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Takings and Transmission

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TAKINGS AND TRANSMISSION*

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Ever since the Supreme Court's controversial 2005 decision in Kelo v. City of New London, *courts, state legislatures, and the public have scrutinized eminent domain actions like never before. Such scrutiny has focused, for the most part, on the now-controversial "economic development" or "public purpose" takings involved in* Kelo. *By contrast, until recently, there has been little change in law or public opinion with regard to takings involving publicly owned projects such as schools, post offices, and other government buildings, or "use by the public" takings that condemn land for railroad lines, electric transmission lines, or other infrastructure projects. However, recent changes in electricity markets and the development of the country's electric transmission system have raised new questions about the validity of "use by the public" takings in the context of electric transmission lines. With some transmission lines now being built by private "merchant" companies rather than by publicly regulated utilities, and with the push to build more interstate transmission lines to transport renewable energy to meet state renewable portfolio standards, what was once a classic public use is now subject to new statutory and constitutional challenges. This Article explores the potential impact of these developments on the use of eminent domain for electric transmission lines. Ultimately, it suggests that states should ensure that their eminent domain laws governing transmission lines are consistent with their policy preferences surrounding energy development in the state. This Article outlines some ways for states to accomplish this goal.*

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INTRODUCTION

After the United States Supreme Court decided the controversial *Kelo v. City of New London*[1] case in 2005, Congress, state courts,

1. 545 U.S. 469 (2005).

state legislatures, and the public began a heated debate over what constitutes a "public use" for purposes of exercising eminent domain authority. In *Kelo*, the U.S. Supreme Court, in a five-to-four decision, upheld the ability of the City of New London, Connecticut, to take private homes by eminent domain as part of a larger economic development plan for the city,[2] which included a corporate headquarters for a large pharmaceutical company.[3] In reaching the decision, the Court held that economic development in the form of attempting to create jobs and increase the tax base was a recognized "public use" under the Fifth Amendment,[4] and thus, so long as "just compensation" was paid, the taking was valid.[5] While the case resulted in numerous statutory and constitutional reforms to state eminent domain laws nationwide to protect private property rights, those reforms focused primarily on the urban renewal, "economic development" takings at issue in *Kelo*.[6] Very few of these reforms attempted to limit eminent domain authority for other types of takings by governments and private actors.

This Article explores what has historically been a fairly non-controversial taking: namely, actions by governments and, more often, by utility companies or other electricity providers, to take private property in order to build interstate transmission lines. These takings, unlike the situation in *Kelo*, typically involve the government or public utilities condemning or otherwise occupying property in order to put it directly to public use, rather than to transfer it to a private entity that will engage in an activity to benefit the public. But is a transmission line always a public use? Many state statutes and constitutions state expressly that it is, but what if the line is being built by a private "merchant" transmission company[7] that is not a public

2. *Id.* at 472, 484. The City of New London delegated its eminent domain authority for the development to the New London Development Corporation, *id.* at 475, a private nonprofit corporation created to assist the city in planning economic development. *Id.* at 473.

3. *See id.* at 473.

4. *Id.* at 483–84.

5. *See id.* at 489–90; *see also* U.S. CONST. amend. V (requiring that no "private property be taken for public use, without just compensation").

6. *See generally* David Schultz, *Economic Development and Eminent Domain After* Kelo*: Property Rights and "Public Use" Under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41 (2006) (examining the various constitutional measures states took after the Supreme Court's decision); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009) (analyzing the various responses state legislatures took after the *Kelo* decision).

7. Private merchant transmission companies, unlike regulated public utilities or independent transmission companies, generate revenue solely from contracts they sign with electricity generators to transmit electricity over the merchant lines for delivery to

utility? What if the line is being built to provide power solely to customers in other states and will not provide any power to customers in the state in which the eminent domain action must be filed? What if the line is to provide power to a single, large, private customer or provide market access to a single, large, private generator such as a solar plant or wind farm? Should the power of eminent domain be available for these projects or should the proposer of the project be forced to negotiate with all property owners in the line's path to obtain the necessary easements? Current lawsuits pending in Montana and potential lawsuits in other states over transmission lines, many of which are intended to facilitate the increased use of wind, solar, and other renewable electricity sources throughout the country, make this question more than just an intellectual exercise.[8]

To answer these questions, some background on eminent domain and public use is helpful. There remains little debate that the government can take private property and transfer it to public ownership, such as taking private property to build a school, a road, or a military base, so long as just compensation is paid.[9] There is also a long history in United States jurisprudence and state and federal statutes granting certain common carriers, public utilities, and other private actors authority to take private property to create infrastructure or other projects that will be used by the public so long as they obtain government approval or the actions are designated as a public use by statute.[10] Somewhat more controversial is the ability of mining and other natural resource development companies to take private property to develop natural resources such as coal, gas, and oil.[11] Although these takings directly benefit private industry, many states in the Interior West, wishing to ensure complete development of their natural resources to build their economies, designated these actions early on as "public uses" in state constitutions and statutes.[12]

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the retail market. *See* Heidi Werntz, *Let's Make a Deal: Negotiated Rates for Merchant Transmission*, 28 PACE ENVTL. L. REV. 421, 424 n.13 (2011). Thus, merchant transmission providers do not receive a regulated, cost-based rate of return from electricity users. *See id.*; *see also infra* notes 248–53 and accompanying text (discussing the rise of merchant transmission operators).

8. *See infra* Part III.C (discussing these current lawsuits).

9. *See Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting); *see also* U.S. CONST. amend. V (guaranteeing "just compensation" to a private party subject to a government taking); Berman v. Parker, 348 U.S. 26, 30, 36 (1954) (holding constitutional a governmental taking of "land to be devoted to such public purposes as streets, utilities, recreational facilities, and schools").

10. *See Kelo*, 545 U.S. at 498.

11. *See infra* Part III.C.

12. *See infra* Part III.C.

Finally, the greatest controversy in this area in recent years has been the "economic development" or "public purpose/public benefit" takings at issue in *Kelo*, where the taking will not result in a public project like a highway or a post office, nor will it result in a project that the public can use, such as a railroad or a stadium.[13]

Where do transmission lines fit in this legal structure? Without transmission lines, of course, it would be impossible to bring electricity to homes and businesses, thus making them as critical to the country's electricity infrastructure as power plants and light bulbs. As a result, states historically have classified transmission lines as a "public use."[14] Yet such easy categorization has become more difficult as electricity markets around the country have been restructured, private actors have entered the electric transmission market, and interstate power lines are being planned and built to bring more renewable energy, like wind and solar, from sparsely populated parts of the country to population centers often across state lines.[15] As interstate transmission lines begin to resemble yet another form of economic development that provides a "public purpose" or "public benefit" in terms of increased renewable energy and creation of new, interstate electricity markets, they may not always fulfill the requirement of "use by the public." Consequently, much as there have already been,[16] there will be more calls to restrict eminent domain authority in this area.

The issue of eminent domain authority for transmission lines is important beyond its doctrinal implications. First, the country's transmission grid is in need of expansion to improve reliability and to integrate domestic renewable energy into the grid to allow greater energy independence and achieve federal and state climate change goals.[17] Unlike traditional fossil fuel-generated electricity, however,

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13. *See infra* Part I (discussing the *Kelo* decision and the subsequent responsive actions taken by various states). Notably, the *Kelo* majority expressly determined that "public use" need not mean that the public must actually be able to use the property, but rather that the project must simply have a public purpose. *Kelo*, 545 U.S. at 478.

14. *See infra* notes 132–41 and accompanying text (discussing statutory authorization of eminent domain for transmission lines).

15. *See infra* notes 258–63 and accompanying text (discussing proposed interstate transmission lines to transport renewable energy).

16. *See infra* Part III.C (discussing eminent domain challenges to interstate transmission lines).

17. *See* LETHA TAWNEY, RUTH GREENSPAN BELL & MICAH S. ZIEGLER, HIGH WIRE ACT: ELECTRICITY TRANSMISSION INFRASTRUCTURE AND ITS IMPACT ON THE RENEWABLE ENERGY MARKET 6 (2011), http://pdf.wri.org/high_wire_act.pdf ("While grid infrastructure and technology has evolved over the past 100 years, there is a growing

which can be transported to load centers by truck, rail, or ship, renewable energy such as wind and solar can only be transported to load centers through transmission lines.[18] Because the country's renewable energy sources are generally far from population centers,[19] this makes expanding the electric transmission grid critical to achieving these important policy goals. Thus, a key assumption of this Article is that creating and implementing policies to build new transmission lines to connect renewable energy sources to population centers is desirable. Certainly, there can be significant drawbacks to some new transmission lines, most notably the environmental and aesthetic objections that form the basis of regular opposition to such lines—particularly when those lines run through scenic and natural areas.[20] Nevertheless, at the current time, there is no alternative technological means to transport renewable energy long distances, and the ability to transport renewable energy resources is critical in the effort to transition the U.S. energy economy away from fossil fuels, which emit the greenhouse gases that exacerbate climate change.

Furthermore, even apart from the desire to incorporate new renewable energy sources of electricity into the grid, the nation's electric transmission infrastructure is in need of continuous upgrade in order to avoid debilitating and increasingly frequent blackouts and service interruptions.[21] Demand for electricity increased twenty-five percent between 1990 and 2009, but construction of transmission facilities decreased by thirty percent during that same period.[22]

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consensus that it is reaching its technological limits and requires renewed investment to maintain reliability and meet other modern challenges.").

18. *See* Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1811–12 (2012).

19. *See* TAWNEY, BELL & ZIEGLER, *supra* note 17, at 6; *see also* BIPARTISAN POLICY CTR., CAPITALIZING ON THE EVOLVING POWER SECTOR: POLICIES FOR A MODERN AND RELIABLE U.S. ELECTRIC GRID 19 (2013), http://bipartisanpolicy.org/sites/default/files/Energy_Grid_Report.pdf (discussing remoteness of renewable energy resources "from load centers").

20. *See* Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1021–22 (2009) (discussing an example of opposition to recent transmission lines based on environmental grounds and noting that Arizona regulators referred to one proposed line as a "230-mile extension cord" (internal quotation marks omitted)).

21. AM. SOC'Y CIVIL ENG'RS, 2009 REPORT CARD FOR AMERICA'S INFRASTRUCTURE 134 (2009), http://www.infrastructurereportcard.org/sites/default/files/RC2009_full_report.pdf (discussing the need for transmission infrastructure investment and expansion); *see also* BIPARTISAN POLICY CTR., *supra* note 19, at 21–22 (discussing the continuing need to upgrade and expand the grid).

22. AM. SOC'Y CIVIL ENG'RS, *supra* note 21, at 134.

Between 2000 and 2008, the United States added only 668 miles of interstate transmission lines.[23] This deficit of transmission capacity[24] combined with the aging infrastructure[25] is leading to an increase in blackouts and brownouts,[26] costing the U.S. economy $150 billion annually.[27] The 2003 Northeast blackout alone cost the United States $10 billion,[28] and it demonstrated that "the current energy infrastructure cannot always satisfy peak demand and lacks important redundancies that would improve reliability."[29] The "chaos" that ensued as a result of this event also showed that "the United States could be especially vulnerable to targeted and deliberate attacks on its power supplies."[30] In addition, the extreme weather that caused a massive, multi-day blackout on the East Coast in the summer of 2012 led many to question whether America's infrastructure will be able to withstand the more volatile weather caused by climate change.[31] FERC Commissioner Cheryl LaFleur has suggested that $300 billion may need to be spent on new transmission facilities by 2030.[32] However, the high cost is not necessarily what is hindering the construction of new transmission infrastructure: "In many cases ...

23. LITOS STRATEGIC COMM'N, THE SMART GRID: AN INTRODUCTION 6, http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/DOE_SG_Book_Single_Pages%281%29.pdf. This is a problem because "new investment is ... needed to create an effective nationwide transportation network that will facilitate long-distance electricity transportation." Joshua P. Fershee, *Misguided Energy: Why Recent Legislative, Regulatory, and Market Initiatives Are Insufficient to Improve the U.S. Energy Infrastructure*, 44 HARV. J. ON LEGIS. 327, 329 (2007).

24. *See* AM. SOC'Y CIVIL ENG'RS, *supra* note 21, at 136 ("Because the existing transmission system was not designed to meet present demand, daily transmission constraints or 'bottlenecks' increase electricity costs to consumers and increase the risk of blackouts.").

25. *See* LITOS STRATEGIC COMMC'N, *supra* note 23, at 18 ("[T]he average age of a substation transformer is 42, two years more than their expected life span.").

26. *See id.* at 7 ("There have been five massive blackouts over the past 40 years, three of which have occurred in the past nine years.").

27. *Id.* at 5.

28. Fershee, *supra* note 23, at 328.

29. *Id.* at 330.

30. *Id.*

31. *See Easy Fix Eludes Power Outage Problems in U.S.*, UTICA OBSERVER-DISPATCH (July 4, 2012), http://www.uticaod.com/latestnews/x425610106/Easy-fix-eludes-power-outage-problems-in-US (describing the frustrations of elected officials and residents over power companies that are unprepared for extreme weather events); Matthew L. Wald & John Schwartz, *Rise in Weather Extremes Threatens Infrastructure*, N.Y. TIMES, July 26, 2012, at A4 (explaining that burying power lines is becoming more economical as more intense storms batter the transmission infrastructure, and that extreme heat is increasing peak electricity demand "higher than ever").

32. *See* Lynn Garner, *FERC Reaffirms Rule to Remove Barriers to Building More Transmission Lines*, BNA ENVTL. REP., May 25, 2012 (explaining that LaFleur was referring to a study that had estimated the amount needed to be spent).

[o]verly stringent permitting requirements, lawsuits, and other regulatory issues often inhibit construction of transmission lines."[33] These regulatory difficulties, including a patchwork of changing state and local laws governing eminent domain authority for electric transmission lines,[34] thus have significant legal and policy implications for the future development of the grid.

Today's regulatory system governing transmission lines, however, is not ideally adapted to meet these goals associated with expanding the transmission grid. As explained later in this Article, the siting and permitting of electric transmission lines takes place almost exclusively at the state level and sometimes the local level, even though market restructuring and the desire to integrate more renewable energy into the grid has created significant regional and national markets for transmission and electricity.[35] Accordingly, unlike interstate natural gas pipelines that are reviewed and approved at the federal level,[36] it is still largely state public utility commissions and state courts that determine public need, public use, and eminent domain authority for interstate transmission lines on state and private lands.[37] This requires a transmission operator to obtain approval for the line from multiple state public utility commissions and secure eminent domain authority under several states' laws in order to build an interstate line.[38] While this may have once worked well when state-regulated public utilities with defined, in-state territories overwhelmingly provided electricity generation and transmission, the fit is ill-tailored to today's more diverse, regional electricity markets. Admittedly, there are many legal, political, and economic actors that facilitate or impede the development of new transmission lines. Nevertheless, eminent domain authority for transmission lines has always been, and will likely remain, a key legal tool to facilitate the development of such lines.

Importantly, eminent domain authority for interstate transmission lines creates a potentially inequitable distribution of costs and benefits among residents of neighboring states. At various times in the nation's history, many individuals voluntarily and involuntarily (through the exercise of eminent domain) made

33. AM. SOC'Y CIVIL ENG'RS, *supra* note 21, at 136.

34. *See infra* Part III.B–C (offering an overview of these laws).

35. *See infra* notes 129–41 and accompanying text.

36. *See infra* note 320 and accompanying text.

37. *See infra* Part II.A–B.

38. *See infra* notes 264–98 and accompanying text (comparing the various approaches states take when granting eminent domain authority to private actors).

significant sacrifices so that the country could create massive national projects like the interstate highway system in the 1950s.[39] For these projects, many policymakers considered eminent domain authority to be critical to addressing the "assembly" problem, where landowners in the path of the project refuse to sell their land at or near market value because they know their property is critical to the success of the project.[40] Should we expect individual citizens to continue to make similar sacrifices today for "public benefits" such as increasing energy independence and reducing greenhouse gas emissions through the development and transmission of renewable energy? Or should the government and its power of eminent domain stay out of most of these projects, leaving it to the private sector to use markets and voluntary transactions to gain control of the land?

Another concern, of course, is that governments have sometimes abused the power of eminent domain, particularly at the expense of low-income and underrepresented communities.[41] On the other hand, the use of eminent domain to build transmission lines for renewable energy sources seems less likely to involve eminent domain abuse that disrupts entire communities, since the lines are most needed to bring remote sources of energy through relatively undeveloped areas to population centers.[42] While this Article does not attempt to fully address or answer these fundamental questions and concerns, it raises them in the context of interstate transmission lines to illustrate some of the difficult problems that can arise with the use of eminent domain.

Part I of this Article explores the different classifications of "public use" under the Fifth and Fourteenth Amendments of the U.S. Constitution. It discusses the *Kelo* case as well as the public and state legislative backlash to that decision. Part II turns to the use of

39. *See* Richard F. Weingroff, *The Greatest Decade 1955–1966*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/infrastructure/50interstate.cfm (last modified Nov. 22, 2011) (discussing the creation of the federal interstate highway system and use of eminent domain).

40. *See infra* notes 277–79 and accompanying text (offering an example in Montana).

41. *See* Catherine E. Beideman, *Eminent Domain and Environmental Justice: A New Standard of Review in Discrimination Cases*, 34 B.C. ENVTL. AFF. L. REV. 273, 273–80 (2007) (discussing eminent domain decisions with adverse impacts on low-income and minority communities); Ed Gordon, *Weighing the Impact of the Eminent Domain Ruling*, NPR (July 1, 2005, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=4725974 (hosting a panel discussion of the *Kelo* decision, including examples of past eminent domain actions that adversely affected low-income and minority communities).

42. *See infra* note 226 and accompanying text (discussing how renewable resources are frequently in sparsely populated areas).

eminent domain in the context of electric transmission lines. It explains the process by which public utilities and other transmission operators work within state law to exercise the power of eminent domain to build transmission lines when voluntary contractual negotiations to obtain easements on private property fail. Part III then explores how the transmission grid is changing, both to incorporate more transmission lines built by private actors rather than state-regulated public utilities and to build more multi-state, high-voltage transmission lines to transport renewable energy—particularly wind and solar energy—from resource-rich parts of the country to population centers. It also discusses current disputes involving electricity transmission and eminent domain to show how changes in the electricity grid itself are beginning to drive changes in long-established law in this area.

Part IV begins with the premise that expanding federal authority to approve and site interstate electric transmission lines would be the most effective means of creating an expanded interstate transmission grid to facilitate integration of more renewable energy into the grid and reflect the physical and economic realities of today's interstate grid and electricity markets. This Part also recognizes, however, that such a major shift of authority from the states to the federal government may not be politically feasible at the present time. Thus, this Part goes on to consider what actions states can take on their own to facilitate transmission expansion through their energy policies and eminent domain laws. In doing so, Part IV considers ways to analyze the concept of public use for interstate transmission lines, focusing both on those lines built by private merchant companies, and for interstate lines that benefit a multi-state region, whether or not they are built by private parties or public utilities. Part IV concludes that under most circumstances, states should grant private merchant companies the same eminent domain authority to build transmission lines as they grant to public utilities. More importantly, however, states should ensure that their laws governing eminent domain for transmission lines match their policy preferences for energy development and energy export in light of today's regional transmission grid and electricity markets.

I. EMINENT DOMAIN AND "PUBLIC USE"

Eminent domain is the power of government to obtain title or access to property from private parties without their consent.[43] The Fifth Amendment recognizes the right of eminent domain to "take" property but limits it as follows: "nor shall private property be taken for public use, without just compensation."[44] Thus, the Constitution requires that the taking be for a "public use" and that "just compensation" be paid.[45] States generally have similar limits on eminent domain in their own constitutions and statutes[46] and, under principles of federalism, may provide protections for private property rights from eminent domain actions beyond what exists under federal law.[47] While most eminent domain actions are brought by government actors, there is a long history under both state and federal law of governments granting authority to private actors such as railroads, utility companies, and in some cases, even mining companies, to bring their own eminent domain actions to acquire property to build railroad lines, roads, power lines, or industry-related infrastructure.[48]

This Part first explores the definition of "public use" with a focus on the Supreme Court's 2005 decision in *Kelo v. City of New London*. It then looks at state legislative and judicial reactions to *Kelo*. In many cases, these have narrowed the definition of "public use" for takings involving certain types of private development (especially urban economic development) but not necessarily for other types of takings that also involve private development, such as electric transmission lines or mining activities. This Part thus sets the stage for Parts II and III, which together address how changes in the U.S.

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43. *See* Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting) ("[T]he Takings Clause presupposes that government can take private property without the owner's consent . . . .").

44. U.S. CONST. amend. V.

45. *Id.*

46. *See, e.g.*, *supra* note 6 and accompanying text (describing the post-*Kelo* statutory and constitutional reforms instituted on the state level); *infra* notes 66, 82–88 and accompanying text (discussing state limits on eminent domain authority).

47. *Kelo*, 545 U.S. at 489 (noting that many states impose "public use" requirements that are stricter than federal law in state constitutions and statutes).

48. *See infra* notes 88–95 and accompanying text (discussing state statutory and constitutional provisions allowing for private actors to bring eminent domain actions); *infra* notes 266–75 and accompanying text (outlining the various positions states take on merchant line eminent domain action by private parties); *see also* 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.05[3][a] (3d ed. 2012) (discussing eminent domain authority for railroad lines); Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 654–61 (2008) (discussing eminent domain authority for natural resource development takings).

electricity grid in recent years have impacted the question of public use for electric transmission lines.

A. Kelo's *Public Use Revolution*

Until *Kelo*, the public use clause of the Fifth Amendment was far from a "must teach" topic among constitutional and property law scholars.[49] The Court had decided only two public use cases in the preceding forty years: *Berman v. Parker*[50] in 1954, and *Hawaii Housing Authority v. Midkiff*[51] in 1984. In both cases, the Court adopted a very broad definition of "public use."[52] The Court did not consider another public use case until 2005 in *Kelo*.[53] In *Kelo*, the Court reviewed the City of New London's plan to redevelop its waterfront area "to increase tax and other revenues, and to revitalize an economically distressed city."[54] An important part of the redevelopment plan included a proposed $300 million research facility for the pharmaceutical company Pfizer.[55] New London planners hoped the new corporate headquarters would draw new business, create jobs, and provide "a catalyst to the area's rejuvenation."[56] New London was unable to negotiate purchase agreements with all the homeowners in the development area, so it proceeded to use its statutory authority to initiate condemnation proceedings against them.[57]

The Court reviewed the case to determine "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[58] In a five-to-four decision, the Court held that New London's use of

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49. *See, e.g.*, Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 615 (1940) (noting that the issue of public use was an important part of the law of eminent domain even though the issue "has never figured in the constitutional cases which have aroused passionate controversy, nor in those whose names are known to the lay public").

50. 348 U.S. 26 (1954).

51. 467 U.S. 229 (1984).

52. *See id.* at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." (citations omitted)); *Berman*, 348 U.S. at 33 (stating that "[t]he concept of the public welfare is broad and inclusive" and once an issue is within the government's authority to protect public welfare, it may use eminent domain to accomplish its goals).

53. 545 U.S. 469 (2005).

54. *Id.* at 472.

55. *Id.* at 473.

56. *Id.*

57. *See id.* at 472.

58. *Id.* at 477.

eminent domain for economic development purposes was a constitutional public use.[59] Justice Stevens, writing for the majority, reasoned that the taking was executed pursuant to a "carefully considered" economic development plan with no evidence of an illegitimate purpose,[60] and that the Court had "long ago rejected any literal requirement that condemned property be put into use for the general public."[61] Instead, the question of public use centered on whether New London's development plan served a "public purpose," defined expansively and with "deference to legislative judgments."[62] Applying that standard, the city's economic development plan, which was based on the belief that the project would provide benefits to the community in the form of new jobs and increased tax revenue, was sufficient to meet the Court's broad public purpose requirement.[63] Justice Stevens noted that the jurisprudence in this area must recognize the differing needs in different parts of the country, as well as the need to respond to changed circumstances over time.[64] Thus, Justice Stevens relied on past cases where the Court had recognized a public purpose associated with developing private mining, agricultural operations, or removal of urban blight, and found "no principled way of distinguishing" those cases from the economic development goals of New London.[65] Notably, though, the Court "emphasize[d] that nothing in [the] opinion preclude[d] any State from placing further restrictions on its exercise of the takings power" and that many states had already done so through their own statutory or constitutional law.[66]

In a concurring opinion, Justice Kennedy agreed that the taking was for a public use but focused on the fact that New London had acted pursuant to a formal development plan for the area, indicating a lack of evidence of government favoritism toward private parties.[67] Thus, Justice Kennedy may have reached a different result were the risk of impermissible favoritism present; but the procedural

59. *Id.* at 483.
60. *Id.* at 478.
61. *Id.* at 479.
62. *Id.* at 480.
63. *Id.* at 483–84.
64. *Id.* at 482–83.
65. *Id.* at 484.
66. *Id.* at 489.
67. *See id.* at 491–92 (Kennedy, J., concurring) (noting that even dissenting justices on the Connecticut Supreme Court found that the "development plan was intended to revitalize the local economy, not to serve the interests of Pfizer . . . or any other private party" (citation omitted)).

requirements and extensive review of the city's plan in this case did not warrant such heightened scrutiny.[68]

In a dissenting opinion, Justice O'Connor vehemently disagreed with the proposition that economic development alone can constitute a public use for takings purposes.[69] While she recognized that the government can take private property to "build a road or railroad or to eliminate a property use that harms the public, . . . it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property."[70] She then set out three categories of takings that comply with the public use requirement: (1) "transfer[ring] private property to public ownership—such as for a road, a hospital, or a military base";[71] (2) "transfer[ring] private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium";[72] and (3) transferring private property to serve a broader "public purpose . . . even if the property is destined for subsequent private use."[73] Without questioning the ability of government to take private property for public ownership or "use by the public" projects, she turned to the more difficult question of when a "public purpose" taking meets the public use requirement.[74] She found that permitting the City of New London's taking required too broad a reading of "public purpose," placing nearly all real property "susceptible to condemnation" and beyond what the Founding Fathers could have intended.[75] In what has become a now-famous passage, she warned that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[76]

Finally, also dissenting, Justice Thomas argued for the elimination of "public purpose" altogether as a basis for eminent domain.[77] Instead, he concluded that the most natural reading of the public use clause is "that it allows the government to take property

68. *See id.* at 493 ("There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." (citation omitted)).

69. *See id.* at 494 (O'Connor, J., dissenting).

70. *Id.* at 496.

71. *Id.* at 497 (citations omitted).

72. *Id.* at 498 (citations omitted).

73. *Id.* (citations omitted).

74. *See id.*

75. *Id.* at 504–05.

76. *Id.* at 503 (citations omitted).

77. *See id.* at 510 (Thomas, J., dissenting).

only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."[78] Justice Thomas explored the history of eminent domain throughout the country and found that states had at first limited eminent domain authority "to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks."[79] At the beginning of the nineteenth century, however, the Court strayed from this foundation and began to use "public purpose" language in approving eminent domain for private irrigation, mining operations, and other private industrial activity.[80] Accordingly, Justice Thomas would have used this case to "revisit" the Public Use Clause cases "and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property."[81]

B. State Legislative Responses (and Non-Responses) to Kelo

The legal reaction to *Kelo* was explosive. Across the country, state legislatures and state courts were eager to accept Justice Stevens's invitation to limit the definition of "public use" under state law.[82] The supreme courts of Oklahoma and Ohio, among others, rejected *Kelo*'s expansive view of eminent domain and held that economic development on its own was not a public use or public purpose sufficient to satisfy eminent domain under state constitutional law.[83] The *Kelo* decision also incited limits to economic development takings, and the power of eminent domain generally, through state legislation and constitutional amendments.[84] These laws outlawed economic development takings entirely, focused the definition of "blight," or imposed additional restraints on state and local governments.[85] By 2007, "forty-two states had enacted post-*Kelo* reforms, some of which limited significantly the ability of state or local governments to engage in the type of economic development takings the Court found constitutional in *Kelo*."[86] Despite the flood of

78. *Id.*
79. *Id.* at 512.
80. *See id.* at 515–17.
81. *Id.* at 521.
82. *See* Klass, *supra* note 48, at 673 (discussing state judicial and statutory responses to *Kelo*).
83. *Id.*
84. *Id.*
85. *See id.* at 673–74.
86. *Id.* at 674.

post-*Kelo* legislation across the country, some scholars have concluded that the majority of reforms states enacted were "largely symbolic in nature, providing little or no protection for property owners."[87] Notably, though, these statutes generally did not put restrictions on eminent domain authority for private projects associated with electricity transmission or other infrastructure development.[88]

For instance, in 2006, Pennsylvania enacted legislation that prohibits the exercise of eminent domain to benefit private enterprise, except where the property is taken for use by a public utility, railroad, or common carrier, if the land is within an incidental area within a public project, or if there is a threat to public health or safety.[89] Likewise, 2011 eminent domain reform legislation enacted through a ballot initiative in Mississippi limited the ability of government to take property for economic development, but created a specific exemption for levee facilities, roads, bridges, ports, airports, public utilities, and other projects "used in the generation, transmission, storage or distribution of telephone, telecommunications, gas carbon dioxide, electricity, water, sewer, natural gas, liquid hydrocarbons or other utility products."[90] Thus, long-standing eminent domain authority granted directly to private industry outside the urban redevelopment context was rarely

87. *See* Marc Mihaly & Turner Smith, Kelo*'s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703, 708 (2011) ("[A]lthough many states have ostensibly limited eminent domain authority, much of the legislation 'passed in the wake of *Kelo* was substantially cosmetic and will likely have little or no effect on economic development takings.' " (quoting Edward J. Erler, *In* Kelo*'s Wake*, HILLSDALE COLLEGE FREE MARKET FORUM 13 (2008))); Somin, *supra* note 6, at 2105.

88. *See infra* Part III.C.2.

89. H.B. 2054, 2006 Gen. Assemb., 190th Reg. Sess. (Pa. 2006); S.B. 881, 2006 Gen. Assemb., 190th Reg. Sess. (Pa. 2006) (codified at 26 PA. CONS. STAT. ANN. § 204 (West 2009 & Supp. 2012)).

90. DELBERT HOSEMAN, MISS. SEC. OF STATE, INITIATIVE #31, EMINENT DOMAIN (2011), http://www.sos.ms.gov/initiatives/Eminent%20Domain-PW%20Revised.pdf (prohibiting government transfer of property taken by eminent domain to private parties for a period of ten years but creating exceptions for "drainage and levee facilities and usage, roads and bridges for public conveyance, flood control projects with a levee component, seawalls, dams, toll roads, public airports, public ports, public harbors, public wayports, common carriers or facilities for public utilities and other entities used in the generation, transmission, storage or distribution of telephone, telecommunication, gas carbon dioxide, electricity, water, sewer, natural gas, liquid hydrocarbons or other utility products"); *see also Mississippi Voters Approve Eminent Domain Restrictions*, FOXNEWS.COM (Nov. 9, 2011), http://www.foxnews.com/politics/2011/11/09/mississippi-voters-approve-eminent-domain-restrictions/ (reporting the passage of the ballot initiative).

questioned as part of the post-*Kelo* efforts to narrow the definition of "public use."

This eminent domain authority to private parties for industrial and infrastructure projects has a long history in state law, particularly in the Interior West.[91] For example, "the constitutions of Colorado (1876), Idaho (1890), Wyoming (1890), and Arizona (1911) all declare that private property may be taken for private uses that include reservoirs, drains, flumes, or ditches across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes."[92] Under these provisions, private companies could bring eminent domain actions on their own behalf in state court in order to acquire private property for natural resource and other economic development, and they could do so without state or local government officials finding the taking to be for a public use.[93]

Likewise, "[s]tatutes in Arizona, Colorado, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming specifically grant eminent domain authority to private companies in connection with mining, oil and gas, and other natural resource development."[94] Even more broadly, virtually every state has statutes granting eminent domain authority to power companies, railroads, and other common carriers.[95] While the railroad, power line, or other common carrier project historically was destined for "use by the public," the land condemned by an oil or mining company is generally not subject to public access or public use and thus meets only the broad definition of "public purpose" under attack by the *Kelo* dissenters.

Although many may argue that the private "natural resource development" takings allowed in many states in the Interior West are also an abuse of eminent domain authority, even the *Kelo* dissenters did not question the ability of private parties to take property for railroads, power lines, highways, or other projects used by the public on the same grounds.[96] Indeed, the *Kelo* dissenters expressly

91. *See* Klass, *supra* note 48, at 657–61.

92. *Id.* at 657 (discussing and citing the relevant provisions in these state constitutions).

93. *Id.*

94. *Id.* at 659.

95. *Id.*

96. *See* Kelo v. City of New London, 545 U.S. 469, 496–98 (2005) (O'Connor, J., dissenting) (recognizing eminent domain authority for such government or common carrier takings because they are projects that are available for use by the public and distinguishing these takings from economic development takings); *id.* at 512–13 (Thomas,

distinguished the economic development takings they would prohibit from these more "uncontroversial" exercises of eminent domain authority for public infrastructure projects, even if carried out by private parties.[97]

The question for this Article, however, is whether the same arguments supporting eminent domain for transmission lines still hold true. First, as described in more detail below, many states have restructured their electricity markets, and the players in those markets are often not public utilities subject to strict public regulation on access and pricing.[98] Instead, merchant transmission companies,[99] independent transmission companies,[100] and rural electric cooperatives—which are not state-regulated utilities[101]—now construct a growing number of the transmission lines that bring electricity to users.[102] Moreover, the new transmission lines needed to

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J., dissenting) (noting that states limited their uses of eminent domain power to public uses or public purposes).

97. *See id.* at 497–98 (O'Connor, J., dissenting) (describing as "uncontroversial" the power to take property to give to "private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium"); *id.* at 512–13 (Thomas, J., dissenting) (discussing state use of eminent domain "to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks" as well as private roads and Mill Acts that gave rights to private actors with common carrier duties).

98. *See infra* notes 247–57 (discussing the rise of merchant transmission lines).

99. For a definition of merchant transmission companies, see Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842, 49,863 (proposed Aug. 11, 2011) (to be codified at 18 C.F.R. pt. 35) ("[M]erchant transmission projects are defined as those for which the costs of constructing the proposed transmission facilities will be recovered through negotiated rates instead of cost-based rates."). According to one commentator, "Unlike traditional public utilities, merchant transmission providers assume all of a project's market risk and have no captive pool from which to recoup project costs." Werntz, *supra* note 7, at 424 n.11.

100. For an explanation of independent transmission companies, see Werntz, *supra* note 7, at 424 n.11 ("Merchant transmission projects are distinct from independent transmission projects that request Commission approval for incentive rates, and whose costs are allocated to one or more customers without each customer's contractual consent."); *see also infra* notes 253–54 (discussing how independent transmission companies often blur the lines between public and private transmission companies).

101. *See* NAT'L GOVERNORS ASS'N, STATE STRATEGIES FOR ACCELERATING TRANSMISSION DEVELOPMENT FOR RENEWABLE ENERGY 8 (2012), http://www.nga.org/files/live/sites/NGA/files/pdf/1201ENERGYTRANSMISSIONWP.PDF. Rural electric cooperatives, which are more common in Midwestern and Western states, generate electricity and build associated transmission lines on behalf of the cooperative's members. *See id.* Their rates are not regulated by public utility commissions, but they are bound by the same state siting requirements as public utilities and other transmission operators. *Id.*

102. *See infra* notes 252–57 (discussing statutory and regulatory changes that encouraged the creation of private transmission companies which, in turn, have begun to construct major, interstate transmission lines).

transport renewable energy to demand centers cross multiple state boundaries, providing little, if any, electricity or other "public use" to the citizens of the states through which the lines pass.[103] What then is the "public use" or "public purpose" of a transmission line from the perspective of a state court acting under state eminent domain law when that line provides no direct benefit to local citizens?

II. ELECTRIC TRANSMISSION EMINENT DOMAIN

This Part first provides the basics of the United States electric transmission regulatory system with a particular emphasis on how the restructuring of that system in the 1990s has changed it in ways that are relevant to the role of eminent domain for transmission lines.[104] Specifically, what was once a vertically integrated system of generation and transmission provided by public utilities with significant oversight by state public utility commissions has evolved into a system with more private actors.[105] After this summary of the electric transmission system, this Part shows how courts in various states have struggled with determining the circumstances under which transmission operators can exercise the power of eminent domain to build transmission lines.[106] While most of these cases were decided before electricity restructuring began in the 1990s, they deal with many issues that have become even more critical to current disputes over eminent domain and public use.[107] These issues include the debate over whether in-state residents will benefit from the transmission line, the role of private actors, and the importance of state government oversight.[108]

A. The Electric Transmission Regulatory System

The electricity industry in the United States consists of power generation, high-voltage transmission of electricity over long distances, and distribution of the power over lower voltage systems to end users.[109] The breakdown of electricity generation sources includes approximately forty-two percent from coal, twenty-five percent from

103. *See infra* notes 258–63 (discussing proposed interstate transmission lines).

104. *See infra* Part II.A.

105. *See infra* Part II.A; *see also infra* Part III.B (discussing the enactment of PURPA and the rise of private generators and transmission operators).

106. *See infra* Part II.B.

107. *See infra* Part II.B.

108. *See infra* Parts II.B.1–2.

109. *See How Electricity Is Delivered to Consumers*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=electricity_delivery (last visited Apr. 11, 2013) (illustrating the transfer of electricity from power plants to customers).

natural gas, nineteen percent from nuclear, eight percent from hydropower, and five percent from remaining renewable sources such as wind, geothermal, and solar.[110] This electricity travels across over 160,000 miles of high voltage transmission lines in the United States, connecting with lower voltage distribution systems, linking generator sources to users within single states and across states, and linking into Canada and, to a lesser extent, Mexico.[111]

In terms of the transmission grid itself, there are three separate grids (or sub-regions) in the contiguous United States—the Eastern Interconnection, the Western Interconnection, and the Electric Reliability Council of Texas ("ERCOT").[112] Within each of these grids, the electric network is highly interconnected, but there is currently little, if any, interconnection between the three grids.[113] The North American Electric Reliability Corporation ("NERC"), a non-governmental organization, works with eight regional entities that subdivide the grid even further to ensure bulk power reliability.[114]

Until recently, electricity was a natural monopoly because most of the industry was vertically integrated with utilities owning all aspects of the electricity system, including the large centralized generation facilities, transmission lines, and distribution lines.[115] Those utilities would operate in an exclusive service territory, delivering electricity to customers for sale.[116] States, through their public utility commissions ("PUCs"), regulated utilities to ensure that they treated customers fairly and that electric rates remained reasonable.[117] In exchange, utilities obtained exclusive service

110. *Electricity in the United States*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=electricity_in_the_united_states (last updated May 2, 2012).

111. *See Energy*, AM. SOC'Y CIV. ENG'RS, http://apps.asce.org/reportcard/2005/page.cfm?id=25 (last visited Apr. 11, 2013); *How Electricity Is Delivered to Consumers*, *supra* note 109.

112. *See* Seth Blumsack, *Measuring the Benefits and Costs of Regional Electric Grid Integration*, 28 ENERGY L.J. 147, 155 (2007) (noting the three sub-regions of the power grid); *Visualizing the U.S. Electric Grid*, NPR (Apr. 24, 2009), http://www.npr.org/templates/story/story.php?storyId=110997398 (illustrating the interconnections of the power grid).

113. *See* Blumsack, *supra* note 112, at 155.

114. *About NERC*, N. AM. ELECTRIC RELIABILITY CORP., http://www.nerc.com/page.php?cid=1 (last visited Apr. 11, 2012); *Regional Entities*, N. AM. ELECTRIC RELIABILITY CORP., http://www.nerc.com/page.php?cid=1|9|119 (last visited Apr. 11, 2012).

115. *See Electric Power Industry Overview 2007*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/cneaf/electricity/page/prim2/toc2.html (last visited Apr. 11, 2013).

116. *See id.*

117. *See id.*

territories and were effectively guaranteed to receive a reasonable return on their capital investments.[118] During the 1920s, utilities increasingly integrated their systems by constructing interstate transmission lines and thus created the regional grids we have today.[119] When states attempted to regulate the sale of electricity over those lines, the Supreme Court held that such regulation violated the dormant commerce clause, creating a regulatory gap known as the "*Attleboro* gap" after one of the Supreme Court's decisions in this area.[120] Congress then filled that gap in 1935 when it enacted the Federal Power Act, which granted the Federal Power Commission (later renamed the Federal Energy Regulatory Commission or "FERC") the exclusive authority to regulate the transmission of electricity and the sale of electricity at wholesale in interstate commerce.[121]

The next significant federal regulatory change in this area came in the late 1970s with the passage of the Public Utility Regulatory Policies Act of 1978 ("PURPA").[122] PURPA included a provision, section 210, which allowed independent electricity producers with "qualifying" facilities access to the power grid and to make electricity sales.[123] This change gave renewable resource developers and other independent power producers a competitive foothold to challenge the traditional vertical integration model.[124] Moreover, with the Energy

118. *See* RICHARD F. HIRSH, POWER LOSS 26–27 (1999) (discussing the presence of regulations that "gave utilities the expectation that their companies would obtain sufficient revenues from customers to remain financially solvent").

119. *See* JOSEPH P. TOMAIN & RICHARD D. CUDAHY, ENERGY LAW IN A NUTSHELL 372–73 (2d ed. 2011) (discussing industry concentration from 1920 through 1935); *see also* Michael Dworkin et al., *Energy Transmission and Storage*, *in* THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES 531, 534–36 (Michael B. Gerrard ed., 2011) (discussing industry development of high-voltage transmission lines over long distances and state and federal regulation of electricity transmission and sales).

120. *See* New York v. FERC, 535 U.S. 1, 5–8 (2002) (describing the "*Attleboro* gap," the development of federal regulation of transmission of electricity in interstate commerce, and federal regulation of wholesale sales of electricity in interstate commerce); Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89 (1927) (inspiring the name for the gap).

121. Public Utility Act of 1935, ch. 687, 49 Stat. 847 (codified as amended in scattered sections of 16 U.S.C.); *see also New York v. FERC*, 535 U.S. at 5–8.

122. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.); *see* FRED BOSSELMAN, JIM ROSSI & JACQUELINE LANG WEAVER, ENERGY, ECONOMICS AND THE ENVIRONMENT 718 (2000); Dworkin et al., *supra* note 119, at 535.

123. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 210, 92 Stat. 3117, 3144–47 (codified at 16 U.S.C. § 824a-3 (2006)); BOSSELMAN, ROSSI & WEAVER, *supra* note 122, at 718.

124. *See* BOSSELMAN, ROSSI & WEAVER, *supra* note 122, at 718–19; Dworkin et al., *supra* note 119, at 535.

Policy Act of 1992,[125] Congress directed FERC to promulgate rules requiring utilities to provide access to transmission services on an open and non-discriminatory basis and also to encourage significant planning by Regional Transmission Operators ("RTOs"), states, and industry, particularly with regard to interstate transmission.[126] The goal of these efforts was to increase competition in electric generation by ensuring that new, independent generators would have access to utility-owned wires and thus could transmit their product to population centers.

Also in the 1990s, many states began restructuring the regulated utility industry and split apart the vertically integrated utility functions of generation, transmission, and distribution of electricity in an effort to create markets and lower costs.[127] Today, approximately half of the states have traditional regulations (with vertically integrated utilities), and the rest are restructured or partially restructured.[128] RTOs and Independent System Operators ("ISOs"), voluntary organizations sanctioned by FERC, manage the grid and

125. Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified at scattered sections of 11, 15, 16, 25, 26, 30, 42, 43, and 48 U.S.C. (2006)).

126. *See id.* §§ 721–722, 106 Stat. at 2915–19 (codified at 16 U.S.C. §§ 824j–824k (2006)). As a result of this Act, FERC promulgated Orders 888, 889, 890, and 1000. *See* Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35) (publishing Order 1000); Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. 12,266 (Mar. 15, 2007) (codified at 18 C.F.R. pts. 35, 37) (publishing Order 890); Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, 61 Fed. Reg. 21,737 (May 10, 1996) (codified at 18 C.F.R. pt. 37) (publishing Order 889); Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385) (publishing Order 888).

127. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-237, ELECTRICITY RESTRUCTURING: KEY CHALLENGES REMAIN 2–3 (2005), http://www.gao.gov/new.items/d06237.pdf; Mark L. Fagan, *Understanding the Patchwork Quilt of Electricity Restructuring in the United States* 3 (Regulatory Policy Program, John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper RPP-2006-04, 2006), http://www.hks.harvard.edu/m-rcbg/research/rpp/RPP-2006-04.pdf; *Electric Power Industry Overview 2007*, *supra* note 115.

128. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-03-271, LESSONS LEARNED FROM ELECTRICITY RESTRUCTURING: TRANSITION TO COMPETITIVE MARKETS UNDERWAY, BUT FULL BENEFITS WILL TAKE TIME AND EFFORT TO ACHIEVE 31–33 (2002), http://www.gao.gov/assets/160/157320.pdf; W.M. WARWICK, U.S. DEP'T OF ENERGY, A PRIMER ON ELECTRIC UTILITIES, DEREGULATION, AND RESTRUCTURING OF U.S. ELECTRICITY MARKETS 1.1 (2002), https://www1.eere.energy.gov/femp/pdfs/primer.pdf; Fagan, *supra* note 127, at 1; *Electric Power Industry Overview 2007*, *supra* note 115; *Electricity: Status of Electricity Restructuring by State*, U.S. ENERGY INFO. ADMIN. (Sept. 2010), http://www.eia.gov/cneaf/electricity/page/restructuring/restructure_elect.html.

regional markets for wholesale power for a majority of states.[129] As a result, the electricity generation and transmission system has become more regional and national in nature even while state PUCs retain significant regulatory authority over public utilities and transmission siting.[130] Moreover, with restructuring in some states, there is a much larger role for private actors, rather than public utilities with discrete service areas, to create new generation and transmission assets.[131] Thus, while federal law prohibits discrimination in access to transmission and generation regardless of utility status, many of the actors in today's generation and transmission system do not have a "public" statutory mandate under state law and are subject to far less, if any, state regulation over rates and other factors.

Although FERC has jurisdiction over wholesale power sales and the prevention of discrimination in access to transmission lines, the primary authority governing the permitting and siting of transmission lines remains at the state level.[132] As a result, any interstate line must obtain siting permission and eminent domain authority from every state through which it passes, following each state's permitting process and standards.[133] In many states, transmission lines are also subject to some degree of local or municipal siting control.[134] Most states grant their PUCs authority to

129. *See Regional Transmission Organizations (RTO)/Independent System Operators (ISO)*, FED. ENERGY REG. COMM'N, http://www.ferc.gov/industries/electric/indus-act/rto.asp (last updated Apr. 11, 2012).

130. *See id.*; *see also* Dworkin et al., *supra* note 119, at 537–39 (discussing federal and state authority regarding transmission siting as well as the formation of RTOs).

131. *See* TOMAIN & CUDAHY, *supra* note 119, at 379–84; Klass & Wilson, *supra* note 18, at 1806–08.

132. *See* Dworkin et al., *supra* note 119, at 537–39; *see also infra* notes 322–24 and accompanying text (discussing limited FERC authority to site transmission lines under the Energy Policy Act of 2005 where the Department of Energy has designated a National Interest Electric Transmission Corridor).

133. *See* Dworkin et al., *supra* note 119, at 537–39.

134. The degree to which local governments may exercise control over the siting of transmission lines varies widely. In many states, the PUC is bound to honor local siting regulations unless they are deemed unreasonable, in which case the PUC may preempt a local regulation. *See, e.g.*, ARK. CODE ANN. § 23-18-519 (2002 & Supp. 2011); MASS. ANN. LAWS ch. 164, § 69K (LexisNexis 2002); MONT. CODE ANN. § 75-20-301(e) (2011); N.M. STAT. ANN. § 62-9-3(G) (West 2003 & Supp. 2012). In other states, local and municipal governments have primary siting authority over all transmission projects, and state agencies have little or no meaningful control. *See, e.g.*, OKLA. STAT. ANN. tit. 11, §§ 43-110, 45-104 (West 2012) (authorizing municipal planning commissions to enact ordinances regulating installation of utility facilities); JEFFERSON PARISH, LA., CODE OF ORDINANCES § 8-5-115.26.1(4), *available at* http://www.jeffparish.net/modules/showdocument.aspx?documentid=1153 (illustrating local siting requirements in Louisiana). In other states, the PUC has exclusive authority over transmission lines above a specified kV capacity and length, while smaller and/or shorter lines remain under exclusive local control. *See, e.g.*, OHIO REV. CODE ANN. § 4906.01(B)(1)(b) (LexisNexis

review and approve transmission lines as well as electric generating facilities.[135] The transmission siting laws in each state vary, but most of them focus on the "need" for the line, the effect of the line on reliability, alternatives to the new line, and the potential environmental impacts of the line.[136] This review process, if successful, generally culminates in a line receiving a certificate called, among other things, a "Certificate of Need" or a "Certificate of Public Convenience and Necessity."[137] Once a transmission operator receives the necessary certificate to build the line, it can generally exercise the power of eminent domain if it fails to reach voluntary agreements with all landowners over the required easements.[138] As discussed in more detail in Part III.B, in some states, only public utilities and not private transmission companies can exercise the power of eminent domain to build transmission lines.[139] In other states, statutes specify transmission lines as a per se public use and,

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Supp. 2012); *id.* § 4906.05 (LexisNexis 2000) (transmission lines under 125 kV capacity are "not exempt from state or local laws or regulations," but those over 125 kV are).

135. *See* Dworkin et al., *supra* note 119, at 538; Klass & Wilson, *supra* note 18, at 1807.

136. *See* Dworkin et al., *supra* note 119, at 538–39.

137. *See generally* STATE GENERATION & TRANSMISSION SITING DIRECTORY, EDISON ELEC. INST. (Mar. 2012), http://www.eei.org/ourissues/electricitytransmission/documents/state_generation_transmission_siting_directory.pdf (identifying Michigan and Minnesota as issuing a "Certificate of Need" and Alabama, Arkansas, Colorado, Kentucky, Maine, Maryland, Mississippi, New Mexico, Utah, Virginia, Wisconsin, and Wyoming as issuing a "Certificate of Public Convenience and Necessity"); *see also* Rossi, *supra* note 20, at 1019–22 (discussing state siting statutes, certificates of need, and eminent domain authority for transmission lines).

138. *See* Rossi, *supra* note 20, at 1019–21. Many states first require that the condemnor attempt to negotiate in good faith to purchase the land without the benefit of eminent domain, subject to judicial review. *E.g.*, GA. CODE ANN. § 22-3-161 (Supp. 2012); MINN. STAT. ANN. § 117.036 (West 2005 & Supp. 2013). If negotiations fail then the condemnor must provide notice of the appraised value and the condemnor's intent to appropriate the land. *E.g.*, *id.* § 117.036 (West 2005 & Supp. 2013). The condemnee may challenge the alleged public purpose after receiving notice. *See, e.g.*, *id.* § 117.055. The condemnor must then file a petition with the court describing the land to be condemned and identifying both the condemnor and condemnee. *E.g.*, *id.* After the land is officially appraised, the condemnor must pay the appropriate damages to the condemnee. *E.g.*, *id.* § 117.155 (West 2005). Either party may then contest the commissioners' report via jury trial. *E.g.*, *id.* § 117.165. Mechanisms for determining the fair market value of the land include past history of sales, court evaluation, panels of commissioners, and jury trials. *Compare, e.g.*, ALA. CODE § 18-1A-151 (LexisNexis 2007) (providing for judicial determination of fair market value by default), *with* ME. REV. STAT. ANN. tit. 23, § 154 (1992 & Supp. 2012) (providing for a state-appointed commission to appraise the property if condemning authority is unable to negotiate a purchase), *and* S.D. CODIFIED LAWS § 21-35-1 (2004) (mandating a jury trial to determine compensation "[i]n all cases").

139. *See supra* notes 99–100 (defining merchant transmission companies and independent transmission companies); *infra* notes 266–75 and accompanying text; *infra* Appendix A (collecting statutes and cases from all fifty states).

thus, both private entities and public utilities can exercise eminent domain authority.[140] Yet in other states, statutes and case law are not clear on which entities can and cannot exercise eminent domain authority.[141]

B. *Eminent Domain Authority, Transmission Lines, and Public Use*

Early courts declared that eminent domain was necessary for government to function.[142] Courts generally accepted that eminent domain was an "attribute of sovereignty,"[143] an inherent power that the Framers took as a "given" that they only sought to limit through the Public Use[144] and Just Compensation Clauses of the Fifth Amendment.[145] The Supreme Court observed:

> [The Public Use and Just Compensation Clauses] serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great obj[ects] of Gov[ernment]." Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent

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140. *See infra* notes 271–72 and accompanying text.

141. *See infra* notes 271–74 and accompanying text.

142. *See* Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) ("The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State."); Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390, 400 (1912) ("[T]he right of every State to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions."); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) ("[T]here might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent.").

143. *See, e.g.*, Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) ("The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right."). *But see* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 527 (2009) ("The fact that takings might be thought to have been an unavoidable part of the package of powers granted to a sovereign power in seventeenth-century political theory hardly commends itself as a reason to recognize a power of eminent domain today.").

144. American courts have recognized since the founding that a legislature cannot pass "a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." Calder v. Bull, 3 U.S. 386, 388 (1798).

145. 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79F.01[1][a][ii]–[iii] (Michael Allan Wolf ed., 2000) (discussing the inherent power theory and James Madison's role in limiting the takings clause); *see* U.S. CONST. amend. V (providing that private property cannot "be taken for public use, without just compensation").

> domain power—particularly against those owners who . . . may be unable to protect themselves in the political process against the majority's will.[146]

One of the main reasons cited for eminent domain's necessity is that, without it, government would face possibly debilitating problems in assembling the necessary land for government buildings and projects:

> [The United States's] independent existence and perpetuity . . . cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. . . . If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.[147]

The phenomenon described above is commonly referred to as the "holdout problem," whereby one property owner takes advantage of the fact that the government needs (or greatly desires) his particular parcel by demanding payment that significantly exceeds the value of the property, thus derailing the project.[148] However, not everyone is convinced that the government would cease to function without eminent domain.[149] Others note how the potential for

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146. Kelo v. City of New London, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting) (second and third alterations in original) (citations omitted).

147. Kohl v. United States, 91 U.S. 367, 371 (1875).

148. *See* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 781–82 (Mich. 2004) ("If a property owner between points A and B holds out—say, for example, by refusing to sell his land for any amount less than fifty times its appraised value—the construction of the railroad is halted unless and until the railroad accedes to the property owner's demands. And if owners of adjoining properties receive word of the original property owner's windfall, they too will refuse to sell. The likelihood that property owners will engage in this tactic makes the acquisition of property for railroads, gas lines, highways, and other such 'instrumentalities of commerce' a logistical and practical nightmare."); *see also* Bell, *supra* note 143, at 531 ("Imagine that the land in the valley is owned by a number of private individuals. The government must now purchase for the reservoir all the valley parcels in the drainage basin; even one holdout in the middle of the planned reservoir can ruin the project . . . [and] strategic considerations may block the transaction.").

149. *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 560 (1972) ("It is far from certain that eminent domain power is 'inherent' in the sense governments would perish if they did not have it. Natural persons and corporate bodies conduct all sorts of activities with great success without any such power. [Without

condemnation often aids governments and those with delegated powers in the negotiation process so that the need to invoke the power never arises.[150]

Putting aside this debate, the fact remains that, early on, state legislatures granted the power of eminent domain to utility companies and others to generate electricity and build the means of transporting it. Early courts had no difficulty upholding that authority as a public use. For instance, in 1904, the New Hampshire Supreme Court stated that whether "the use of land for constructing and maintaining a line of wires to conduct currents of electricity . . . for all persons who may desire such service, or in lighting public streets, highways, and buildings . . . is a 'public use' . . . is beyond question."[151] Likewise, the Vermont Supreme Court in 1912 declared, "To hold that the supplying of electric current for heat and power is not . . . 'proper, useful, and needful for the government to provide,' is to close our eyes to conditions which surround us."[152] These early judicial sentiments have continued, for the most part, resulting in the enactment of the statutes around the country described in Part II expressly granting eminent domain authority to public utilities and, in many states, even private entities proposing to construct electric transmission lines.[153]

Not surprisingly, landowners have often challenged the power of utility companies and others to take their property by eminent domain for transmission lines.[154] While many of these challenges focus on the route of the line or the amount of compensation paid, there have also been challenges regarding whether the line is a "public use."[155] These challenges raise issues such as whether the line is intended to bring electricity to a private party rather than the public at large, whether the transmission operator is a regulated public

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eminent domain], [l]and . . . could usually be acquired, though perhaps not always exactly where desired and, no doubt, at a higher average cost than if it could be expropriated.").

150. *See* 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, 760 n.223 (2010) ("[T]he negotiating dynamics of acquiring property, and most likely the resulting price, can be heavily influenced by the fact that a seller is aware that the buyer possesses the power to condemn the seller's property in the absence of a mutually acceptable, consensual agreement.").

151. Rockingham Cnty. Light & Power Co. v. Hobbs, 58 A. 46, 47 (N.H. 1904).

152. Rutland Ry. Light & Power Co. v. Clarendon Power Co., 83 A. 332, 336 (Vt. 1912).

153. *See supra* note 138 and accompanying text.

154. *See infra* Part II.B.1–2 (discussing lawsuits challenging eminent domain authority for transmission lines).

155. *See infra* Part II.B.1–2.

utility, and whether the line is intended to provide power to out-of-state users rather than in-state users. These cases are significant because they form a legal foundation that courts and legislators will need to consider as the industry moves toward more private companies building transmission lines and as new interstate lines increasingly provide power exclusively to out-of-state users. While this would be less of a problem if the federal government had plenary authority to approve transmission lines on state and private lands taking into account national and regional public benefits, state courts, applying state law, currently make those determinations.[156] This often creates a mismatch between state regulatory authority and the emerging regional and national transmission system.[157]

Indeed, while the push for more renewable energy and the restructuring of electricity markets have made these tensions even more acute, the case law prior to these developments remains relevant today. That case law can help answer current questions and controversies, such as: (1) Is it within a state's jurisdiction to find a "public use" for purposes of eminent domain authority to build a line partially in that state where the benefit of increased electricity goes primarily or exclusively to out-of-state users or a private party?; and (2) Is a transmission line a public use when it is designed to serve the interests of a single, private power user? In both situations, courts must address broader questions of whether transmission lines are public benefit/public purpose takings due to the general public benefits stemming from the transmission system, including economic development brought about by improved infrastructure.

156. In the Energy Policy Act of 2005, Congress granted authority to the U.S. Department of Energy to determine whether any areas of the country were experiencing transmission constraints or congestion and, if so, classifying such areas as National Interest Transmission Corridors ("NIETCs"). *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221, 119 Stat. 594, 946–51 (2005) (codified at 16 U.S.C. § 824p (2006)). NIETC designation allows FERC to exercise "backstop" siting authority under section 216 of the Federal Power Act and override state barriers to transmission siting. *See id.* Despite this authority, efforts by the DOE to designate NIETCs and efforts by FERC to enact rules to implement its backstop siting authority have been successfully challenged in the courts. *See* Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1107 (9th Cir. 2011) (vacating the designation of NIETCs); Piedmont Envtl. Council v. FERC, 558 F.3d 304, 313 (4th Cir. 2009) (invalidating the FERC rule on backstop siting authority), *cert. denied*, 130 S. Ct. 1138 (2010). As a result of these decisions, federal authority over transmission siting on state and private lands remains limited. *See generally* Klass & Wilson, *supra* note 18, at 1817–21, 1859–65 (discussing limited federal authority over transmission siting off federal lands).

157. *See* Klass & Wilson, *supra* note 18, at 1828–31, 1857–58.

1. In-State Versus Out-of-State Benefits

Some states have historically taken a narrow view regarding whether a transmission line qualified as a public use based on whether in-state residents, out-of-state residents, or both would benefit from the line. For instance, in *Mississippi Power & Light Co. v. Conerly*,[158] a Mississippi power company brought a condemnation action to obtain rights-of-way for a high-voltage line that would transmit power to a Louisiana power company for distribution in that state.[159] The Mississippi PUC granted a certificate of public convenience and necessity for the line, and the company then sought to use eminent domain under a state statute granting eminent domain authority for the construction and operation of power lines.[160] In a 1984 decision, the Mississippi Supreme Court affirmed a district court order dismissing the condemnation petition.[161] Quoting the district court's findings, it agreed that "[n]ot one Mississippi customer is to be served by the proposed transmission line," "that the terms 'public necessity' and 'public use' . . . contemplate use by the citizens of this state," and that the power company's contention that the line could be altered to bring power back to Mississippi if warranted by future demand was speculative.[162] The court was clearly influenced by two important facts: (1) because no in-state customers would be served, the Mississippi PUC would have no jurisdiction to establish or approve rates for the interstate sale of the electricity; and (2) the total cost of the line would be approximately $25 million, and that cost incurred by the Mississippi power company would be passed on to Mississippi consumers once it was added to the utility's next rate increase request.[163]

Likewise, in *Clark v. Gulf Power Co.*,[164] the Florida District Court of Appeal held in 1967 that a state's power of eminent domain exists "only within its territorial limits for the use and benefit of the people within the state."[165] As a result, the court found that a "one way transmission line" from Florida to Georgia for which Florida citizens "will not derive one iota of benefit" was beyond that state's

158. 460 So. 2d 107 (Miss. 1984).
159. *Id.* at 108–09.
160. *Id.*
161. *Id.* at 113.
162. *Id.*
163. *Id.* at 109, 112.
164. 198 So. 2d 368 (Fla. Dist. Ct. App. 1967).
165. *Id.* at 371.

eminent domain authority, despite "conjecture" that electrical current flowing back and forth would benefit residents of both states.[166]

Not all state courts, however, have viewed the "public use" or "public benefit" of transmission through such an in-state lens, at least when some in-state residents are benefitted. For instance, in *Shedd v. Northern Indiana Public Service Corp.*,[167] the Indiana Supreme Court held in 1934 that eminent domain authority existed for a power company to build a transmission line that would serve both in-state and out-of-state residents.[168] The court rejected the plaintiff's argument that the state-regulated public utility had no power of eminent domain for uses constituting interstate commerce.[169] The court, citing an Alabama case concerning a dam, explained the grant of eminent domain authority in this situation:

> While a state will take care to use this power for the benefit of its own people, it will not refuse to exercise it for such purpose, because the inhabitants of a neighboring state may incidentally partake of the fruits of its exercise. Such refusal would violate the principles of just public policy, and the neighborly comity which should exist between states.[170]

Even in this case, however, the court implied that if all of the benefits of the project were solely for residents of other states, there would not be a sufficient public use to justify the utility's exercise of eminent domain authority.[171]

The Indiana Court of Appeals appeared to further relax the public use necessary to exercise eminent domain in the 1980 case of *Oxendine v. Public Service Co.*[172] In *Oxendine*, PSI, a public utility, sought eminent domain authority to build a new transmission line it contended was necessary to ensure the stability and reliability of its network in general rather than to provide electricity service to

166. *Id.*

167. 188 N.E. 322 (Ind. 1934).

168. *Id.* at 325–26.

169. *Id.* at 325.

170. *Id.* (quoting Columbus Waterworks Co. v. Long, 25 So. 702, 703 (Ala. 1899)).

171. *See id.* at 326. *See generally* Gralapp v. Miss. Power Co., 194 So. 2d 527 (Ala. 1967) (allowing an out-of-state company to exercise eminent domain in Alabama to build a transmission line because: (1) a statute provided the same right of eminent domain to foreign and domestic corporations; (2) the power company established that electricity would flow in both directions along the line, thus benefitting the public in Alabama as well as Mississippi even though most of the projects benefits went to Mississippi; and (3) Alabamans would benefit from more interconnectedness, which would give them alternative sources of energy in an emergency as well as lower cost energy when one system could transfer its cheaper, excess power to the other system that needs it).

172. 423 N.E.2d 612 (Ind. Ct. App. 1980).

customers in its territory.[173] Landowners challenged that authority on grounds that the line would not serve the needs of Indiana residents, but instead would supply electricity to other power companies with service mostly outside the state.[174] In rejecting the challenge, the court cited an Indiana statute granting eminent domain authority to companies furnishing or transmitting electrical energy "for the use of the public."[175] The court held that this grant of eminent domain authority was to furnish electricity to "the public, not to Indiana residents alone."[176] Thus, the court appeared to embrace a much broader vision of "public use" that encompassed the needs of the regional electricity network in general rather than solely the balkanized needs of in-state residents.

Finally, the North Dakota Supreme Court decided a case in 1976, *Square Butte Electric Cooperative v. Hilken*,[177] in which the majority opinion embraced a more regional vision of public use to justify eminent domain.[178] An electrical cooperative in North Dakota that distributed electricity wholesale to its members sought to acquire easements for a transmission line that would provide direct benefits to members in Minnesota, while leaving open the possibility that it might provide power to North Dakota members in the future if demand was sufficient.[179] Analyzing authority from other states, the court determined that for a public use to exist, the following requirements must be met: (1) the public in the state must have either an actual benefit or a right to benefit guaranteed by regulatory control through a public service commission regulating the actor seeking eminent domain; (2) the public in the state authorizing the benefit must derive a substantial and direct benefit even if other states are also benefitted; and (3) the public benefit to the state must be attached to the territorial limits of the state because the state's sovereignty is likewise constrained.[180]

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173. *Id.* at 614.

174. *Id.* at 615.

175. *Id.* at 617 (citing IND. CODE § 32-11-3-1 (repealed 2002)).

176. *Id.*

177. 244 N.W.2d 519 (N.D. 1976).

178. *See id.* at 526–30 (analyzing the power sales agreements between an out-of-state and an in-state electrical cooperative and recognizing that there was a reasonable probability that in-state customers would benefit from the out-of-state utility). The regional approach taken by the majority stands in sharp contrast to the dissenting judges in the case who argued that "public use" must be for the inhabitants of the state and not for inhabitants of other states. *See id.* at 535–36 (Sand, J., dissenting).

179. *See id.* at 521–22, 529 (majority opinion).

180. *Id.* at 525.

Based on the facts before it, the court found a sufficiently substantial and direct benefit to North Dakota as a result of the line because it would provide additional reliability to the system as a whole and reduce the frequency of outages (even though no witness was able to testify to significant outages in the past).[181] As a result, the court reversed the district court's decision not to consider reliability as a factor in determining the benefits to North Dakota residents.[182] The court also rejected arguments that North Dakota could not possibly receive any power from the line in the future because the Minnesota cooperative members outnumbered the North Dakota members on the board.[183] Instead, the court expressed skepticism that North Dakota's "needs and advantages" would be "overshadowed by a zealous state patriotism."[184] Although the court recognized that the North Dakota PUC did not have regulatory control over the cooperative because it was not a public utility and only sold power wholesale, the court refused to let that undermine the public interest in the project without "a showing that the contract [was] designed only to defraud North Dakota by allowing eminent domain without an attendant benefit to the State."[185]

In a concurring opinion, Justice Paulson concluded that the broad legislative grant of eminent domain authority to transmission lines foreclosed the district court's narrower interpretation.[186] Justice Paulson explained this broad grant historically; he noted that at the time the state's eminent domain rules were written, the state's greatest concern related to the "bolstering of the State's economy."[187] Further, legislators assumed that the public welfare would be "benefitted by anything which would enhance the opportunity to market our natural resources and excess energy."[188] Thus, while such economic development must now be balanced by conservation and environmental protection, the "energy situation" is still a national "crisis," not controllable within the borders of any one state.[189] Therefore, the risk was that the federal government would completely take over these affairs "if the States adopt too provincial an

181. *Id.* at 526–27.
182. *Id.*
183. *Id.* at 529.
184. *Id.*
185. *Id.* at 530.
186. *Id.* at 532 (Paulson, J., concurring).
187. *Id.*
188. *Id.*
189. *Id.*

attitude."[190] He then cited to classic economic development public use cases such as *Berman v. Parker*[191] and found the public use in the current case well within that broad definition.[192]

The dissenters in *Square Butte Electric Cooperative*, however, focused on private property rights, particularly private property rights in North Dakota.[193] Justice Sand cited to the public use clause of the North Dakota Constitution and stated that it could only refer to the public use of state inhabitants or would otherwise be invalid.[194] Unlike the majority, he did not see the increase in reliability in the transmission system as sufficient to provide the "direct" and "substantial" benefit necessary to justify eminent domain.[195] Since this was a direct current ("DC") line rather than an alternating current ("AC") line, the power could not be converted until it passed into Minnesota, thus providing no benefits for North Dakota residents.[196] He concluded that the majority opinion "permits pirating North Dakota resources and land primarily for the benefit of persons other than the inhabitants of the State of North Dakota."[197] For his separate dissent, Justice Vogel also discounted the "public benefit" associated with increased reliability of the interstate transmission system in question and argued that because this justification would apply to any line anywhere, it improperly expanded the right of eminent domain.[198]

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190. *Id.*

191. 348 U.S. 26 (1954).

192. *Square Butte Elec. Coop.*, 244 N.W.2d at 533 (Sand, J., dissenting).

193. *See id.* at 533–40.

194. *Id.* at 534.

195. *Id.* at 536–37.

196. *Id.* at 537. Most electric transmission in the United States today is AC, which allows power to move in both directions. *See* Patrick J. Kiger, *High-Voltage DC Breakthrough Could Boost Renewable Energy*, NAT'L GEOGRAPHIC DAILY NEWS (Dec. 5, 2012), http://news.nationalgeographic.com/news/energy/2012/12/121206-high-voltage-dc-breakthrough/. Over very long distances, however, DC, in which power moves in only one direction, is more efficient and results in less power loss over the length of the line. *Id.*; *see also About HVDC Technology*, CLEAN LINE ENERGY PARTNERS, http://www.cleanlineenergy.com/technology/hvdc (last visited Apr. 11, 2013) (discussing the advantages of high voltage direct current). Today, new, high-voltage DC ("HVDC") lines are often proposed as the most efficient and economical method of transporting wind power long distances. *See About HVDC Technology*, *supra*; *see also* Daniel Cusick, *Texas Company's 'Clean Lines' Transmission Plans Progress Despite Tax Credit Stalemate*, E&E NEWS (Oct. 2, 2012), http://www.eenews.net/public/climatewire/2012/10/02/1 (discussing use of DC transmission for Clean Line Energy Partners's interstate transmission line projects designed to bring large amounts of wind energy from the Midwestern to Eastern cities); *Iowa's Energy Future: Transmission Lines in Iowa*, SIERRA CLUB, http://iowa.sierraclub.org/Energy/Transmission.pdf (last visited Jan. 25, 2013) (explaining HVDC lines proposed for wind power transport in Iowa).

197. *Square Butte Elec. Coop.*, 244 N.W.2d at 538 (Sand, J., dissenting).

198. *See id.* at 538–39.

He also questioned the right of a power cooperative organized by a "private utility" to exercise eminent domain for its own private interests.[199]

A review of these cases allows a few tentative conclusions. Not surprisingly, those states that see themselves as natural resources exporters, like North Dakota, more fully encompass regional benefits in considering whether a transmission line is a public use.[200] Other states, or at least their courts, have historically been more hostile to facilitating interstate electricity transfers, particularly if it means ratepayers in the state are paying for lines to send electricity to other states.[201] That was a significant issue in *Mississippi Power & Light Co.*[202] In more recent years, Arizona has been hostile to building lines and infrastructure to facilitate exporting electricity to California.[203] These public use issues will only become more salient as California attempts to implement its thirty-three percent renewable energy standard.[204] It is likely that the state cannot easily meet that requirement solely with in-state renewable resources but must look to wind, solar, and hydropower resources in the Pacific Northwest and the desert Southwest which require new transmission development in those states.[205] Thus, whether to define the "public" on a state or regional basis remains critical to transmission planning, transmission siting, and the overall development of the electricity grid.

2. Distinguishing Private and Public Use

Another set of public use cases involving transmission lines centers around whether the recipient of the energy transported by the new line is a private entity or "the public." For instance, in *Montana Power Co. v. Bokma*,[206] a public utility sought eminent domain authority to construct a power line to serve a pipeline company in the state as well as to meet power needs as they developed in the region through normal growth.[207] Initially, the proposed line would serve

199. *Id.* at 539.

200. *See id.* at 526–29, 532–34.

201. *See* Miss. Power & Light Co. v. Conerly, 460 So. 2d 107, 112–13 (Miss. 1984).

202. *Id.*

203. *See* Rossi, *supra* note 20, at 1022 (discussing controversial transmission line proposed to run from Arizona to California).

204. *See* Klass & Wilson, *supra* note 18, at 1836–40 (discussing California RPS and the state's potential need to import renewable energy resources from other states in the region to meet the RPS).

205. *See id.*

206. 457 P.2d 769 (Mont. 1969).

207. *Id.* at 771.

only the pipeline company, but service from the line could be available to other customers upon request.[208] In responding to landowners' challenges to eminent domain authority on public use grounds, the Montana Supreme Court, in a 1969 decision, upheld the utility's eminent domain authority.[209] The court recognized the conflicting lines of authority in other jurisdictions between the broad "public benefit" approach to public use and the narrower "use by the public" framework.[210] The court found that Montana had always adhered to the broad view, "presumably to promote general economic development."[211] Here, though, the court appeared to merge the two approaches, finding that "public benefit" was the standard but that "public benefit" meant "the right of the public to use the proposed facilities for which condemnation is sought," whether or not the right is exercised.[212] Thus, because other customers would have the same right as the pipeline company to use the transmission line, there was sufficient public benefit for the taking.[213] Moreover, the fact that the Montana Power Company was a public utility was critical. As such, "it ha[d] dedicated its property to the public use under regulations imposed by the Montana Public Service Commission."[214] Thus, if it ever refused to serve other customers, "it [could] be compelled to do so in a proper case."[215]

Likewise, in *Public Service Co. v. Shaklee*,[216] the Colorado Supreme Court held in 1989 that a public utility could exercise eminent domain authority to build a power line to provide electrical service to the Adolph Coors Company ("Coors") for mining activities.[217] In response to landowner contentions that construction of the transmission line was an illegal exercise of eminent domain for a private use, the court found that because the public had the right to use the line on equal terms with Coors, the public use requirement was met.[218] As in *Bokma*, the Colorado court focused on the fact that

208. *Id.*
209. *Id.* at 773–74.
210. *Id.* at 772–73.
211. *Id.* at 772.
212. *See id.* at 772–73.
213. *See id.* at 773.
214. *Id.*
215. *Id.*
216. 784 P.2d 314 (Colo. 1989).
217. *Id.* at 315.
218. *Id.* at 318–19.

the utility was a regulated monopoly and was "obligated to provide service to the public without discrimination."[219]

3. Summary

In both sets of cases described above, courts have struggled with defining what constitutes "the public." Does it include out-of-state electricity users as well as in-state users? Does the fact that the transmission operator is a public utility subject to extensive state regulation render the entire project sufficiently "public" even if out-of-state or private users will be the immediate beneficiaries of the line? Notably, the question of defining the boundaries of "the public" generally arises when state PUCs consider the "public need" or "public necessity" for the line in the first place in the certificate of need process, which usually precedes any eminent domain action or line construction.[220] While a few states have redefined public need,

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219. *Id.* at 319.

220. Most states require all transmission operators to obtain a Certificate of Need, Certificate of Public Convenience and Necessity ("CPCN"), or equivalent certificate from the PUC or comparable state agency prior to commencing construction on a new major transmission facility and, either implicitly or explicitly, prior to exercising eminent domain. *See* Rossi, *supra* note 20, at 1019–22 (discussing state siting statutes, certificates of need, and eminent domain authority for transmission lines). Eight states—Colorado, Georgia, Hawaii, Indiana, Louisiana, Utah, Wisconsin, and Wyoming—by contrast, appear to allow eminent domain authority for transmission lines without first obtaining a state certificate. Colorado and Wisconsin require a CPCN prior to construction of a transmission line, but not prior to condemnation of the land on which the line will be constructed. COLO. REV. STAT. § 40-5-101 (2012); WIS. STAT. ANN. §§ 196.49(1)(am), 196.49(3)(c) (West 2002 & Supp. 2012); Pub. Serv. Co. of Colo. v. Shaklee, 784 P.2d 314, 317 (Colo. 1989); Miller v. Pub. Serv. Co. of Colo., 272 P.2d 283, 285 (Colo. 1954). Georgia and Hawaii require the operator to hold community meetings prior to exercising eminent domain, but do not require a CPCN. GA. CODE ANN. § 22-3-160.1 (Supp. 2012); HAW. REV. STAT. ANN. §§ 269-27.5, 269-27.6(a)–(b) (LexisNexis 2011). In 2006, the Georgia Supreme Court held that the legislature had intentionally left the evaluation of public need up to electric utilities and that the siting body had no authority to make necessity determinations. *See* Forsyth Cnty. v. Ga. Transmission Corp., 632 S.E.2d 101, 105 (Ga. 2006). Indiana requires state approval of the operator's status as a public utility before it exercises eminent domain, but does not require approval of a CPCN prior to an established utility's use of eminent domain. Alabach v. N. Ind. Pub. Serv. Co., 329 N.E.2d 645, 647 (Ind. Ct. App. 1975); *see also* U.S. Steel Corp. v. N. Ind. Pub. Serv. Co., 951 N.E.2d 542, 551, 560 (Ind. Ct. App. 2011) (discussing statutes defining "public utility" and jurisdiction over making the determination as to whether a corporation is a public utility). *See generally* Re AEP Ind. Mich. Transmission Co., No. 44000, 2011 WL 5505445 (Ind. U.R.C. Nov. 2, 2011) (requesting approval of status as a public utility). Louisiana does not have any state level oversight of transmission lines and leaves siting and eminent domain decisions to the courts. *See generally* Notice of Proposed General Order and Request for Comments, La. Pub. Serv. Comm'n, Docket R-26018 (La. Pub. Serv. Comm'n Feb. 17, 2012), *available at* http://lpscstar.louisiana.gov/star/ViewFile.aspx?Id=e5ba79e0-e4b3-4828-a1c6-d478e9132b01 (considering introduction of stronger state authority). Utah requires regulated utilities to obtain a CPCN prior to construction of transmission lines, but does

benefit, or necessity in recent years to encompass regional impacts, most have not, maintaining a parochial view.[221] As more private merchant companies enter the transmission market, and as both federal and state governments attempt to encourage more interstate transmission lines for reliability and renewable energy purposes, these questions will arise with even greater frequency. If courts do not view these new transmission projects as sufficiently "public," the corresponding lack of eminent domain authority in many states will be a significant hurdle to realizing these growing energy policy goals of increasing renewable energy and maintaining grid reliability. Therefore, establishing a consistently broad interpretation of "the public" will prove essential to continuing to meet the nation's energy needs.

III. INTERSTATE TRANSMISSION CORRIDORS, THE RISE OF RENEWABLE ENERGY, AND CURRENT TRANSMISSION CONFLICTS

This Part explores how the electric generation and transmission system in the United States has developed in recent years. It focuses specifically on the growth of regional interstate transmission markets and the desire for new, interstate transmission lines.[222] Driving these new interstate lines are efforts to increase the reliability of these regional systems and bring more renewable energy online to meet state renewable energy mandates.[223] This Part then turns to recent disputes over the use of eminent domain for transmission lines.[224] These disputes reflect many of the same concerns that courts focused on in the earlier cases discussed in Part II, but raise even more difficult issues surrounding the use of eminent domain for interstate

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not require the same of non-utilities, which may proceed directly with local permit applications. *See* Barnes v. Lehi City, 279 P. 878, 883 (Utah 1929); Brown & Rossi, *supra* note 150, at 720. Similarly, Wyoming requires public utilities to obtain a CPCN prior to construction of a line, but the Wyoming Supreme Court held in 2005 that a regional electric generation and transmission cooperative, over which the Public Service Commission did not have jurisdiction, did not require a CPCN. WYO. STAT. ANN. §§ 1-26-816, 37-2-205(a) (2011); Bridle Bit Ranch Co. v. Basin Elec. Power Co-op., 2005 WY 108, ¶¶ 1, 12, 118 P.3d 996, 998, 1003–04 (Wyo. 2005).

221. *See* Ashley C. Brown & Damon Daniels, *Vision Without Site; Site Without Vision*, THE ELECTRICITY J., Oct. 2003, at 23, 23–34 (discussing continuing parochial views of most states in certificate of need proceedings as well as a few state courts or legislatures that have begun to consider regional needs in these determinations); *see also* Brown & Rossi, *supra* note 150, at 748–51 (discussing the need for a broader definition of "public interest" in states' transmission siting laws to reflect developing regional and national markets for electricity and transmission).

222. *See infra* Part III.A.

223. *See infra* Part III.A–B.

224. *See infra* Part III.C.

transmission projects as a result of the scope and regional nature of these projects.

A. Transmission Investment, Reliability, and Integration of Renewables

There is a general consensus that more transmission is needed in the United States to maintain grid reliability, meet growing demand, and integrate more renewable energy into the grid.[225] New transmission capacity is particularly critical for renewable energy because the best sources of renewable energy are available in more sparsely populated parts of the country with underbuilt transmission resources.[226] The result is new renewable generation sources waiting for years to connect to the transmission grid in many regions of the country.[227] Moreover, it is important to keep in mind that unlike traditional energy sources such as coal, natural gas, or uranium that can be transported by train, truck, or ship to load centers, renewable energy resources such as wind and solar can only be transported from the point of generation to load centers through transmission lines.[228]

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225. *See* A. SCHUMACHER, S. FINK & K. PORTER, NAT'L RENEWABLE ENERGY LAB., MOVING BEYOND PARALYSIS: HOW STATES AND REGIONS ARE CREATING INNOVATIVE TRANSMISSION PROJECTS MAY 2009–MAY 2010, at 1 (2009), http://www.nrel.gov/docs/fy10osti/46691.pdf (discussing drop in level of transmission investment through the 1990s that is only now beginning to rise); MIDWEST INDEP. SYS. OPERATOR, TRANSMISSION EXPANSION PLAN 2011, at 1 (2011), https://www.midwestiso.org/Library/Repository/Study/MTEP/MTEP11/MTEP11%20Report.pdf (recommending $6.5 billion in new transmission expansion through 2021 for the MISO region alone as part of "a continuing effort to ensure a reliable and efficient electric grid that keeps pace with energy and policy demands"); *see also* U.S. DEP'T ENERGY, 20% WIND ENERGY BY 2030: INCREASING WIND ENERGY'S CONTRIBUTION TO U.S. ELECTRICITY SUPPLY 97 (2008), http://www1.eere.energy.gov/wind/pdfs/41869.pdf (stating that "significant additional transmission capacity would be required to integrate high levels of wind across the country"); WIRES & THE BRATTLE GROUP, EMPLOYMENT AND ECONOMIC BENEFITS OF TRANSMISSION INFRASTRUCTURE INVESTMENT IN THE U.S. AND CANADA 1 (2011), http://wiresgroup.com/images/Brattle-WIRES_Jobs_Study_May2011.pdf ("[M]eeting economic and public policy goals, in particular congestion relief and renewable energy standards, has created additional growing needs of transmission investment, underscoring the multi-faceted benefits of a robust transmission network, which the recent increase in investments has only started to address."); *supra* notes 21–32 and accompanying text (discussing the need for upgrade in the nation's electric transmission infrastructure).

226. *See* BIPARTISAN POLICY CTR., *supra* note 19, at 19 (including a map and discussion illustrating long distances between wind energy resources and load centers); TAWNEY, BELL & ZIEGLER, *supra* note 17, at 6.

227. SCHUMACHER, FINK & PORTER, *supra* note 225, at 1.

228. *See* MARCELINO MADRIGAL & STEVEN STOFT, TRANSMISSION EXPANSION FOR RENEWABLE ENERGY SCALE-UP: EMERGING LESSONS AND RECOMMENDATIONS, at xi (2011), *available at* http://siteresources.worldbank.org/EXTENERGY2/Resources/Transmission-Expansion-and-RE.pdf ("Unlike fossil-fuel based power sources, renewable

Humans cannot control where the sun shines and where the wind blows. Therefore, new interstate transmission lines are critical to bringing those renewable resources to population centers.

Thus, in order to meet current reliability needs as well as to add meaningful amounts of renewable energy to the system, transmission development cannot remain stagnant. The problem is that unlike new generation facilities that can take one to three years to plan and construct, a new interstate transmission line can take over a decade to plan and construct.[229] A significant part of that delay is a result of state permitting obstacles, but another part is the inevitable challenges by landowners to all aspects of the transmission line—including whether there is eminent domain authority to obtain easements.[230] As the parties building the lines become less "public" in nature and the benefits of the line become more difficult to ascribe directly to the residents of the states through which the lines will travel, the question of public use becomes increasingly significant.

Much of the urgency surrounding new transmission results from state efforts to require a certain percentage of electricity produced in the state to come from renewable resources.[231] With few federal policies mandating renewable energy development, states have taken an active role in developing their own policies to promote renewable

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energy sources are greatly site-constrained and, for this reason, transmission networks need to be expanded to reach the renewable energy sites.").

229. *See* N. AM. ELECTRIC RELIABILITY COUNCIL, LONG-TERM RELIABILITY ASSESSMENT 33 (2011), http://www.nerc.com/files/2011LTRA_Final.pdf (stating that delays to transmission construction due to permitting and siting continue to limit the industry from building new and vital transmission infrastructure and, once planning is complete, a project can take ten or more years to permit, site, and build); *see also* EDISON ELECTRIC INST., TRANSMISSION PROJECTS: AT A GLANCE, at iv (2012), http://www.wiresgroup.com/docs/EEI_Transmission%20Projects_042312.pdf (providing details on a cross-section of transmission projects completed in 2011 and planned for the next ten years, highlighting large, interstate projects representing a $42 billion investment, and which "face significant challenges for siting, permitting, cost allocation, and cost recovery").

230. *See* U.S. DEP'T OF ENERGY, *supra* note 225, at 99 (noting that local opposition to transmission lines "is often a major challenge to transmission expansion," that even though AC transmission lines generally benefit all users along its path by increasing reliability, local owners "do not always value such benefits," and that state agencies sometimes reject interstate transmission proposals "if it appears that they would not result in significant benefits for intrastate residents").

231. *See* Klass & Wilson, *supra* note 18, at 1809–11, 1832–43 (discussing how state RPSs are driving the need for new transmission to bring renewable resources across state lines); *see also supra* notes 17–19, 225–28 and accompanying text (discussing why integration of renewable energy into transmission grid requires transmission build-out).

energy.[232] Historically, just a small fraction of electricity produced in the United States was generated from renewable energy sources. Most of this electricity was generated from biomass combustion, municipal solid waste, and geothermal energy, with solar and wind comprising a small percentage.[233] After 2005, however, growth in renewable energy—primarily wind power—increased significantly with non-hydropower renewable energy in 2011 generating over five percent of all electricity nationwide and well over ten percent in several states.[234]

There are currently over 51,000 megawatts ("MWs") of installed wind power in the United States, and this is beginning to have a significant effect on transmission planning, particularly in the Midwest, Texas, and the West where wind resources are most significant.[235] In addition, there are significant but yet-undeveloped wind resources in several other Midwestern and Interior West states, including Kansas, Colorado, Nebraska, Montana, and Wyoming.[236]

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232. *See* Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1341–42 (2009); Barry Rabe, *States on Steroids: The Intergovernmental Odyssey of American Climate Policy*, 25 REV. POL'Y RES. 105, 106–108 (2008).

233. *See* Miriam Lydia Fischlein, Renewable Energy Deployment in the Electricity Sector: Three Essays on Policy Design, Scope, and Outcomes 7–8 (Nov. 2010) (unpublished Ph.D. dissertation, University of Minnesota), http://conservancy.umn.edu/bitstream/99640/1/Fischlein_umn_0130E_11598.pdf.

234. *See* U.S. ENERGY INFO. ADMIN., ELECTRIC POWER MONTHLY 22 (Dec. 2012), http://www.eia.gov/electricity/monthly/current_year/december2012.pdf (providing monthly percentages); *Frequently Asked Questions: What is U.S. Electricity Generation by Energy Source?*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/tools/faqs/faq.cfm?id=427&t=3 (last updated June 26, 2012) (providing yearly percentages); *Shares of Electricity Generation from Renewable Energy Sources Up in Many States*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/todayinenergy/detail.cfm?id=5750 (Apr. 9, 2012) (noting the increased usage of renewable energy sources in individual states); *see also* Dan Seif, *U.S. Renewables Hit 5% . . . Where's the Celebration?*, ROCKY MOUNTAIN INST. (June 28, 2012), http://blog.rmi.org/blog_US_Renewables_Hit_5_percent (citing U.S. Energy Information Administration data).

235. *See 2012 U.S. Wind Industry Statistics*, AM. WIND ENERGY ASS'N, http://www.awea.org/learnabout/industry_stats/index.cfm (last updated Oct. 18, 2012).

236. *See* Press Release, Am. Wind Energy Ass'n, Annual Report: Wind Power Bringing Innovation, Manufacturing Back to American Industry (May 12, 2012), http://www.awea.org/newsroom/pressreleases/Annual_Report.cfm (reporting an increase in wind power in various states as well as those states that have exceeded ten percent of electricity derived from wind energy); *State-Specific Wind Energy Fact Sheets, Updated Through the 3rd Quarter 2012*, AM. WIND ENERGY ASS'N, http://www.awea.org/learnabout/publications/factsheets/factsheets_state.cfm; *U.S. Installed Wind Capacity Map*, NAT'L RENEWABLE ENERGY LAB. (Oct. 25, 2012), http://www.windpoweringamerica.gov/pdfs/wind_maps/installed_capacity_current.pdf; *Wind Speed Resource Map*, NAT'L RENEWABLE ENERGY LAB. (Apr. 1, 2011), http://www.nrel.gov/gis/images/80m_wind/USwind300dpe4-11.jpg; *see also* Klass & Wilson,

At least thirty-eight states have adopted renewable portfolio standards ("RPSs"), alternative energy portfolios, or voluntary goals to spur additional renewable energy development, with significant variation among which types of utilities are included, how they are held accountable, and which resources "count" as renewable.[237] Typically, state RPSs require that by 2020 or 2030, fifteen to twenty percent of electricity sold in the state must be produced from renewable energy sources.[238] Many states have additional policies to promote renewable energy, such as renewable energy credits ("RECs"),[239] feed-in tariffs, tax incentives, and taxes.[240]

RECs allow utilities to fulfill their statutory obligations, potentially at lower costs, by purchasing the "environmental benefit" of renewable energy out of state.[241] RECs are tradable certificates that create a separate market for the "environmental benefit" of renewable energy.[242] Some states allow utilities to purchase RECs to fulfill their statutory obligations and meet their RPS requirements from other states, while others require in-state renewable generation.[243] Since neighboring or nearby states may have lower cost renewable development, utility-purchased RECs can have a significant impact on renewable energy deployment in neighboring states and drive the need for additional, interstate transmission projects.[244] For instance, even though Iowa does not have an RPS, it ranks second in the nation for percentage of state power derived from wind in part because wind generators in the state can sell RECs to utilities in other states like Minnesota, which does have an aggressive

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supra note 18, at 1827–47 (discussing wind energy capacity and installed wind capacity for various states).

237. *Renewable and Alternative Energy Portfolio Standards*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, http://www.c2es.org/us-states-regions/policy-maps/renewable-energy-standards (last updated Mar. 21, 2012); *see also* Davies, *supra* note 232, at 1375–90 (discussing the variations in current state RPSs); Lincoln L. Davies, *State Renewable Portfolio Standards: Is There a "Race" and Is It "To the Top"?*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 3, 13–16 (2011–12) (comparing the RPSs in several states); Fischlein, *supra* note 233, at 7 (discussing policies at the state level for developing renewable energy).

238. Fischlein, *supra* note 233, at 7.

239. *Id.* at 29.

240. Eric Lipton & Clifford Krauss, *Rich Subsidies Powering Solar and Wind Projects*, N.Y. TIMES, Nov. 12, 2011, at A1.

241. Fischlein, *supra* note 233, at 29.

242. *Id.*

243. *Id.*

244. *See* Klass & Wilson, *supra* note 18, at 1810–11 (discussing RECs and the impact of various state RPSs on renewable energy development in neighboring states).

RPS, thus creating a regional market for wind energy.[245] Nevertheless, as discussed above, none of the benefits of this new, renewable electricity generation can be realized without access to an expanded transmission grid.[246]

B. The Rise of Private Generators and Transmission Operators

As noted earlier, in 1978, Congress enacted PURPA, which required utilities to purchase power from independent producers at incentive rates.[247] One of Congress's goals in enacting the legislation was to diversify the electricity market and support the growth of renewable energy.[248] Congress required utilities to buy electricity from these independent generators at the same rate that it would cost the utilities to produce the power, known as the utility's "avoided cost."[249] In 1992, Congress sought to promote even greater competition at the generator level and thus authorized FERC as part of the Energy Policy Act of 1992 to require that utilities allow open and nondiscriminatory access to the transmission grid.[250] FERC responded by promulgating Orders 888 and 889, which require transmission-owning utilities to provide equal access to the transmission system on a non-discriminatory basis and to share transmission information to facilitate wholesale power transactions.[251]

In addition, the Energy Policy Act of 2005 altered PURPA to encourage utilities to provide net metering and other smart metering practices to facilitate more distributed transmission, and required

245. *Id.* at 1832–34. Another factor apart from RECs that drives significant wind development in Iowa is the generous wind production tax credit the state provides. *Id.* at 1834.

246. *See supra* notes 225–28 and accompanying text (discussing the need for an expanded grid to bring renewable resources to population centers).

247. 16 U.S.C. § 824a-3(a) (2006); Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 750–51 (1982).

248. *See Fed. Energy Regulatory Comm'n*, 456 U.S. at 750–51.

249. *See* 16 U.S.C. § 824a-3(b); 18 C.F.R. §§ 292.303 to 292.305 (2012); Frederick R. Fucci, *Distributed Generation*, *in* THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES 349 (Michael B. Gerrard ed., 2011); *see also* Dworkin et al., *supra* note 119, at 535 ("PURPA required utilities to buy power from independent companies, called qualifying facilities (QFs), which could produce power for less than what it would have cost for the utility to generate the power, called the 'avoided cost.' "); Jim Rossi, *The Limits of a National Renewable Portfolio Standard*, 42 CONN. L. REV. 1425, 1427 (2010) (discussing the "[u]se of federal law to expand the development of renewable sources of electric power").

250. Energy Policy Act of 1992, Pub. L. No. 102-486, § 721, 106 Stat. 2776, 2915 (codified at 16 U.S.C. § 824j (2006)); Dworkin et al., *supra* note 119, at 542.

251. Dworkin et al., *supra* note 119, at 542; *see also Major Orders & Regulations*, FED. ENERGY REG. COMM'N, http://www.ferc.gov/legal/maj-ord-reg.asp (last updated Apr. 1, 2013) (providing summary of each order and links to full text of the orders).

utilities to provide interconnection services to any customer in that utility's service area.[252] This created a market for private or "merchant" transmission lines that compete with public utilities, which historically owned and operated the transmission lines throughout the country.[253] The line between public and private utilities is not always clear, and several states have granted "transmission-only utility" status to private independent transmission lines.[254] Such lines may then earn a cost-based fee in the same manner as a traditional public utility, but are thereby subject to greater regulation than a merchant line.[255] Today, approximately 500 private and public entities own transmission facilities in the United States.[256] State-regulated, investor-owned utilities own sixty-six percent of transmission assets; rural cooperatives and public power districts own twenty-seven percent; and private merchant transmission companies that finance and own transmission facilities independent of

252. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1251–1252, 119 Stat. 594, 963–67 (codified as amended at 16 U.S.C. §§ 2621, 2622, 2625, 2634, 2642 (2006)); Dworkin et al., *supra* note 119, at 536.

253. For a discussion of merchant transmission lines and efforts by FERC to promote merchant transmission in general, see Werntz, *supra* note 7, at 424–25; *see also id.* at 425 n.13 ("Lacking captive customers, merchant transmission providers do not earn the regulated, cost-based rate of return that captive customers would traditionally pay. Instead, merchant transmission providers' compensation comes from contracts they sign with customers to transmit electricity over their merchant transmission lines.").

254. *See, e.g.*, Am. Transmission Co., No. 01-0142, 2003 WL 1995923 (Ill. C.C. Jan. 23, 2003) (illustrating that the Illinois Commerce Commission granted ATC, an independent transmission company, the right to operate as a public utility, even though it did not directly provide retail service to the public); *Badger Coulee Transmission Line Project*, AM. TRANSMISSION CO., http://www.atc-projects.com/BadgerCoulee.shtml (last visited Apr. 11, 2013) (describing ATC's Badger-Coulee Project, a 345-kV proposed line in Wisconsin that would cost between $470 million and $500 million). Costs of the Badger-Coulee Project will be allocated to utility customers' electric bills based on the percentage of energy used in each area. Ken Leiviska, *Power Play: ATC Seeks Approval for Electrical Transmission Line*, REEDSBURG TIMES-PRESS (May 11, 2011), http://www.wiscnews.com/news/local/article_a77c8a7c-7bfe-11e0-8708-001cc4c002e0.html (estimating the cost of the line to be about $425 million); Transcript of Town of Stark Committee on Energy Planning & Information—Public Meeting with Representatives from American Transmission Company (La Farge, WI, Mar. 24, 2011) (noting ATC's Lee Meyerhofer's affirmation that ratepayers will pay a small portion of the cost of transmission).

255. *See supra* note 254; *see also* Zephyr Power Transmission, LLC, 139 FERC ¶ 61,020, at PP 58–60 (2012) (waiving certain filing requirements for a merchant line because it will be charging negotiated rates rather than cost-based rates and is thereby not subject to FERC's cost-based data regulations).

256. NAT'L GOVERNORS ASS'N, *supra* note 101, at 8, http://www.nga.org/files/live/sites/NGA/files/pdf/1201ENERGYTRANSMISSIONWP.PDF.

generation or customer-serving utilities own approximately four percent.[257]

Merchant interstate transmission projects at various stages of planning, approval, construction, and operation include: (1) the completed Cross-Sound Cable, a twenty-four-mile, undersea bidirectional high-voltage direct current cable between Connecticut and Long Island, New York, completed in 2004;[258] (2) the Montana Alberta Tie Line ("MATL"), a 214-mile merchant line running between Lethbridge, Alberta, and Great Falls, Montana, designed to support development of the region's wind-energy potential with the Montana portion complete and the Alberta portion in progress;[259] (3) the Zephyr Transmission Project, now owned by Duke-ATC, a proposed $3.5 billion, 1,100-mile, 500-kilovolt ("kV") line from southeast Wyoming to Las Vegas, Nevada, largely through public lands, with a 2020 proposed completion date;[260] (4) the SunZia Southwest Transmission Project, two proposed bi-directional 500-kV lines intended to move 3,000 MW of energy through Arizona and New Mexico, currently in the initial development phase and expected to prompt significant growth in the states' renewable generation markets;[261] (5) the Rock Island Clean Line Energy project, a $2 billion, 500-mile, high-voltage direct current transmission line designed to bring up to 3,500 MW of wind power in Iowa as well as other generation in surrounding states to Illinois and other states to the east, with construction expected to begin as early as 2014 and power to run in 2017;[262] and (6) the Texas Clean Energy Express, a

257. *Id.* at 8–9.

258. *See* Bruce Lambert, *New York and Connecticut Agree to End Cable Dispute*, N.Y. TIMES, June 25, 2004, at B6; CROSS-SOUND CABLE CO., LLC, http://www.crosssoundcable.com (last visited Apr. 11, 2013).

259. *See Montana-Alberta Tie-Line (MATL) Project*, ENBRIDGE, INC., http://enbridge.com/matl (last visited Apr. 11, 2013); *Timeline*, ENBRIDGE, INC., http://enbridge.com/MATL/Timeline.aspx (last visited Apr. 11, 2013); *Wind Energy*, MONT. DEP'T COM., http://commerce.mt.gov/Energy/windenergy.mcpx (last visited Apr. 11, 2013).

260. *See* Zephyr Power Transmission, LLC, 139 FERC ¶ 61,020, at PP 2–13 (2012); *Duke-American Acquires Zephyr Project for Wyoming Wind Power*, WYO. ENERGY NEWS (Jan. 4, 2012), http://wyomingenergynews.com/2012/01/duke-american-acquires-zephyr-project-for-wyoming-wind-power/.

261. *Project Schedule*, SUNZIA, http://www.sunzia.net/schedule.php (last updated May 2012); *SunZia Southwest Transmission Project*, SUNZIA, http://www.sunzia.net/ (last visited Apr. 11, 2013); *see also* SunZia Transmission, LLC, 135 FERC ¶ 61,169, at 61,992 (2011) (authorizing the project).

262. *FAQs*, ROCK ISLAND CLEAN LINE, http://www.rockislandcleanline.com/site/page/faqs (last visited Apr. 11, 2013); *Schedule*, ROCK ISLAND CLEAN LINE, http://www.rockislandcleanline.com/site/page/schedule (last visited Apr. 11, 2013); *see also Benefits*, ROCK ISLAND CLEAN LINE, http://www.rockislandcleanline.com/site

200-mile, 345-kV transmission line built and operated by NextEra Energy that, since becoming operational in 2009, brings 845 MW of wind energy from Abilene, Texas, to Comfort, Texas, near load centers in San Antonio.[263]

As discussed in Part II, virtually all states grant public utilities the right to exercise eminent domain authority to build transmission lines.[264] The states differ, however, as to whether they allow merchant transmission lines to also exercise eminent domain authority.[265] In those states where merchant lines cannot exercise eminent domain authority or where the law is unclear, it may be more difficult for merchant lines to assemble the necessary land to build the line, resulting in fewer interstate lines built in those states. The following paragraphs and Appendix A provide a summary of the laws in each of the fifty states with regard to whether they allow merchant lines to exercise eminent domain authority.

/page/benefits (last visited Apr. 11, 2013) (listing expected benefits of the project); Hannah Northey, *FERC Approves Iowa-to-Ill. Renewable Power Line*, E&E NEWS (May 24, 2012), http://www.eenews.net/Greenwire/2012/05/24/4 (announcing the line's approval). Other Clean Line merchant transmission projects currently in the initial planning, environmental review, and rate approval process include: (1) the Grain Belt Express Clean Line, a proposed $2 billion, 700-mile line designed to deliver 3,500 MW of wind energy from western Kansas to Missouri, Illinois, Indiana, and other eastern states; (2) the Plains & Eastern Clean Line, a proposed $2 billion, 700-mile line proposed to connect 7,000 MW of energy from western Oklahoma, southwestern Kansas, and the Texas Panhandle to Tennessee, Arkansas, and other locations in the mid-South and Southwest; and (3) the Centennial West Clean Line, a proposed $2.5 billion, 900-mile line to connect 3,500 MW of energy from New Mexico to Arizona and California and designed to enable more than 4,000 MW of new renewable energy to be built in that region. For the Grain Belt Express Clean Line, see GRAIN BELT EXPRESS CLEAN LINE, http://www.grainbeltexpresscleanline.com/site/home (last visited Apr. 11, 2013); *Project Description*, GRAIN BELT EXPRESS CLEAN LINE, http://www.grainbeltexpresscleanline.com/site/page/project_description (last visited Apr. 11, 2013). For the Plains & Eastern Clean Line, see PLAINS & EASTERN CLEAN LINE, http://www.plainsandeasterncleanline.com/site/home (last visited Apr. 11, 2013); *Project Description*, PLAINS & EASTERN CLEAN LINE, http://www.plainsandeasterncleanline.com/site/page/project-description (last visited Apr. 11, 2013). For the Centennial West Clean Line, see CENTENNIAL WEST CLEAN LINE, http://www.centennialwestcleanline.com/site/home (last visited Apr. 11, 2013); *Project Description*, CENTENNIAL WEST CLEAN LINE http://www.centennialwestcleanline.com/site/page/project_description (last visited Apr. 11, 2013).

263. *See* Klass & Wilson, *supra* note 18, at 1845–46 (discussing Texas Clean Energy Express); Eileen O'Grady, *FPL Builds Private Transmission Line in Texas*, REUTERS (Oct. 6, 2009), http://www.reuters.com/article/2009/10/26/utilities-wind-texas-idUSN2620354820091026.

264. *See supra* note 95, 138 and accompanying text. Such grants of authority sometimes include independent transmission companies that have been granted the right to act as a public utility. *See, e.g.*, Re ATC, Minn. Power and Superior Water Light & Power Co., No. 5-AE-200, 2011 WL 6740412, at *1 (Wis. P.S.C. Nov. 30, 2011) (defining ATC as a "public utility").

265. *See infra* notes 266–75 and accompanying text; *infra* Appendix A.

Many states grant eminent domain authority to merchant lines. Florida, Kentucky, Michigan, Montana, New Mexico, Oregon, Rhode Island, Vermont, and Wisconsin have all granted merchant transmission lines the right of eminent domain through statutes.[266] Kansas and Oklahoma lack specific statutory grants, but their public utility commissions[267] have granted eminent domain powers to merchant lines.[268]

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266. For Florida, see FLA. STAT. ANN. §§ 403.522(12), 403.531(1), 403.539 (West 2008 & Supp. 2013) (permitting independent transmission companies or other transmission organizations approved by FERC to be certified by the state to exercise eminent domain). For Kentucky, see KY. REV. STAT. ANN. §§ 278.700(5), 278.714(1)–(2) (LexisNexis 2003 & Supp. 2012); *id.* § 416.130(1)–(2) (LexisNexis 2005) (the Kentucky Electric Generation & Transmission Siting Board requires builders of a "nonregulated electric transmission line" to obtain a construction certificate that includes information about land that will be taken for the project, strongly suggesting the right of eminent domain). *See generally* KENTUCKY STATE BOARD ON ELECTRIC GENERATION AND TRANSMISSION SITING, A GUIDE TO PUBLIC PARTICIPATION http://psc.ky.gov/agencies/psc/siting_board/guide.pdf (describing the siting application process). For Michigan, see MICH. COMP. LAWS ANN. § 486.255 (West 2008) ("[A]n independent transmission company or an affiliated transmission company shall have the power to condemn property that is necessary to transmit electric energy for public use."); MICH. COMP. LAWS ANN. §§ 460.569, 460.570(3) (West 2002 & Supp. 2012); MICH. COMP. LAWS ANN. § 460.1149 (West Supp. 2012); Electric Transmission Line Certification Act, 2008 Mich. Op. Att'y Gen. 7216 (June 30, 2008). For Montana, see MONT. CODE ANN. §§ 69-3-101, 75-20-113 (2011); MATL LLP v. Salois, 2011 MT 126, ¶¶ 6–7, 360 Mont. 510, 511, 255 P.3d 158, 160 (Mont. 2011) (holding that section 75-20-113 of the Montana code, as amended by H.B. 198, permitted MATL, a "private merchant transmission line," to exercise eminent domain). For New Mexico, which permits the New Mexico renewable energy transmission authority to exercise eminent domain authority on behalf of private transmission projects where needed, see N.M. STAT. ANN. §§ 62-1-1, 62-1-4 (West 2003); *id.* §§ 62-16A-3, 62-16A-4(B)(8) (West Supp. 2012); N.M. CODE R. § 17.8.3.10 (LexisNexis 2012), *available at* http://www.nmcpr.state.nm.us/nmac/parts/title17/17.008.0003.pdf. For Oregon, see OR. REV. STAT. ANN. § 758.015 (West 2007) (stating that "any transmission company"—defined as anyone who owns or operates a high voltage transmission line and is subject to FERC regulation—may petition the state PUC for condemnation rights). For Rhode Island, see R.I. GEN. LAWS § 39-1-2(13) (2006) (stating that an "electric transmission company," defined as a company owning and/or operating transmission facilities which is regulated by FERC but not as a public utility, "shall have the power of eminent domain exercisable following a petition to the [PUC]"). For Vermont, which allows companies under the jurisdiction of the public service board to exercise eminent domain and gives the public service board jurisdiction over all companies engaged in transmission of electricity, see VT. STAT. ANN. tit. 30, §§ 2(a)(7), 110 (2008); *id.* § 248(a)(2)(A–B) (Supp. 2012). For Wisconsin, see WIS. STAT. ANN. §§ 32.02(5)(b), 196.485(1)(d), 196.485(1)(dm) (West 2012) (stating that "independent transmission owner[s]" that are approved by FERC and control transmission facilities in Wisconsin and another state "may acquire [land] by condemnation").

267. The term "public utility commission" as used here is meant to include any public service commission, corporation commission, or comparable administrative agency tasked with regulation of energy transmission.

268. KAN. STAT. ANN. § 17-618 (2007); Grain Belt Express Clean Line LLC, No. 11-GBEE-624-COC (Kan. Corp. Comm'n Dec. 7, 2011), *available at*

Conversely, some states do not grant eminent domain authority to merchant lines. Illinois, Maryland, New Hampshire, and Nebraska expressly prohibit merchant transmission lines from exercising eminent domain and clearly exclude such lines from general grants of authority to public utilities.[269] New York has an extremely specific prohibition on eminent domain for *intrastate* merchant projects that does not necessarily restrict eminent domain for *interstate* merchant projects.[270]

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http://estar.kcc.ks.gov/estar/ViewFile.aspx/20111207160045.pdf?Id=3a579188-df77-4d09-b079-3de798a414a5 (granting public utility status to a Clean Line merchant transmission project, thereby bringing the line within the statutory grant of eminent domain to public utilities); Plains and Eastern Clean Line LLC, PUD 201000075 (Okla. Corp. Comm'n Oct. 28, 2011) (Order No. 590530), *available at* http://imaging.occeweb.com/AP/Orders/0300D92C.pdf (granting public utility status to a Clean Line merchant transmission project).

269. 18 C.F.R. § 292.101(b)(i) (2012) (stating that a "qualifying facility" includes transmission lines that "directly and indirectly interconnect[] [with] electric utilities"). For Illinois, see 220 ILL. COMP. STAT. ANN. §§ 5/3-105(b)(7), 5/8-406.1(a), 5/8-509 (West 2011) (stating that a "qualifying facilit[y]," as defined by PURPA, is not a public utility and thus lacks eminent domain authority). For Maryland, see MD. CODE ANN. PUB. UTIL. COS. § 7-207(b)(3)(i) (LexisNexis 2012); Memorandum from the Md. Office of People's Counsel to the Economic Matters Comm. (Feb. 23, 2011), *available at* http://www.opc.state.md.us/LinkClick.aspx?fileticket=649JFgzoxuY%3D&tabid=138 (noting that only "electric companies" could build overhead transmission lines in Maryland, and successfully supporting an amendment that would permit construction by a "generator lead line," although it would not expand the right to build transmission lines to merchant lines). For Nebraska, which permits only an "electric supplier," defined as a "public power district, . . . municipality, . . . or a cooperative," to exercise eminent domain, see NEB. REV. STAT. § 70-301 (2009); *id.* §§ 70-1014.02(1)(a), 70-1014.02(6) (Supp. 2011); *id.* § 76-710.04(3)(a) (2009); Deb Fischer, *Senator Deb Fischer's Legislative Notes*, SANDHILLS EXPRESS (Mar. 19, 2010, 2:55 PM), http://www.sandhillsexpress.com/BuySell/BuySellDetails/tabid/108/smid/384/ArticleID/1500/Default.aspx (arguing that L.B. 1048 "clarifies wind power development in Nebraska"). For New Hampshire, see N.H. REV. STAT. ANN. § 371:1 (LexisNexis 2008 & Supp. 2012).

270. N.Y. TRANSP. CORP. LAW § 10 (McKinney 1996); *id.* §§ 11(3-a), 11(7) (McKinney 1996 & Supp. 2013). In 2006, the right of eminent domain was withdrawn from a "merchant transmission company" which (1) has built a line that begins and ends within New York, (2) has testified that the line may increase electric rates, and (3) which has applied for and been denied early designation as a National Interest Electric Transmission Corridor. *See id.* § 11(7). The New York law arose in response to the controversial New York Regional Interconnect ("NYRI") project, which would have moved energy from upstate New York to New York City and surrounding population centers. Anthony DePalma, *Pataki Signs Bill Limiting the Use of Eminent Domain to Build High-Voltage Power Lines*, N.Y. TIMES (Oct. 4, 2006), http://www.nytimes.com/2006/10/04/nyregion/04power.html. The law was unambiguously intended to inhibit NYRI's use of eminent domain. *See id.* The project's backers have since withdrawn their application. *See* New York Indep. Sys. Operator, Inc., 126 FERC ¶ 61,320, at 62,741 (Mar. 31, 2009), *available at* http://elibrary.ferc.gov/idmws/search/fercgensearch.asp (set the date ranges to 03/30/2009 and 04/01/2009 and set the docket number as "OA08-52-*"); Leslie Kaufman, *Consortium Drops Its Plan to Build New Power Lines*, N.Y. TIMES (Apr. 3, 2009), http://www.nytimes.com/2009/04/04/business/energy-environment/04power.html.

Other states *might* grant eminent domain authority to merchant lines. Alabama, Alaska, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming have statutes that generally confer eminent domain power to "power companies," companies engaged in "transmission of electricity," "utilities," or similar entities, and define these terms broadly enough that merchant transmission lines *might* be included; however, no case law or administrative law firmly suggests the state will or will not grant eminent domain to a merchant transmission line.[271] Statutes in Arizona, Colorado, Idaho, Indiana, Iowa, Massachusetts, South Dakota, Tennessee, Texas, West Virginia, and Wyoming suggest a greater likelihood that the states would grant eminent domain authority.[272] Conversely, statutes in California, Hawaii, Minnesota, Nevada, and Pennsylvania suggest a weaker likelihood that the states would grant eminent domain authority.[273] Arkansas and Connecticut lack specific statutory prohibitions, but their public utility commissions or courts have denied eminent domain powers to merchant lines.[274] Delaware limits eminent domain powers of *all* electric transmission companies to former railroad rights-of-way, public roads, canals, and highways.[275]

Providing additional context for the information listed above, the next Section details current controversies regarding eminent domain authority for transmission lines in general and merchant lines in particular.

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271. For statutes, see *infra* Appendix A.

272. *See infra* Appendix A.

273. *See infra* Appendix A.

274. For Arkansas, see ARK. CODE ANN. §§ 18-15-503(a), 18-15-503(b)(1) (2003 & Supp. 2011); *id.* § 18-15-512 (2003); Plains & Eastern Clean Line, LLC, No. 10-041-U (Ark. Pub. Serv. Comm'n, Jan. 11, 2011), http://www.apscservices.info/pdf/10/10-041-u_41_1.pdf. (denying public utility status to a Clean Line project, which was necessary for it to exercise eminent domain). For Connecticut, see CONN. GEN. STAT. ANN. §§ 16-50x(b), 16-50z (West 2007); *id.* § 16-244p (West Supp. 2012); Conn. Light & Power Co. v. Huschke, 409 A.2d 153, 155 (Conn. Super. Ct. 1979); Transenergie U.S. Ltd., No. 00-06-14, 2000 WL 33121599, at *4 (Conn. Dep't Pub. Util. Control Oct. 18, 2000) (holding that Transenergie was not an "electric distribution company," and as such, lacked the right of eminent domain).

275. DEL. CODE ANN. tit. 26, §§ 901, 906–908 (2009).

C. *Current Disputes over Eminent Domain for Transmission Lines*

Several particular issues have brought new focus to the question of when transmission lines are a public use sufficient to justify eminent domain authority: (1) the rise of merchant transmission lines; (2) the backlash against the Supreme Court's *Kelo* decision; and (3) state renewable energy goals requiring ambitious interstate transmission projects, particularly in the Midwest and West. This Section details several current controversies over public use and transmission lines to set the stage for a more in-depth analysis of these issues in Part IV.

1. Merchant Transmission Lines and Energy Destined for Out-of-State Use

States continue to grapple with two questions concerning merchant transmission lines: (1) the extent to which private transmission companies—rather than public utilities—should be able to exercise eminent domain authority for transmission lines and (2) whether it matters if the energy is destined for in-state or out-of-state use. For instance, in Montana, the state courts, legislature, governor, and members of the public are embroiled in a controversy over the Montana Alberta Tie Line, a 215-mile merchant transmission line intended to transmit primarily wind energy from Great Falls, Montana, to Alberta, Canada.[276] Calgary-based Enbridge Energy acquired the MATL from the project's original developer in October 2011.[277] A few years earlier, in October 2008, the Montana Department of Environmental Quality issued a Certificate of Compliance for the line, and pursuant to existing law, MATL commenced an eminent domain action to secure easements it was unable to obtain through voluntary agreements.[278] A landowner

276. Mont. Alberta Tie, Ltd., 116 FERC ¶ 61,071, at 61,417 (July 20, 2006) (describing the MATL line as a "merchant transmission project"); CONCERNED CITIZENS MONT., http://www.concernedcitizensmontana.net (last visited Apr. 11, 2013) (illustrating public sentiment against the MATL Project); *Montana-Alberta Tie-Line (MATL) Project*, *supra* note 259.

277. NAW Staff, *Enbridge Acquires Tonbridge, MATL Transmission Project*, N.A. WIND POWER (Oct. 14, 2011), http://www.nawindpower.com/e107_plugins/content/content.php?content.8739.

278. *See* MONT. CODE ANN. §§ 70-30-102(37), 70-30-111 (2011); Montana Alberta Tie Ltd., Certificate of Compliance (Mont. Dep't Envtl. Quality Oct. 22, 2008), *available at* http://enbridge.com/MATL/~/media/www/Site%20Documents/Delivering%20Energy/Projects/MATL/US/DEQ-DOE%20-%20Certificate%20of%20Compliance.ashx; JAMES A. HOLTKAMP & MARK A. DAVIDSON, TRANSMISSION SITING IN THE WESTERN UNITED STATES: OVERVIEW AND RECOMMENDATIONS 25 (Aug. 2009), http://www.hollandhart.com/articles/Transmission_Siting_White_Paper_Final.pdf.

opposed the eminent domain action, and in December 2010, a trial court granted the landowner's motion to dismiss the condemnation action on grounds that there was no specific statutory grant of eminent domain power to a merchant transmission line.[279] MATL appealed, and the Montana legislature simultaneously took up the matter.[280]

Ultimately, in 2011, the state legislature enacted House Bill 198, which clarified that transmission projects that receive a certificate and are defined as a public use by statute may exercise eminent domain to construct the facility authorized by the certificate.[281] The bill was controversial with Montana citizens, but it received bipartisan legislative support and renewable energy nonprofit support.[282] The Montana Governor did not sign the bill on grounds that it failed to adequately address landowner concerns, but a sufficient majority of the legislature enacted it over the Governor's objection.[283] House Bill 198 explicitly stated that it applied retroactively to all projects that had received a Major Facility Siting Act certificate after September 30, 2008, and thus applied to the MATL line.[284]

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279. Perri Knize, *Montana Court Finds Power Line Developer Has No Authority to Condemn Private Land*, INFRASTRUCTURE INVESTMENT & POL'Y (Bureau of Nat'l Affairs, Arlington, Va.), Jan. 3, 2011, at 12, http://www.barrylepatner.com/documents/LePatnerPDF.pdf; *see also* LeAnne Kavanagh, *District Judge Denies MATL's Claim of Eminent Domain*, CUT BANK PIONEER PRESS (Dec. 15, 2010, 9:46 AM), http://cutbankpioneerpress.com/articles/2010/12/15/cut_bank_pioneer_press/news/doc4d08ed393db37475858638.txt (detailing the case and the judge's ruling).

280. *See* Act of May 9, 2011, ch. 321, 2011 Mont. Laws 1320 (clarifying the power of eminent domain as it pertains to public utilities); MATL LLP v. Salois, 2011 MT 126, ¶¶ 3–7, 360 Mont. 510, 511–12, 255 P.3d 158, 159–60 (discussing the impact of H.B. 198).

281. *See* Act of May 9, 2011, §§ 1–2, 2011 Mont. Laws at 1320 (clarifying the power of eminent domain as it pertains to public utilities); MONT. CODE ANN. § 69-3-101(d) (2011) (defining "public utility" to include every public or private entity which owns or controls any plant or equipment to provide, among other things, "power in any form or by any agency"); *id.* § 69-3-113 (granting any eminent domain authority to a "public utility" for a "public use authorized by law"); *id.* § 70-30-102(37) (defining "public use[]" for purposes of eminent domain authority to include "electrical energy lines"); *id.* § 75-20-113 ("A person issued a certificate pursuant to this chapter may acquire by eminent domain any interest in property, as provided in Title 70, chapter 30, for public use authorized by law to construct a facility in accordance with the certificate."); *MATL LLP*, 2011 MT at ¶¶ 3–7, 360 Mont. at 511–12, 255 P.3d at 159–60 (discussing the impact of H.B. 198); Editorial, *Group Hails Power Bill*, MONT. STANDARD (May 12, 2011, 12:15 AM), http://mtstandard.com/news/opinion/editorial/group-hails-power-bill/article_f9f34498-7c22-11e0-87a5-001cc4c002e0.html.

282. *See* Editorial, *supra* note 281.

283. Charles S. Johnson, *Referendum Planned on Eminent Domain*, MONT. STANDARD (May 18, 2011, 12:15 AM), http://mtstandard.com/news/local/referendum-planned-on-eminent-domain/article_be8f67a0-8105-11e0-b310-001cc4c03286.html.

284. Act of May 9, 2011, § 6, 2011 Mont. Laws at 1321. The MATL received a Major Facility Siting Act Certificate on October 22, 2008. *MATL LLP*, 2011 MT at ¶ 5, 360

In June 2011, the Montana Supreme Court reviewed the trial court's determination that the line was not a public use and overruled the decision in light of House Bill 198.[285] In a separate lawsuit, landowners sued the state and the transmission line company alleging that the new eminent domain law was unconstitutional on due process grounds and because it constituted "special legislation."[286] The district court rejected these claims in January 2012.[287] Notably, in speaking with reporters, the plaintiffs "questioned the logic of allowing a Canadian company to condemn private property in the United States."[288] The landowner disputes have resulted in significant additional costs and delays for the project.[289] The American Wind Energy Association estimates that Montana has the second-largest wind power potential in the country behind Texas but that only a small amount of wind power capacity has been installed in the state, primarily because of inadequate transmission capacity.[290]

In Nebraska, the state legislature took the opposite approach to that of Montana. It made clear that private entities do *not* have eminent domain authority for such lines. Prior to 2010, Nebraska law was not supportive of any private renewable energy generation or transmission projects, and policies favored the regulated public power system.[291] In 2010, the legislature enacted a bill that created new incentives for private renewable energy generation developers to build facilities that would export electricity out of the state.[292] The law provides that only public power entities may exercise eminent domain in the construction of transmission lines which will serve private

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Mont. at 512, 255 P.3d at 160; Charles S. Johnson, *New Eminent Domain Law Challenged*, MONT. STANDARD (May 21, 2011, 12:00 AM), http://mtstandard.com/news/state-and-regional/new-eminent-domain-law-challenged/article_276c5d74-8367-11e0-aba7-001cc4c03286.html.

285. *MATL LLP*, 2011 MT at ¶¶ 6–7, 360 Mont. at 512, 255 P.3d at 160.

286. *See* Complaint at 11–14, Maurer Farms, Inc. v. Montana, No. DV-11-024 (Mont. Dist. Ct. May 20, 2011), http://www.concernedcitizensmontana.net/Publish/Complaint.pdf; Johnson, *supra* note 284.

287. *See generally* Maurer Farms, Inc. v. Montana, Cause No. DV-11-024 (Mont. Dist. Ct. Jan. 11, 2012) (analyzing and rejecting these claims).

288. *See* Scott Streater, *Mont. Eminent Domain Ruling Inches Power Line Project Toward Completion*, E&E NEWS: LAND LETTER (Jan. 19, 2012), http://www.eenews.net/Landletter/2012/01/19/6.

289. Dina O'Meara, *Power Line Slowed by Cash Crunch; Montana Link Faces $5.8M Shortfall*, CALGARY HERALD (June 28, 2011), https://www.wind-watch.org/news/2011/06/28/power-line-slowed-by-cash-crunch-montana-link-faces-5-8m-shortfall/.

290. *See* AM. WIND ENERGY ASS'N, WIND ENERGY FACTS: MONTANA (2012), www.awea.org/learnabout/publications/upload/4Q-11-Montana.pdf; Streater, *supra* note 288.

291. *See* Fischer, *supra* note 269.

292. Act of Apr. 12, 2010, L.B. 1048, 2010 Neb. Laws 773, 774, 776.

energy generation facilities; the statute expressly notes that "[n]othing in this section shall be construed to grant the power of eminent domain to a private entity."[293] This policy reflected the drafters' desire to create a compromise between private wind generators and the public power system.[294] Private merchant transmission groups were not considered. Thus, while Nebraska expressed a policy in favor of exporting renewable energy from the state, it did not want to grant eminent domain authority to private parties, as opposed to public utilities, in connection with building the related transmission lines.

Legislators in Idaho are similarly concerned with the use of eminent domain for merchant transmission companies wishing to build lines to transport energy out of state. Public uses in Idaho for eminent domain authority are defined by statute and include "[e]lectric distribution and transmission lines for the delivery, furnishing, distribution, and transmission of electric current for power, lighting, heating or other purposes."[295] In 2011, members of the Idaho House of Representatives introduced House Bill 268 in response to several proposed merchant transmission lines designed to reach electricity markets in Arizona, California, and Nevada.[296] The bill provided that entities that were not public utilities, electric cooperatives, or municipalities could not condemn land for transmission lines unless the developer established that the project "materially serves the interests of the citizens of Idaho."[297] Although the bill did not pass, this effort illustrates public concern over the potential for the exercise of eminent domain authority by private

293. *Id.*; NEB. REV. STAT. § 70-1014.02(6) (Supp. 2011).

294. *See* Fischer, *supra* note 269 (discussing the viewpoints of the private and public stakeholders involved in the legislation); Press Release, Rembolt Ludtke LLP, Passage of LB 1048 Fosters Development of Wind Energy in Nebraska (Apr. 22, 2010), *available at* http://www.prlog.org/10642305-passage-of-lb-1048-fosters-development-of-wind-energy-in-nebraska.html (noting that one of the drafters of the bill had the initial idea of creating a public-private partnership between public power companies and private wind companies).

295. IDAHO CODE ANN. § 7-701(11) (2010).

296. *See* H.B. 268, 61st Legis., 1st Reg. Sess. (Idaho 2011), *available at* http://legislature.idaho.gov/legislation/2011/H0268.pdf; *see, e.g.*, *Project Overview*, GATEWAY W. TRANSMISSION LINE PROJECT, http://www.gatewaywestproject.com/ (last visited Apr. 11, 2013) (providing information on the proposed transmission line project by Rocky Mountain Power and Idaho Power); Geoffrey Talmon, *Idaho Senate Puts Off Decisions on Eminent Domain Bills*, IDAHO BLAWG (Apr. 10, 2011), http://blog.talmonlaw.com/?p=6 (stating that H.B. No. 268 would have a significant impact on the Gateway West Transmission Line Project).

297. H.B. 268.

transmission companies as efforts to develop renewable energy in western states and build associated transmission continue.[298]

2. State Concerns over Eminent Domain Authority for RPS and Other Renewable Energy Goals

With RPS mandates in place in states across the country, there are concerns that governments and private parties may attempt to take advantage of existing, expansive eminent domain authority for power generation and transmission to meet those goals. Some states are thus creating new limits on historic eminent domain authority. For instance, in Wyoming, state statutes grant eminent domain authority to both public utilities and private companies that own transmission lines.[299] However, Wyoming expressly denies eminent domain authority to public utilities and private companies alike for the construction of wind farms.[300] In recent years, there has been

298. *See* Talmon, *supra* note 296 (noting that the legislature adjourned prior to the Senate taking any action on House Bill 268); *supra* notes 206–19 and accompanying text; *see also* Act of Oct. 3, 2006, ch. 741, § 1, 2006 N.Y. Sess. Laws 3702, 3702 (codified at N.Y. TRANSP. CORP. LAW § 11(7) (McKinney Supp. 2013)) (prohibiting the use of eminent domain by power companies intending to transfer power out of New York or raise electrical rates); H.B. 648, 2012 Leg., 162d Gen. Court, 2d Sess. (N.H. 2012) (codified at N.H. REV. STAT. ANN. § 371:1 (2008 & Supp. 2012)) (restricting the use of eminent domain by public utility companies to take private property); *New Hampshire Eminent Domain Rules Tightened*, PORTLAND PRESS HERALD (Mar. 6, 2012), http://www.pressherald.com/news/n_h_-eminent-domain-rules-tightened_2012-03-06.html (discussing the impact that House Bill 648 will have, including blocking a power project known as the "Northern Pass").

299. *See* WYO. STAT. ANN. § 1-26-815(a) (2011); ABIGAIL M. JONES, WIND ENERGY DEVELOPMENT AND EMINENT DOMAIN IN WYOMING: WHO HAS THE "POWER"? 3 (2011), http://www.buddfalen.com/content/2-Landowners%20and%20Energy%20Development/A.%20%20Wind%20lease%20negotiation/Article%20-%20Wind%20Energy%20Development%20and%20Eminent%20Domain%20in%20Wyoming.pdf discussing the availability of eminent domain to private companies in erecting transmission lines). Notably, although public utilities in Wyoming must obtain a certificate of public convenience and necessity prior to exercising eminent domain authority for a transmission line, electricity wholesalers and other private entities building transmission lines need not obtain a certificate prior to exercising statutory eminent domain authority. *See* WYO. STAT. ANN. § 37-2-205(a) (2011) (requiring any public utility to obtain a certificate prior to "construction of a line, plant or system"); *id.* § 1-26-815 ("Any person, association, company or corporation ... may appropriate by condemnation a way of necessity over, across or on so much of the lands or real property of others as necessary for the location, construction, maintenance and use of ... electric power transmission and distribution systems."); Bridle Bit Ranch Co. v. Basin Elec. Power Coop., 2005 WY 108, ¶ 31, 118 P.3d 996, 1011 (Wyo. 2005) (holding that electricity wholesaler was not a public utility and thus did not need to obtain a certificate of public convenience and necessity prior to exercising eminent domain authority to build transmission line).

300. *See* JONES, *supra* note 299, at 2. *See generally* WYO. STAT. ANN. §§ 1-26-501 to -817 (2011) (encompassing the entirety of the Wyoming Eminent Domain Act).

controversy in Wyoming over whether the state should grant eminent domain authority for the small transmission lines (a.k.a. collector systems) that transmit power directly from a wind farm to a large transmission line.[301] This is because, in 2010, the Wyoming Legislature amended the State Eminent Domain Act to create a statewide moratorium on allowing land for collector systems to be condemned.[302] This moratorium was enacted because there was considerable public opposition to the state's broad grant of power relating to wind energy development.[303] The legislature wanted to halt all eminent domain projects while it reviewed its policies.[304] The moratorium was scheduled to end in June 2011, but was extended in 2011 until 2013.[305]

Colorado has also considered how far eminent domain authority should extend to meet new renewable energy goals. In 2010, the Colorado legislature amended its statutes to require certain providers of retail electricity in the state, known as "qualifying retail utilities" ("QRUs"), to generate thirty percent of their electricity from renewable resources by 2020.[306] This increased need for renewable energy is naturally expected to result in a corresponding need for new transmission lines. Colorado law also provides that any corporation formed for the purpose of constructing an electric line has the power of eminent domain.[307] However, a separate Colorado statute enacted with the state's first RPS in 2005 provides that a QRU does not have the power of eminent domain "to site the generation facilities of a

301. *See* JONES, *supra* note 299, at 3–4; *see also* WYOMING WIND ENERGY TASK FORCE, REPORT TO THE LEGISLATURE AND GOVERNOR, 60th Legis., Gen. Sess., at 6–7 (2010), http://legisweb.state.wy.us/lsoweb/Wind%20Energy/Documents/WETF%20Final%20Report.pdf (discussing what constitutes a collector system and when it is appropriate to use eminent domain for these systems).

302. *See* Act of Mar. 5, 2010, ch. 48, § 1, 2010 Wyo. Sess. Laws 232, 232–33 (putting a moratorium into effect until June 30, 2011); JONES, *supra* note 299, at 4 (discussing the reasoning behind the moratorium).

303. *See* JONES, *supra* note 299, at 4.

304. *See* Act of Mar. 5, 2009, ch. 159, § 348, 2009 Wyo. Sess. Laws 526, 526–27 (creating a task force to study aspects of the wind energy industry); JONES, *supra* note 299, at 4 (discussing the findings of the task force).

305. *See* Act of Mar. 2, 2011, ch. 86, § 1, 2011 Wyo. Sess. Laws 173, 173 (extending the moratorium until June 30, 2013).

306. *See* COLO. REV. STAT. § 40-2-124(1)(c)(I)(E) (2012).

307. *See id.* § 38-1-202(2)(l) (providing statutory authorization for any corporation that is formed to construct electrical lines); *id.* § 38-2-101(1) (authorizing any corporation that is formed to construct electrical lines through condemnation); *see also id.* § 38-5-105 (granting power of eminent domain to transmission companies and electric light power companies).

renewable energy system used in whole or in part to meet the electric resource standards."[308]

There is thus a question over whether the 2005 limits on eminent domain authority relating to meeting the state RPS may hamper efforts to use eminent domain for transmission lines within the state.[309] At this point, although the separate statutory eminent domain authority for transmission lines would appear to remain intact, issues may arise over (1) whether the transmission line is "sufficiently distinct from the generation facility it interconnects"; (2) whether a new renewable energy project falls within the statutory eminent domain limits if the QRU has already exceeded the state RPS; and (3) whether the statute has any effect on interstate power producers or other companies who sell power wholesale and thus are not QRUs.[310] As new interstate transmission projects develop in Colorado to meet the state RPS as well as improve the regional transmission system in general, these eminent domain limitations will likely be highly relevant to any disputes.

The Wyoming and Colorado examples show states revisiting their eminent domain laws to carve out new limits on what was historically very extensive authority granted to public utilities and others to take private property for energy generation and transmission purposes. While states may wish to encourage the development of renewable energy through RPSs and other incentives, they appear to be less comfortable granting the same blanket eminent domain authority to the energy industry (whether public utilities or private parties) than in years past. This shift can be attributed in part to the impact of *Kelo* and the increased attention now given to eminent domain across the board. It can also be attributed to the much more complicated landscape of electricity generation and transmission that now exists throughout the country. Part IV considers these fundamental changes in law, policy, and the electric transmission system and attempts to provide some guidance for states in developing eminent domain laws that will further the states' policy goals surrounding electricity development and transmission.

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308. *Id.* § 40-2-125; *see also* Jaclyn K. Casey, *Can a QRU Take from You? Restrictions on Using Eminent Domain for Renewable Energy Projects*, ROTHGERBER JOHNSON & LYONS (Nov. 1, 2010), http://www.rothgerber.com/showarticle.aspx?Show=1377 (discussing the limitations and uncertainty surrounding the use of eminent domain by QRUs).

309. *See, e.g.*, Casey, *supra* note 308 (discussing the uncertainty over whether eminent domain can be used to construct transmission lines to connect a renewable energy source to the grid).

310. *Id.*

IV. DEVELOPING NEW APPROACHES TO EMINENT DOMAIN FOR TRANSMISSION LINES

As an initial matter, in most states, whether public utilities can use eminent domain authority for transmission lines is not subject to significant dispute.[311] The majority of states have statutory or constitutional provisions stating expressly that transmission lines are a public use and can exercise eminent domain.[312] While some states limit that authority to public utilities, many do not, in which case there is less of a role for a court to determine public use, depending on how the statute is worded.[313] Notably, eminent domain actions for transmission lines, railroads, and other privately developed infrastructure projects are more easily described as "private takings" than the traditional economic development takings criticized as a result of *Kelo*. This is because in traditional economic development takings, like the one in *Kelo*, a governmental body is at least bringing the condemnation action in its own name after a public review prior to transferring the property to a private party. By contrast, in a transmission line taking or other private infrastructure taking, it is a private party rather than any government entity that initiates the taking in its own name.

Nevertheless, even though one can argue that transmission line takings resemble private takings because of the party initiating the action, the fact remains that virtually all states allow public utilities, private transmission companies, or both to exercise the power of eminent domain for these reasons.[314] Yet as was made clear in the years immediately following *Kelo*, public opinion can turn quite quickly in this area. Thus, it is certainly possible that a sympathetic plaintiff in a transmission line case, particularly a merchant line sending power out-of-state, could galvanize opposition to the use of eminent domain for such projects and result in many states revising their statutes and constitutions. Indeed, Part III illustrates that some states are already starting to reconsider this historically broad grant of authority.[315] Accordingly, the remainder of this Part puts aside the existing state statutes and constitutions that declare transmission lines a public use and considers ways in which the federal government and states can best ensure existing law supports the development of new,

311. *See supra* notes 95, 138 and accompanying text (illustrating widespread eminent domain authority for transmission lines).

312. *See supra* notes 266–75 and accompanying text; *infra* Appendix A.

313. *See supra* notes 266–75 and accompanying text; *infra* Appendix A.

314. *See supra* notes 266–75 and accompanying text; *infra* Appendix A.

315. *See supra* Part III.C.

interstate lines, subject to appropriate economic and environmental review.

Section A begins with a discussion of federal preemption of state siting authority, and how the Natural Gas Act, which authorizes federal siting approval and eminent domain authority for interstate natural gas pipelines, might serve as precedent for transferring approval and siting authority for interstate transmission lines from the states to the federal government. This Section recognizes, however, that while the federal model exists, the likelihood of such a transfer of authority over transmission lines from the states to the federal government at the present time is unlikely. Thus, the remainder of this Part discusses what actions states can take on their own to facilitate the development of interstate lines. It first considers the question of "public use" in the context of lines designed to bring power primarily to out-of-state customers, drawing connections between the disputes in this area with the controversy that arose after *Kelo*. It then specifically considers the question of merchant lines and whether such lines should be able to exercise eminent domain.

A. Federal Preemption of State Siting Authority and the Natural Gas Act

As discussed in Part II, the problem with a single state determining whether an interstate transmission line is a public use for purposes of authorizing eminent domain authority is that a single state legislature or state court must focus primarily on the citizens of its own state.[316] If the United States had a regional or national system for siting transmission lines rather than a state system, however, this would not be an issue at all.[317] If Congress were to expand the Department of Energy's ("DOE") and FERC's authority in this area, or grant plenary authority to FERC to site interstate transmission lines, the public use question would be quite different. In that case, the "public" would be defined on a regional or national basis, and eminent domain could be justified without concern for which state residents stand to benefit. Using that model, a transmission line would receive a certificate of public convenience and necessity from FERC after a review of the economics and environmental impact of

316. *See supra* Part II.B.

317. *See infra* note 322 and accompanying text (discussing very limited federal authority to site transmission lines on state and private lines if the Department of Energy designates a National Interest Electric Transmission Corridor).

the line and input from state and local governments and the public.[318] The line would have a federal siting permit as well as federal eminent domain authority that would override any state law to the contrary.[319] Such federal siting authority that preempts state authority is the model that has existed for decades for interstate natural gas pipelines under the Natural Gas Act.[320] This would address the "public use" concerns inherent in today's state-based system, eliminate the patchwork of siting and eminent domain authority across the country, and avoid the need to obtain siting approval from multiple states, thus streamlining the process significantly.[321]

Today, however, as noted earlier, the only authority the federal government possesses to site electric transmission lines off federal lands is contained in the Energy Policy Act of 2005, which grants the DOE authority to identify National Interest Electric Transmission Corridors ("NIETCs") in areas of the country experiencing transmission constraints or congestion.[322] Once the DOE identifies a NIETC, FERC has authority to exercise backstop siting authority to site the line if the states through which the line will pass cannot or will not site the line within a specified time period.[323] The federal courts, however, have interpreted the DOE's and FERC's authority under this law quite narrowly, with the result being that the DOE has not successfully designated a NIETC, and FERC has not exercised its backstop siting authority.[324]

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318. *See* Klass & Wilson, *supra* note 18, at 1865–67 (using the Telecommunications Act of 1996 as a model for balancing local and national interests in siting cell phone towers).

319. *See id.* at 1859–60.

320. *See* 15 U.S.C. § 717(c)–(h) (2006) (requiring certificate of public convenience and necessity); *see also* Klass & Wilson, *supra* 18, at 1865–67 (discussing the Natural Gas Act and FERC authority for siting interstate natural gas pipelines and grant of eminent domain authority).

321. *See* BIPARTISAN POLICY CTR., *supra* note 19, at 28–32 (recommending that Congress enact legislation granting FERC enhanced siting authority for certain interstate transmission lines that would preempt state decisions on such lines); Rossi, *supra* note 20, at 1026 (recognizing that interconnectedness was not the focus when siting authorities were created and that the system would almost certainly be different if it were established today).

322. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221, 119 Stat. 594, 946–51 (codified at 16 U.S.C. § 824p (2006)) (discussing DOE authority to designate NIETCs).

323. *See id.* (discussing FERC backstop authority).

324. *See* Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1107 (9th Cir. 2011) (vacating the designation of NIETCs); Piedmont Envtl. Council v. FERC, 558 F.3d 304, 313 (4th Cir. 2009) (invalidating the FERC rule on backstop siting authority), *cert. denied*, 130 S. Ct. 1138 (2010). *See generally* Klass & Wilson, *supra* note 18, at 1817–21, 1859–65 (discussing limited federal authority over transmission siting off federal lands).

There would be drawbacks, of course, to federalizing the transmission siting system. A centralized system would make it more difficult for states and local governments to impose siting conditions to protect local economic and environmental interests.[325] It may also be more difficult in some cases for individual landowners and local environmental groups to participate in the process and ensure that their concerns are addressed. Indeed, environmental groups in particular are often conflicted with regard to new interstate transmission lines.[326] Many environmental groups favor new lines, along with wind and solar generation development in general, so long as these projects will expand the use of renewable energy.[327] Other environmental groups, however, are more concerned with the local environmental impacts of these developments on scenic, aesthetic, biological, and animal resources, regardless of any positive climate-related impacts or other benefits associated with renewable energy.[328]

These concerns notwithstanding, a more streamlined federal—or even regional—siting authority would facilitate the development of new interstate transmission lines for increased renewable energy integration, grid reliability, and other purposes.[329] In other related areas such as liquefied natural gas terminals and cell phone towers, Congress has recently shifted some authority to federal agencies to site these projects in the face of state and local resistance to such projects.[330] Both of these frameworks are potential models for interstate transmission lines.[331] However, the current political climate does not bode well for a shift toward greater federal authority for interstate transmission lines.[332] While there have been numerous

325. *See* Klass & Wilson, *supra* note 18, at 1859–60 (discussing state preemption provisions of the National Gas Act).

326. *See* Alexandra B. Klass, *Energy & Animals: A History of Conflict*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 159, 196–97 (2011–12) (discussing conflicts among environmental groups over whether to support or oppose renewable energy-related projects).

327. *See id.* (recognizing support for renewable energy development among environmental groups due to its potential for reducing greenhouse gases).

328. *See id.* at 197 (referencing litigation by environmental groups challenging renewable energy development due to its potential effects on habitats); Rossi, *supra* note 20, at 1021–22.

329. *See* BIPARTISAN POLICY CTR., *supra* note 19, at 28–32; Klass & Wilson, *supra* note 18, at 1859–67 (explaining the benefits of federal siting authority as seen in the areas of natural gas terminals and cell phone towers).

330. *See* Klass & Wilson, *supra* note 18, at 1860–67 (discussing increased federal authority in these areas).

331. *See id.*

332. *See id.* at 1820–21, 1862–64 (discussing failed congressional attempts to create more federal authority for transmission line siting and comparing state-based siting system

congressional efforts to expand FERC's siting authority for interstate transmission lines in recent years, none have succeeded so far.[333] As a result, the disputes will continue over public use for interstate transmission lines that do not directly serve residents of all states through which the lines pass. This makes it even more important for the states to ensure that their laws governing eminent domain authority for interstate transmission lines reflect their energy policy preferences regarding the import and export of electricity and particularly renewable electricity. The remainder of this Part thus focuses on the states.

B. State Policies to Facilitate Development of Interstate Lines

As noted earlier, today's political climate makes it unlikely that Congress will shift any significant authority from the states to the federal government for interstate transmission siting.[334] As a result, it is important to focus on what actions states can take on their own to facilitate the development of new, interstate transmission lines. Such actions include: (1) broadening the scope of public use determinations to include regional benefits to the transmission grid and electricity markets; and (2) expressly extending the same eminent domain authority to merchant transmission lines that exists for lines built by public utilities, so long as the state has in place a rigorous certificate of need process for both types of lines.

1. State Consideration of Out-of-State Uses and Benefits in Determining Public Use

As discussed in Part II, for decades, state courts have taken varying approaches regarding whether a transmission line designed to exclusively or primarily bring power to out-of-state customers is a "public use" for eminent domain purposes.[335] This raises an initial question of how to define "the public." To the extent the public is defined exclusively as state residents, it is easier for courts to conclude that there is no public use for the line if no state residents will be able to use or benefit from the line. This is the approach that

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for interstate transmission lines with federal siting system for interstate natural gas pipelines).

333. *See id.* at 1820–21 (describing the attempts of FERC and the House of Representatives to pass new legislation expanding FERC authority in 2005 and 2009 respectively).

334. *See supra* notes 332–33 and accompanying text (discussing recent, failed congressional efforts to shift some transmission siting authority from the states to the federal government).

335. *See supra* Part II.B.

the courts in Mississippi[336] and Florida[337] have historically taken, making it difficult for either public utilities or private lines to take advantage of eminent domain authority to build interstate lines. However, courts in other states, such as North Dakota[338] and Indiana,[339] have taken a broader view of what constitutes public use, focusing on regional benefits, the benefits to in-state residents of grid reliability generally, and the economic benefits to the state that may be generated from the export of electricity.[340]

336. *See* Miss. Power & Light Co. v. Conerly, 460 So. 2d 107, 113 (Miss. 1984) (blocking a power company's efforts to use eminent domain to build a line between Louisiana and Mississippi because Mississippi residents would not receive power from the line). It is unclear whether the court would have viewed the line more favorably if some of the power had been designated for Mississippi customers even if Louisiana remained the primary beneficiary, but the court "seemed to suggest that some sort of balancing would have to be applied before eminent domain could be exercised in the Magnolia state." *See* Brown & Daniels, *supra* note 221, at 27.

337. *See* Clark v. Gulf Power Co., 198 So. 2d 368, 371 (Fla. 1967) (rejecting state utility's petition because it failed to sufficiently allege any specific public benefit or purpose as required by Florida law to justify its proposed eminent domain takings to build a one-way transmission line from Florida to Georgia that would provide power to Georgia customers but "from which the citizens of Florida [would] not derive one iota of benefit").

338. *See* Square Butte Elec. Coop. v. Hilken, 244 N.W.2d 519, 530 (N.D. 1976) (holding that a one-way transmission line from North Dakota to Minnesota served a public use when all the benefits—including the possibility of future use by the public, increased reserve supplies, stabilization of the grid, and lower cost power—were considered together instead of separately).

339. *See* Oxendine v. Pub. Serv. Co., 423 N.E.2d 612, 615 (Ind. Ct. App. 1980) (upholding eminent domain taking by public utility because of a "present need for this transmission line to insure the reliability of [the provider's] network system of distribution and the stability of [its] generating station"). Even though most of the electricity produced would go to Illinois customers, the court noted that Indiana's legislature had "expressly granted the power of eminent domain to [the utility] to furnish electricity to the 'public' not to Indiana residents alone." *Id.* at 617; *see also* Shedd v. Pub. Serv. Co., 188 N.E. 322, 326 (Ind. 1934) (holding that a project that benefits out-of-state residents in addition to in-state residents does not cease to be a public use).

340. *See, e.g.*, Okla. Gas & Elec. Co. v. Beecher, 256 P.3d 1008, 1012 (Okla. Civ. App. 2010) (analogizing an interstate transmission line to an interstate highway and concluding that even though Oklahoma customers would not be the primary users of electricity from an interstate transmission line, they were the "primary intended beneficiaries" of the line since it would increase "the availability of more reliable, efficient, and economical electricity"); Stone v. Pa. Pub. Util. Comm'n, 162 A.2d 18, 21, 22 (Pa. Super. Ct. 1960) (emphasizing the importance of integrating the transmission systems of Philadelphia, Pennsylvania, and Baltimore, Maryland, to allow each system to "be able to meet, adequately and safely, its varying and growing load demands, and to maintain constant voltage, frequency stability, and reliability of service" and also explaining that the electricity was needed because "the area to be served include[d] oil refineries, ship building, steel production, and other industries vital to the nation's peacetime economy and national defense"); Grice v. Vt. Elec. Power Co., Inc., 2008 VT 64, ¶ 20, 956 A.2d 561, 571 (Vt. 2008) (recognizing that a line that would be part of the Northwest Reliability Project served a public use, and that the nature of the integrated grid system makes it impossible to guarantee that a particular line will serve state residents). *See generally*

Notably, this debate strongly resembles the "use by the public" versus "public purpose" debate arising out of *Kelo*. For the courts in Mississippi and Florida, the fact that the transmission line would not be providing electricity immediately to in-state residents meant that there was no "use by the public" and thus no public use to justify eminent domain, consistent with Justice Thomas's dissent in *Kelo*.[341] For the courts in North Dakota and Indiana, by contrast, the line could more easily establish a public use by showing the regional economic and grid reliability benefits associated with the line, which is more analogous to the "public purpose" analysis in the *Kelo* majority opinion.[342]

These doctrinal differences among the states become more significant as the electricity grid becomes increasingly interstate in nature—both as an engineering matter, due to the existence of more interstate lines, and from a policy perspective, given the desire to encourage competition. Especially regarding policy, the federal government and many states now expressly focus on regional benefits to make decisions regarding the expansion of the transmission grid. For instance, in 2011, FERC issued Order 1000, which requires transmission providers to consider state "public policy requirements" (e.g., state RPSs) in regional transmission planning efforts.[343]

Sandeep Vaheesan, *Preempting Parochialism and Protectionism in Power*, 49 HARV. J. ON LEGIS. 87, 99 (2012) (discussing the benefits of increasing the capacity of the transmission system, including "(1) enhanced system reliability; (2) decreased energy costs due to more efficient generation dispatch and greater market competition; (3) increased fuel diversity; and (4) reduced emissions of air pollutants—that are often regional in nature").

341. *See* Kelo v. City of New London, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting). Justice Thomas relies on historical originalism and a strict textualist construction of the Fifth Amendment to argue that the Framers intended a narrow interpretation for what constitutes "public use." *Id.* at 507. He vehemently rejects the majority's abandonment of this standard in favor of the broader "public purpose" doctrine, which he contends is historically unsupported and difficult to apply, arguing that "[o]nce one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use." *Id.* at 517.

342. *See id.* at 479–80 (majority opinion) (explaining the Court's shift away from a strict public use test toward a "broader and more natural" public purpose framework because the former "proved to be impractical given the diverse and evolving needs of society").

343. *See* FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,876 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35) (requiring "public utility transmission providers to amend their OATTs to describe procedures that provide for the consideration of transmission needs driven by Public Policy Requirements in the local and regional transmission planning processes"); *see also* FED. ENERGY REGULATORY COMM'N, ORDER NO. 1000 FACTS (2011), http://www.ferc.gov/media/news-releases/2011/2011-3/07-21-11-E-6-factsheet.pdf ("Each public utility transmission provider must establish procedures to identify transmission needs driven by public policy requirements and evaluate proposed solutions to those transmission needs."). *But see* JAMES HEIDELL & SANDRA RINGELSTETTER

Likewise, the Midwest Independent System Operator ("MISO"), which oversees the electricity grid for eleven Midwestern states, also considers "public policy" benefits in determining which transmission projects in the MISO region are "multi-value" projects subject to broader cost allocation across the region.[344]

Moreover, in addition to the supreme courts of North Dakota and Indiana, which have articulated a more regional approach to public use and public benefit, several states have enacted statutes in recent years that specifically direct their state PUCs to consider regional benefits or general economic benefits in reviewing proposed transmission lines. For instance, in 2007, New Mexico enacted a law specifically to facilitate interstate transmission corridors within the state.[345] The law directs the state's Renewable Energy Transmission

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ENNIS, NERA ECONOMIC CONSULTING, FERC ORDER 1000 & PUBLIC POLICY TRANSMISSION PROJECTS 3–4 (2012), http://www.nera.com/nera-files/PUB_FERC_Order_1000_0412.pdf (cautioning that FERC Order No. 1000's public policy requirement rule provides no clear definition of how public benefits should be calculated and risks making it more difficult to reach consensus amongst stakeholders). In response to these concerns, FERC eventually clarified that

> we are not requiring that any federal or state laws or regulations themselves be considered as part of the transmission planning process.... Our intent is that public utility transmission providers consider such transmission needs just as they consider transmission needs driven by reliability or economic concerns. We are not requiring that public utility transmission providers do any more than that.

FERC Order No. 1000-A, 77 Fed. Reg. 32,184, 32,217 (May 31, 2012) (codified at 18 C.F.R. pt. 35).

344. *See* MIDWEST INDEP. SYSTEM OPERATOR, MULTI-VALUE PROJECT PORTFOLIO: RESULTS AND ANALYSIS 3 (2011), https://www.misoenergy.org/Library/Repository/Study/Candidate%20MVP%20Analysis/MVP%20Portfolio%20Analysis%20Full%20Report.pdf (stating that "[p]ublic policy decisions over the last decade have driven changes in how the transmission system is planned" and highlighting how "[t]he recent adoption of Renewable Portfolio standards (RPS) and clean energy goals [by states] across the MISO footprint have driven the need for a more regional and robust transmission system to deliver renewable resources from often remote renewable energy generators to load centers"). *But see* Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 477 (7th Cir. 2009) (invalidating pro rata cost allocation rule for high-voltage transmission lines within the PJM RTO on grounds that the relationship between the benefits transmission owners would receive and the costs they would bear was too attenuated and thus invalid under the FPA); *see also* Klass & Wilson, *supra* note 18, at 1871 (suggesting that the Seventh Circuit's holding may not be as unfriendly toward FERC's public policy requirement rule as it initially appears because, "as Judge Posner['s majority opinion] noted, all that is required is 'an articulable and plausible reason to believe that the benefits are at least roughly commensurate with those utilities' share of total electricity sales' " (quoting *Ill. Commerce Comm'n*, 576 F.3d at 477)).

345. Renewable Energy Transmission Authority Act, ch. 3, 2007 N.M. Laws 125 (codified at N.M. STAT. ANN. § 62-16A (Supp. 2012)).

Authority ("RETA") to participate in regional transmission forums[346] and grants it the power of eminent domain to acquire property or rights of way for public use if needed for regional transmission projects.[347] RETA's website highlights the ample renewable resources in the state and declares that New Mexico "can develop a major renewable energy industry thereby creating permanent jobs, protecting the environment, reducing greenhouse gas emissions, and furthering the nation's goals toward a sustainable and clean energy resource for generations to come."[348] Likewise, the Wyoming legislature created the Wyoming Infrastructure Authority to "diversify and expand the Wyoming economy through improvements in the state's electricity transmission infrastructure and to facilitate the consumption of Wyoming energy."[349] The Authority can plan, own, develop, and maintain infrastructure within and outside of Wyoming to accomplish its purpose and acquire property by condemnation for those purposes.[350]

In creating the North Dakota Transmission Authority, the North Dakota legislature cited economic development as its main purpose since most of the findings establishing the Authority emphasize the economic benefits of increasing transmission capacity.[351] The statute states that developing North Dakota's lignite coal and wind resources will "stabilize and increase revenues to the state"[352] and "increas[e] employment ... and improv[e] the state's economy";[353] that "[t]ransmission constraints impede the development of the state's lignite and wind resources";[354] and that an "essential governmental function and public purpose is to assist with the removal of electric transmission export constraints ... to facilitate the development of the state's abundant natural resources."[355] By contrast, the rationale

346. N.M. STAT. ANN. § 62-16A-4b(6) (Supp. 2012) ("The authority may ... through participation in appropriate regional transmission forums, coordinate, investigate, plan, prioritize and negotiate with entities within and outside the state for the establishment of interstate transmission corridors.").

347. *Id.* § 62-16A-4b(8) ("The authority may ... pursuant to the provisions of the [state's] Eminent Domain Code, exercise the power of eminent domain for acquiring property or rights of way for public use if needed for projects ....").

348. N.M. RENEWABLE ENERGY TRANSMISSION AUTH., http://www.nmreta.com (last visited Apr. 11, 2012).

349. WYO. STAT. ANN. § 37-5-303(a) (2011).

350. *Id.* § 37-5-304(a)(iv)–(v).

351. N.D. CENT. CODE § 17-05-01 (2009).

352. *Id.* § 17-05-01(3).

353. *Id.* § 17-05-01(6).

354. *Id.* § 17-05-01(4).

355. *Id.* § 17-05-01(5); *see also* KEVIN PORTER & SARI FINK, NAT'L RENEWABLE ENERGY LAB., STATE TRANSMISSION INFRASTRUCTURE AUTHORITIES: THE STORY SO

behind Idaho's transmission authority statute is based on reliability issues, declaring that the "regional interconnection of electric utilities" and the "restructuring of the electric industry in recent years by the federal government" has "exposed ... Idaho ... to volatile market prices [and] reliability concerns,"[356] and that "the ability of ... utilities to provide reliable and economic electric services at stable prices is essential to the economy and the economic development of the state of Idaho and to the health, safety and welfare of its people."[357] The statute grants the Energy Resources Authority the power of eminent domain to address these issues.[358] The Kansas Electric Transmission Authority cites both reliability and economic development as purposes for its authority.[359] The legislature acknowledged the importance of cooperating with neighboring states in transmission planning by giving the Authority the power to "participat[e] in and coordinat[e] with" the Southwest Power Pool ("SPP") RTO[360] and the SPP Regional Reliability Organization.[361] It also grants the Authority eminent domain power in order to carry out its purpose.[362]

These developments show federal and state efforts to create integrated regional electricity markets for renewable energy development, grid reliability, and general economic development purposes. All of these efforts require moving power across the country through transmission lines in the interests of a broader "public." The language used by the states to promote renewable

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FAR 7 (2008), http://www.nrel.gov/docs/fy08osti/43146.pdf (explaining how the North Dakota Transmission Authority can only "investigate, plan, prioritize, and propose electric transmission corridors" and does not have the power of eminent domain).

356. IDAHO CODE ANN. § 67-8902(b) (2006).

357. *Id.* § 67-8902(a). The statute also recognizes that

> [i]t is in the best interest of the state of Idaho and its people to encourage and promote the development of renewable energy resources in order to develop sustainable sources of energy supply, reduce inefficiencies in the use of electric energy and enhance the long-term stability of the energy resources and requirements of the state.

Id. § 67-8902(g).

358. *Id.* § 67-8908(g).

359. KAN. STAT. ANN. § 74-99d01 (Supp. 2011) ("The purpose for which the Kansas electric transmission authority is created is to further ensure reliable operation of the integrated electrical transmission system, diversify and expand the Kansas economy and facilitate the consumption of Kansas energy through improvements in the state's electric transmission infrastructure.").

360. *Id.* § 74-99d07(a)(15).

361. *Id.* § 74-99d07(a)(16).

362. *Id.* § 74-99d08(b).

energy and grant eminent domain authority focuses on developing state resources, expanding state economies, and benefiting the public good through economic growth and environmental protection.[363]

Differences among the states, however, may hinder these goals. First, a state with a broad public purpose approach to eminent domain for transmission lines may be stymied in its efforts to export its resources if it neighbors a state with a narrower "use by the public" approach. Likewise, it may be more difficult for a state wishing to attract new lines to export renewable energy to accomplish its goals if a neighboring state between the exporting state and the load center will not grant eminent domain authority to lines designed primarily to deliver electricity to out-of-state users.[364] Moreover, to the extent states continue to narrow their definitions of "public use" in response to *Kelo*, they may intentionally or inadvertently limit eminent domain authority for some interstate transmission lines as part of that reform unless, as some states have done, they expressly carve out an exception for transmission lines in general.[365] For example, Indiana's statute defines public use as, among other things, the "use of a parcel of real property to create or operate a public utility" or "an energy utility,"[366] but it excludes "the public benefit of

363. *See, e.g.*, N.D. CENT. CODE § 17-05-01(4) (2009) (declaring that transmission constraints present an obstacle to realizing the economic benefits of the state's energy resources); WYO. STAT. ANN. § 37-5-303(a) (2011) (stating that the purpose of the Wyoming Infrastructure Authority is to "diversify and expand the Wyoming economy"); N.M. RENEWABLE ENERGY TRANSMISSION AUTH., *supra* note 348 (citing job creation as a goal of the New Mexico Renewable Energy Transmission Authority).

364. For example, New Mexico is striving to become a renewable energy exporter. *See* N.M. RENEWABLE ENERGY TRANSMISSION AUTH., *supra* note 348. However, neighboring Arizona has taken a more parochial stance on interstate transmission lines, which could block New Mexico from the crucial Southern California market. *See* Vaheesan, *supra* note 340, at 116 ("Southern California Edison's unsuccessful attempt to build a 230-mile transmission line from Palo Verde, Arizona to Devers, California exemplifies the impact of parochialism among state regulators.").

365. *See generally* LARRY MORANDI, NAT'L CONFERENCE OF STATE LEGISLATURES, EMINENT DOMAIN LEGISLATION: POST-KELO UPDATE (Jan. 1, 2012), http://www.ncsl.org/documents/natres/EminentDomainPost-Kelo.pdf (describing broad trends and categories of state legislative responses to *Kelo*, including barring eminent domain takings solely for economic development purposes, limiting *Kelo*'s applicability to blighted areas, restricting the definition of "public use," increasing compensation requirements, and increasing public notice requirements). For a more detailed state-by-state analysis, see Larry Morandi, *State Eminent Domain Legislation and Ballot Measures*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 1, 2012), http://www.ncsl.org/issues-research/env-res/eminent-domain-legislation-and-ballot-measures.aspx. *See also supra* notes 89–90 (discussing laws in Pennsylvania and Mississippi that restrict eminent domain but carve out exceptions for transmission lines and other enumerated infrastructure projects).

366. IND. CODE ANN. § 32-24-4.5-1(a)(3) (LexisNexis Supp. 2012).

economic development" from the definition of public use,[367] which may create ambiguity. Likewise, post-*Kelo* reforms in Wyoming limiting eminent domain to "possession, occupation and enjoyment of the land by a public entity" also state that "nothing in this section shall restrict or impair the right or authority of . . . the Wyoming infrastructure authority to transfer property condemned by the authority to another public or private entity."[368] Ironically, the more the promoters of interstate transmission for renewable energy tout the "public benefits" of such lines, the more they may ultimately erode one of the bases for eminent domain authority by placing the lines in the more controversial takings category post-*Kelo*.

Thus, the question of how to define the "public" in "public use" remains central to the inquiry. There is some logic to the approach taken by the courts in Mississippi and Florida that refused to grant eminent domain authority to interstate lines serving out-of-state residents. Normatively speaking, how much weight should a state court give to the needs of out-of-state residents in determining state eminent domain authority? Aren't such considerations beyond a single state court's jurisdiction? Indeed, in both of those cases, the courts cited jurisdictional challenges inherent in considering any public use beyond state borders in support of their refusals to invoke eminent domain on behalf of the utilities.[369] Even the North Dakota[370] and Indiana[371] courts, which did find a public use for such lines,

367. *Id.*

368. WYO. STAT. ANN. § 1-26-801(c) (2011).

369. *See* Clark v. Gulf Power Co., 198 So. 2d 368, 371 (Fla. 1967) ("The sovereign's power of eminent domain, whether exercised by it or delegated to another, is limited to the sphere of its control and within the jurisdiction of the sovereign. A state's power exists only within its territorial limits for the use and benefit of the people within the state. Thus, property in one state cannot be condemned for the sole purpose of serving a public use in another state."); Miss. Power & Light v. Conerly, 460 So. 2d 107, 110 (Miss. 1984) (noting that the Mississippi Public Service Commission has jurisdiction over "the *intrastate* business and *property* of public utilities," but "the sale of electric power from Mississippi Power & Light Co. to the Louisiana Power & Light Co. is an *interstate* sale" (citations omitted)).

370. *See* Square Butte Elec. Coop. v. Hilken, 244 N.W.2d 519, 525 (N.D. 1976) (concluding that under relevant North Dakota precedents, "the public benefit, while not confined exclusively to the state authorizing the use of the power, is nonetheless inextricably attached to the territorial limits of the state because the state's sovereignty is so constrained" (citations omitted)).

371. *See* Oxendine v. Pub. Serv. Co. of Ind., 423 N.E.2d 612, 617 (Ind. Ct. App. 1980) (rejecting landowners' jurisdictional argument by noting that Indiana's legislature and supreme court had both previously indicated that in the context of eminent domain takings by state utilities, the term "public" should be interpreted to include out-of-state residents).

acknowledged the jurisdictional question before rejecting it as an obstacle based on the facts of each case.[372]

A contemporary example of this issue is a decision by Arizona siting regulators in 2007 to block a transmission line that would have transported electricity from a nuclear generating station west of Phoenix to Southern California.[373] In rejecting the transmission line, the siting board "emphasiz[ed] the ostensible environmental costs the line would impose on Arizona at the expense of California [and] called the line a '230-mile extension cord.' Among the concerns stated were environmental impacts on 'everything from native plants and wildlife to viewshed and archeological sites.' "[374] However, it is possible that a court weighing those concerns against providing a reliable electricity source to the growing population of Southern California would find that the latter took priority over the former and that those environmental concerns were not a legitimate state interest.[375] Moreover, in that case, there was some evidence that regulators were acting with a discriminatory purpose, which would render the decision per se invalid. One regulator declared, "I don't want Arizona to become an energy farm for California. This project,

372. On the other hand, one might argue that the refusal to grant eminent domain authority to an interstate transmission line violates the dormant commerce clause of the U.S. Constitution because the denial unduly burdens interstate electricity markets. Such a claim, however, would have to address arguments by the state that the denial was based on legitimate, nondiscriminatory reasons such as environmental, aesthetic, or land use concerns associated with the line. *See* U.S. CONST. art. 1, § 8, cl. 3; Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (holding that laws that block imports or otherwise give facial preference to in-state resources or goods at the expense of out-of-state goods are facially discriminatory and violate the commerce clause); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that state laws that are facially neutral may violate the dormant commerce clause if the burden imposed on interstate commerce is "clearly excessive" in relation to the local benefits); *see also* Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 66–70 (2003) (discussing defenses to dormant commerce clause claims based on state environmental protection grounds and outcome of Supreme Court decisions).

373. *See* Rossi, *supra* note 20, at 1022.

374. *Id.* (quoting Press Release, Ariz. Corp. Comm'n, Regulators Reject "Extension Cord for California": Commissioners Reject Palo Verde to Devers II Power Line (May 30, 2007), http://www.cc.state.az.us/divisions/administration/news/Devers_II_Vote.pdf).

375. Indeed, the Supreme Court has a long history of invalidating state attempts to protect environmental resources via laws that burden interstate commerce. *See, e.g.*, Klein, *supra* note 372, at 10 (citing Chief Justice Rehnquist's frustration at the majority's decisions—in a series of cases striking down state landfill regulations—to protect interstate trade in solid waste rather than a state's interest in preserving open space); *see also* Hughes v. Oklahoma, 441 U.S. 322, 337–38 (1979) (invalidating a state law that prohibited the interstate sale of minnows in order to prevent the depletion of the resource).

if we approved it, would use our land, our air and our water to provide electricity to California."[376]

To address such disputes, and assuming no fundamental shift in regulatory siting authority from the states to the federal government, state legislatures and state courts can address the issue more effectively in several ways. First, state legislatures can amend their state siting and eminent domain laws to make it clear whether general economic benefits or regional benefits such as grid reliability will support eminent domain authority for transmission lines. Many states prefer to keep their statutory language general so that each transmission line is considered on a case-by-case basis through the siting process. States should recognize, however, that such uncertainty may hinder the ability of the state to attract investment in interstate lines, particularly in light of the frequent legal challenges to transmission lines. This will likely be most important to states with significant renewable resources, like North Dakota and Wyoming, which rely heavily on exporting those resources for economic development purposes.[377] Second, to the extent states wish to retain broad "public use" language in their eminent domain statutes without designating all interstate lines as a per se public use, state legislatures can enact statutes like those in New Mexico and Wyoming that explain why the development of renewable energy and the expansion of interstate transmission lines is a public purpose and public benefit to the state.[378]

2. Eminent Domain Parity for Merchant Lines

As discussed in Part III, legislatures and courts in some states have addressed whether the broad, statutory eminent domain authority for electric transmission projects in general should apply equally to merchant lines. In most states, until electricity restructuring in the 1990s, publicly regulated utilities had captive customers and owned both generation and transmission assets.[379] Thus, there was

376. Rossi, *supra* note 20, at 1022 (quoting Press Release, *supra* note 374).

377. *See, e.g.*, *Expanding Target Industries: Energy*, N.D. DEP'T COM., http://www.business.nd.gov/target/energy/ (last visited Apr. 11, 2013) (publicizing that energy is North Dakota's third largest industry and that when its new renewable energy projects come on line they will "have the capacity to produce 325 million gallons of ethanol, 85 million gallons of biodiesel, and 2,500 megawatts of wind power").

378. *See supra* notes 345–50 and accompanying text.

379. *See* Daniel Wm. Fessler & Cynthia McArthur Morelli, *Franchise Modification and Constitutional Confrontation: An Avoidable Crisis of Consumer Expectations and Investor Trust*, 44 S.D. L. REV. 552, 552 (1999) (recognizing that a consensus emerged at the beginning of the 1900s that energy generation was best left to a monopoly).

little room for merchant transmission companies.[380] Now, however, as a result of restructuring as well as the increasing need to transmit renewable energy and other distant resources to load centers, there is a developing market for merchant lines.[381] Accordingly, a growing number of states are now forced to consider whether the same eminent domain authority granted to publicly regulated utilities should also apply to private lines.

As noted earlier, many states in the Interior West have a long history of granting eminent domain authority to private industry to develop state natural resources.[382] Outside the Interior West, however, that history of granting eminent domain authority to private parties to develop natural resources is not nearly so prevalent—with such delegations generally limited to highly regulated industries or common carriers such as public utilities and railroads.[383] Moreover, even in those Interior West states with this history of granting broad, private eminent domain authority, there are good arguments that the exercise of such authority can result in abuses and harm.[384] In all states, however, the legislature has authority to grant private merchant companies eminent domain authority to build electric transmission lines. Indeed, it would not appear difficult for a state to justify such lines as a public use; the need to develop renewable or other electricity resources, to increase grid reliability, or to otherwise contribute to the state's economic welfare only begin the list of possible reasons a legislature might cite.

However, even if eminent domain authority for merchant lines can be legally justified, is it good public policy? Should we be concerned with private lines exercising such authority? Certainly, there is a concern throughout the country over the growing privatization of historically public functions such as schools, prisons, hospitals, police authority, and other public services.[385] Without direct

380. *See id.* at 560 (demonstrating how the barriers to transmission of electricity reduced competition between utility owners).

381. *See id.* at 555 (discussing how the Public Utilities Regulatory Policies Act of 1978 attacked the dominance of public utilities by opening utility facility ownership to "qualified utilities").

382. *See supra* notes 91–95 and accompanying text.

383. *See* Klass, *supra* note 48, at 677–81 (discussing differences between Interior West states and the rest of the country on the role of eminent domain and natural resource development).

384. *See id.* at 681–85 (discussing current conflicts between coal-bed methane development and landowners in the Interior West as well as the environmental harms associated with such development).

385. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1394–95 (2003) (arguing that the push for privatization of public services involves a

political accountability or an express mission to work in the public interest, many of the safeguards that historically existed for these services have faded away.[386] Moreover, government oversight of these private entities is often lacking, sometimes resulting in inappropriate or excessive government spending on services provided by the private sector, decreased quality of service, or outright fraud on the public.[387]

It is not clear, however, that the same concerns exist for transmission lines, at least where adequate federal and state review approval processes exist. Even private lines must receive FERC approval to enter into contracts with electricity generators and providers, which affords oversight of at least some aspects of the financial viability of the line.[388] To the extent states have a certificate

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"regime of mixed administration" with government providing funding and setting goals but private individuals implementing the program); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 467–69 (2008) (noting a significant trend in privatizing government benefit programs and arguing that economic efficiency indicates that the government should privatize some tasks but should not privatize to the extent that it has in this area); Stephanie Chen, *Larger Inmate Population Is Boon to Private Prisons*, WALL ST. J., Nov. 19, 2008, at A4 (recognizing that private prisons housed 7.4% of nation's prisoners in 2007 and highlighting the construction of other private prisons); Paul Krugman, Op-Ed., *Prisons, Privatization, Patronage*, N.Y. TIMES, June 22, 2012, at A25 (using the privatization of halfway houses to identify and analyze the enhanced trend of privatizing government programs).

386. *See* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260–61 (2003) (recognizing that accountability of public-private ventures must go beyond keeping honest books and delivering what is promised in order for private ventures to reflect society's values).

387. *See* Super, *supra* note 385, at 466; U.S. Dep't of Health & Human Servs. & U.S. Dep't of Justice, *About Fraud*, STOP MEDICARE FRAUD, http://www.stopmedicarefraud.gov/aboutfraud/index.html (last visited Apr. 11, 2013) (identifying examples of Medicare fraud and laying out steps under the Affordable Care Act and other statutes that the government is taking to curb Medicare fraud and its attendant societal costs).

388. *See* FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,845 (Aug. 21, 2011) (codified at 16 C.F.R. pt. 35) (requiring that public utility transmission suppliers consider more cost-efficient and effective solutions for meeting regional transmission needs); Chinook Power Transmission, LLC & Zephyr Power Transmission, LLC, 126 FERC ¶ 61,134, at 61,765, 61,769 (2009) (authorizing merchant lines Chinook and Zephyr to charge negotiated rates on their proposed merchant transmission projects pursuant to 16 U.S.C. § 824d and 18 C.F.R. § 35, and laying out ten criteria that a merchant line must meet to be granted such authorization); TransEnergie U.S., Ltd., 91 FERC ¶ 61,230, at 61,838–41 (2000) (granting the first merchant transmission owner's application for negotiated rate authority and instituting conditions to ensure that rates are just and reasonable); Werntz, *supra* note 7, at 440–70 (describing the evolution of FERC's approach to evaluating proposals for negotiated rate authority); *see also* 16 U.S.C. § 824d(a) (2006) (authorizing FERC's jurisdiction over "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy"); 18 C.F.R. § 35.28(g) (2012) (setting detailed procedures for approved independent system operators and RTOs regarding tariffs, bids from aggregators of retail customers, and market monitoring),

of need or siting process through their state PUCs, such review processes provide additional oversight of the line's economics, as well as a review of its potential environmental impacts. Of course, these review processes have many flaws and can often result in lines being built that are not economically justified or that have adverse environmental impacts that outweigh the lines' benefits.[389] Yet it is not at all clear that these concerns are more significant for private lines than for those built by public utilities—particularly since both kinds of lines are generally subject to the same state review of public necessity and need.[390] Indeed, since merchant lines are not able to recover their costs of construction and operation from ratepayers, there may be less concern that unnecessary lines will be built.[391]

Moreover, in recent orders, FERC has attempted to encourage the development of new transmission lines by non-incumbent providers (i.e., private transmission companies or others who do not have a designated retail service territory) in order to meet regional transmission needs.[392] To accomplish this goal, FERC Order 1000 required each public utility transmission provider to remove any

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amended by 77 Fed Reg. 26,674, 26,686 (May 7, 2012) *and* 77 Fed. Reg. 41,482, 41,541 (July 13, 2012); 18 C.F.R. § 35.47 (2012) (setting parameters for organized wholesale electric market tariff provisions), *amended by* 77 Fed Reg. 26,674, 26,686 (May 7, 2012) *and* 77 Fed. Reg. 41,482, 41,541 (July 13, 2012). *See generally* ENERGY & NATURAL RES. MKT REGULATION COMM., 2011 ANNUAL REPORT, *in* AM. BAR ASS'N, ENVIRONMENT, ENERGY, AND RESOURCES LAW: THE YEAR IN REVIEW 2011, at 181 (2011) (explaining that under Order No. 1000, proposed merchant lines must be evaluated in light of openness requirements of Order No. 890).

389. *See* Rossi, *supra* note 20, at 1018–22 (reviewing the existing regulatory analysis of public need and environmental impact and the ineffectiveness of such an analysis due to the shifts in the industry).

390. *See id.*; *supra* Part II.A. Most states require both public utilities and non-utilities to obtain a certificate of public convenience and necessity or equivalent approval prior to exercising eminent domain for new transmission lines. *See, e.g.*, MONT. CODE ANN. §§ 75-20-113, 75-20-201 (2011). The exceptions are Colorado, Georgia, Hawaii, Indiana, Louisiana, Utah, Wisconsin, and Wyoming. *See supra* note 220.

391. *See* Brown & Rossi, *supra* note 150, at 749 ("[U]nless the line is being proposed by a utility for inclusion in rate base . . . it is difficult to see what is accomplished by requiring a public adjudication of need.").

392. *See* FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,880 (Aug. 21, 2011) (codified at 16 C.F.R. pt. 35) (enacting reforms that will "eliminate practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust or unreasonable, or otherwise result in undue discrimination by public utility transmission providers"); *see also FERC Order 1000*, MIDWEST INDEP. TRANSMISSION SERV. OPERATOR, INC., https://www.midwestiso.org/WhatWeDo/StrategicInitiatives/Pages/FERCOrder1000.aspx (last visited Apr. 11, 2013) (discussing provisions of FERC Order 1000 and arguing that Order 1000 is "a major step forward in advancing transmission planning").

federal right of first refusal from its FERC-approved tariffs and agreements for a transmission facility.[393] Notably, there are exceptions to the elimination of federal rights of first refusal for certain transmission projects, and the rule has no impact on state laws that may favor incumbent utilities.[394] The rule's objective, however, is to address discrimination in assigning new transmission projects that favor incumbent utilities, often leading to higher costs and less efficient transmission expansion.[395] The practical result of this rule is to limit the "home-field" advantage incumbent transmission owners currently have with regard to building new transmission lines and to expand the opportunities for potential competitors, including merchant lines.[396]

FERC Order 1000 is relevant to the question of eminent domain for transmission lines because it identifies a market problem for new transmission that may be partially ameliorated by creating a more level playing field between public utilities and merchant lines when it comes to eminent domain authority. Although the rule states expressly that it does not affect state or local laws governing transmission, there is a good policy argument that granting merchant lines the same eminent domain authority for new transmission lines as public utilities would promote the federal policy of minimizing existing barriers for new entrants to the transmission market. Of course, some states may not wish to promote a policy that increases transmission lines at all. For instance, Delaware does not grant eminent domain authority to any transmission lines, regardless of who builds them.[397] Other states, however, may wish to promote such lines to facilitate participation in regional electricity markets. If so, creating

393. *See* FERC Order No. 1000, 76 Fed. Reg. at 49,842.

394. *See* WINSTON & STRAWN LLP, ENERGY: FERC REFORMS TRANSMISSION PLANNING AND COST ALLOCATION PRINCIPLES 3 (2011), http://www.winston.com/siteFiles/Publications/FERC_7_22_11.pdf.

395. *See id.*; *see also* Statement of Jon Wellinghoff, Chairman of F.E.R.C., on Right of First Refusal (ROFR) Orders (July 19, 2012), http://www.ferc.gov/EventCalendar/Files/20120719164044-E-11-WELLINGHOFF.pdf.

396. *See* Statement of Jon Wellinghoff, *supra* note 395 (arguing that the rule against rights of first refusal and the open and transparent transmission planning process will ensure there is no undue discrimination between energy transmission providers). *But see* WINSTON & STRAWN, *supra* note 394, at 3 (advising that the exclusions written into the rule would extend the substantial advantage that incumbent transmission owners have over transmission developers).

397. *See* DEL. CODE ANN. tit. 26, §§ 901, 906–908 (2009) (limiting eminent domain powers of all electric transmission companies to former railroad rights-of-ways, public roads, canals, and highways).

a level playing field with regard to eminent domain authority is consistent with that policy choice.

Overall, it is hard to justify treating merchant lines differently from utility-owned lines for eminent domain purposes.[398] At that level, the question is then whether the benefits of facilitating new lines for renewable energy development, grid reliability, or reduced costs[399] outweigh the potential environmental impacts and other harms or costs associated with new lines. This would appear to be a policy question each state may decide for itself, based on state and regional energy development and grid reliability goals, rather than based on any principles inherent in eminent domain doctrine.

This, of course, leads to a patchwork of eminent domain authority across the country for merchant lines, which creates a problem for the development of new, interstate lines to develop renewable energy resources and maintain grid reliability. There will likely be a growing number of instances where the economics support development of a new, interstate merchant line but unfriendly eminent domain policies in certain states may make construction more difficult. One can argue that in the case of a private line, it is incumbent on the line developer to simply pay its way through

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398. For arguments in favor of eminent domain authority for private development of renewable energy, including the renewable energy facilities themselves, see generally Hannah Wiseman et al., *Formulating a Law of Sustainable Energy: The Renewables Component*, 28 PACE ENVTL. L. REV. 827 (2011) (explaining the need for "utility-scale renewable development" in creating a sustainable energy policy and addressing the gaps in the current law that stifle this development).

399. Increasing transmission capacity in areas like the Northeast has the potential to significantly reduce electricity costs, as the increased transmission capacity provides access to less expensive renewable and non-renewable energy sources in low-density areas outside transmission-constrained regions like New York City. *See* SUSAN F. TIERNEY ET AL., N.Y. INDEP. SYS. OPERATOR, FUEL DIVERSITY IN THE NEW YORK ELECTRICITY MARKET 4–9 (2008), http://www.nyiso.com/public/webdocs/newsroom/white_papers/fuel_diversity_11202008.pdf (explaining that introducing additional wind power into the New York City market could reduce energy prices by roughly ten percent); *see also* BOB FAGAN ET AL., SYNAPSE ENERGY ECON, INC., THE POTENTIAL RATE EFFECTS OF WIND ENERGY AND TRANSMISSION IN THE MIDWEST ISO REGION 3 (2012), http://cleanenergytransmission.org/wp-content/uploads/2012/05/Full-Report-The-Potential-Rate-Effects-of-Wind-Energy-and-Transmission-in-the-Midwest-ISO-Region.pdf (explaining that increasing transmission capacity for wind resources will reduce the market price of electricity for Midwest consumers); I.S.O. NEW ENGLAND, INC., ELECTRICITY COSTS WHITE PAPER 3 (2006), http://www.iso-ne.com/pubs/whtpprs/elec_costs_wht_ppr.pdf (arguing that increasing energy supply from low cost sources (e.g. wind) could save New England consumers $600 million per year); Johannes Pfeifenberger & Delphine Hou, *Transmission's True Value*, PUB. UTILS. FORTNIGHTLY, Feb. 2012, at 47 (explaining that limited liquidity of electricity markets results in higher prices and decreased reliability, and that increasing transmission capacity increases liquidity).

voluntary contracts with landowners without the threat of eminent domain authority. However, the fact remains that if states wish to develop their renewable energy resources and transmit those resources to out-of-state load centers, and those load centers wish to receive the energy, those states may wish to consider any current obstacles to eminent domain authority for private lines. The other approach, as noted earlier in the discussion of interstate lines, is to create federal eminent domain authority for transmission lines similar to what exists for interstate natural gas pipelines.[400] Federal legislation could expressly grant eminent domain authority to any merchant line that obtains a certificate of public convenience and necessity for an interstate line from FERC.[401]

To the extent the law continues to develop on a state-by-state basis for intrastate lines, interstate lines, or both, states that wish to attract investment in merchant lines may choose to amend their existing eminent domain statutes to expressly grant eminent domain authority to merchant lines. As discussed in Part III.B, a few states like Montana have recently amended their statutes to expressly grant eminent domain authority to merchant lines.[402] Other states, like Wyoming, with broad grants of eminent domain authority to transmission lines generally, have court decisions confirming that such authority also applies to merchant lines.[403] In many other states, however, the statutes are unclear and no case law exists interpreting them.[404] For the states that fall into this category, if they wish to be more hospitable to such lines, they should enact legislation clarifying that private companies have the same eminent domain authority to build transmission lines as public utilities after receiving all necessary state approvals. Again, as a policy matter, many states may not wish to grant such authority to merchant lines, choosing instead to limit the use of eminent domain to more highly regulated public utilities. Indeed, some states, like Nebraska, have enacted such limitations expressly.[405] Still, the bulk of the states have laws that are unclear on

400. *See supra* notes 329–31 and accompanying text.

401. *See supra* notes 329–31 and accompanying text.

402. *See* Act of May 9, 2011, ch. 321, § 2, 2011 Mont. Laws 1320, 1320 (codified at MONT. CODE. ANN. § 75-20-113 (2011)); MATL LLP v. Salois, 2011 MT 126, ¶ 6, 360 Mont. 510, 512, 255 P.3d 158, 160 (reversing the district court for not applying the newly codified eminent domain authority).

403. *See* WYO. STAT. ANN. § 1-26-815(a) (2011); Bridle Bit Ranch Co. v. Basin Elec. Power Co-op., 2005 WY 108, ¶ 23, 118 P.3d 996, 998, 1003 (Wyo. 2005).

404. *See supra* notes 266–75 and accompanying text; *infra* Appendix A.

405. *See* Act of April 12, 2010, §§ 6, 9, 2010 Neb. Laws 773, 775–78, 779–80 (codified as amended in NEB. REV. STAT. §§ 70-1014.02, 76-710.04 (Supp. 2011)); Sen. Deb Fisher, *LB*

the subject, and more clarity in this area would undoubtedly aid in planning and decision-making for both regulators and the regulated community. Creating consistency between state energy policy and eminent domain law by statute and, if necessary, judicial decision will go a long way toward creating a more hospitable environment for merchant lines specifically and for expanding the transmission grid to facilitate increased renewable energy deployment and reliability more generally.

CONCLUSION

This is a critical time in the development of interstate electricity transmission in the United States. As regulatory policy attempts to encourage the development of renewable energy and create regional electricity markets, there are significant questions surrounding whether the nation's state-based system of transmission siting is up to the task of facilitating the necessary developments in the electricity grid. As this Article shows, eminent domain law has always played a central role in the building of transmission lines. Now, however, as merchant transmission companies become more significant players in the field and it becomes increasingly necessary to build interstate transmission lines to integrate these resources into the grid, it is apparent that the patchwork of eminent domain law for transmission lines among the states is a potential barrier to meeting policy goals regarding grid reliability, cost reduction, and renewable energy integration. This Article explores these challenges, particularly in light of the backlash to *Kelo*, and suggests various paths states can follow to ensure their eminent domain laws are consistent with their policy preferences on energy development and export.

1048 Clarifies Wind Power Development in Nebraska, SANDHILLS EXPRESS (Mar. 19, 2010, 2:55 PM), http://www.sandhillsexpress.com/BuySell/BuySellDetails/tabid/108/smid/384/ArticleID/1500/Default.aspx. *See generally* NEB. REV. STAT. § 70-301 (2009) (laying out the general law of eminent domain in Nebraska).

APPENDIX A

The following states have statutes that generally confer eminent domain authority to "power companies," companies engaged in "transmission of electricity," "utilities," or similar entities, and define these terms broadly enough that merchant transmission lines *might* be included, but no case law or administrative law firmly suggests they will or will not grant eminent domain authority to a merchant transmission line. For states that more clearly do or do not grant eminent domain authority to merchant lines, see *supra* notes 266–75 and accompanying text.

* Statutes and case law suggest a stronger likelihood that eminent domain authority would be granted.
† Statutes and case law suggest a weaker likelihood that eminent domain authority would granted.

Alabama: ALA. CODE §§ 10A-21-2.01, 10A-21-2.04 (2010); *id.* § 18-1B-2 (2007); *id.* § 37-4-130 (1992).

Alaska: ALASKA STAT. § 09.55.240(a)–(b) (2010).

Arizona*: ARIZ. CONST. art. XV, § 2; ARIZ. REV. STAT. ANN. §§ 12-1111(a)(10), 12-1115(c) (2003); Sw. Transmission Coop., Inc. v. Ariz. Corp. Comm'n, 142 P.3d 1240, 1243–47 (Ariz. Ct. App. 2006) (holding that a transmission co-op that only provided electric power at wholesale to other utilities was defined as a "public service corporation," even though it did not provide power directly to the public, suggesting a flexible definition of "public service corporation").

California†: CAL. PUB. UTIL. CODE §§ 216(e), 217, 218(b)(3), 610, 612 (West 2004 & Supp. 2013). The California Public Utilities Code appears to restrict the use of eminent domain by corporations. *See* California Law Revision Commission, *Comment on Sec. 610 of the California Public Utilities Code* (1975) ("Section 610 is included to make clear that this article extends the right of eminent domain only to 'public utilities' . . . and not to persons or corporations that are not subject to regulation and rate control."). However, the Code continues to use a broad definition of "public utility." *See* CAL. PUB.

UTIL. CODE § 216(c) (West 2004) (defining public utility as "any person or corporation" that delivers "any commodity to" an entity that serves the public).

Colorado*: COLO. REV. STAT. §§ 32-12-125, 38-1-101(1), 38-1-103, 38-1-105, 38-1-202(2)(e), 38-1-202(2)(l), 40-1-103(2)(a) (2012); *see id.* § 38-2-101 ("If any corporation formed for the purpose of constructing [an] electric line . . . is unable to agree with the owner for the purchase of any real estate or right-of-way or easement or other right necessary or required for the purpose of any such corporation for transacting its business or for any lawful purpose connected with the operations of the company, the corporation may acquire title to such real estate or right-of-way or easement or other right in the manner provided by law for the condemnation of real estate or right-of-way.").

Georgia: GA. CODE ANN. §§ 22-3-160, 22-3-160.1, 22-3-161 (Supp. 2012).

Hawaii†: HAW. REV. STAT. ANN. § 101-4 (LexisNexis 2006); *id.* § 269-1 (LexisNexis 2011 & Supp. 2011) (amended by Act of June 27, 2012, 2012 HAW. SESS. LAWS 584, 590).

Idaho*: IDAHO CODE ANN. § 7-701(11) (2010); *see also* H.B. 268, 61st Leg., 1st Reg. Sess. (Idaho 2011) (failed 2011 legislation that would have required entities other than public utilities to prove a proposed taking was in the interest of Idaho citizens, strongly suggesting non-utility transmission companies currently have an unencumbered right of eminent domain).

Indiana*: IND. CODE ANN. §§ 8-1-2-1(b)(1), 8-1-8-1(a)(2) (LexisNexis 1998 & Supp. 2012); AEP Ind. Mich. Transmission Co., Cause No. 44000, 2011 WL 5505445, at *11, *13 (Ind. Util. Regulatory Comm'n Nov. 2, 2011), *available at* https://myweb.in.gov/IURC/eds/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b6318017c616 (granting eminent domain powers to an independent transmission company, which it deemed a "transmission only public utility").

Iowa*: IOWA CODE ANN. §§ 478.1(1), 478.6, 478.15 (West 2009) (grant of franchise by the Utilities Board to "any person, company, or

corporation" for the operation of transmission lines vests in that entity the right to exercise eminent domain "to such extent as the board may approve and find necessary for public use"); ITC Midwest LLC, No. E-21948, 2011 WL 3796221, at *1 (Iowa Util. Bd. Aug. 24, 2011).

Louisiana: LA. REV. STAT. ANN. § 19:2 (2004 & Supp. 2013).

Maine: ME. REV. STAT. tit. 35-A, §§ 3131(1)–(3), 3136(1)–(2) (2010).

Massachusetts*: MASS. ANN. LAWS ch. 164, § 1 (LexisNexis 2002 & Supp. 2012); *id.* §§ 69G, 69R (LexisNexis 2002); *id.* § 72(a) (LexisNexis 2002 & Supp. 2012) (noting that in addition to granting broad authority to "electric companies," the Department of Public Utilities may authorize a "transmission company" to use eminent domain).

Minnesota†: MINN. STAT. ANN. §§ 216E.01(1), 216E.12(1) (West 2010); *id.* § 117.189 (West Supp. 2013); *In re* Prairie Rose Transmission, LLC, No. IP-6838/TL-10-134, 2012 WL 258025 (Minn. Pub. Util. Comm'n, Jan. 13, 2012), *available at* https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={EE2F8171-D509-41B8-8B85-BDA605E2AF29}&documentTitle=20121-70271-01 (granting a CPCN for a private transmission project that would connect Prairie Rose Wind Farm to the grid, and noting that Prairie Rose Transmission would not have eminent domain authority, but failing to explain why or whether it had sought eminent domain authority).

Mississippi: MISS. CODE ANN. § 11-27-47 (West 2008); Miss. Power & Light Co. v. Conerly, 460 So. 2d 107, 113 (Miss. 1984).

Missouri: MO. ANN. STAT. § 386.020(14)–(15) (West 2010); *id.* § 523.010(1) (West 2002); State *ex rel.* Harline v. Pub. Serv. Comm'n of Mo., 343 S.W.2d 177, 183 (Mo. Ct. App. 1960).

Nevada†: NEV. REV. STAT. ANN. § 37.010 (LexisNexis 2012); *id.* § 704.020(2)(a) (LexisNexis 2009); *id.* § 704.021 (LexisNexis 2009 & Supp. 2011) (noting that persons who produce and sell energy to public utilities are not themselves public utilities).

New Jersey: N.J. STAT. ANN. §§ 48:2-13, 48:3-17.6 (West 2009).

North Carolina: N.C. GEN. STAT. §§ 40A-3(a), 62-183, 62-185 (2011) (private persons and corporations may use eminent domain for "public use or benefit," for purposes including "electric power lines, electric lights"); Duke Power Co. v. Ribet, 25 N.C. App. 87, 89, 212 S.E.2d 182, 183 (1975) ("Where an agency has the power of condemnation, the choice of route is primarily in its discretion and will not be reviewed . . . unless it appears that there has been an abuse of discretion.").

North Dakota: N.D. CENT. CODE § 32-15-02(4) (2010); *id.* § 49-22-03 (1999 & Supp. 2011); *id.* § 49-22-07 (1999); Otter Tail Power Co. v. Demchuk, 314 N.W.2d 298, 301 (N.D. 1982).

Ohio: OHIO REV. CODE ANN. § 4933.15 (LexisNexis 2000); Ohio Power Co. v. Diller, 247 N.E.2d 774, 779 (Ohio Ct. App. 1969) (describing the broad and discretionary nature of the legislature's grant of authority to electric companies).

Pennsylvania†: 15 PA. CONS. STAT. ANN. §§ 1511(a)(3), 1511(c) (West 1995); 26 PA. CONS. STAT. ANN. §§ 203(b)(1), 204(b)(2)(i) (West 2009); 66 PA. CONS. STAT. ANN. § 102 (West 2000 & Supp. 2012) (defining a "public utility" as any person or corporation that owns facilities in the state for "transmitting . . . electricity . . . for the production of light, heat, or power *to or for the public for compensation*" (emphasis added)).

South Carolina: S.C. CODE ANN. § 58-27-130 (1977).

South Dakota*: S.D. CODIFIED LAWS §§ 21-35-1, 21-35-1.1, 49-34-4 (2004); Basin Elec. Power Coop. v. Payne, 298 N.W.2d 385, 386 (S.D. 1980) (in which the South Dakota Supreme Court expressed no reservations about construing "utility" so broadly as to include an electric co-operative for purposes of eminent domain authority).

Tennessee*: TENN. CODE ANN. §§ 7-39-102(3), 7-39-201, 7-39-303(a)(4) (2011) (granting eminent domain rights to "energy acquisition corporations" that transmit *and* distribute energy); *id.* § 65-22-101 (2004); Webb v. Knox Cnty. Transmission Co., 225 S.W. 1046, 1046–48, 1050–51 (Tenn. 1920) (affirming the eminent domain

rights of a private company that served only to transmit electricity from an unaffiliated generation facility to a public service corporation, but prior to the enactment of relevant modern statutes). Tennessee courts upheld *Webb* in 1951 and 1990, after the enactment of applicable statutes, suggesting the lasting impact of this common law rule. *See* Middle Tenn. Elec. Membership Corp. v. Batey, No. 89-233-II, 1990 WL 6383, at * 3–4 (Tenn. Ct. App. Jan. 31, 1990).

Texas*: TEX. UTIL. CODE ANN. § 181.004 (West 2007); Motion for Issuance of Interim Orders, Complaint of Richard D. Bass Family Against Lone Star Transmission, LLC (No. 39,902), 2011 WL 5890724 (Tex. Pub. Util. Comm'n Nov. 16, 2011); Joint Response of Electric Transmission Texas, LLC and Staff to Order No. 4, Application of Electric Transmission Texas LLC (No. 39,902), 2009 WL 3698814, at Attachment A (Tex. Pub. Util. Comm'n Aug. 26, 2009) (revised notice from private transmission developer ETT to landowners informing them ETT has the power of eminent domain under Texas law).

Utah: UTAH CODE ANN. §§ 78B-6-501(8), 78B-6-505 (LexisNexis 2008 & Supp. 2012).

Virginia: VA. CODE ANN. §§ 56-1, 56-49(2), 56-265.1(b) (2012).

Washington: WASH. REV. CODE ANN. §§ 80.32.060, 80.32.080, 80.32.090 (West 2001); State *ex rel.* Woodruff v. Superior Court, 259 P. 379, 380 (Wash. 1927).

West Virginia*: W. VA. CODE ANN. §§ 54-1-1, 54-1-2(a)(2) (LexisNexis 2008); W. VA. CODE R. §§ 53-3-1 to 53-3-10 (2012); Potomac Edison Co. v. Jefferson Cnty. Planning & Zoning Comm'n, 512 S.E.2d 576, 580 (W. Va. 1998) (affirming right of "privately-owned power companies to take or damage private property for specified public uses"); Handley v. Cook, 252 S.E.2d 147, 148–49 (W. Va. 1979) (affirming the right of a privately-owned power company to exercise the power of eminent domain); *In re* Trans-Allegheny Interstate Line Co., 267 PUR 4th (PUR, Inc.) 169, 261–62 (W. Va. Pub. Serv. Comm'n Aug. 1, 2008) (supporting the eminent domain rights of an independent transmission company that charges cost-based rates), *order rescinded in part In re* Trans-Allegheny Interstate Line Co., No. 07-0508-E-CN, 2009 WL 3517729 (W. Va. Pub. Serv.

Comm'n Feb. 13, 2009); Firstenergy Corp. Allegheny Energy, Inc, 133 FERC ¶ 61,222, at 62,186 (2010); Trans-Allegheny Interstate Line Co., 119 FERC ¶ 61,219, at 62,280 (2007).

Wyoming*: WYO. STAT. ANN. § 1-26-815(a) (2011); Bridle Bit Ranch Co. v. Basin Elec. Power Co-op., 2005 WY 108, ¶¶ 1–3, 12, 118 P.3d 996, 998, 1003 (Wyo. 2005) (holding that a wholesale electric generation and transmission cooperative was not a public utility, and therefore did not need a certificate of public necessity and convenience, but that it exercise eminent domain regardless).