ *See id.* at 798, 801.

²⁹⁰ *See id.* at 808 (first quoting *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 858 N.E.2d 294, 299 (Mass. 2006) and then quoting *Goldberg v. Bd. of Health of Granby*, 830 N.E.2d 207, 216 (Mass. 2005)).

On the appellants' claim that Cape Wind did not make a good-faith effort to seek the requisite local permits as required under Massachusetts General Law chapter 164 section 69L (A) (4), the Supreme Judicial Court rejected this argument.²⁹¹ Similarly, the Supreme Judicial Court rejected the appellants claim that the board had not adequately found that the Cape Wind project would have a minimum impact on the environment.²⁹² The court reviewed and analyzed two relevant statutes:

Section 69O (2) requires a finding with respect to the "compatibility of the facility with *considerations of environmental protection*," and § 69O (3) requires a finding that any exemption from conformance with State or local law be "consistent with the implementation of the energy policies contained in this chapter to provide *a necessary energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost*."²⁹³

The Supreme Judicial Court found, again through a statutory interpretation analysis, that the stated purpose of the Board, being to "to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost,"²⁹⁴ must logically be balanced with the board's other enabling statutes.²⁹⁵ The Supreme Judicial Court upheld the decision of the Energy Facilities Siting Board granting a preemptive state certificate which overrode the Cape Cod Commission's decision with a composite permit "that covered all the necessary approvals under state law."²⁹⁶ The Supreme Judicial Court held that the legislation that created the Cape Cod Commission and gave it authority to approve the development of a regional impact proposal which was needed for the transmission project, did not supersede the Board's authority to override local permitting decisions.²⁹⁷

The court focused on the procedural integrity of the process, finding the plaintiffs failed to show the EFSB acted in any manner

²⁹¹ See *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 808.

²⁹² *Id.* at 811.

²⁹³ *Id.* (quoting MASS. ANN. LAWS ch. 164, § 69O (2016)).

²⁹⁴ *Id.* § 69H.

²⁹⁵ See *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 811–12.

²⁹⁶ *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 815; Kimmell & Stolfi Stalenhoef, *supra* note 149, at 208.

²⁹⁷ See *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 791, 796–97. The Supreme Judicial Court also held that the Board was correct in limiting its review to the transmission lines and not the wind farm itself since the Board only has jurisdiction to consider "in-State impacts." See *id.* at 803, 806; Kimmell & Stolfi Stalenhoef, *supra* note 149, at 222, 223, 224.

inconsistent with administrative process.²⁹⁸ The court gave the ESFB substantial discretion as an administrative agency to interpret its rules and “great deference” to its “expertise and experience” to make determinations.²⁹⁹ The interveners failed to show the EFSB acted inconsistently from the “Turners Falls Standard” in determining the need for electrical power lines.³⁰⁰ The *Alliance to Protect Nantucket Sound* court also failed to establish the board did not act with reasoned consistency, the standard to challenge an EFSB decision.³⁰¹ In reaching the decision, the court seemed to agree with an earlier decision which found the board “[was] eminently reasonable and practical” in its approach to the issues presented.³⁰² The Supreme Judicial Court held that the Board was correct in limiting its review to the transmission lines and not the wind farm itself since the Board only has jurisdiction to consider “in-State impacts.”³⁰³

V. COMPARING STATE GOVERNMENT REGULATION OF POWER SITING OF FACILITIES

In the fifty states, there are distinctions as to whether the state regulates the siting of all new, renewable energy, and/or wind power generation facilities.³⁰⁴ There is a dichotomy of the exercise of legal approval: Approximately half the states do not regulate power facility siting, while the other half selectively regulate new facilities of certain minimum sizes in certain ways. These parameters shape the future of power in America.

²⁹⁸ See *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 808, 810–11.

²⁹⁹ *Id.* at 808, 809.

³⁰⁰ See *id.* at 810–11. The Turner Falls Standard is:

[W]hether the energy from the new generator was needed to improve the reliability of the power supply system, or to increase economic efficiency, by analyzing (1) whether there was a need within New England for the power generated by the non-jurisdictional generating facility, and (2) whether the transmission lines would provide benefits to Massachusetts.

Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 858 N.E.2d 294, 296 (Mass. 2006).

³⁰¹ See *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 810–11. “[R]easoned consistency” means only “that any change from an established pattern of conduct must be explained.” *Alliance to Protect Nantucket Sound, Inc.*, 858 N.E.2d at 302 (citing *Robinson v. Dep’t of Pub. Utils.*, 624 N.E.2d 951, 954 (Mass. 1993)).

³⁰² *Alliance to Protect Nantucket Sound, Inc.*, 858 N.E.2d at 302; see *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 810–11.

³⁰³ See *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 803, 804; Kimmell & Stolfi Stalenhoef, *supra* note 149, at 223–24 (discussing the *Alliance* case further).

³⁰⁴ See *infra* Section V.A.

A. *All and Nothing*

A group of states has a similar legal structure in which the state plays no role in the siting process for independent merchant, or investor-owned utility, projects. In twenty-three states, there is no state energy siting permit, apart from separate state environmental regulation, required for new power generation facilities.³⁰⁵ In Pennsylvania, Oklahoma, Georgia and Utah, the PUC and other state agencies have no singular jurisdiction or authority over generation facility siting.³⁰⁶ Georgia, Oklahoma, and Utah have no primary siting agencies in their states, instead a state permit regarding construction rests in many different state agencies.³⁰⁷ In Oklahoma and Pennsylvania, municipalities are the only entity that has jurisdiction on energy facility siting matters,³⁰⁸ though in Pennsylvania the PUC can examine life cycle costs of “non-coal fired, utility owned generation units.”³⁰⁹ In Pennsylvania, the PUC can also “order the cancellation or modification” of locally sanctioned projects, and the state can preempt local land-use regulations.³¹⁰ In this group of approximately half of the states, siting new electric power facility location is fundamentally a local determination in the absence of separate state siting authority.³¹¹

In the other group, twenty-eight states separately regulate new power facility siting at the state level: Arizona,³¹² California,³¹³ Connecticut,³¹⁴ District of Columbia,³¹⁵ Florida,³¹⁶ Iowa,³¹⁷ Kentucky,³¹⁸ Maine,³¹⁹ Maryland,³²⁰ Massachusetts,³²¹ Minnesota,³²²

³⁰⁵ See EDISON ELECTRIC INST., STATE GENERATION AND TRANSMISSION SITING DIRECTORY 1, 3, 7, 15, 21, 29, 31, 35, 37, 41, 47, 51, 61, 67, 69, 101, 107, 111, 115, 117, 119, 131, 137 (2013) [hereinafter EDISON SITING DIRECTORY].

³⁰⁶ See *id.* at 29, 30, 101, 107, 119.

³⁰⁷ NAT’L ASS’N OF REGULATORY UTIL. COMM’RS, WIND ENERGY & WIND PARK SITING AND ZONING BEST PRACTICES AND GUIDANCE FOR STATES A-23, A-77, A-93 (2012).

³⁰⁸ *Id.* at A-77, A-81.

³⁰⁹ EDISON SITING DIRECTORY, *supra* note 305, at 107.

³¹⁰ *Id.* Additionally, a corporation can petition PUC, and after a public hearing, PUC can “decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.” 53 PA. CONS. STAT. § 10619 (2016).

³¹¹ See ENVT. LAW INST., *supra* note 120, 5–6.

³¹² ARIZ. REV. STAT. § 40-360.02(A)–(B) (LexisNexis 2016).

³¹³ CAL. PUB. RES. CODE § 25500 (Deering 2016).

³¹⁴ CONN. GEN. STAT. § 16.50k(a) (2016).

³¹⁵ D.C. CODE § 34-302 (2016).

³¹⁶ FLA. STAT. ANN. §§ 403.503(8)(9), 403.506(1) (LexisNexis 2016).

³¹⁷ IOWA CODE § 476A.2(1) (2016).

³¹⁸ KY. REV. STAT. ANN. § 278.020(1) (LexisNexis 2016).

³¹⁹ ME. STAT. tit. 35-A, § 3132-A (2015).

³²⁰ MD. CODE. ANN., PUB. UTIL. § 7-207(b)(1) (LexisNexis 2016).

Montana,³²³ Nebraska,³²⁴ Nevada,³²⁵ New Hampshire,³²⁶ New Jersey,³²⁷ New Mexico,³²⁸ New York,³²⁹ North Carolina,³³⁰ North Dakota,³³¹ Ohio,³³² Oregon,³³³ Rhode Island,³³⁴ South Dakota,³³⁵ Vermont,³³⁶ Virginia,³³⁷ Washington³³⁸ and Wisconsin.³³⁹ Any new electric generation facility of a certain size must obtain prerequisite state certification before construction of the asset begins.³⁴⁰

And this jurisdiction does differ within these twenty-eight states which exercise authority as to whether jurisdiction over siting is vested in the state, the PUC, or in a separate state siting board authority. Fifteen of these twenty-eight states have a separate and single-purpose specific energy facility siting authority legally apart from the PUC that regulates retail energy transactions in the state. The fifteen with separate state regulatory agencies exercising authority over energy facility siting are: Arizona, California, Connecticut, Florida, Maine, Massachusetts, Nebraska, Kentucky, New Hampshire, New York, Ohio, Oregon, Rhode Island, Washington, and Wyoming.³⁴¹

Many impose size thresholds, in an ascending staircase of size thresholds for state regulation of utility or independent power generation facilities:

- Iowa,³⁴² New York,³⁴³ Oregon,³⁴⁴ and Washington³⁴⁵

³²¹ MASS. ANN. LAWS ch. 164, § 69J (LexisNexis 2016).

³²² MINN. STAT. § 216B.243 (2016).

³²³ MONT. CODE ANN. § 75-20-201 (2015).

³²⁴ NEB. REV. STAT. ANN. § 70-1012 (LexisNexis 2016).

³²⁵ NEV. REV. STAT. ANN. § 704.865(1) (LexisNexis 2016).

³²⁶ N.H. REV. STAT. ANN. § 162-H:5 (LexisNexis 2016).

³²⁷ N.J. REV. STAT. § 40:55D-67(a) (2016).

³²⁸ N.M. STAT. ANN. § 62-9-1(A) (LexisNexis 2016).

³²⁹ N.Y. PUB. SERV. LAW § 121(1) (Consol. 2016).

³³⁰ N.C. GEN. STAT. § 62-110(a) (2016).

³³¹ N.D. CENT. CODE §49-22-07(1) (2015).

³³² OHIO REV. CODE. ANN. § 4906.04 (LexisNexis 2016).

³³³ OR. REV. STAT. § 469.320(1) (2016).

³³⁴ 42 R.I. GEN LAWS § 42-98-4 (2016).

³³⁵ S.D. CODIFIED LAWS § 49-41B-4 (2016).

³³⁶ VT. STAT. ANN. tit. 30, § 248(a)(B)(3) (2016).

³³⁷ VA. CODE ANN. § 56-265.2(A)(1) (2016).

³³⁸ WASH. REV. CODE ANN. § 80.50.060(1) (2016).

³³⁹ WIS. STAT. § 196.491(3)(a)(1) (2016).

³⁴⁰ See, e.g., *Requirements for Power Plant Construction Applications*, PUB. SERV. COMMISSION OF WISCONSIN, <http://psc.wi.gov/utilityinfo/electric/construction/powerPlantRequirements.htm> (last visited Apr. 9, 2016).

³⁴¹ See TOM STANTON, WIND ENERGY & WIND PARK SITING AND ZONING BEST PRACTICES AND GUIDANCE FOR STATES 13 (2012).

³⁴² IOWA CODE §§ 476A.1(3), (5), 476A.2 (2016). In Iowa a developer cannot begin construction of a project that will produce 25 MW or more of electricity within obtaining a Certificate of Public Convenience, Use, and Necessity from the Iowa Utility Board. See *id.*

require commission approval and certification for electric generation plants with a generation capacity capable of producing 25 MW or more of power output;

- One step up, the New Hampshire Site Evaluation Committee (SEC) has jurisdiction over facilities that could produce more than 30 MW;³⁴⁶
- Rhode Island's Public Utilities Commission Energy Facilities Siting Board (EFSB) has jurisdiction over facilities capable of operating at a gross capacity of 40 MW or more³⁴⁷ and on alterations that will have a major impact on the environment, public health, or safety;³⁴⁸
- Minnesota³⁴⁹ Montana,³⁵⁰ North Dakota³⁵¹ and Ohio³⁵² require plants capable of producing an output

§ 476A.2(1), (4).

³⁴³ See N.Y. PUB. SERV. LAW § 172(1) (Consol. 2016); 2 PATRICIA E. SALKIN, NEW YORK ZONING LAW AND PRACTICE § 11:23.10 (4th ed. 2016). The New York Power Plant Act of 2011 created the Multi-Agency Siting Board (Siting Board). *Id.* The Siting Board established a streamlined permitting process for all electric generation facilities with the capability of producing 25 MW or more of power. *Id.*

³⁴⁴ See OR. REV. STAT. §§ 469.300(11)(a)(A), 469.320(1) (2016). If a thermal or combustion power electric power plant has a normal generation capacity of 25 MW or if geothermal, solar, or wind energy plant has a normal generation capacity of 35 MW then the developer of such a plant must apply for a site certificate. *Id.* §§ 469.300(11)(a)(A), (J), 469.320(1). Smaller plants may also require a certificate if its accumulated effects of development are similar to a single plant with an average electric generation capacity of 35 MW or more. *Id.* §§ 469.300(12), 469.320(1).

³⁴⁵ See *Comparison of Siting Requirement*, OREGON.GOV, <http://www.oregon.gov/energy/Siting/Pages/compare.aspx> (last visited Apr. 9, 2016) (comparing consolidated review process in Montana, California, and Oregon). Washington's Energy Facility Site Evaluation Council (EFSEC) makes siting decisions, and has jurisdiction covers power plants 250 MW and greater, and facilities able to receive greater than 50,000 bbl or process greater than 25,000 bbl per day of crude or refined petroleum. *See id.*

³⁴⁶ See N.H. REV. STAT. ANN. § 162-H:2(VII)(b), (g), 162-H:4(I) (LexisNexis 2016).

³⁴⁷ 42 R.I. GEN. LAWS § 42-98-3(c)–(d) (2016) (defining major energy facility as capable of operating at 40 MW or more); *id.* § 42-98-4.

³⁴⁸ See *id.* §§ 42-98-3(c), 42-98-4.

³⁴⁹ MINN. STAT. §§ 216B.243, 216B.2421 (2016) (defining what size power plants and transmission lines will be subject to this process). No person in Minnesota seeking to build a plant producing over 50 MW or lines over 200 KV can begin construction without first filing an application with the Minnesota Public Utilities Commission to obtain a Certificate of Need and a siting permit. *See id.* §§ 216B.243, 216B.2421.

³⁵⁰ See *Comparison of Siting Requirements*, *supra* note 345 (comparing consolidated review process in Montana, California, and Oregon). Montana's Natural Resources Board has jurisdiction over power plants of 50 MW and up, any in-sit coal gas facility, energy conversion facility, uranium mines, gas pipelines, and any geothermal developments in excess of \$750,000. *See id.*

³⁵¹ N.D. CENT. CODE §§ 49-22-03(5)(b), 49-22-07 (2015). An energy conversion facility is defined as a facility that can produce 50 MW or more of power. *Id.* § 49-22-03(5)(b).

³⁵² OHIO REV. CODE ANN. §§ 4906.01(B)(1)(a), 4906.04 (LexisNexis 2016). In Ohio “[n]o

capacity of 50 MW or more to obtain approval and certification;

- Maryland³⁵³ and Nevada³⁵⁴ draw the pre-construction permit line at 70 MW;
- Florida³⁵⁵ requires pre-construction permits for new electric generation facilities capable of producing 75 MW or more;
- Arizona,³⁵⁶ California,³⁵⁷ Massachusetts,³⁵⁸ South Dakota,³⁵⁹ and Wisconsin³⁶⁰ require a certification

person shall commence to construct a major utility facility in this state without first having obtained a certificate for the facility.” *Id.* § 4906.04. The Ohio statute defines a major plant as one that has the capacity to produce 50 MW or more. *Id.* § 4906.01(B)(1)(a).

³⁵³ MD. CODE ANN., PUB UTIL. §§ 7-207(b)(1), 7-207.1(a)(1)(i) (LexisNexis 2016); *see also id.* § 7-207.2(a)(2) (exempting plants that do not meet definition listed in § 7-207.1). Maryland plants capable of producing over 70 MW must obtain a Certificate of Public Convenience and Necessity from the Maryland Public Service Commission. *See id.* § 7-207.

³⁵⁴ NEV. REV. STAT. ANN. §§ 704.860(1), 704.865(1) (LexisNexis 2015). There is a Public Utilities Commission of Nevada exemption for renewable projects under 70 MW gross nameplate rating. *See id.* § 704.860(1).

³⁵⁵ *See* FLA. STAT. ANN. § 403.506(1) (LexisNexis 2016). Only power plants that produce more than “75 megawatts in gross capacity,” are regulated. *Id.*

³⁵⁶ ARIZ. REV. STAT. §§ 40-360(9), 40-360.03 (LexisNexis 2016). A plant is a separate thermal electric, nuclear or hydroelectric generating unit with a nameplate rating of 100 MW or more. *Id.* §§ 40-360(9), 40-360.03. Prior to construction plants must obtain a certificate of environmental compatibility from the Arizona Corporation Commission. *Id.* § 40-360(1)–(3), 40-360.03.

³⁵⁷ CAL. PUB. RES. CODE § 25541 (Deering 2016).

The commission may exempt from this chapter thermal powerplants with a generating capacity of up to 100 megawatts and modifications to existing generating facilities that do not add capacity in excess of 100 megawatts, if the commission finds that no substantial adverse impact on the environment or energy resources will result from the construction or operation of the proposed facility or from the modifications.

Id.

³⁵⁸ *See* MASS. ANN. LAWS ch. 164, §§ 69G, 69J (LexisNexis 2016). The Massachusetts Energy Facilities Siting Board has jurisdiction over proposed power plants capable of operating at a gross capacity of 100 MW or more and new electric transmission lines having a design rating of 69KV and with one mile or more in length. *See id.* §§ 69G, 69J.

³⁵⁹ S.D. CODIFIED LAWS §§ 49-41B-2(6), (7), 49-41b-4 (2016). South Dakota requires new conversion, AC/DC conversion, wind energy and electric transmission facilities to notify the Public Utilities Commission for a certificate that deals with location, construction and operation. *See id.* §§ 49-41b-2(7), 49-41b-4 (2016). A conversation facility is defined as a generation facility designed for or capable of generating 100 MW or more of electricity. *Id.* § 49-41b-2(6).

³⁶⁰ *See* WIS. STAT. § 196.491(1)(g), (3)(a)(1) (2016). Wisconsin requires plants with the capacity of 100 MW or more to obtain a Certificate of Public Convenience and Necessity (CPCN) from the Public Service Commission of Wisconsin. *See id.* § 196.491(1)(g), (3)(a)(1) (2016); *see also* WIS. DEPT OF NAT. RES., PUB. SERV. COMM’N OF WIS., APPLICATION FILING REQUIREMENTS ELECTRIC GENERATION PROJECTS IN WISCONSIN i (2015), <https://psc.wi.gov/utilityinfo/electric/construction/documents/powerPlantAFR.pdf> (informing those attempting to apply for a certificate of their obligations).

process for all plants over 100 MW; and

- New Mexico³⁶¹ and North Carolina³⁶² regulate facilities with over 300 Mw of facility power generation capacity and sale of the output to the public.³⁶³

In each of the twenty-eight states with state siting statutes, the siting commission, board, or council differently weighs distinct factors to determine if a siting certificate for a project will be approved, including:

- If the facility will meet current or future electricity needs;
- Adequacy of health and safety standards to protect those living in the area of the facility;³⁶⁴
- Aesthetic considerations;³⁶⁵
- Environmental considerations; and
- Economic impact of the facility on the economy of the local area and the effect of construction costs on the utility rate base to be borne by consumers.³⁶⁶

The states that exercise state authority each consider different factors in approving power generation equipment: Arizona,³⁶⁷ California,³⁶⁸ Connecticut,³⁶⁹ Florida,³⁷⁰ Iowa,³⁷¹ Kentucky,³⁷²

³⁶¹ See N.M. STAT. ANN. § 62-9-3(B) (LexisNexis 2016). “The legislature finds that it is in the public interest to consider any adverse effect upon the environment and upon the quality of life of the people of the state that may occur due to plants” See *id.* § 62-9-3(A).

³⁶² See N.C. GEN. STAT. § 62-110.1(a) (2016) (requiring a certificate for any person generating a utility sold to the general public); 4 N.C. ADMIN. CODE § 11.R8-61(a) (2016) (clarifying that plants that produce over 300 megawatts or are included in the rate base are subject to greater scrutiny); *id.* § 11.R8-63(a)(1) (2016) (noting that § 62-110.1(a) only applies to merchant plants). Administrative Code 11.R8-63 defines a “merchant plant” as:

[A]n electric generating facility, other than one that qualifies for and seeks the benefits of 16 U.S.C.A. 824a-3 or G.S. 62-156, the output of which will be sold exclusively at wholesale and the construction cost of which does not qualify for inclusion in, and would not be considered in a future determination of, the rate base of a public utility pursuant to G.S. 62-133.

Id. § 11.R8-63(a)(2).

³⁶³ See N.M. STAT. ANN. § 62-9-3(A), (B), (G) (LexisNexis 2016). “The legislature finds that it is in the public interest to consider any adverse effect upon the environment and upon the quality of life of the people of the state that may occur due to plants” See *id.* § 62-9-3(A).

³⁶⁴ See, e.g., FLA. STAT. ANN. § 403.509(3)(a) (LexisNexis 2016).

³⁶⁵ See, e.g., N.H. REV. STAT. ANN. § 162-H:16(IV)(c) (LexisNexis 2016).

³⁶⁶ See, e.g., ARIZ. REV. STAT. § 40-360.06(A)(8) (LexisNexis 2016).

³⁶⁷ See *id.* § 40-360.06(A)(1)–(9); *Arizona Power Plant and Transmission Line Siting Committee*, ARIZ. CORP. COMMISSION: UTIL. DIVISION, <http://www.azcc.gov/divisions/utilities/electric/linesiting-faqs.asp> (last visited Apr. 6, 2016).

³⁶⁸ See CAL. PUB. UTIL. CODE § 1745.5(b) (Deering 2016); CAL. ENERGY COMM’N, PUBLIC PARTICIPATION IN THE SITING PROCESS: PRACTICE AND PROCEDURE GUIDE 121 (2006), <http://www.energy.ca.gov/2006publications/CEC-700-2006-002/CEC-700-2006-002.PDF>. After

Maine,³⁷³ Maryland,³⁷⁴ Massachusetts,³⁷⁵ Minnesota,³⁷⁶ Montana,³⁷⁷ Nebraska,³⁷⁸ Nevada,³⁷⁹ New Hampshire,³⁸⁰ New York,³⁸¹ Ohio,³⁸² Oregon,³⁸³ Rhode Island,³⁸⁴ South Dakota,³⁸⁵ Vermont,³⁸⁶ Washington,³⁸⁷ and Wisconsin.³⁸⁸

an initial “Application for Certification” hearing, the Presiding Member of the two-person Committee “prepares a proposed decision based upon the evidence presented at the hearings.” *Id.* at 121. The Members’ proposed decision follows a rigid format in which each proposal includes an outline of the evidence relevant to that issue, considers the Energy Commission and public comments, states the factual findings and conclusion of the Committee, and lists the conditions of certification and verification. *See* CAL. PUB. UTIL. CODE § 1745.5(b), (c).

³⁶⁹ *See* CONN. GEN. STAT. § 16-50p(a)(3) (2016).

³⁷⁰ *See* FLA. STAT. ANN. § 403.509(3) (LexisNexis 2016). All hearings are held before an administrative law judge who creates recommendations that are approved or rejected by the FDEP. *Id.* §§ 403.5065, 403.508(1)(c)–(d). The final step in certification is approval by the Governor and those sitting on the siting board. *See id.* §§ 403.522(6), 403.5065, 403.508(a), (c)–(f), 403.522(6).

³⁷¹ *See* IOWA CODE § 476A.5(1)–(2) (2016).

³⁷² *See* KY. REV. STAT. ANN. § 278.706(2) (LexisNexis 2016).

³⁷³ *See* Presentation to the Vermont Energy Generation Siting Policy Commission: An Introduction to Maine’s Energy Siting Long-Term Contracting Considerations (Dec. 19, 2012), http://sitingcommission.vermont.gov/sites/cep/files/Siting_Commission/Publications/Meeting1_21912/ME_Bergeron_121912.pdf; *see also* ME. DEPT OF ENVTL. PROTECTION, PERMIT APPLICATION: SITE LOCATION OF DEVELOPMENT 1, 5–7, Form A, Form B (2015), <http://www.maine.gov/dep/land/sitelaw/application-text-2015.pdf> (describing the application process and including a sample application and certification forms).

³⁷⁴ *See* MD. CODE ANN., PUB. UTIL. §§ 7-207(b)(1), 7-207.1(b) (LexisNexis 2016).

³⁷⁵ *See* MASS. ANN. LAWS ch. 164, § 69J¼ (LexisNexis 2016). This finding does not require a determination of need. *See id.*

³⁷⁶ *See* MINN. STAT. § 216E.03(7) (2015).

³⁷⁷ *See* MONT. CODE ANN. § 75-20-301(1)–(2) (2015).

³⁷⁸ *See* NEB. REV. STAT. ANN. § 70-1014 (LexisNexis 2016).

³⁷⁹ *See* NEV. REV. STAT. ANN. § 704.890(1) (LexisNexis 2015).

³⁸⁰ *See* N.H. REV. STAT. ANN. § 162-H:16(IV) (LexisNexis 2016). The site evaluation committee, in connection with the counsel for the public, may request any information or studies it needs to make an informed decision; the applicant must pay all reasonable costs. All proceedings and deliberations on these matters are open to the public. *See id.* § 162-H:10(V).

³⁸¹ *See* N.Y. PUB. SERV. LAW § 168(2)–(3) (Consol. 2016).

³⁸² *See* OHIO REV. CODE ANN. § 4906.10(A) (LexisNexis 2016).

³⁸³ *See* OR. ADMIN. R. 345-022-0000(1)–(2) (2016) (offering a general standard of review); *see also* *Energy Facility Siting Standards*, OR. DEPT OF ENERGY, <http://www.oregon.gov/energy/siting/pages/standards.aspx> (last visited Apr. 6, 2016) (listing fundamental questions that need to be answered when considering the standards).

³⁸⁴ *See* 90-050-001 R.I. CODE R. § 1.13(c)(1) (LexisNexis 2016). The Public Utilities Commission holds separate hearings to determine need. *See id.* § 1.13(c)(2)(i). Final decisions from the Siting Board are released at least 120 days after the application is filed. *See id.* § 1.13(a).

³⁸⁵ *See* S.D. CODIFIED LAWS § 49-41B-7 (2016). Within one year after the application is submitted, the Commission must render a decision. *See id.* § 49-41B-24.

³⁸⁶ *See* VT. STAT. ANN. tit. 30, § 248(b) (2016); VT. PUB. SERV. BOARD, DRAFT: GUIDE TO FILING SECTION 248 PETITIONS 9–21, <http://psb.vermont.gov/statutesrulesandguidelines/guidelines/GuidetoFiling248Petition> (last visited April 9, 2016). There is no specific timeframe for state Commission decisions. *See id.* at 3.

³⁸⁷ *See* *Siting/Review Process*, WA. ENERGY FACILITY SITE EVALUATION COUNCIL,

B. Preemption of Siting Authority at the State Level

Some of the twenty-eight states with state power generation approval preempt local authority and permits through their jurisdiction. Those states with some state preemptive authority of local regulation include: Arizona,³⁸⁹ California,³⁹⁰ Connecticut,³⁹¹ Florida,³⁹² Iowa,³⁹³ Kentucky,³⁹⁴ Maine,³⁹⁵ Maryland,³⁹⁶ Massachusetts,³⁹⁷ Minnesota,³⁹⁸ Montana,³⁹⁹ New Hampshire,⁴⁰⁰

<http://www.efsec.wa.gov/cert.shtml#6> (last visited Apr. 9, 2016).

³⁸⁸ See WIS. STAT. § 196.491(3)(b), (d) (2015) (noting that the Commission must hold a public hearing).

³⁸⁹ See ARIZ. REV. STAT. § 40-360.05(A)(2) (LexisNexis 2016) (“The parties to a certification proceeding shall include . . . [e]ach county and municipal government and state agency interested in the proposed site . . .”). All Certificates of Environmental Compatibility from the Siting Committee are conditioned on compliance with applicable local ordinances and regulations, unless such ordinances or regulations are found to be “unreasonably restrictive and compliance therewith is not feasible . . .” *Id.* § 40-360.06(D).

³⁹⁰ See CAL. PUB. RES. CODE § 25500 (Deering 2016) (“In accordance with the provisions of this division, the commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.”); Eric Garofano, Note, *Losing Power: Siting Power Plants in New York State*, 4 ALB. GOVT L. REV. 728, 744 (2011).

The Commission can override local regulations only if the affected local government agrees to amend the regulation in question, or the “Commission finds that the proposed project is needed for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity.” CAL. ENERGY COMMISSION, ENERGY FACILITY LICENSING PROCESS: DEVELOPERS GUIDE OF PRACTICES & PROCEDURES 13 (2000), http://www.energy.ca.gov/siting/documents/2000-12-07_700-00-007.PDF.

³⁹¹ See CONN. GEN. STAT. §§ 16-50x(a), 16-243 (2016). The Connecticut Siting Council has exclusive jurisdiction over the location and type of all energy generation facilities. See § 16-50x(a). Nevertheless, “[a]ny town, city or borough zoning commission and inland wetland agency may regulate and restrict the proposed location of a facility . . .” See § 16-50x(d).

³⁹² See FLA. STAT. ANN. §§ 403.502, 403.508(f) (LexisNexis 2016).

³⁹³ See IOWA CODE § 476A.5(1), (3) (2016) (“City and county zoning authorities designated as parties to the proceeding may appear on record and may state whether the facility meets city, county and airport zoning requirements. The failure of a facility to meet zoning . . . shall not preclude the board from issuing the certificate and to that extent the provisions . . .”).

³⁹⁴ See KY. REV. STAT. ANN. § 278.704(1)–(3) (LexisNexis 2016). Any exhaust stack or wind turbine must be built at least one thousand feet from the property boundary, and two thousand feet from any residential neighborhood, school, hospital, or nursing home. *Id.* § 278.704(2). The state can preempt local zoning regulations. See *id.* § 100.211(2). If the proposed facility will be sited in an area with existing land-use or zoning regulations, those set-back requirements dominate over those listed in statute, and are not subject to modification by the board. See *id.* § 278.704(3).

³⁹⁵ See ME. STAT. tit. 12, § 685-A(3), (4-A)(B) (2015).

³⁹⁶ See MD. CODE REGS. 20.79.01.04; 20.79.06(A)–(B) (2016).

³⁹⁷ See MASS. ANN. LAWS ch. 164, §69K (LexisNexis 2016). The Massachusetts Siting Board certifies all electric generation projects of 100 Mw or larger; if local regulation prevents

New Mexico,⁴⁰¹ New York,⁴⁰² Ohio,⁴⁰³ Oregon,⁴⁰⁴ Rhode Island,⁴⁰⁵ South Dakota,⁴⁰⁶ Vermont,⁴⁰⁷ and Washington.⁴⁰⁸

Regarding a Washington wind project, county commissioners wanted an increased setback requirement, in excess of 2,000 feet to

a state certified generation construction project, the Board has the authority to issue a Certificate of Environmental Impact and Public Interest if the applicant is prevented or hindered from building the facility because of adverse state or local agency permitting decision or undue agency delay. *See id.* §§ 69G, 69J, 69K.

³⁹⁸ *See* MINN. STAT. §§ 216E.03(1), .05(1)(a), .10(1) (2015) “A large electric generating plant may be constructed only on a site approved by the commission,” with a state-issued site permit, which “shall supersede and preempt all zoning, building, or land use rules, regulations, or ordinances promulgated by regional, county, local and special purpose government.” *Id.* §§ 216E.03(1), .10(1).

³⁹⁹ *See* MONT. CODE ANN. §§ 75-20-103, -401(1) (2015).

⁴⁰⁰ *See* N.H. REV. STAT. ANN. §§ 162-J, 162-H:4(VI) (LexisNexis 2016). Renewable energy projects have the opportunity to engage in a fast track permitting process. *See id.* §162-H:4(IV), :5(I). The state commission has the power to exempt an applicant from certain provisions of the Act, and preempt local statutes, laws and ordinances. *See id.* §§ 162-J, 162-H:4(VI).

⁴⁰¹ *See* N.M. STAT. ANN. § 62-9-3(G) (2016) (“The judgment of the Commission [is] conclusive on all questions of siting, land use, aesthetics and any other state or local requirements affecting the siting.”).

⁴⁰² *See* N.Y. PUB. SERV. LAW § 168(3)(e) (Consol. 2016). The Board will offer the local government an opportunity to present evidence in support of the local law, but if the municipality fails to file a notice of interest at the appropriate time in the proceeding, it is barred from all enforcement authority. *See id.* The Multi-Agency Siting Board grants a Certificate for Construction if the Board determines that the proposed facility is in compliance with applicable local laws and regulations, although the board “may elect not to apply” a local law, ordinance, or regulation in whole or in part. *See id.*

⁴⁰³ *See* OHIO REV. CODE ANN. § 4906.13(B) (LexisNexis 2016) (“No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or initial operation of a major utility facility or economically significant wind farm authorized by a certificate issued [by the Ohio Power Siting Board].”).

⁴⁰⁴ *See The Siting Process for Energy Facilities*, OR. DEP’T OF ENERGY, <http://www.oregon.gov/energy/Siting/Pages/process.aspx> (last visited Apr. 7, 2016) (describing state certification as a one-step process). The Council’s decision is binding on all state and local entities, but does not constitute a federal-delegated permit. *See* OR. REV. STAT. § 469.320(1) (2016) (“[N]o facility shall be constructed or expanded unless a site certificate has been issued for the site thereof.”); *id.* § 469.401(3) (2016) (noting certificate binds all state entities, counties, and cities to the approval of the site).

⁴⁰⁵ *See* 42 R.I. GEN. LAWS ANN. § 42-98-9(a)–(c), (e) (2016).

⁴⁰⁶ *See* S.D. CODIFIED LAWS §§ 49-41B-7, 49-41B-28 (2016). “A permit for the construction of a transmission facility” at the state level “preempt[s] any county or municipal land use, zoning, or building rules, regulations or ordinances.” *Id.* § 49-41B-28.

⁴⁰⁷ *See* *South Burlington v. Vt. Elec. Power Co.*, 344 A.2d 19, 24, 25 (Vt. 1975) (“[W]e recognize and approve the general statement of public policy . . . that local municipalities should play a secondary role where a clash of authority appears to exist between state control and local control.” (citing *Jennings v. Conn. Light & Power Co.*, 103 A.2d 535, 542–43 (Conn. 1954))).

⁴⁰⁸ *See* WASH. REV. CODE ANN. § 80.50.030(1), (4)–(5), .50.040(1)–(2), (11)–(12) (2015); *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 197 P.3d 1153, 1158 (Wash. 2008). The Council asks potentially impacted cities, towns, and port districts to appoint representatives to the Council. *See* WASH. REV. CODE § 80.50.030(4)–(5).

the nearest property line, which the project developer, Horizon, contended would make the project unviable.⁴⁰⁹ Eventually, the county rejected Horizon's proposal.⁴¹⁰ Thereafter, Horizon applied to the EFSEC for a request for preemption of the county's zoning ordinances, and the state EFSEC approved the proposed plan which the governor certified after sending the plan back to the council for further setback alterations.⁴¹¹ On appeal, the Supreme Court of Washington noted that Horizon had participated in many months of public meetings, and had agreed to reduce the size of the project by approximately fifty percent.⁴¹² For these reasons, the Supreme Court affirmed the governor's approval of the Horizon project: "This case involves the State's authority to permit the construction and operation of wind turbines for energy production in the state without authorization from the county in which the turbines will be placed."⁴¹³

Three other states require compliance with local regulations, however, local laws can be preempted under limited special circumstances: Nevada,⁴¹⁴ New Jersey,⁴¹⁵ and Wisconsin.⁴¹⁶ Five of the twenty-eight states with state siting statutes retain the necessity of power facility applicants to obtain all local land-use and environmental authority in their siting processes.⁴¹⁷ They do this either by requiring all local permits to be obtained as a prerequisite for state siting approval, or by not preempting any local permits.⁴¹⁸

⁴⁰⁹ *Residents Opposed to Kittitas Turbines*, 197 P.3d at 1160, 1161.

⁴¹⁰ *Id.* at 1161.

⁴¹¹ *Id.*

⁴¹² *Id.* at 1160, 1175.

⁴¹³ *Id.* at 1157, 1158.

⁴¹⁴ See NEV. REV. STAT. ANN. § 704.890(1)(e) (LexisNexis 2015).

⁴¹⁵ See N.J. REV. STAT. § 40:55D-19 (2016). If the Board finds that the land "described in the petition is necessary for the service, convenience or welfare of the public, . . . the public utility or electric power generator may proceed in accordance with such decision of the Board of Public Utilities, any ordinance or regulation made under the authority of this act notwithstanding." *Id.*

⁴¹⁶ See THE BRATTLE GRP., SURVEY OF TRANSMISSION SITING PRACTICES IN THE MIDWEST 6, 8, 11 (2004) (hereinafter "EEI"). Sixty days before submitting an application, an applicant must submit a description on their proposed project to the Wisconsin Department of Natural Resources (WDNR). *Id.* at 6. WDNR will then provide a list of all set-specific permits required for construction and operation on that site. WIS. STAT. § 196.491(3)(a)3.a. (2015). Within twenty days, applicants must apply for these permits, and within 120 days WDNR must decide then whether to issue these environmental permits. See *id.*; DEP'T OF NAT. RES., STATE OF WIS., ELECTRIC UTILITY PRE-CPCN APPROVAL AND APPLICATIONS (2004), <http://dnr.wi.gov/files/PDF/pubs/wa/WA606.pdf>. The Public Service Commission holds public hearings, and prepares an Environmental Impact Statement before it determine whether to approve, reject or modify the plant plants. See *id.*

⁴¹⁷ See *infra* notes 424–28 and accompanying text.

⁴¹⁸ See *infra* notes 424–28 and accompanying text.

In the latter situation, this adds an additional state permit layer without preempting or superseding the required local permits which must be obtained. These five states are: Nevada,⁴¹⁹ New Jersey,⁴²⁰ North Carolina,⁴²¹ Virginia,⁴²² and Wisconsin.⁴²³

There still can be conditional preemption. In North Carolina, the process is primarily local; the state Commission can revoke the certificate if the facility fails to gain local approval.⁴²⁴ Virginia features a primarily local siting process, although the state can preempt local zoning regulations.⁴²⁵ In states with preemptive authority over power asset siting, consistency with local land-use regulations is a significant consideration, if not a requirement.⁴²⁶ However, these are considered at the state level, not by local officials. Local input is obtained either by granting the local officials intervenor party status in the state proceeding or more directly by either creating an advisory committee with local representation, or by having local representation on the state agency considering the permit.⁴²⁷

C. Small Wind Project Siting Authority

Several states have state zoning rules that act as a default when a locality lacks regulations relevant to small wind projects. Only Minnesota has passed legislation that completely pre-empts local rule for wind projects.⁴²⁸ Eight states are examined, in context, below.

MINNESOTA. Minnesota enacted the Minnesota Wind Siting

⁴¹⁹ See NEV. REV. STAT. ANN. § 704.890(1)(e) (LexisNexis 2015).

⁴²⁰ See *supra* note 415 and accompanying text.

⁴²¹ See 4 N.C. ADMIN. CODE 11.R8-63(b)(2)(v), (e)(2) (2016).

⁴²² Developers must obtain pre-construction approval from the State Corporation Commission, but the Commission focuses on overarching concerns of “public interest.” See VA. CODE ANN. § 56-234.3 (2016) (stating requirements for utilities pre-construction). The state can preempt local zoning regulations. *Id.*

⁴²³ See *supra* note 416 and accompanying text.

⁴²⁴ See 4 N.C. ADMIN. CODE 11.R8-63(b)(2)(v), (e)(2).

⁴²⁵ See VA. CODE ANN. § 56-265.2(A)(2) (West 2016); EDISON SITING DIRECTORY, *supra* note 309, at 125. Developers must obtain pre-construction approval from the State Corporation Commission, but the Commission focuses on overarching concerns of “public interest.” See VA. CODE ANN. § 56-265.2(A)(1)–(2) (stating requirements for utilities pre-construction); *id.* § 56-234.3; EDISON SITING DIRECTORY, *supra* note 305, at 125.

⁴²⁶ See, e.g., WASH. ADMIN. CODE § 463-43-050(1) (2016).

⁴²⁷ See, e.g., MINN. STAT. ANN. § 216F.08(a)-(c) (West 2016); WASH. REV. CODE ANN. § 80.50.030(4)–(5) (2016).

⁴²⁸ MINN. STAT. ANN. § 216F.07 (2016).

Act in 1995, and wind projects over 5 MW in size require only a state permit.⁴²⁹ This state permit process pre-empts all local regulation.⁴³⁰ If the facility is less than 5 MW in size, local regulations still control.⁴³¹ In 2007, the Minnesota legislature amended the wind siting act to allow county boards to take over the permitting process for projects under 25 MW following strict guidelines; several counties chose to assume this responsibility.⁴³²

WISCONSIN. Wisconsin passed Wisconsin Act 40 that empowered the Public Service Commission to create a wind Council to develop a wind ordinance limiting the requirements a town or city can impose on a wind facility.⁴³³ The lot set back requirements in PSC 128 was 3.1 times the total height of the turbine.⁴³⁴ Wisconsin's Joint Committee for Review of Administrative Rules voted to temporarily suspend this statute.⁴³⁵ Wisconsin does still allow for projects over 100 MW or facilities built by a utility to go through only a state level review.⁴³⁶ These facilities are reviewed by the Public Service Commission of Wisconsin only and preempt local regulations.⁴³⁷

OHIO. Ohio enacted legislation that allowed the Ohio Power Siting Board (OPSB) to oversee the development of commercial wind facilities of 5-50 MW.⁴³⁸ This process is only for wind systems and does preempt all local regulations.⁴³⁹

⁴²⁹ See *id.* §§ 216F.01, 216F.02, 216F.04, 216F.05. The process allows for a 180-day deadline for a decision from the Public Utilities Commission once the application has been determined to be complete. *Id.* § 216F.04. The application process considers the environmental impact, noise levels, set back distances, and the overall design of the facility. See *id.* § 216F.05(5).

⁴³⁰ *Id.* § 216F.07. The Wind Siting Act states: "A permit under this chapter is the only site approval required for the location of an LWECs. The site permit supersedes and preempts all zoning, building, or land use rules, regulations, or ordinances adopted by regional, county, local, and special purpose governments." *Id.*

⁴³¹ See *id.* §§ 216F.01(3), 216F.02.

⁴³² See *id.* § 216F.08.

⁴³³ S.B. 185, 2009 Assemb. (Wis. 2009).

⁴³⁴ WIS. ADMIN. CODE PSC § 128.13 (2016).

⁴³⁵ *Wisconsin Wind Siting*, WIWINDINFO.NET, <http://www.renewwisconsin.org/wiwindinfoOLD.net/policy/siting.html> (last visited Apr. 12, 2016).

⁴³⁶ See WIS. STAT. ANN. § 196.491(1)(e), (1)(g), (3)(a) (West 2016).

⁴³⁷ See *id.* § 196.491(1)(e), (1)(g), (2r) (3)(a).

⁴³⁸ See OHIO REV. CODE ANN. §§ 4906.02, 4906.13, 4906.20 (West 2016). The application requires a review of the environmental impacts, has certain height and noise guidelines, guidelines for the design of the wind turbine as well as lot set-back regulations. See *id.* § 4906.20(B)(2). The OPSB decides whether or not to issue a Certificate of Environmental Compatibility and Public Need. See *id.* §§ 4906.01(D), 4906.20(A).

⁴³⁹ See *id.* § 4906.13.

OREGON. If the facility is larger than 105 MW, the developer only proceeds through a state level procedure.⁴⁴⁰ If the facility is under 105 MW, it is typically local review, however the developer can opt into the state Energy Facility Siting Council (EFSC) review.⁴⁴¹ The EFSC site certificate s preempts local regulation, and if the certificate has been issued, all applicable state and local agencies are required to issue a permit as well.⁴⁴² Wind facilities in Oregon that are under 100 MW also have the option of choosing an expedited review that would be six months in length or nine months in length if there are any groups challenging the site.⁴⁴³

WASHINGTON. In Washington, wind facilities are exempt from statewide review and are permitted through local review. However, the developer can choose to opt into the Washington State Energy Facility Site Council review.⁴⁴⁴ The EFSC includes a representative from the municipality where the wind facility is proposed, but also includes a representative from five state agencies and an appointee of the governor.⁴⁴⁵ The EFSC review and decision by the EFSC does preempt local rule.⁴⁴⁶ However, unlike other states like Massachusetts or Connecticut, the final siting decision for an energy facility in Washington lies with the governor, pursuant to the RCW 80.50.100.⁴⁴⁷ The governor's final determination may be subject to judicial review pursuant to RCW 80.50.140.⁴⁴⁸ A county Wind Farm Resource Overlay Zone ordinance was deemed preempted by the state's Energy Facility Site Locations Act.⁴⁴⁹

⁴⁴⁰ See OREGON COLUMBIA PLATEAU ECOREGION WIND ENERGY SITING AND PERMITTING GUIDELINES 5 (2008).

⁴⁴¹ See OR. REV. STAT. ANN. § 469.320 (2)(c), (4) (West 2016); OREGON COLUMBIA PLATEAU ECOREGION WIND ENERGY SITING AND PERMITTING GUIDELINES 5 (2008). The EFSC in Oregon is composed of seven members who all are appointed by the governor. OR. REV. STAT. ANN. § 469.450(1).

⁴⁴² See *id.* § 469.401(3).

⁴⁴³ *Id.* § 469.370(10).

⁴⁴⁴ See *Siting/Review Process*, ENERGY FACILITY SITE EVALUATION COUNCIL, <http://www.efsec.wa.gov/cert.shtml> (last visited Nov. 3, 2016).

⁴⁴⁵ See WASH. ADMIN. CODE § 463-06-020 (2016).

⁴⁴⁶ See *id.* §§ 463-28-020, 463-28-070 ("If the council approves the request for preemption it shall include conditions in the draft certification agreement which consider state or local governmental or community interests affected by the construction or operation of the energy facility.").

⁴⁴⁷ *Id.* § 80.50.100(3).

⁴⁴⁸ *Id.* § 80.50.140.

⁴⁴⁹ See *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 197 P.3d 1153, 1173, 1176–77 (Wash. 2008) (holding that county Wind Farm Resource Overlay Zone order was preempted by the state's Energy Facilities Site Locations Act and inconsistently of a project site with the ordinance did not bar the project); Uma

IOWA. In Iowa any project over 25 MW requires review by the Iowa Utilities Board for a consolidated permit that preempts local zoning.⁴⁵⁰ The rules provide where a proposed project does not meet local regulations, it can still be approved at the state level.⁴⁵¹

HAWAII. In Hawaii only renewable energy projects have a dedicated siting process.⁴⁵² All other energy projects must face approvals by various departments and agencies.⁴⁵³ The subdivision exemption allows renewable energy projects to qualify for 20-year renewable leases.⁴⁵⁴ Hawaii law specifically allows wind turbines in areas zoned as agricultural districts.⁴⁵⁵

VERMONT. Vermont has two acts, depending on which applies to a particular energy project, that demarcate whether state or local jurisdiction, respectively, applies to energy facilities siting. Vermont Act 250 embodies county government with authority over siting decisions. Alternatively, Vermont Act 248 offers one model of state preemption on energy project siting.

Traditionally, Vermont's large-scale utility projects have been regulated by Act 248 which authorizes the Public Service Board (PSB) to issue a Certificate of Public Good (CPG) as final approval.⁴⁵⁶ Projects coming under the purview of Act 248 "are exempt from local zoning and Act 250 review," with the purpose of making "the PSB the sole governmental body responsible for assuring reliable provision of electric service" in Vermont.⁴⁵⁷ Under Act 248, "[t]he PSB considers the public good in determining whether a project will have an undue adverse effect on natural resources, aesthetics or scenic beauty," among other things.⁴⁵⁸ Conversely, while Act 250 does contain a number of the same criteria contained in Act 248, "[t]he district commissions do not consider the public good in assessing a proposed project's" undue

Outka, *The Renewable Energy Footprint*, 30 STAN. ENVTL. L.J. 241, 279 (2011).

⁴⁵⁰ IOWA CODE ANN. §§ 476A.1(5), 476A.2(1), 476A.5(3) (West 2016).

⁴⁵¹ *See id.* § 476A.5.

⁴⁵² HAW. REV. STAT. ANN. §§ 201N-1, 201N-4(c)(2) (West 2016).

⁴⁵³ *See* EDISON SITING DIRECTORY, *supra* note 305, at 31.

⁴⁵⁴ HAW. REV. STAT. ANN. § 201N-14(1), (d)(2).

⁴⁵⁵ *See id.* § 205-2 (d)(4).

⁴⁵⁶ VT. STAT. ANN. Tit. 30, § 248(a)(B)(3) (2016).

⁴⁵⁷ VT. COMM'N ON WIND ENERGY REGULATORY POLICY, FINDINGS AND RECOMMENDATIONS 2-4 (2004), <http://www.state.vt.us/psd/index/WindCommissionFinalReport-12-15-04.pdf>.

⁴⁵⁸ *Id.*

adverse effect.⁴⁵⁹

The Commission ultimately determined that Act 248 is the appropriate rubric for reviewing commercial wind proposals.⁴⁶⁰ The Commission enumerated several factors which the PSB should always consider when analyzing a proposal's adverse effects.⁴⁶¹ These include the cumulative impact of wind development on an area, FAA lighting,⁴⁶² and the presence of decommissioning funds.⁴⁶³

The Vermont Commission on Wind Energy Regulatory Policy is designed to "provid[e] guidance and recommendations on whether the current regulatory approval process as prescribed in 30 V.S.A. Section 248 provide[d] a review process appropriate to commercial [merchant power supply wind farms] and, if not, to recommend regulatory or other appropriate changes to the regulatory process."⁴⁶⁴ It recommended that the state continue to consider overall energy needs when reviewing application for wind power projects under its Section 248 rules, which exempt projects from local zoning regulations.⁴⁶⁵ This allows the Public Service Board to consider the "public good" and overall electric capacity needs of the state, along with the environmental impact of a project, when rendering its decision.⁴⁶⁶ There was deliberation to change the process so that wind projects would fall under Section 250 rules, which give local district commission's primary jurisdiction over siting.⁴⁶⁷ These local commissions are not required to consider the "public good" aspects of renewable energy, but instead focus more on local environmental impacts, including aesthetics; projects also are required to comply with local and regional land use plans.⁴⁶⁸

VI. CONCLUSION

Electric power was recently deemed, aside from the wheel, to be the second most important invention in history and the most important invention of the last one thousand years.⁴⁶⁹ There is no

⁴⁵⁹ *Id.*

⁴⁶⁰ *See id.* at 4-14.

⁴⁶¹ *See id.* at 4-20.

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at 1-1.

⁴⁶⁵ *See id.* at 2-4, 4-14.

⁴⁶⁶ *See id.* at 2-4, 2-6.

⁴⁶⁷ *See id.* at 2-7, 4-13.

⁴⁶⁸ *See id.* 2-8, 2-9.

⁴⁶⁹ Fallows, *supra* note 7.

technology, today, that matters more than electric power.⁴⁷⁰ And for the past few years, wind has been the primary new power source deployed in America.⁴⁷¹ The power sector has a delivered value in the United States of almost \$400 billion annually,⁴⁷² exceeding the total amount of corporate income taxes collected in the United States.⁴⁷³

And it is no longer a primary question of technology—everything about this technology is turning on how the law is interpreted and applied.

The federalist United States system of law regulates and controls the siting of new renewable energy resources, including wind turbines. Approximately half of the states preempt the inherent local power over wind and/or new power generation siting. The legal metrics which establish jurisdiction vary. For example, the Massachusetts siting board has jurisdiction over all generating facilities based only limited by size, whereas in Florida the siting board only has jurisdiction over certain types of generating facilities, and in Nevada the siting board only has jurisdiction by ownership over public utility generating facilities and not regarding power generation by merchant power generation facilities. Size of power development matters in terms of legal jurisdiction: Massachusetts has a 100 Mw minimum threshold,⁴⁷⁴ Florida has a 75 Mw threshold,⁴⁷⁵ Oregon has a 25 Mw threshold for thermal power sources⁴⁷⁶ and a 35 Mw threshold for renewable power sources,⁴⁷⁷ Rhode Island a 40 Mw threshold,⁴⁷⁸ and New Hampshire has a 30 Mw threshold.⁴⁷⁹

Some states approach the threshold criteria differently. In Hawaii, the size of the parcel determines which board oversees the

⁴⁷⁰ See FERREY, *supra* note 4, at 562, 563.

⁴⁷¹ See *Energy Dept: U.S. Wind Energy Production and Manufacturing Reaches Record Heights*, U.S. DEP'T OF ENERGY (Aug. 6, 2013), <http://energy.gov/articles/energy-dept-reports-us-wind-energy-production-and-manufacturing-reaches-record-highs>; *Scheduled 2015 Capacity Additions Mostly Wind and Natural Gas; Retirements Mostly Coal*, U.S. ENERGY INFORMATION ADMINISTRATION (Mar. 10, 2015), www.eia.gov/todayinenergy/detail.cfm?id=20292.

⁴⁷² PUB. POLICY INSTITUTE OF N.Y. STATE, *supra* note 14.

⁴⁷³ *Historical Amount of Revenue by Source*, TAX POLICY CTR. (Feb. 4, 2015), <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=203>.

⁴⁷⁴ EDISON SITING DIRECTORY, *supra* note 305, at 57.

⁴⁷⁵ *Id.* at 25.

⁴⁷⁶ OR. REV. STAT. § 469.300(11)(a)(A) (2015).

⁴⁷⁷ *Id.* § 469.300(11)(a)(J).

⁴⁷⁸ See 42 R.I. GEN. LAWS §§ 42-98-3(c)–(d), 42-98-4 (2016).

⁴⁷⁹ See N.H. REV. STAT. ANN. § 162-H:2(VII)(a)–(b) (LexisNexis 2016).

siting of the project,⁴⁸⁰ while in Nevada the population of the county acts as the threshold criterion.⁴⁸¹ Nevada assumes jurisdiction for siting decisions through the state PUC in less populated counties, while county air control agencies at the local level assume authority in the largest counties. There is exclusive state jurisdiction over the facilities and hardware which produce and move power

In certain states, the state siting board process has the power to preempt local and other state permitting authorities.⁴⁸² In some states, the siting board possesses the power to take extraordinary action to issue a composite permit, consisting of all the necessary permits for construction if a project is determined to have faced considerable opposition and frustration at the state or local level, however, the state energy siting board cannot preempt the state or local laws, as opposed to interpreting them itself.⁴⁸³ States such as Florida and Rhode Island offer a “one-stop shop” streamlined approach to the permitting process where all the necessary state and local permits are routinely granted through one state authority permitting process.⁴⁸⁴ And, states like Nevada allow for exclusive jurisdiction of the process to be dependent on the operating budget of the applicant.⁴⁸⁵ Some also feature the availability of expedited approval timelines. In New Hampshire, the expedited approval process is only available to renewable energy projects.⁴⁸⁶ The Oregon statute creates an expedited approval process for proposed energy facility whose total capacity is less than 100 Mw.⁴⁸⁷

This United States federalist legal dichotomy over power has caused conflict and friction in American law. There are different legal standards employed in different states, depending on how the state constitution or statutes activate preemptive state power to override traditionally asserted municipal land-use power over power facilities and lines. As discussed herein, approximately half the states exert preemptive power over their municipalities when it comes to power; while the remaining states defer to their municipalities. These are the ripples of constitutional federalism, played out differentially in a fifty-state checkerboard. And this is

⁴⁸⁰ See EDISON SITING DIRECTORY, *supra* note 305, at 31.

⁴⁸¹ See *id.* at 77.

⁴⁸² See, e.g., OR. REV. STAT. § 469.401 (2016).

⁴⁸³ See, e.g., MASS. ANN. LAWS. Ch. 164, § 69K1/2 (LexisNexis 2016).

⁴⁸⁴ See, e.g., 42 R.I. GEN. LAWS § 42-98-7(a)(1) (2016); EDISON SITING DIRECTORY, *supra* note 305, at 25.

⁴⁸⁵ NEV. REV. STAT. ANN § 704.873 (LexisNexis 2016).

⁴⁸⁶ EDISON SITING DIRECTORY, *supra* note 305, at 79–80.

⁴⁸⁷ OR. REV. STAT. § 469.370(10) (2016).

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an issue and friction which will continue, as electric power in America is transformed by new technology and new private stakeholders in the implementing role.