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Traditional Public Utility Law and the Demise of a Merchant Transmission Developer

By Meredith Hurley*

INTRODUCTION

Due to advances in technology and the coinciding reduction in the cost of renewable energy sources, the United States electric power system is currently undergoing dramatic changes.¹ The electricity grid is becoming less centralized as more distributed resources, such as wind and solar energy, become available to generate power.² Concurrently, a larger number of private developers are looking to enter the electricity market in order to bring more energy sources onto the grid.³ These changes to the electricity grid are challenging incumbent utilities and the current regulatory construct created under traditional public utility law.⁴ As renewable energy resources continue to develop in a non-centralized manner, the jurisdictional lines between the Federal Energy Regulatory Commission and state public utility commissions continue to blur and overlap.⁵ Renewable energy resources are unconventional in how they produce electricity, which exacerbates the application of public utility law to their development. Unlike most fossil fuels, which are burned in a small number of large power plants, renewable energy sources are dispersed in a wide variety of areas and in much larger numbers.⁶

In particular, wind energy continues to grow nationwide thanks to the federal production tax credit and state renewable portfolio standards.⁷ In 2017, wind energy became the largest

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¹ MIT ENERGY INITIATIVE, UTILITY OF THE FUTURE, 10 (2016), <http://energy.mit.edu/research/utility-future-study/>.

² *Id.* at 2.

³ *Id.* at 8.

⁴ *See id.* (stating that renewable-energy resources are being increasingly deployed as distributed generation, which is disrupting the traditional "top-down" structure of the power sector); *see also* Pilita Clark, *The Big Green Bang: How Renewable Energy Became Unstoppable*, FIN. TIMES (May 18, 2017) <https://www.ft.com/content/44ed7e90-3960-11e7-ac89-b01cc67cfeec> (noting that wind and solar projects are being built at unprecedented rates, threatening the business models of established power companies).

⁵ *See generally* Giovanni S. Saarman González, *Evolving Jurisdiction Under the Federal Power Act: Promoting Clean Energy Policy*, 63 UCLA L. REV. 1422 (2016).

⁶ *See* MIT ENERGY INITIATIVE, *supra* note 1, at 29 (explaining that the primary differentiating factor of renewable-energy resources is that their distributed nature allows them to provide services either more effectively, cheaply, or simply in locations inaccessible to the larger, more centralized energy resources).

⁷ *Energy Department Reports: Wind Energy Continues Rapid Growth in 2016*, DEP'T OF ENERGY (Aug. 8, 2017), <https://www.energy.gov/articles/energy-department-reports-wind-energy-continues-rapid-growth-2016>; MOLLY F. SHERLOCK, CONG. RESEARCH SERV., R43453, THE RENEWABLE ELECTRICITY PRODUCTION TAX CREDIT: IN BRIEF 1, Nov. 27, 2018, <https://fas.org/sgp/crs/misc/R43453.pdf> ("The renewable electricity [production tax credit] is a

source of renewable energy capacity in the United States.⁸ The availability of additional wind resources requires the construction of new transmission lines to deliver the wind energy to urban areas with high demand for electricity. Unfortunately, wind energy is being curtailed due to “an inability to transmit power from where it is generated to where it is needed, [which] could degrade the potential for wind power to reduce fuel costs and emissions.”⁹ Historically, transmission line development was controlled by public utilities, but now independent or merchant transmission developers are increasingly entering the market to build new transmission facilities.¹⁰ Unfortunately, these new entrants into the electricity market are being treated similarly to the traditional vertically integrated utilities that were established decades ago.¹¹ As this paper will demonstrate, the analogous treatment of two very different types of energy providers creates barriers to clean energy development.¹² While clean energy development has made great strides in recent years, contemporary federalism issues and the application of traditional public utility law to private developers of interstate transmission lines continue to limit the expansion of clean energy in the United States.

In order to highlight the barriers confronting transmission line development in the United States today, this Comment examines a case study of a transmission line project in the Midwest and analyzes how federalism issues and the application of public utility law stifled its development. In the case study, Clean Line Energy Partners (Clean Line), a merchant transmission developer, attempted to build a new transmission line through two states in order to transport wind energy produced in the Great Plains to the Chicago area. Clean Line was operating within the confines of traditional public utility law but was stymied by regulatory action at the state level due to a “state-centric” approach that lacked a broader perspective on the benefits of clean energy development. As a merchant transmission developer, Clean Line does not fit within the definition of a traditional public utility and, as a result, was barred from developing an electric transmission line in Illinois and other states.¹³

per-kilowatt-hour tax (kWh) credit for electricity generated using qualified energy resources...For wind facilities, the credit is available for facilities for which construction begins before January 1, 2020.”).

⁸ Frank Oteri et al., Nat’l Renewable Energy Lab., 2017 State of Wind Development in the United States by Region 1 (Apr. 2018), <https://www.nrel.gov/docs/fy18osti/70738.pdf>.

⁹ Jennie Jorgenson et al., Nat’l Renewable Energy Lab., Reducing Wind Curtailment Through Transmission Expansion in a Wind Vision Future iv (Jan. 2017), <https://www.nrel.gov/docs/fy17osti/67240.pdf> (“Overall, these results suggest that the power system can be operated with more than 35% wind penetration (and 12% solar penetration), but that transmission expansion is necessary to fully utilize the available renewable energy.”).

¹⁰ Heidi Wertz, *Let’s Make a Deal: Negotiated Rates for Merchant Transmission*, 28 PACE ENVTL. L. REV. 421, 424 (2011); for more information on merchant transmission developers see *infra* Part II.A.

¹¹ See MIT ENERGY INITIATIVE, *supra* note 1, at 36 (hypothesizing that, in order to continue to encourage clean-energy development, a “radical deviation from the centralized paradigm that has prevailed for more than a century” will have to occur); see also JOEL EISEN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 66 (4th ed. 2015) (explaining that a vertically integrated utility is one that owns all levels of its supply chain: the generation plants, the transmission wires, and the local-distribution system).

¹² See MIT ENERGY INITIATIVE, *supra* note 1, at 38 (recognizing that increasing clean-energy development will only be possible in a power sector that is dramatically different than the current one, as renewable-energy providers need to be active participants in the operation of the power system).

¹³ Steve Daniels, *Supreme Court Ruling Leaves Wind-Power Line Up in the Air*, CRAIN’S CHI. BUS. (Sept. 21, 2017), <https://www.chicagobusiness.com/article/20170921/NEWS11/170929969/illinois-supreme-court-rules-on-rock-island-clean-line-project>; Jennifer DeWitt, *Rock Island Clean Line: Ill. Supreme Court Ruling Stalls Transmission Line Project*, QUAD-CITY TIMES (Sept. 23, 2017), https://qctimes.com/business/ill-supreme-court-ruling-stalls-transmission-line-project/article_fa1baa4f-ee1e-50c6-a671-b5034178afb6.html.

Part I of this Comment reviews the history and development of public utility law in the United States including the regulation of interstate transmission lines. It also explores how contemporary federalism conflicts have developed from the jurisdictional split between state and federal oversight of interstate transmission development. Part II then examines Clean Line's experience in the Midwest including the barriers the company encountered while attempting to build large interstate transmission lines across several states. Finally, Part III contains proposed solutions to this problem and recommends re-assessing the jurisdictional mismatch of federal and state authority over transmission line development. A more regional approach to transmission line planning would be effective if both the states and the federal government ceded more control to the Regional Transmission Operators in approving new transmission lines. Moreover, states need to re-assess their current framework of public utility law and its application to merchant developer transmission projects. Following this re-assessment, it is likely that many state statutes will need to be amended to better incorporate new market entrants who do not meet the statutory definition of a public utility.

I. BACKGROUND ON TRADITIONAL PUBLIC UTILITY LAW IN THE UNITED STATES

A. *Regulation of the Electricity System*

The following Part provides background on public utility law in the United States, at both the state and federal level. It then addresses how the jurisdictional overlap of the interstate transmission system developed in the context of the state and federal public utility law framework.

1. The State Regulatory Construct

The United States has a long and varied history of managing and encouraging energy development. For decades, U.S. energy policy emphasized the formation of public utilities and, in the process, created a large body of public utility law. Historically, states granted monopoly power to public or private companies that were looking to build energy infrastructure and provide electricity to a specific geographic area.¹⁴ These companies were granted monopoly franchises following the basic principle that it was more economic for a single company to build the necessary infrastructure required to serve a regional market.¹⁵ These electric companies organized primarily into large, vertically integrated utilities that individually owned and operated their own generation, transmission, and distribution systems.¹⁶ The companies became known as public utilities due to the requirement that they provide service to the public and, therefore, “became clothed with a public interest.”¹⁷ Thus, during this era, public utility law developed

¹⁴ EISEN ET AL., *supra* note 11, at 38.

¹⁵ *Id.*

¹⁶ See William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1628 (2014) (“What was distinctive in an economic sense about these industries were their high fixed-capital requirements (electric power has long been the most capital intensive sector of the U.S. economy), substantial economies of scale, and extensive reliance on a network infrastructure that was expensive to build and maintain.”).

¹⁷ *Munn v. Illinois*, 94 U.S. 113, 126 (1877) (“What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. . . . If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns.”) *Id.* at 133; CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE*

primarily around supporting vertically integrated utilities by granting them regulated monopolies¹⁸ and by protecting them from competing firms.¹⁹

In the early twentieth century, many states established state Public Utility Commissions (PUCs) to heavily regulate both the public utilities or investor-owned utilities.²⁰ Utilities are required to seek approval from the PUC to increase the rates charged to their customers. Although the process is slightly different by state, most public utility state statutes require companies to obtain permission to operate in the state through the acquisition of a Certificate of Convenience and Necessity (CPCN).²¹ Similar to an incumbent public utility, a transmission developer must also seek approval from the PUC by securing a CPCN in order to operate within the regulated market²² and the CPCN may provide eminent domain power depending on the state.²³ Generally, the “[i]ssuance of a CPCN is based on a finding by the state authority that the proposed project is in the public interest” and “[h]ow state authorities determine whether a project is in the public interest is a major factor affecting the development of projects.”²⁴ Thus state PUCs are able to control the entry of new companies into the local electricity markets by requiring them to demonstrate, through the acquisition of a CPCN, that there is a “public need” for or “public interest” in the new or expanded services proposed by the new entrant.²⁵

Public utilities are also required to set “just and reasonable rates”²⁶ with the expectation that they will receive a fair rate of return on their investments; the PUC approves the rates at a

STRUGGLE AGAINST INEQUALITY 142–49 (1986) (noting that public utilities have similar characteristics of common carriers: they provide essential services, are natural or legal monopolies, can exercise eminent domain, are assigned a specific geographic-service territory by the state, and have a duty to serve the public, which originated from the idea that if the company desires to have an exclusive business franchise, it must provide equal access for all).

¹⁸ Jonas J. Monast, *Maximizing Utility in Electric Utility Regulation*, 43 FLA. ST. U. L. REV. 135, 142–43 (2015).

¹⁹ EISEN ET AL., *supra* note 11, at 60–62.

²⁰ *See id.* at 78; Robert L. Bradley, Jr., *The Origins of Political Electricity: Market Failure or Political Opportunism?*, 17 ENERGY L.J. 59, 65 (1996); EISEN ET AL., *supra* note 11, at 71–72 (noting that in the United States, there are both privately-owned utilities, which include investor-owned utilities and rural electric cooperative associations, and publicly-owned utilities which include federal power systems like the Tennessee Valley Authority and public power systems like the Los Angeles Department of Water and Power).

²¹ William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920*, 79 COLUM. L. REV. 426, 427 (2008) (“The certificate of public convenience and necessity is pervasive in contemporary regulation of public service companies.”).

²² JOSEPH H. ETO, LAWRENCE BERKELEY NAT’L LAB., BUILDING ELECTRIC TRANSMISSION LINES: A REVIEW OF RECENT TRANSMISSION PROJECTS 3 (Sept. 2016), <https://emp.lbl.gov/sites/all/files/lbnl-1006330.pdf>. (“A CPCN is typically required for a transmission developer to construct facilities to transport electricity at transmission (and sometimes lower, sub-transmission) voltages within a state’s borders.”).

²³ EISEN ET AL., *supra* note 11, at 78 (explaining that in exchange for an exclusive geographic franchise, the state PUC charges the utility with a duty to serve and allows the utility to charge “just and reasonable” rates).

²⁴ ETO, *supra* note 22, at 3 (“Generally speaking, the way in which public interests are affected by the expected economic impacts of a project within the state is a primary focus of a state’s consideration.”).

²⁵ Jones, *supra* note 21, at 427 (“Even if the applicant fulfills all other pertinent requirements, the application may be denied if the regulatory agency concludes that the addition of the proposed services to those already available in the market would not be in the public interest. Thus, the essence of the [CPCN] is the exclusion of otherwise qualified applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences or, in a more extreme case, would actually have harmful consequences.”).

²⁶ *See* 16 U.S.C. § 824d(a) (2012) (referring to a statutory mandate to set “just and reasonable” rates under § 205 of the Federal Power Act); Patrick J. McCormick III & Sean B. Cunningham, *The Requirements of the “Just and Reasonable” Standard: Legal Bases for Reform of Electric Transmission Rates*, 21 ENERGY L.J. 389, 397 (2000) (“[T]he government must allow a regulated industry to earn a reasonable rate of return on its investment. This is

level sufficient for the utility to cover its expenses and collect a return on its investment.²⁷ This kind of regulation enables utilities to secure capital at a lower cost and direct it towards their large, technologically complex systems.²⁸ Under this regulatory construct, unless the investment is approved by the PUC, utilities cannot recover the cost of a capital investment from its ratepayers.²⁹ This is in contrast to merchant transmission developers who do not seek rate recovery from the PUC, but recover project costs through agreements with those who plan to use the transmission capacity,³⁰ thereby assuming all market risk for a transmission project.³¹ In addition to requiring prudent investments by utilities, the state PUC customarily operates under a general mandate to seek the least cost option for maintaining reliable electricity service.³² State PUCs are also involved in approving the siting proposals for new energy infrastructure projects.³³ Consequently, state PUCs wield significant power over the development of the electricity systems within the state's borders.³⁴

This regulatory regime governing public utilities that developed over a long period of time was designed to establish economies of scale and promote low-cost, centralized power.³⁵ It represented an “unprecedented experiment in the social control of business” and struck a fair balance between out-right government ownership and fair regulation of a company that was clothed in the public interest.³⁶ This perspective on public utility law recognized the need for a pragmatic approach to regulation due to the interrelation of complex factors that a utility manages when serving the public.³⁷ This perspective also depended on compromise and adjustment rather than a rigid response to either utility needs or public needs.³⁸ While this

because an unreasonably low rate would effect an unconstitutional taking of the industry owners' property without just compensation.”)

²⁷ Inara Scott, *Teaching an Old Dog New Tricks: Adapting Public Utility Commissions to Meet Twenty-First Century Climate Challenges*, 38 HARV. ENVTL. L. REV. 371, 382 (2014).

²⁸ Boyd, *supra* note 16, at 1643.

²⁹ Scott, *supra* note 27, at 382 (explaining that seeking recovery of investments in traditional utility assets and infrastructure such as generation and transmission facilities is easier for a utility than other projects that may be deemed more progressive or risky).

³⁰ Joseph H. Eto, LAWRENCE BERKELEY NAT'L LAB, PLANNING ELECTRIC TRANSMISSION LINES: A REVIEW OF RECENT REGIONAL TRANSMISSION PLANS, 3 (Sept. 2016), <https://www.energy.gov/sites/prod/files/2017/01/f34/Planning%20Electric%20Transmission%20Lines--A%20Review%20of%20Recent%20Regional%20Transmission%20Plans.pdf>.

³¹ Werntz, *supra* note 10, at 424.

³² Monast, *supra* note 18, at 146–47.

³³ *See id.* at 145 (explaining how the least-cost framework also provides significant discretion to the state PUC in determining whether an electric utility's decisions are in the public's best interest).

³⁴ Scott, *supra* note 27, at 375 (noting that “regulatory commissions have significant power to determine how and when the electric utility grid will evolve, the types of generation facilities that will be constructed, and the amount of money and capital investment that will be expended toward various resource options, including renewables and energy efficiency”).

³⁵ *See id.* at 385 (“Based on the regulatory compact, regulation of electric utilities by state public utility commissions developed in the early twentieth century with a multi-faceted purpose: (1) to ensure that customers had access to safe, reliable service; (2) to prevent discrimination against certain classes of customers; and (3) to ensure that the cost of service rendered under monopoly conditions remained reasonable.”).

³⁶ Boyd, *supra* note 16, at 1645 (quoting Robert Lee Hale as characterizing utility regulation as a regulatory experiment that deserved a fair trial as a substitute for government ownership and operation).

³⁷ *Id.* at 1647

³⁸ *Id.* (quoting Justice Felix Frankfurter, who said that public-utility law had “made possible, within a selected field, a degree of experimentation in governmental direction of economic activity of vast import and beyond any historical parallel”).

regulatory structure worked extremely well for the traditional public utility that operated centralized power plants in a confined service territory, as technology continues to advance and more private companies enter the electricity market, cracks have appeared in this regulatory framework.³⁹

As the next section will further explain, the Federal Energy Regulatory Commission (FERC) oversees the interstate transmission of electricity and wholesale energy sales, which are sold by generators, including utilities, on the open market. Despite FERC's oversight in this area, state PUCs exert the greater power and authority within each state over traditional public utilities and over the application of public utility law to the evolving electric industry.⁴⁰ While the current public utility construct has experienced considerable success over the past century, more adjustments may be needed as the electric power system becomes more decentralized and as more customers can generate their own power.

2. The Federal Regulatory Construct

Although the state PUC regulatory construct made perfect sense for governing local public utilities and the sale of electricity within one state's borders, it quickly became apparent that a different regulatory construct was needed for interstate electricity sales. In 1927, the Supreme Court established a jurisdictional line between federal and state regulatory commissions when it held that the Dormant Commerce Clause barred states from regulating interstate sales of electricity.⁴¹ Shortly following this decision, Congress enacted the Federal Power Act (FPA), which provided the Federal Power Commission, the predecessor to FERC, with exclusive authority to regulate the transmission and sales of interstate electricity.⁴² From this moment forward, federal jurisdiction controlled wholesale electricity and interstate transmission while state jurisdiction controlled retail electricity sales directly to consumers within a state.⁴³

The next significant federal regulatory change came with the passage of the Public Utility Regulatory Policies Act of 1978 (PURPA), which encouraged the formation of independent power producers that could produce and sell electricity despite not being designated as public utilities.⁴⁴ Section 210 of PURPA was the provision through which Congress intended to reduce or remove the monopoly barriers constructed to protect the traditional public utility and allow

³⁹ See MIT ENERGY INITIATIVE, *supra* note 1, at 36 (stating that the centralized-utility model has started to fray along with the introduction of competitive generation by a diverse set of actors with new and different business models for providing electricity to consumers).

⁴⁰ 16 U.S.C. § 824(b)(1) (2015) (“The Commission (FERC) . . . shall not have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.”).

⁴¹ See *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927) (closing the “Attleboro gap” with the purpose of regulating activities and transactions which states lacked the authority to regulate and holding that interstate transactions could only be regulated by Congress), *abrogated by* *Quill Corp. v. N.D. ex rel. Heitkamp*, 504 U.S. 298 (1992).

⁴² 16 U.S.C. § 824; see also *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767, 780–81 (2016) (explaining that § 201 of the FPA gave the Federal Power Commission the power to regulate the “sale of electric energy at wholesale in interstate commerce”).

⁴³ *González*, *supra* note 5, at 1432–33.

⁴⁴ Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601–2645 (2012); see also *EISEN ET AL.*, *supra* note 11, at 73 (recognizing that the power generation sector did not represent a natural monopoly and could be regulated in a way that encouraged prices to be set by the market instead of by a state PUC).

new entrants into the generation sector.⁴⁵ This change provided renewable energy developers and independent power producers with the opportunity to enter the electricity generation market and compete with incumbent public utilities.⁴⁶ Fortunately, these regulatory changes were effective in increasing competition in the generation sector and, as of today, independent power producers represent more than 40% of the power generation supply in the United States.⁴⁷ Despite the successful opening of the generation sector to non-utility participants, the transmission sector has not been similarly successful at encouraging the entrance of new market entrants due to overlapping state and federal oversight.

3. The Interstate Transmission System

Historically, electricity transmission service was thought to be a natural monopoly due to the inefficiency of constructing duplicate wire systems between two geographic points.⁴⁸ But, the federal Energy Policy Act of 1992 (EPAAct 1992) expanded FERC's authority over transmission access enabling it to push the industry towards open access and increased competition.⁴⁹ The first major decision following EPAAct 1992 came a year later when FERC voted unanimously to require a utility, Florida Power & Light, to transmit or "wheel" other utilities' power using its own transmission lines.⁵⁰ Through this decision, FERC indicated that it was looking to create a competitive market for transmission owners and users. Despite FERC's desire to increase transmission access, utilities were still stifling competition and letting available grid capacity go unused.⁵¹ Shortly following this decision, FERC issued two regulatory orders that continue to have a significant impact on the current structure of the transmission system.

First in 1996, FERC issued Order No. 888, which required all public utilities to file open access non-discriminatory transmission tariffs with the objective of opening up the power supply markets to competition.⁵² The objective of this Order was to require utilities to provide comparable service "to third-party users of their transmission systems."⁵³ This Order allowed other companies to transmit electricity across states despite not owning their own transmission systems by enabling them to transmit power on utility-owned transmission systems. Through Order No. 888, FERC also pushed for inter-utility open access plans by encouraging the formation of Independent System Operators (ISOs), which are organizations that "have regional

⁴⁵ See Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 210, 92 Stat. 3117 (codified as amended at 16 U.S.C. § 824a-3 (2012)) (authorizing FERC to encourage new entrants into the market by requiring utilities to purchase or sell electricity from qualifying facilities); EISEN ET AL., *supra* note 11, at 631.

⁴⁶ See González, *supra* note 5, at 1435 ("The [qualified-facilities] program created an avenue for non-utility generators to sell electricity, marking the beginning of wholesale competition. This dramatically reduced the barriers to entry in the electricity generation market.").

⁴⁷ EISEN ET AL., *supra* note 11, at 633.

⁴⁸ David B. Spence, *The Politics of Electricity Restructuring: Theory vs. Practice*, 40 WAKE FOREST L. REV. 417, 422 (2005).

⁴⁹ EISEN ET AL., *supra* note 11, at 641.

⁵⁰ See Fla. Mun. Power Agency, 65 FERC ¶ 61,125 (1993) (order noting and granting interventions) (emphasizing in the order that the rates and conditions by which service was offered had to be nondiscriminatory and comparable to what the utility offered its own customers).

⁵¹ Paul K. Joskow, *Transmission Policy in the United States*, CENTER FOR ENERGY AND ENVIRONMENTAL POLICY RESEARCH, 19 (2004), <https://dspace.mit.edu/bitstream/handle/1721.1/45025/2004-017.pdf?sequence=1>.

⁵² EISEN ET AL., *supra* note 11, at 642.

⁵³ Regional Transmission Organizations, 89 FERC ¶ 61,285, at 12–13 (1999).

control of a transmission grid and act independently of generators and will thus not favor certain generators over others for use of the grid.”⁵⁴

Three years later, FERC issued Order No. 2000 advancing the development of ISOs by updating the standards required for qualifying as a regional organization and identifying them as Regional Transmission Operators (RTOs) that would help with managing transmission lines at a regional instead of state level.⁵⁵ “Both ISOs and RTOs are non-profit organizations that control large portions of the transmission grid” by operating transmission lines owned by the utilities.⁵⁶ The RTOs and ISOs do not own the transmission lines they manage, but utilities cede control of their own transmission lines so that the regional operators can better manage the grid on a nondiscriminatory basis.⁵⁷ As Order No. 2000 stated, “[r]egional institutions can address the operational and reliability issues now confronting the industry, and eliminate any residual discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility.”⁵⁸ While FERC requires ISOs and RTOs to conduct long-term planning for necessary grid expansion, the regional operators do not currently have independent authority to site new transmission lines.⁵⁹ The distinction between RTOs having the authority to *operate* transmission lines as opposed to *siting* transmission lines is important and leads to federalism conflicts addressed later in this paper.

Parallel to this federal regulatory framework, the majority of states grant transmission siting authority to their PUCs to review and approve both electric generation facilities and transmission lines constructed within their borders.⁶⁰ As noted earlier, this normally requires the utility or private developer to acquire a CPCN, which can involve significant oversight and review by the state PUC.⁶¹ State PUCs have substantial influence over private developers who seek to develop transmission projects within a state because they are able to restrict the access of CPCNs to companies that have “public utility status.”⁶² Moreover, most states require a company to acquire a CPCN before it can utilize the power of eminent domain, which may be required to acquire land in the approved path of the transmission line.⁶³ If state law or state PUCs restrict CPCN ownership to only companies with a “public utility” designation, then the states can use that designation as a barrier to new entrants looking to gain access to their electricity market.

⁵⁴ EISEN ET AL., *supra* note 11, at 652.

⁵⁵ Regional Transmission Organizations, 89 FERC ¶ 61,285, at 1 (1999).

⁵⁶ EISEN ET AL., *supra* note 11, at 652 (noting that with few exceptions, “ISOs and RTOs are essentially the same—RTOs are simply those organizations approved by FERC under the year 2000 standards, as opposed to the 1999 standards.”).

⁵⁷ See EISEN ET AL., *supra* note 11, at 652; Shelley Welton, *Electricity Markets and the Social Project of Decarbonization*, 118 COLUM. L. REV. 1067, 1079 (2018) (“These entities would be ‘independent grid management organizations’ in charge of managing the transmission grid and running electricity markets to procure and dispatch least-cost electricity across the region.”).

⁵⁸ See Regional Transmission Organizations, 89 FERC ¶ 61,285, at 3 (1999) (noting that the FERC would provide the regulatory flexibility to accommodate such an improvement).

⁵⁹ EISEN ET AL., *supra* note 11, at 652.

⁶⁰ Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1916 (2015).

⁶¹ *Id.*

⁶² James J. Hoecker & Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?*, 35 ENERGY L.J. 71, 84 (2014) (discussing how PUC commissioners have significant influence over the ability of new companies to develop transmission projects within a state by refusing to designate the company as a “public utility,” thereby preventing it from obtaining a CPCN or gaining eminent-domain authority).

⁶³ Klass, *supra* note 60, at 1916–17.

Thus, the state PUC remains heavily involved in interstate electric transmission development despite the federal push for more regional and national oversight.⁶⁴

Due to the nature of local or regional development by public utilities in the early part of the twentieth century, there was minimal pressure on Congress to establish federal jurisdiction in this area.⁶⁵ As this section has demonstrated, the delivery of electricity on existing transmission lines is now open and competitive, but the approval of new transmission lines remains strictly within the domain of the state PUCs. The next section reviews how the overlap between state and federal jurisdiction over transmission line development results in federalism conflicts, which ultimately either inhibits or delays the development of interstate electric transmission lines.

B. Contemporary Federalism Issues Over the Siting of Interstate Transmission Development

1. Federal Siting Authority

While FERC has exclusive authority to regulate wholesale electricity sales and its jurisdiction extends to all electricity transmission facilities in interstate commerce, it has extremely limited power in siting new transmission lines within individual states.⁶⁶ In 2005, Congress enacted the Energy Policy Act of 2005 (EPAct 2005) which created limited federal siting authority to address transmission congestion.⁶⁷ EPAct 2005 directed the Department of Energy (DOE) to conduct transmission congestion studies every three years and to formally designate congested areas as National Interest Electric Transmission Corridors (NIETCs).⁶⁸ Under Section 1221 of EPAct 2005, FERC could also exercise siting authority for designated areas if a state declined to approve a transmission line within a designated NIETC.⁶⁹ Ideally, this provision would have enabled the DOE to unilaterally issue permits to developers in specific circumstances for the construction of transmission projects, even after the denial of the project by the state PUC.⁷⁰

Unfortunately, despite Congress's instructions for FERC to exercise this "back-stop" siting authority under Section 1221 for transmission lines in congested areas,⁷¹ federal appellate court decisions following the passage of EPAct 2005 significantly limited both the DOE and FERC's

⁶⁴ See *id.* at 1916 (noting that "although FERC has jurisdiction over wholesale power sales in interstate commerce and transmission of electricity in interstate commerce, states retain jurisdiction over retail electricity sales and the siting, approval, and grant of eminent domain authority for virtually all transmission lines, including interstate transmission lines").

⁶⁵ Alexandra B. Klass & Jim Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 HARV. ENVTL. L. REV. 423, 436 (2017).

⁶⁶ See 16 U.S.C. § 824(b)(1) (2015), ("The [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution . . .").

⁶⁷ Klass, *supra* note 60, at 1918.

⁶⁸ *Id.*; 16 U.S.C. § 824p (2012).

⁶⁹ Klass, *supra* note 60, at 1918 (noting that § 1221 of the Energy Policy Act of 2005 added § 216 to the Federal Power Act, providing for the designation of NIETCs in order to strengthen federal jurisdiction in areas that are in need of electric-transmission development).

⁷⁰ Thomas Hutton, *Energy Policy Act § 216: A Power Worth Preserving*, 39 ENVTL. L. REP. 11002, 11003 (2009), <https://elr.info/sites/default/files/articles/39.11002.pdf>.

⁷¹ *Id.* at 11003 ("Within NIETCs, the Secretary has the special ability, under certain circumstances, to unilaterally issue permits to developers for the construction of transmission projects, even over the objections of state siting authorities.").

authority in this area.⁷² First, the Fourth Circuit held in *Piedmont Environmental Council v. FERC* that FERC's authority over transmission siting was limited to circumstances where the state PUC did not have authority to act or where the state PUC acted inappropriately by including overly-stringent conditions on the permit.⁷³ This effectively limited FERC's authority to issue a federal permit even after it was rejected by a state PUC.⁷⁴

Following this decision, in *California Wilderness Coalition v. U.S. Dept. of Energy*, the Ninth Circuit invalidated the DOE's designation of a congested area as a NIETC due to its failure to consult with affected states when making the designation.⁷⁵ Challengers of the designation argued that the federalization of the transmission permitting process would "allow [federal] regulators to make critical decisions about local land use in a vacuum of political accountability," which ultimately would burden the smaller, local population for the benefit of the larger, distant population.⁷⁶ These decisions effectively limited FERC's authority in siting transmission lines and re-affirmed state PUCs' authority in this area. Unfortunately, this also resulted in "no strong or coordinated central planning authority for transmission in the United States."⁷⁷

Shortly after the Ninth Circuit's ruling, FERC issued Order No. 1000,⁷⁸ which again attempted to remove barriers to transmission development and to provide more opportunities to update the grid in order to help states achieve lower emissions as well as incorporate more renewable energy resources. The more controversial element of Order No. 1000 was that it eliminated the "right of first refusal," which had originally provided an incumbent utility the right to build any new transmission line within its own footprint.⁷⁹ Instead, Order No. 1000 encouraged *any* qualified entity, public or private, to bid on the construction of a transmission line.⁸⁰ The Order also required RTOs to "provide for the consideration of transmission needs driven by public policy requirements in the local and regional transmission planning processes."⁸¹ Under Order No. 1000, RTOs were required to consider local and regional needs in their transmission planning processes, but unfortunately the participant utilities were not obligated to follow what the transmission planning studies found.

FERC Order No. 1000 was a step in the right direction, but states still retain significant authority over the development and siting of new transmission lines despite the fact that modern day transmission lines are usually multi-state endeavors that feed into large, multi-state power

⁷² See *id.* at 11004 (noting that the decision "significantly diluted the potency of § 216" and that the court held "on plain language grounds that 'withholding approval' [of a corridor project] does not include a state commission's affirmative rejection of a permit application.").

⁷³ *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 324 (4th Cir. 2009); Hutton, *supra* note 66, at 11004.

⁷⁴ Hutton, *supra* note 70, at 11004.

⁷⁵ See *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1107 (9th Cir. 2011).

⁷⁶ Hutton, *supra* note 70, at 11004.

⁷⁷ Miriam Fischlein et al., *States of Transmission: Moving Towards Large-Scale Wind Power*, 56 ENERGY POL'Y 101, 103 (2013).

⁷⁸ Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC 61,051 (2011) (codified at 18 C.F.R. § 35.28 (2018)).

⁷⁹ See Steven Ferrey, *Supreme Court Strips States of Their Power over the World's Second Most Important Technology*, 69 BAYLOR L. REV. 315, 338 (2017); FERC Order 1000: Five Things You Need to Know, T&D WORLD (Apr. 13, 2017), <http://www.tdworld.com/substations/ferc-order-1000-five-things-you-need-know> ("Under FERC 1000 . . . , no utility, Regional Transmission Organization (RTO), Independent System Operator (ISO) or other entity solely 'owns' the right to construct and/or operate transmission facilities. Any qualified entity, private or public, can bid on construction and/or services.").

⁸⁰ FERC Order 1000: Five Things You Need to Know, *supra* note 75.

⁸¹ 136 FERC ¶ 61,051, at 1.

markets organized by the RTOs.⁸² Even though Congress attempted to extend federal jurisdiction over electric transmission development, EPAct 2005 did not result in shifting siting authority away from state PUCs.⁸³ Ultimately, this has resulted in a substantial mismatch between the need for continued national transmission grid expansion and the expansive state regulatory siting authority over new transmission lines.

2. State Siting Authority

FERC has broad jurisdiction over transmission facilities that move electricity in interstate commerce, but the Federal Power Act makes federal and state powers “complementary” so that there is no room for private interests to undermine the public welfare.⁸⁴ While the jurisdictional lines are less than clear in this area, as discussed earlier, federal precedent indicates that the siting of new transmission lines is generally not within the FERC’s authority.⁸⁵ Instead, both Congress and the courts left significant authority to the states to manage and regulate the siting of new transmission lines.⁸⁶ Either state PUCs or review boards analyze and determine whether a proposed energy project as a whole is in the public interest.⁸⁷ Therefore, a merchant transmission developer planning to construct an interstate transmission line must seek permission for siting and eminent domain authority from each state through which a new transmission line will be constructed.⁸⁸

By design, state PUCs tend to be more state-centric and focused on the individual state’s economic and energy issues in order to ensure that the energy project will benefit the state’s electricity ratepayers.⁸⁹ As a result of this perspective, state PUCs often do not consider the broader benefits to the regional or national electric grid when evaluating new interstate electric transmission lines.⁹⁰ Even if a specific transmission line project were included in a regional transmission plan (likely created by an RTO under Order No. 1000), the inclusion does not necessarily replace the need for an independent finding by the state PUC that the project serves the public interest.⁹¹ Moreover, the negative effects resulting from the construction of a transmission line, including the impact of the line on property values, environmental impacts to the land, and obstructed views, exacerbate the state-centric perspective.⁹² Depending on the state statute, PUCs may not even be able to consider broader regional benefits, but instead must accept

⁸² Hoecker & Smith, *supra* note 62, at 79.

⁸³ Klass, *supra* note 60, at 1920.

⁸⁴ FERC v. Elec. Power Supply Ass’n, 136 S. Ct. 760, 780 (2016) (“The [FPA] makes federal and state powers ‘complementary’ and ‘comprehensive,’ so that ‘there [will] be no ‘gaps’ for private interests to subvert the public welfare.”) (citing FPC v. La. Power & Light Co., 406 U.S. 621, 631 (1972)).

⁸⁵ *Id.*

⁸⁶ New York v. FERC, 535 U.S. 1, 24 (2002).

⁸⁷ Hoecker & Smith, *supra* note 62, at 82 (noting that state PUCs have considerable power through their ability to approve or disapprove the siting of a new electric-transmission line and listing forty states that require permits and siting approval for electric-transmission lines within their borders).

⁸⁸ Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. Rev. 1079, 1101 (2013).

⁸⁹ Klass, *supra* note 60, at 1917 (noting that the regional or national benefits of interstate-transmission lines may overshadow any in-state benefits, which is especially true for long-distance transmission lines designed to bring wind energy from several states away).

⁹⁰ *Id.*

⁹¹ ETO, *supra* note 22, at 3.

⁹² *Id.*

or reject the project based on in-state transmission needs or in-state benefits.⁹³ If the reviewing PUC is in a pass-through state for the transmission line, the regulators will not have a large incentive to approve the project.⁹⁴

As noted earlier, state PUCs can exert even more influence over private developers by refusing to designate them as a “public utility,” which is often a pre-requisite for obtaining a CPCN to construct and operate any kind of energy infrastructure in the state.⁹⁵ It is generally understood that transmission operators need a CPCN not only to operate within the state, but also to exercise the power of eminent domain if it fails to reach voluntary agreements with all landowners along the transmission line path.⁹⁶ This state-centric perspective that regulators harbor has resulted in several states blocking interstate electric transmission projects by merchant developers that have the ability to increase the integration of clean energy resources in the United States.⁹⁷

Part I has demonstrated how the current regulatory framework governing the electricity grid developed between the states and the federal government over time. For most of the United States’ history, this framework was successful at encouraging and managing the growth of public utilities, but it is now being challenged by new market entrants looking to build interstate transmission lines. Part II will review the application of this regulatory framework to a merchant transmission developer to analyze and better understand where the construct is failing.

II. CLEAN LINE ENERGY PARTNERS CASE STUDY ANALYSIS

This Part describes the experience of one merchant transmission developer, Clean Line Energy Partners (Clean Line), that attempted to develop new, long-haul transmission lines in several different regions across the United States.⁹⁸ Founded in 2009, Clean Line’s goal was to construct high voltage direct current transmission lines, which would enable the integration of more renewable energy resources on the grid while also reducing power line losses due to

⁹³ See *id.* at 24 (“The state-centric public-interest issue that arises most vividly for multi-state transmission projects involves the so-called ‘fly-over’ states. . . . The public-interest issue raised by states in the middle is that, at bottom, they are being asked to bear significant portions of the cost or adverse impacts of a project, yet they do not believe they are being provided with sufficient opportunities to share in the benefits of the project.”); Alexandra B. Klass, *Expanding the U.S. Electric Transmission and Distribution Grid to Meet Deep Decarbonization Goals*, 47 ENVTL. L. REP. 10749, 10756 (2017).

⁹⁴ See ETO, *supra* note 22, at 24; Klass, *supra* note 93, at 10756 (“Thus, a project that transmits power generated in one state, passes through a second state, and serves load in a third state could have difficulty winning approval from regulators in the second state.”).

⁹⁵ See Klass, *supra* note 93, at 10756 (stating that both Kentucky and Arkansas PUCs have construed state law such that an entity either not providing state-regulated rates or one that does not serve customers within its borders cannot qualify as a utility within the state); see also ETO, *supra* note 22, at 3 (“Merchant transmission projects must also obtain a state permit to operate as a public utility within the state. To grant such a permit, the state agency considering this permit must usually make a public interest finding similar to that described above [for CPCNs].”).

⁹⁶ Klass, *supra* note 60, at 1916–17.

⁹⁷ Klass & Rossi, *supra* note 65, at 440.

⁹⁸ Clean Line Energy Partners was pursuing five different electric-transmission-line projects in the United States prior to closing its business in 2019. Clean Line’s website states: “The existing transmission system was created primarily as a result of local utility planning to connect population centers with nearby fossil fuel power plants; it is now insufficient to meet the demands of our new energy economy. We need long-haul HVDC transmission lines to move America’s vast renewable energy resources to market.” CLEAN LINE ENERGY, <https://www.cleanlineenergy.com>.

increased efficiency.⁹⁹ Unfortunately, Clean Line’s experience as a merchant transmission developer is an example of how the current regulatory framework creates barriers to transmission line development—as of February 2019, Clean Line was disbanded and sold off all of its assets to other companies.¹⁰⁰ At its peak, Clean Line had “five long-distance high-voltage transmissions line projects started that were projected to carry 16.5 gigawatts of wind energy across the US.”¹⁰¹ Clean Line’s experience in numerous states demonstrates the ways in which transmission projects are stagnated by the improper application of public utility law to merchant transmission developers, and how the federal-state jurisdictional mismatch exacerbates the problem. By understanding these experiences, the regulatory community should recognize the changes that need to be made to the transmission line development and siting process in order to better encourage clean energy development.

A. *Merchant Transmission Developer Projects*

As the development of and demand for more renewable energy grows, new companies are trying to enter the electricity market and offer services different from those offered by traditional public utilities. Merchant transmission developers are attempting to enter the interstate transmission space to develop new transmission projects that are independent from the traditional public utility infrastructure.¹⁰² A merchant transmission developer, such as Clean Line, is not a public utility and therefore is not eligible to recover any of its construction costs through cost-based rates paid by ratepayers.¹⁰³ Merchant transmission developers are private companies, commonly backed by private investors, and assume the risk of their large, capital-intensive projects.¹⁰⁴ Despite these significant differences, merchant transmission developers continue to be regulated under traditional public utility law.

B. *Clean Line’s Rock Island Transmission Line*

Clean Line created a subsidiary, Rock Island, to both manage and construct an electric transmission line from O’Brien County in northwest Iowa to Grundy County in northeast

⁹⁹ Klass, *supra* note 93, at 10754; Aaron Larson, *Benefits of High-Voltage Direct Current Transmission Systems*, POWERMAG, Aug. 1, 2018, <https://www.powermag.com/benefits-of-high-voltage-direct-current-transmission-systems/> (noting the advantages of HVDC transmission lines including higher efficiencies in transmitting power over long distances thereby reducing line losses).

¹⁰⁰ Ros Davidson, *Ambitious Clean Line Energy ‘Wrapping Up’*, WIND POWER MONTHLY (Feb. 1, 2019), <https://www.windpowermonthly.com/article/1523646/ambitious-clean-line-energy-wrapping-up> (“The Houston-based firm now has no employees and will close down for good once the sale of the Grain Belt Express assets to Invenergy is completed.”).

¹⁰¹ *Id.*

¹⁰² See generally Louis Pitre, *FERC Order 1000, What Does It Mean to Clean Line?*, CLEAN LINE ENERGY (June 18, 2012), <https://web.archive.org/web/20170907191944/http://www.cleanlineenergy.com/blog/entry/ferc-order-1000>.

¹⁰³ Ill. Landowners All., *NFP v. Ill. Commerce Comm’n*, 90 N.E.3d 448, 452 (Ill. 2017).

¹⁰⁴ ETO, *supra* note 30, at 3.

A merchant transmission project does not seek rate recovery through a regional transmission planning process but instead recovers its costs through agreements negotiated directly with those seeking to use the transmission capacity that the project provides. Thus, the involvement of merchant transmission projects in regional transmission planning processes differs from the involvement of transmission developers who seek rate recovery through these regional processes.

Illinois.¹⁰⁵ The Rock Island transmission line was projected to deliver approximately 3,500 megawatts of electricity from Iowa to Illinois, which was expected to be able to power more than 1.4 million homes with wind energy.¹⁰⁶ The project was estimated to cost approximately \$1.8 billion to construct, operate, and maintain.¹⁰⁷ Since the transmission line was to be constructed across two states, Clean Line first needed approval from FERC, which approved Clean Line's proposal to pre-subscribe up to 75% of the proposed line's transmission capacity to anchor customers who would commit to purchasing the wind energy and allowed the remaining 25% to be sold at auction.¹⁰⁸ Once Clean Line acquired FERC's approval, it started the process of seeking regulatory approval for the transmission line in both Iowa and Illinois.

1. Regulatory Barriers in Iowa

After three years of meetings with landowners, environmental agencies, government officials, and other stakeholders to gather feedback on the project, Clean Line formally requested approval of a route through Iowa.¹⁰⁹ Under state law, Iowa's PUC approves transmission projects by holding a single hearing where it determines the need for the project, the specific route of the transmission line, and reviews any eminent domain requests associated with it.¹¹⁰ Clean Line requested that the Iowa PUC split this process into two parts: first, the review of the project and proposed route, and then second, the review of any eminent domain requests.¹¹¹ Unlike public utilities, which can recover the cost of contacting landowners regarding the potential route of a new transmission line, Clean Line was unable to make such a large up-front investment without knowing whether the project would be approved by the PUC.¹¹² Under Iowa's single-stage approval process, Clean Line would have been forced to complete right-of-way acquisitions for the transmission route *prior* to project approval, which it was not willing or able to do.¹¹³

Clean Line also faced legislative barriers in Iowa following its requests to the Iowa PUC to bifurcate the review process. Most notably, in December of 2015, twenty-four Republican members of the Iowa House wrote an opinion piece in the *Des Moines Register* warning Clean Line that they opposed the use of eminent domain along the route and would pass legislation to keep them from doing so.¹¹⁴ This statement was made in opposition to Iowa's rapidly expanding

¹⁰⁵ Ill. Landowners All., NFP v. Ill. Commerce Comm'n, 60 N.E.3d 150, 153 (Ill. App. Ct. 2016), *aff'd*, 90 N.E.3d 448 (Ill. 2017).

¹⁰⁶ Overview, ROCK ISLAND CLEAN LINE, <https://web.archive.org/web/20171020091523/http://www.rockislandcleanline.com/site/home>.

¹⁰⁷ *Id.*

¹⁰⁸ Ill. Landowners All., 90 N.E.3d at 453.

¹⁰⁹ Press Release, Clean Line Energy, *Rock Island Clean Line Files for Transmission Franchise in Iowa* (Nov. 6, 2014),

https://www.rockislandcleanline.com/sites/rock_island/media/docs/IUB_FILING_PRESS_RELEASE_11_6_14_FINAL_1.pdf.

¹¹⁰ Karen Uhlenhuth, *Why Clean Line Developers Want Changes to Iowa's Approval Process*, MIDWEST ENERGY NEWS (Jan. 5, 2016), <http://midwestenergynews.com/2016/01/05/why-clean-line-developers-want-changes-to-iowa-approval-process/>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Karen Uhlenhuth, *Proposed Wind-Energy Transmission Line Hits a Roadblock in Iowa*, MIDWEST ENERGY NEWS (Nov. 18, 2015), <http://midwestenergynews.com/2015/11/18/proposed-wind-energy-transmission-line-hits-a-roadblock-in-iowa/>.

¹¹⁴ Rep. Bobby Kaufmann, *An Open Letter to Rock Island Clean Line from Lawmakers*, DES MOINES REG. (Dec. 17, 2015), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/12/17/open-letter-rock-island>

wind energy industry and Clean Line’s argument that “the project would drive demand for wind turbine components that are manufactured in Iowa and would ‘generate millions of dollars in state and local tax revenues.’”¹¹⁵

While pursuing approval for the transmission line in Iowa, Clean Line was simultaneously pursuing approval of the project in Illinois. Due to delays in the regulatory approval process in Illinois, Clean Line was forced to file a notice with the Iowa PUC explaining that pending the outcome in Illinois, it would likely withdraw its application from the Iowa review process.¹¹⁶ Unfortunately in 2017, making good on their promise, the Iowa legislature “enacted a law that prohibit[ed] the use of eminent domain for high-voltage transmission lines,” ultimately forcing Clean Line to permanently withdraw its application for the project.¹¹⁷

2. Regulatory Barriers in Illinois

Clean Line’s experience in Illinois was very different from its experience in Iowa. Notably, the regulatory barriers experienced in Illinois were not caused by the state PUC or the state legislature, but by Illinois state courts applying traditional state public utility law to Clean Line as a merchant transmission developer.

In Illinois, acquiring a CPCN is required before a merchant transmission developer may be designated as a “transmission public utility” and before it may begin constructing, operating, or maintaining the electric transmission line.¹¹⁸ In 2014, Clean Line filed an application for a CPCN with the state PUC, known as the Illinois Commerce Commission (ICC),¹¹⁹ for the Rock Island project so that it could operate as a “transmission-only public utility” in Illinois.¹²⁰ In order to finance the project, Clean Line planned to enter into long-term financing agreements with one or more wind generators or “anchor tenants” and use them as collateral to attract lenders.¹²¹ Clean Line emphasized that it was assuming the market risk for the project and admitted that the wind generators utilized in its energy and financial simulation models did not exist yet.¹²²

At the evidentiary hearing in front of the ICC, witnesses for Clean Line testified that due to state renewable portfolio standards in several Midwestern states, including Illinois, demand for electricity from wind sources would remain high and, therefore, would provide demand for

clean-line-lawmakers/77492872/ (“You are not a utility. You have no intention of letting Iowans plug in to your project, nor do you plan to sell us power along your route. We hope that it doesn’t have to come to us passing legislation to keep you in check, but we will if it has to come to that.”).

¹¹⁵ Brianne Pfannenstiel, *Rock Island Clean Line Withdraws Petition for Iowa Wind Project*, DES MOINES REG. (Dec. 22, 2016), <https://www.desmoinesregister.com/story/news/politics/2016/12/22/rock-island-clean-line-withdraws-petition-iowa-wind-project/95756496/>.

¹¹⁶ *Id.*

¹¹⁷ Robert Bryce, *The Antithesis of Green*, NAT’L REV. (Jan. 9, 2019),

<https://www.nationalreview.com/2019/01/green-new-deal-renewable-energy-cannot-meet-needs/>.

¹¹⁸ See 220 ILL. COMP. STAT. § 5/8-406(a)–(b) (2015) (authorizing private developers to operate as a transmission-only public utility in Illinois and to construct, operate, and maintain an electric-transmission line for wind energy).

¹¹⁹ In Illinois, the state public-utility commission is known as the Illinois Commerce Commission.

¹²⁰ *Ill. Landowners All., NFP v. Ill. Commerce Comm’n*, 60 N.E.3d 150, 153 (Ill. App. Ct. 2016), *aff’d*, 90 N.E.3d 448 (Ill. 2017).

¹²¹ See *Ill. Landowners All.*, 60 N.E.3d at 154 (noting that in its filing with the ICC, Rock Island stressed that it was a merchant developer and, therefore, Illinois residents would not pay for the transmission line through any rate assessments and stated that it was not seeking cost recovery through traditional electric rates).

¹²² *Id.* at 155.

Clean Line’s transmission services.¹²³ The President of Clean Line also testified that, at the time the CPCN application was filed with the ICC, and at the time of the hearing, that Clean Line did not “own, control, operate, or manage any transmission plants, equipment, or property in Illinois.”¹²⁴ On behalf of its members, the Illinois Landowners Association intervened in Clean Line’s filing with the ICC and argued that Clean Line did not qualify as a public utility under Section 3-105 of the Illinois Public Utilities Act, and therefore could not acquire a CPCN for its Rock Island project in the state.¹²⁵ The Commission’s administrative law judge (ALJ) denied their motion and ruled that “the application process under Section 8-406 of the Act is not limited to entities that are already certified public utilities” and, therefore, Rock Island could seek certification for its project.¹²⁶ Ultimately, the ICC granted Clean Line a CPCN to conduct business as a transmission public utility in Illinois and to construct the Rock Island transmission line over its preferred route.¹²⁷ The ICC also agreed with the ALJ that Clean Line, through its Rock Island project, met the qualifications of a public utility under section 3-105(a) of the Public Utilities Act.¹²⁸

Several stakeholders, including the local public utility, challenged the Commission’s order in an appeal claiming that the ICC lacked authority to grant a CPCN because Clean Line was not a public utility, and that the findings of the ICC were not supported by substantial evidence.¹²⁹ While reviewing the ICC’s decision, the Illinois Appellate Court addressed the two prongs required for attaining public utility status: (1) a company must own or operate utility assets, directly or indirectly, within Illinois; and (2) it must offer those assets for public use.¹³⁰ The court found that Clean Line did not fulfill either requirement.¹³¹ It also found that since there was no way to know if an Illinois energy generator would submit a successful bid for the 25% of transmission capacity available for auction on the transmission line, Clean Line had failed to satisfy the Illinois statute’s public use requirement.¹³² The court held that since Clean Line was

¹²³ *See id.* (pointing to the imposed mandates that require utilities to replace fossil fuels with renewable-energy resources and the fact that at least 75% of that renewable energy comes from wind power).

¹²⁴ *Id.*

¹²⁵ *See id.* (testifying that the Illinois Landowners Association (ILA) is a non-profit entity composed of approximately 300 members who own or have an interest in the land impacted by the transmission-line project).

¹²⁶ *See id.* at 154 (The ALJ stated that construing the statute to require applicants to own public-utility plants, equipment, or property created an unworkable “Catch-22,” as it would mean that the company could not apply for CPCN unless it already owned property; but under the Public Utilities Act, the company needed a CPCN to construct any of those facilities.); *see also* Ill. Landowners All., NFP v. Ill. Commerce Comm’n, 90 N.E.3d 448, 455 (Ill. 2017). Notably, the Commission staff found it “illogical to suggest that an entity [could] not apply for a Certificate to construct public utility facilities and transact public utility business unless it already owns [a] public utility plant, equipment, or property.” Rock Island Clean Line LLC, Docket No. 12-0560, at 13 (Ill. Commerce Comm’n, June 14, 2018) (order on remand), <https://www.icc.illinois.gov/docket/files.aspx?no=12-0560&docId=272967> (follow “Order on Remand” link) [hereinafter “ICC Order on Remand”].

¹²⁷ Ill. Landowners All., 60 N.E.3d at 157.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 159.

¹³¹ *See id.* (finding that Rock Island does not own or operate any assets in Illinois and that the proposed transmission line is not for public use without discrimination).

¹³² *Id.* at 160.

not a public utility and could not meet the requirements of the definition under the Public Utilities Act, the ICC lacked authority to issue them a CPCN.¹³³

Following this ruling, the ICC appealed to the Supreme Court of Illinois to defend its designation of Clean Line as a public utility. The same group of stakeholders continued to argue that Clean Line did not meet the definition of a public utility under the Illinois Public Utilities Act and, therefore, “the company was ineligible to receive, and the Commission had no authority to grant” a CPCN.¹³⁴ The Illinois Supreme Court affirmed the appellate court’s ruling that Clean Line failed to meet the first requirement of a public utility under the Act as it did not own or operate any equipment or property in the state.¹³⁵ Notably, the court stated that a prior version of the Act would have allowed for *future* ownership of property to qualify, but since the Illinois General Assembly repealed that part of the statute, the current law only allowed for *present* ownership of property to qualify.¹³⁶ Therefore, the court held that since Clean Line could not meet the requirements to qualify as a public utility in Illinois, the Commission’s order granting it a CPCN failed as a matter of law.¹³⁷

Interestingly, the court went on to say in dicta that nothing prohibited new entrants like Clean Line from developing their transmission lines as a purely private project.¹³⁸ The court recognized that proceeding in this manner would likely make their operations considerably more difficult and cumbersome, but not impossible.¹³⁹ The court also stated that the Public Utilities Act “is based on a model of limited monopoly and reflects a policy of preventing rather than promoting competition with existing utilities”¹⁴⁰ even if it did not agree with that policy. Ultimately, the Illinois Supreme Court agreed with the appellate court that since Clean Line did not own, manage, or control utility property, it was not a public utility under Illinois law, and therefore was ineligible to acquire a CPCN from the ICC.¹⁴¹

Clean Line’s experience with its Rock Island transmission project in both Iowa and Illinois demonstrates just how extreme and diverse state regulatory barriers can be. Clean Line emphasized in its testimony to the ICC that the goal of the Rock Island project was to deliver wind energy to the Midwest and directly into Illinois, which could help the state achieve its Renewable Portfolio Standard goal of acquiring 25% of Illinois’ energy from renewable sources by 2025.¹⁴² From a state policy perspective, the Rock Island transmission line made sense. And in this case, the state PUC was supportive of the merchant transmission developer: the ICC

¹³³ See *id.* (acknowledging that being a public utility was not a prerequisite to seeking CPCN and that a plain reading of the statute demonstrated that an applicant could seek public-utility status while applying for a CPCN; nevertheless, the court did not believe that Rock Island qualified as a public utility under the statute).

¹³⁴ Ill. Landowners All., NFP v. Illinois Commerce Comm’n, 90 N.E.3d 448, 457 (Ill. 2017).

¹³⁵ See *id.* at 460 (noting that under § 3-105 of the Act, the company must own, control, operate, or manage, within Illinois, directly or indirectly, a plant, equipment, or property to be used in connection with transmission services).

¹³⁶ See *id.* at 460–61 (noting that “the language of section 3-105 stands in clear contrast to its predecessor in plainly and unambiguously requiring present ownership, management, or control of defined utility property or equipment in order to qualify as a public utility”).

¹³⁷ *Id.* at 462.

¹³⁸ See *id.* (stating that “nothing in the Public Utilities Act prohibits new entrants such as Rock Island from commencing development of transmission lines immediately as a purely private project”).

¹³⁹ See *id.* (recognizing that the new entrants would not have the benefit of eminent domain to obtain properties on the path of their transmission line).

¹⁴⁰ See *id.* at 463 (citing *Gulf Transp. Co. v. Ill. Commerce Comm’n*, 402 Ill. 11, 19–20 (1948)).

¹⁴¹ *Id.*

¹⁴² Emma Foehringer Merchant, *Illinois Approves Path to 25% Renewable Energy by 2025*, GREENTECH MEDIA (Apr. 5, 2018), https://www.greentechmedia.com/articles/read/illinois-approves-path-to-a-quarter-renewable-resources-by-2025#gs.r7tTkZA_

approved Clean Line's application for a CPCN and supported the development of the transmission line.¹⁴³ Clean Line followed the established regulatory process as the Public Utilities Act of Illinois requires that a public utility obtain a CPCN from the Commission before transacting business or beginning new construction within the state.¹⁴⁴ Yet, the confines of traditional public utility law enabled the state courts to block Clean Line's designation as a public utility in the state, effectively requiring the company to acquire property in the state and demonstrate some benefit to the state before it could proceed with its clean energy project.

In Iowa, the PUC's unwillingness to provide a more flexible regulatory review process for merchant developer projects created a different kind of barrier to clean energy development. Moreover, the Iowa legislature's willingness to intervene in this area of law created another barrier for merchant transmission developers. Clean Line's experience with this one transmission line exposes the areas of the transmission system's regulatory construct that needs to be updated in order to allow for and encourage continued clean energy development.

3. Regulatory Barriers in Other States

It is important to note that Clean Line experienced delay and regulatory barriers on several of its other transmission lines, including one where it partnered with the federal government.¹⁴⁵ Clean Line's Plains & Eastern project, which aimed to deliver 4,000 megawatts of wind power across the Great Plains, ran into major regulatory barriers and opposition from property owners in its path.¹⁴⁶ The Oklahoma PUC granted Clean Line the status of "electric transmission-only public utility" in 2011, but Clean Line was denied a similar request in Arkansas.¹⁴⁷ The Arkansas PUC found that Clean Line "could not obtain public utility status in the state because applicable law required it to transmit power 'to or for the public for compensation,'" and Clean Line did not have contracts for the sale of electricity to the public.¹⁴⁸ Interestingly, the Arkansas PUC also recognized that "the law governing public utilities was not drafted to comprehend changes in the utility industry such as this one—where a non-utility, private enterprise endeavors to fill a void in the transmission of renewable power that is much needed but for which the Commission is unable to afford any regulatory oversight."¹⁴⁹ And, unfortunately in 2015, the Arkansas General Assembly also enacted legislation that prohibited a merchant transmission developer from obtaining a CPCN in the state.¹⁵⁰

In 2016, the U.S. Energy Secretary invoked Section 122 of EPAAct 2005, which provides the DOE the authority to collaborate with other entities on developing or constructing electric

¹⁴³ The ICC staff members believed that Rock Island was in the public interest and maintained that "to constitute a public use, under Section 3-105, all persons must have an equal right to use the utility, and it must be in common, upon the same terms, however few the number who avail themselves of it." ICC Order on Remand, *supra* note 121, at 15.

¹⁴⁴ 220 ILL. COMP. STAT. § 5/8-406 (2015).

¹⁴⁵ Karen Uhlenhuth, *Clean Line Says Federal Partnership Still an Option for Midwest Projects*, ENERGY NEWS NETWORK (Mar. 29, 2018), <https://energynews.us/2018/03/29/southeast/clean-line-says-federal-partnership-still-an-option-for-midwest-projects/>.

¹⁴⁶ *Id.*

¹⁴⁷ Klass & Rossi, *supra* note 65, at 466.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citing and quoting Plains & E. Clean Line LLC, Docket No. 10-041-U, Order No. 10 (Ark. Pub. Serv. Comm'n, Jan. 11, 2011)).

¹⁵⁰ *See id.* ("Under the new state law, a certificate cannot be issued to an entity that is not currently a public utility, primarily transmits electricity, and has not been directed or designated to construct an electric transmission facility by an RTO.").

power transmission facilities.¹⁵¹ This partnership was significant because it was the first time the DOE “exercised the authority Congress granted it in section 1222 of the EAct 2005 to collaborate on a private project in an effort to overcome state siting and eminent domain barriers to an interstate electric transmission line designed to serve multistate regional electricity needs and promote renewable energy.”¹⁵² Despite this promising partnership with the DOE and the completion of major environmental permits necessary for construction,¹⁵³ Clean Line continued to struggle with the Arkansas PUC and litigation over the transmission line. In 2018, after the Tennessee Valley Authority withdrew from a wind purchasing agreement with Clean Line, both the federal government and Clean Line mutually dissolved their partnership.¹⁵⁴ Clean Line cited “changes in ownership structure and substantial changes to the nature of the project” as the reason for the dissolution, but also noted that the “project was on a much slower track in Arkansas and Tennessee.”¹⁵⁵

On yet another transmission line, the Grain Belt Express, Clean Line successfully gained approval for the line in three states, but was rejected by a fourth state’s PUC.¹⁵⁶ The Missouri PUC required agreement from every county the transmission line would run through before it would consider approving the line.¹⁵⁷ Fortunately, this determination was overruled by the Missouri Supreme Court and remanded to the PUC to determine whether the project was “necessary or convenient” for the public.¹⁵⁸ In March of 2019, the Missouri PUC issued the

¹⁵¹ See Frank E. Lockwood, *Plan to Build Power Line Across State Out of Steam*, ARK. DEMOCRAT GAZETTE (Mar. 24, 2018) <https://www.arkansasonline.com/news/2018/mar/24/plan-to-build-power-line-across-state-o/> (quoting § 1222 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended at 42 U.S.C. § 16421 (2012)), which gives the Department of Energy the “authority to design, develop, construct, operate, own or participate with other entities in designing, developing, constructing, operating, maintaining, or owning . . . electric power transmission facilities.”

¹⁵² Klass & Rossi, *supra* note 65, at 469–70.

¹⁵³ Tom Kleckner, *DOE Issues Favorable EIS on Plains & Eastern Project*, RTO INSIDER, Nov. 7, 2015, <https://www.rtoinsider.com/doe-eis-plains-eastern-19594/>.

¹⁵⁴ Nichola Groom, *U.S. Withdraws from Wind Energy Power Line Project*, REUTERS (Mar. 23, 2018), <https://www.reuters.com/article/us-usa-energy-clean-line/u-s-withdraws-from-wind-energy-power-line-project-idUSKBN1GZ3A2>.

¹⁵⁵ Michael Bates, *DOE, Clean Line Go Separate Ways on Plains & Eastern Transmission*, N. AM. WINDPOWER (Mar. 26, 2018), <https://nawindpower.com/doe-clean-line-go-separate-ways-on-plains-eastern-transmission>.

¹⁵⁶ *Id.*; Public Service Commission of the State of Missouri, Report and Order on Remand, File No. EA-2016-0358, Mar. 20, 2019, at 9, https://www.efis.psc.mo.gov/mpsc/commoncomponents/view_itemno_details.asp?caseno=EA-2016-0358&attach_id=2019013449 (“The Project would traverse the states of Kansas, Missouri, Illinois, and Indiana, including approximately 206 miles in Missouri. The Project would deliver 500 megawatts (“MW”) of wind-generated electricity from western Kansas to customers in Missouri, and another 3,500 MW to states further east.”).

¹⁵⁷ Bryce Gray, *Missouri Supreme Court Says State Regulators Erred in Denial of Grain Belt Express Transmission Line*, ST. LOUIS POST-DISPATCH (July 17, 2018), https://www.stltoday.com/business/local/missouri-supreme-court-says-state-regulators-erred-in-denial-of/article_a3d5f39d-f342-5916-a35a-46013f899526.html.

¹⁵⁸ *Grain Belt Express Clean Line, LLC. v. Public Service Commission*, 555 S.W.3d 469, 474 (Mo. 2018). Noting that the statute that governed CPCNs in the state—known as “certificates of convenience and necessity” or CCNs—distinguished between line CCNs and area CCNs. The Supreme Court stated:

In this case, Grain Belt has applied for a *line* CCN under section 393.170.1. It has not applied for an *area* CCN under 393.170.2 because, according to Grain Belt, it will not be providing retail service to electric consumers. Accordingly, it was not required to obtain consents from the affected counties before the Commission could issue a *line* CCN.

Id. at 473-74.

unanimous decision of granting the Grain Belt Express transmission line a CPCN.¹⁵⁹ In its report, the Missouri PUC recognized that a group of municipal utility owners and several cities in Missouri had already contracted with Clean Line to purchase transmission capacity rights on the line in order to bring renewable energy to their customers.¹⁶⁰ It noted that the transmission line enabled the municipal power group to utilize cheaper wind power and that the wind contracts would save its members over \$11 million annually as compared to its current contract for Illinois coal resources.¹⁶¹ The Commission also found that “the Project [would] provide positive environmental impacts, since displacement of fossil fuels for wind power will reduce emissions of carbon dioxide, sulfur dioxide, and nitrogen oxide, and reduce water usage in Missouri.”¹⁶² Unfortunately for Clean Line, the Missouri PUC’s finding that the transmission line qualified as a public utility,¹⁶³ would provide “environmentally-friendly energy,” and, therefore, would be in the public interest¹⁶⁴ was too little too late—Clean Line had already disbanded and sold the rights of the transmission project to another private developer.¹⁶⁵

The experiences of Clean Line over the past decade demonstrate that the application of public utility law to merchant transmission developers effectively stagnates or even halts clean energy development projects in the United States. Despite the need for additional transmission lines to connect areas with high wind power to areas with high demand for electricity, as a merchant transmission developer Clean Line ran into too many regulatory barriers to succeed. This demonstrates an area in need of significant legal and policy changes in order to help the United States both modernize its grid and to enable the utilization of more clean energy sources. The next Part provides several proposed solutions for moving the United States in this direction.

III. PROPOSED SOLUTIONS TO IMPROVE AND INCREASE TRANSMISSION LINE DEVELOPMENT

Recognizing the complexity of the electricity grid and the pace of technological change, this Comment presents a variety of legal and policy modifications that could ameliorate problems facing transmission line development. From the state perspective, individual states need to review and revise their public utility law statutes in light of the dramatic changes the grid is undergoing to better recognize new market participants. In addition to amending these state utility statutes, reconfiguring the jurisdictional mismatch between state and federal authority over transmission lines would go a long way in developing a more efficient process for approving and siting new transmission lines.

Fortunately, the RTOs and ISOs represent a promising area where many of these jurisdictional problems may be solved. The RTOs and ISOs are in a favorable position to better manage the siting of transmission lines in a larger part of the United States.¹⁶⁶ More state and

¹⁵⁹ Bryce Gray, *After Years of Rejection, Missouri Regulators Give Nod to Grain Belt Express Transmission Line*, ST. LOUIS POST-DISPATCH, March 20, 2019, available at: https://www.stltoday.com/business/local/after-years-of-rejection-missouri-regulators-give-nod-to-grain/article_55872edc-1e28-5de9-a7eb-68c01311ab44.html.

¹⁶⁰ Missouri Public Service Commission Report, *supra* note 156, at 13 and 14.

¹⁶¹ *Id.* at 41.

¹⁶² *Id.* at 46.

¹⁶³ *Id.* at 38 (“Missouri courts have stated that for a company to qualify as a public utility, the company must be devoted to a public use for the general public. The evidence showed that when the Project...will transmit energy from wind farms in Kansas to wholesale customers in Missouri.”).

¹⁶⁴ Missouri Public Service Commission Report, *supra* note 156, at 47.

¹⁶⁵ Gray, *supra* note 157.

¹⁶⁶ I recognize that RTOs and ISOs only manage about 60% of the U.S. electric-power grid and that most of the western and southeastern parts of the U.S. would be left out of this proposed solution. Existing organizations in the

federal partnerships on new transmission lines with the RTOs and ISOs may work to effectively create a happy medium where the regional organizations can use their expertise to overcome the jurisdictional mismatch.

A. *State Regulatory Changes: Traditional Public Utility Law Must Adapt*

In addition to modifying federal law, many regulatory changes need to occur at the state level. First, states need to review and revise their public utility statutes to better encourage growth and incentivize new market entrants that do not have the same characteristics as traditional utilities. As new technologies develop, new entrants hope to both enter the market with disruptive innovations and challenge entrenched monopolistic utilities that would prefer to preserve the status quo.¹⁶⁷ Due to their distinctive relationship with the public, utilities are regulated in unique and pragmatic ways by the state PUC.¹⁶⁸ While this construct works very well for public utilities, its application to other companies and their unique business models may not be the most effective for encouraging growth and development of the electricity grid within the state. Despite their substantial differences, the new market entrants are being channeled through the framework of traditional public utility law, often to their detriment.¹⁶⁹

This treatment of new entrants under state law has stacked the deck against them by requiring them to seek “public utility status” before acquiring a CPCN. Requiring Clean Line to “own, control, operate, or manage” property within a state prior to applying for a CPCN only serves to drive up the costs of these much-needed transmission lines.¹⁷⁰ The Illinois Supreme Court made clear that it was bound by the provisions of the Illinois Utilities Act when reviewing decisions made by the Illinois PUC.¹⁷¹ While completing its review of whether Clean Line met the qualifications to be considered a “public utility,” the court looked to the governing statutory framework of the Public Utilities Act.¹⁷² Clean Line believed that it would “qualify as a public utility facility and that the service it provides [would] constitute a public utility service within the meaning of the Public Utilities Act.”¹⁷³ Ultimately, as discussed earlier, the Illinois Supreme Court found that Clean Line did not meet the statutory requirements of a “public utility,” and the court “read the current law as evincing an intention by the legislature to limit the definition of ‘public utility’ to situations where the subject entity meets the ownership test at the present time.”¹⁷⁴ This treatment allowed the Illinois Supreme Court to rescind the state PUC’s approval of the transmission line “on the technicality that Clean Line did not have a physical presence in

West, including the Western Electricity Coordinating Council or the ColumbiaGrid, could potentially provide similar transmission planning services, but how that would work within this organization is outside the scope of this paper. *About 60% of the U.S. Electric Power Supply Is Managed by RTOs*, U.S. ENERGY INFO. ADMIN. (Apr. 4, 2011), <https://www.eia.gov/todayinenergy/detail.php?id=790>.

¹⁶⁷ Boyd, *supra* note 16, at 1675.

¹⁶⁸ *Id.* at 1649.

¹⁶⁹ See BIPARTISAN POL’Y CTR., CAPITALIZING ON THE EVOLVING POWER SECTOR: POLICIES FOR A MODERN AND RELIABLE U.S. ELECTRIC GRID 28 (2013), [https://bipartisanpolicy.org/wp-content/uploads/sites/default/files/Energy_Grid_Report\[1\].pdf](https://bipartisanpolicy.org/wp-content/uploads/sites/default/files/Energy_Grid_Report[1].pdf) (“Under the current siting regime, the developer of a multistate transmission line must obtain requisite approvals from state and local authorities along the full length of the line, while also obtaining required federal and state environmental approvals.”).

¹⁷⁰ *Id.* at 39.

¹⁷¹ *Ill. Landowners All., NFP v. Ill. Commerce Comm’n*, 90 N.E.3d 448, 456 (Ill. 2017).

¹⁷² *Id.* at 457; 220 ILCS § 5/1-101 (2018).

¹⁷³ *Ill. Landowners All.*, 90 N.E.3d at 458.

¹⁷⁴ *Id.* at 461.

the state and therefore could not qualify as a utility.”¹⁷⁵ This demonstrates how the statutory structure of state public utility law needs to change—state legislatures need to expand the definitions and applications of public utility codes to allow for new market entrants to bring more clean energy projects onto the grid.

Under the current statutory construct of most states, merchant transmission developers will be forced to invest in property at a time that is too early to know if it will be used and useful. Merchant transmission developers are also confronted with statutes that either do not allow or have not been interpreted to allow for the issuance of CPCNs to companies that do not have customers within the state.¹⁷⁶ As exemplified in the Rock Island transmission project, merchant transmission developers are faced with a Catch-22: they will not have transmission customers until the transmission line is built, but are required by some PUCs to demonstrate that they have customers before building the line.¹⁷⁷ As Clean Line indicated, the merchant transmission developer must start with anchor generation tenants interested in transmission and use them as collateral for attracting lenders to help build the line.¹⁷⁸ Unfortunately, many of these state statutes continue to require merchant transmission developers to look and act as a public utility despite the developers’ declarations otherwise.¹⁷⁹ Therefore, traditional public utility law definitions and requirements need to be updated to better recognize and incorporate these new kinds of companies and services.

Second, Clean Line’s experience with the Iowa PUC demonstrates other areas of regulatory breakdown. In the traditional regulatory construct, public utilities are able to invest money in acquiring rights-of-way for large infrastructure projects and can be fairly confident that they will be able to recover those investments through electricity rates charged to their ratepayers. Merchant transmission developers do not have the luxury of assuming they will make back their investments and are therefore unable to spend significant amounts of money prior to project approval. Unfortunately, Iowa’s regulatory process only provided a one-step review process, which hindered Clean Line’s ability to apply for and acquire a CPCN.¹⁸⁰ These kind of state regulatory applications of public utility law to private developers simply are inherently unfair and result in the stagnation of clean energy projects in the United States. The regulatory process itself in many states is not designed to facilitate the consideration of non-utility companies. These regulatory processes and procedures need to be updated and likely changed so that new market entrants are not treated unfairly in the regulatory review process.

Third, state statutes that require state PUCs or state courts to interpret the “public interest” as only relating to that specific state should be modified to allow for more regional benefits to be considered. As this Comment has demonstrated, “individual state authorities may be bound by

¹⁷⁵ Gray, *supra* note 157.

¹⁷⁶ BIPARTISAN POL’Y CTR., *supra* note 169, at 39.

¹⁷⁷ See *Ill. Landowners All.*, 90 N.E.3d at 462 (“Echoing the ‘Catch-22’ concerns expressed by the Commission’s administrative law judge, . . . interpreting section 3-105 of the [Public Utilities] Act to require present ownership of utility infrastructure assets will effectively bar new entrants from qualifying as public utilities and obtaining [CPCNs] under section 8-406 of the Act so they may transact business as such.”).

¹⁷⁸ *Ill. Landowners All.*, NFP v. Ill. Commerce Comm’n, 60 N.E.3d 150, 154 (Ill. App. Ct. 2016), *aff’d*, 90 N.E.3d 448 (Ill. 2017).

¹⁷⁹ See *Ill. Landowners All.*, 90 N.E.3d at 462–63 (stating that “the fact there may be barriers and significant costs to new companies wishing to enter the state to establish a new public utility is in no way incompatible with the theory and operation of the Public Utilities Act. The Act, after all, is based on a model of limited monopoly and reflects a policy of preventing rather than promoting competition with existing utilities.”) (citing *Gulf Transp. Co. v. Ill. Commerce Comm’n*, 402 Ill. 11, 19–20 (1948)).

¹⁸⁰ Uhlenhuth, *supra* note 110.

state statutes to accept or reject the project on the basis of their in-state transmission needs, or the in-state benefits that the project offers.”¹⁸¹ Especially in regard to pass-through states where the transmission line does not begin or end, this can be particularly problematic as state regulators and state courts can reject the transmission lines by finding they do not benefit the state. A state in the middle of a proposed transmission line path is incentivized to “hold out” on regulatory approval of the line because the transmission line will not produce the same benefits for its citizens as for the citizens of neighboring states.¹⁸² Here, state PUCs and merchant transmission developers need to be creative about how to create benefits for the pass-through states—perhaps model the system off of a toll road and allow the state to “tax” usage of the line. Or perhaps the states themselves could create a benefit system through an energy compact that recognizes the middle state as a necessary part of the energy delivered.

At the end of the day, “[s]tatutes—as well as regulators’ and policymakers’ understanding of the public interest—must also evolve beyond the parochial, more narrowly focused model that co-existed with traditional public utility regulation.”¹⁸³ When evaluating interstate transmission projects, states should consider moving away from their “state-centric” approach and consider the broader benefits to the region.¹⁸⁴ This will require regulators to look beyond the need for transmission within their own state, which is a “perspective [that] is rooted in the old industry model of vertically-integrated, largely insular, monopolies” and recognize that it is “outdated in the context of competitive, multistate bulk power markets.”¹⁸⁵

Finally, state legislatures and state PUCs need to recognize that new market entrants can help them achieve their own clean energy policy goals. For instance, the clean energy provided by these transmission lines can help states achieve their Renewable Portfolio Standard goals or any other clean energy goals they may have established for themselves.¹⁸⁶ As Clean Line’s experience with its Rock Island project demonstrated, the new transmission line was rejected despite the fact that Illinois has an established renewable portfolio goal of increasing renewable energy options in the state.¹⁸⁷ The Missouri PUC recognized the benefits that Clean Line’s transmission line would bring the state:

¹⁸¹ BIPARTISAN POL’Y CTR., *supra* note 169, at 28.

¹⁸² See Alexandra Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 130 MINN. L. REV. 129, 132–33 (2015) (noting that “a government regulator in a ‘pass-through’ state, which would neither export nor consume power from a proposed transmission line, is especially likely to face considerable interest group pressure to hold out from approving a project.”).

¹⁸³ Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the “Public Interest” in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705, 712 (2010).

¹⁸⁴ Scholars Alexandra Klass and Jim Rossi have advanced “an argument for revitalizing dormant Commerce Clause review of discriminatory state siting and eminent domain regimes, with the goal of better promoting interstate coordination in energy markets.” They hypothesize that state regulators who complete a narrow assessment of the benefits of a new transmission line could possibly be challenged under the Dormant Commerce Clause, especially if the state regulator refuses to take into account any out-of-state or regional benefits associated with a transmission line. Klass & Rossi, *supra* note 182, at 134.

My personal perspective on that argument is that while it makes sense that, under the Dormant Commerce Clause, states might be precluded from taking a state-centric view on interstate-transmission development, the Dormant Commerce Clause is too blunt of an instrument to motivate states to consider the more regional benefits of clean-energy development. And such an argument would take too long to be argued in the judicial system.

¹⁸⁶ See N.C. CLEAN ENERGY TECH. CTR. & U.S. DEP’T OF ENERGY, RENEWABLE PORTFOLIO STANDARD POLICIES (2017), <http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2017/03/Renewable-Portfolio-Standards.pdf> (demonstrating that twenty-nine states currently have an RPS in place).

¹⁸⁷ See N.C. Clean Energy Tech. Ctr., *Renewable Portfolio Standard*, DSIRE, <http://programs.dsireusa.org/system/program/detail/584> (last updated June 28, 2018) (requiring “large investor-

There can be no debate that our energy future will require more diversity in energy resources, particularly renewable resources. We are witnessing a worldwide, long-term and comprehensive movement towards renewable energy in general and wind energy specifically. Wind energy provides great promise as a source for affordable, reliable, safe, and environmentally-friendly energy. The Grain Belt Project will facilitate this movement in Missouri, will thereby benefit Missouri citizens, and is, therefore, in the public interest.¹⁸⁸

But states' rejection of interstate transmission development despite intra-state policies and support for clean energy may lead to under-investment in future transmission capacity and the grid as a whole.¹⁸⁹ States should recognize, as the Missouri PUC did, that clean energy projects can provide significant benefits for their citizens and find ways to facilitate the projects' growth and development.

As traditional public utility law was fluid in its early years of development and changed to meet the needs of public utilities over time, so too must it now adapt to recognize the changing needs of the grid. This represents an opportunity for state PUCs to provide leadership and support to both utilities and new market entrants as electricity-based business models change and adjust.¹⁹⁰ State PUCs have the opportunity to usher in a new era of energy management by creating a framework that is experimental, adaptable, and fair for all participants.¹⁹¹ This will require the perspective that public utility law is not a single, immutable enterprise, but is an open-ended project that is able to adapt and meet the needs of a constantly changing world.¹⁹² "The choice of making a low-carbon future can only be realized if it is approached as a shared, political choice--a choice that will require a significant amount of statecraft, public participation, and private enterprise, a choice that calls for a revitalized understanding of public utility."¹⁹³

B. *A Regional RTO-Centered Regulatory Approach*

At the heart of the jurisdictional issue related to transmission line development is each state's desire to retain authority over what is built within its borders. This is an important consideration and a tangible part of federalism that makes interstate projects like the construction of transmission lines challenging, but states can retain this authority while also recognizing the broader needs of the region. To this end, the expertise and authority of the RTOs and ISOs may work in favor of transmission line expansion. If states desire to avoid complete federal preemption over interstate transmission development, they may want to consider ceding more control and authority to the RTOs on the siting of new transmission lines. Fortunately, RTOs are already in an excellent position to act as an intermediary between federal and state power over

owned electric utilities (EUs) and alternative retail electric supplies (ARES) to source 25% of eligible retail electricity sales from renewable energy by 2025").

¹⁸⁸ Missouri Public Service Commission Report, *supra* note 156, at 47.

¹⁸⁹ Hoecker & Smith, *supra* note 62, at 79.

¹⁹⁰ Boyd, *supra* note 16, at 1708.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1710.

transmission lines,¹⁹⁴ and they are aware of regional transmission needs, thanks to the planning processes they complete on an annual basis.¹⁹⁵

There are currently seven RTOs covering service territories that comprise about two-thirds of the U.S. population, and they “range in size from single-state (for example, those that serve New York and California) to fifteen-state (for example, MISO, the RTO serving the upper Midwest).”¹⁹⁶ The RTOs were federally created and remain regional representatives of FERC.¹⁹⁷ Yet the RTOs are also granted a considerable amount of deference by FERC and are able to set their own agendas as well as provide their own suggested solutions to problems.¹⁹⁸ The RTOs rely on the voluntary actions of market participants in their regions and utilize the transmission lines their utility participants own.¹⁹⁹ Without the transmission line owners (generally utilities), RTOs could not be established “because the owners need to give up a property right – management of the transmission lines – for an RTO to be able to fulfill its duties.”²⁰⁰ Therefore, utilities and RTOs are mutually reliant on each other for the efficient and effective coordination of the electricity grid. In this position, RTOs are ideally situated to bridge the gap between the federal and state governments.²⁰¹

1. The Answer: RTO Transmission Siting Boards

When establishing the RTOs, FERC Order No. 2000 was forward-looking and established an “open architecture” policy which allowed the RTOs and its members “to improve their organizations in the future in terms of structure, operations, market support and geographic scope to meet market needs.”²⁰² This open architecture policy will enable RTOs to be flexible enough in responding to the needs of their members and will provide the mechanism that enables RTOs to adapt into their new role as transmission siting coordinator.

Building on Hannah Wiseman’s recommendation that a new form of regional governance institution be formed to address the “regulatory commons tragedy in renewable development,”²⁰³ a specific transmission siting board within the RTOs would be an effective way to address the stagnation of interstate transmission line development in the United States. As Wiseman states, “The boards must be independent institutions with regulatory powers, and they must use these powers to resolve overlapping and conflicting rights and provide streamlined yet thorough

¹⁹⁴ See Gonzàlez, *supra* note 5, at 1462 (“With restructuring and the move towards competition, there is increasing regional governance through ISOs and RTOs, organizations not constrained by state borders.”).

¹⁹⁵ See Regional Transmission Organizations, 89 FERC ¶ 61,285, at 5 (1999) (Order No. 2000 stated that some of the RTOs’ minimum functions would include interregional coordination in addition to planning and expansion).

¹⁹⁶ See Michael A. Dworkin & Rachel Aslin Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 555 (2007) (noting that joining an RTO is not required and that many states do not participate in RTOs); Welton, *supra* note 57, at 1079.

¹⁹⁷ See Dworkin & Goldwasser, *supra* note 196, at 555; Welton, *supra* note 57, at 1110 (“Tariffs, by-laws, and operating agreements dictate the terms of RTO operations and governance, and the RTO board must file proposed changes in these documents with FERC for its approval.”).

¹⁹⁸ Dworkin & Goldwasser, *supra* note 196, at 555.

¹⁹⁹ *Id.* at 556.

²⁰⁰ *Id.* at 558.

²⁰¹ Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, U. ILL. L. REV. 1, 53 (2014).

²⁰² *Id.*

²⁰³ Hannah Wiseman, *Expanding Regional Renewable Governance*, 35 HARV. ENVTL. L. REV. 477, 484–85 (2011) (“A regulatory commons is a regulatory environment in which no one government entity controls the policy realm or has sufficient incentive to lead it.”).

processes for the approval of renewable energy siting and construction.”²⁰⁴ While Wiseman asserts that these regional energy boards must be independent agencies that do not function within an existing federal or state entity,²⁰⁵ I think that RTOs are sufficiently independent to avoid the risk of being beholden to either the federal government or to the utility participants within their markets.

It will be more efficient if the RTO transmission siting board operates as a hybrid institution that combines multiple levels of authority and “[b]y virtue of this combining, these institutions draw from regulatory authority of key stakeholders and foster or force collaborations.”²⁰⁶ In order for this structure to be effective, state governments will need to cede some authority to this new governance structure, but also retain some power over the decisions made by it. This will require, again, updating many state public utility statutes that currently prioritize the state PUC’s determination of need for a new transmission line above the RTO’s determination of need.²⁰⁷

Thus, the governance structure of the RTOs will likely need to be changed. A specific board that only manages interstate transmission siting will need to be created within the RTO. The interstate transmission siting board should be comprised of state representatives who will have the opportunity to advocate for or against the siting of a transmission line within or across its borders. The RTO transmission siting board will provide a place where states can discuss and negotiate the different benefits that may be gained from new interstate transmission lines.²⁰⁸

Fortunately, many RTOs already have regional state committees which are “comprised of state representatives (typically utility commissioners) from the states within the RTO’s territory.”²⁰⁹ The interstate transmission siting board would need to have a formalized role within the RTO, a governance structure that complies with its members’ recommendations, and a requirement that it must explain any major deviations from the recommendations of the board.²¹⁰ The exact inter-workings of this governance structure are difficult to define, but they must recognize the federalism issues inherent in the decision-making process, provide the RTO with the ability to act as a mediator, and create an appeals process that does not require FERC review.²¹¹ Moreover, procedural protections may be built into the decision-making structure of the RTO’s transmission siting board to adequately protect it from federal over-involvement, while also empowering the states to participate in the decisions. To this end, it will be necessary

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 528.

²⁰⁶ See Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 841 (2013) (defining hybrid institutions as organizations that “combine authority from more than one source, whether as a formal or informal part of their structure or governance process”).

²⁰⁷ See GREG BASHEDA ET AL., THE BRATTLE GRP., SURVEY OF TRANSMISSION SITING PRACTICES IN THE MIDWEST 13 (2004), <https://pubs.naruc.org/pub.cfm?id=538D82DD-2354-D714-5157-244A2AA66041> (“However, not surprisingly, no state said that its need determination would either be met or waived if a RTO identified the need for a line.”).

²⁰⁸ See ETO, *supra* note 22, at 23 (finding that the likelihood of completion for multi-state transmission projects increases if each state finds that the project will adequately address the public interests of the state).

²⁰⁹ Welton, *supra* note 57, at 1111.

²¹⁰ *Id.*

²¹¹ An existing organization could start as a model for the development of these siting boards. The New England States Committee on Electricity (NESCOE) is a non-profit organized under both state and federal law. It is recognized by FERC and represents the collective perspective of six New England states in regional electricity matters. *About NESCOE*, NEW ENG. STATES COMM. ON ELEC., <http://nescoe.com/about-nescoe/> (last visited March 29, 2019).

in the development of the transmission siting boards that they “create clear hierarchies among rights (through pre-emption, if necessary)” and provide a centralized process for applying those rights.²¹²

There are three potential process options for the new RTO transmission siting boards. One option is to allow the state PUCs to continue to moderate the need determination process within their own states, but then the PUC’s recommendation would be reviewed by the RTO transmission siting board. This will allow merchant transmission developers to avoid joining the RTO to participate in the siting process, but at the same time will provide a way to appeal the state PUC decision to the RTO transmission siting board. This option retains much of the state power over the siting process but requires that the decision be reviewed and approved at the regional level. But this option also adds another layer of regulatory review, which likely would require more time and money spent by all parties involved. The second option is to place the project approval of the interstate transmission line within the RTO siting board, but then leave it to the individual states to determine the exact route of the line (within reason). This option involves almost complete federal pre-emption at the project approval stage but retains state authority in the actual geographic siting of the transmission line. A third option is to create a streamlined process for project review, approval, and siting within the RTO transmission siting board. Under this option, the states lose the most authority and control, but it also decreases the regulatory barriers for transmission line developers and likely provides a more efficient path for transmission line development.

It will be integral that utility representatives and state regulators participate on this RTO siting board because “they have local knowledge that is vital to the planning for demand and the siting of future energy capacity projects.”²¹³ Moreover, these representatives are closer to state-based and regionally-based problems and must advocate for customers, unlike FERC’s management of the wholesale market.²¹⁴ If FERC and the states are better able to collaborate with each other through an RTO, then this could avoid unnecessary litigation and prevent potential pre-emption actions.²¹⁵

2. Challenges to the RTO Transmission Siting Board

The creation of these RTO transmission siting boards will be challenging on several fronts. First, the risk of federal over-involvement is extremely high yet the RTO transmission siting board should be viewed as a viable alternative to complete federal preemption. Moreover, since the RTO-state relationship is mutually reliant—the RTO cannot function without the states and their utilities’ participation in the RTO—then the states can use their participation in the RTO as a negotiating tool. If FERC becomes too involved in the RTO transmission siting boards, then the states may allow their utilities to secede from participating in the RTO and bring their energy infrastructure with them.

A second challenge facing this new transmission siting board is that the particulars of utilizing eminent domain within each state will need to be determined. Either federal eminent domain authority could be vested in the RTO transmission siting board or states would apply their own eminent domain authority after being directed to approve a line by the siting board. Professor Alexandra Klass suggests that it is “possible to give RTOs siting and eminent domain

²¹² Wiseman, *supra* note 203, at 539.

²¹³ Dworkin & Goldwasser, *supra* note 196, at 586.

²¹⁴ *Id.*

²¹⁵ Hoecker & Smith, *supra* note 62, at 96.

authority for interstate transmission lines without completely transferring regulatory authority over transmission lines from the states to the RTOs.”²¹⁶ The new RTO transmission siting board will require eminent domain authority, either ceded from the states (bottom-up) or provided by the FERC (top-down).

I recognize that my proposed solution of transferring some of the states’ power in the transmission siting process to the RTOs will be politically unpalatable to many. This solution is also extremely complex from a governance structure standpoint and asks a lot of the RTOs. There is concern that pushing states to work at a regional level will result in losing the wide variety of public preferences and policies that have resulted from the current framework of state control.²¹⁷ Another concern is that the RTOs “offer considerably less transparent, only quasi-public frameworks in which to make these critically important decisions.”²¹⁸ Finally, regional market governance could lead to least-common denominator solutions by forcing states into positions they would not otherwise be if they retained their state-centric position.²¹⁹ But the real question posed by this section is: will a regional perspective on the siting of transmission lines work better than the current state-by-state approach?

Adding transmission siting coordinator to the list of the RTO’s many responsibilities will be challenging, but the RTO is in the best position to manage the wide variety of perspectives and to understand the needs of the electricity grid while still allowing utilities to retain ownership over the transmission lines. Similar to how the states are viewed as “laboratories of democracy,”²²⁰ the same concept of social experimentation could be applied to the RTOs by allowing each RTO and ISO to determine the ideal participant arrangement of the hybrid governance transmission siting board. The exact structure and operating procedures of each should be determined by the participants and best suited to the needs of the region.

As this Comment has demonstrated, the current regulatory construct is not working at the state or federal level and changes will require creative regulatory responses. It seems that a regional approach may strike a better balance than picking either a solely state or solely federal approach. RTOs already make decisions at a regional level and the impacts of their decisions are felt by consumers locally.²²¹ Providing FERC with complete pre-emption power is not the answer here because FERC is “not suited to hear locally-oriented issues or complaints about regional decisions; its size, skill-set, institutional knowledge, and jurisdictional roots leave the FERC with limited awareness of the impacts its actions have on end users.”²²² The creation of RTO transmission siting boards bridges the federalism gap in this space and provides a tangible path forward to encouraging the development of interstate transmission lines in the United States. Inserting a more regional perspective into this process may help better align the transmission siting regulatory process with the public interest.

²¹⁶ Klass, *supra* note 60, at 1950.

²¹⁷ See Welton, *supra* note 57, at 1073 (identifying several risks associated with looking to regional electricity-market governance structures for decarbonization as 1) the loss of transparent, state-level, government-driven decision-making on the direction of decarbonization; 2) the homogenization of state perspectives will water down more ambitious state policies; and 3) the possible reduction it may produce with regard to the ability of the states to accomplish the same policy goal within their own borders).

²¹⁸ *Id.* at 1113.

²¹⁹ *Id.* at 1127.

²²⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

²²¹ Dworkin & Goldwasser, *supra* note 196, at 587.

²²² *Id.* at 588.

CONCLUSION

As new market entrants look to introduce more renewable energy resources onto the grid, RTOs and state PUCs face significant challenges in integrating these resources.²²³ Grid integration studies conclude that in order to encourage higher penetration of renewable resources, the grid will have to become more flexible and there must be increased transmission capacity.²²⁴ The public utility regulatory construct is not currently adapted to quickly incorporating these new forms of energy or new market entrants into the system; therefore new rules and procedures are needed in order to accommodate increased access to the grid in a fair and open manner.²²⁵

Regulating clean energy projects under traditional public utility law can result in the mismanagement and minimization of the projects' benefits. Many state PUCs still demand that merchant transmission developers obtain CPCNs prior to construction, which often requires the company to be designated as or to fit within the definition of "public utility." This monopoly construct that is protected under public utility law may not be benefiting ratepayers in the context of preventing new entrants from entering the electricity market. The insistence of states and state PUCs to apply the requirements of public utility law to merchant transmission developers represents a failure in adequately adapting to new players in the market and the growing demand for renewable energy. It also results in expensive delays and regulatory uncertainty for future clean energy projects.

In addition to problems at the state level, jurisdictional friction between state and federal regulatory bodies over transmission line development has added to the stagnation of clean energy development. FERC has been reluctant to assert jurisdiction on projects such as Clean Line's Rock Island transmission project despite recognizing the need for additional transmission capacity at the federal level. If a transmission line is being built in one state, but the majority of the benefits will be reaped in another state, the PUC in the first state is not incentivized to support the project and can block its development. This state-centric mentality locks the electricity market into an old model that is no longer working for its consumers. This model recognizes benefits from the monopoly construct but has yet to recognize the benefits of the decentralized, open market construct. Here, federalism conflicts result in the failure to encourage clean energy development and the re-affirmation of the traditional public utility model.

This Comment's proposed solution is to create a middle ground where the RTOs manage the interstate transmission siting process with the involvement of both the states and the federal government. If states want to avoid complete federal preemption in this area, it would behoove them to cede some control and authority to these regional entities that are in the best position to manage these federalism issues. This will require significant organizational changes to the RTOs' current governance structures, but fortunately FERC already provides a mechanism for these changes through the "open architecture" policy it established in Order No. 2000.

The United States is at a point where the country desperately needs a national policy aimed at moving the country's energy scheme into a new era. Traditional utilities are currently faced with a radically changing market in which their services are no longer the only options available to their customers.²²⁶ Innovative technology and current market changes require a new regulatory

²²³ Boyd, *supra* note 16, at 1700.

²²⁴ *Id.* at 1701.

²²⁵ *Id.*

²²⁶ MIT ENERGY INITIATIVE, *supra* note 1, at 1-2.

regime—one that recognizes the benefits private developers can bring to the electricity market, and one that recognizes that these developers are dramatically different from traditional utilities. Due to the threat of climate change and the need to decarbonize the electricity industry, our society has reached a point where changes need to be made to encourage the development of clean energy in the United States. Despite the United States' withdrawal from the Paris Agreement, many states still recognize the need to encourage the growth of renewable energy resources.²²⁷ This will require states to take on a more regional perspective and consider a broader concept of the “public interest.”

²²⁷ See Jocelyn Durkay, *State Renewable Portfolio Standards and Goals*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 1, 2017), <http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx> (demonstrating that twenty-nine states, Washington, D.C., and three territories have adopted a Renewable Portfolio Standard, while eight states and one territory have set renewable-energy goals).