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On the Pulse of America: The Federal Government's Assertion of Jurisdiction over Electric Transmission Planning and Its Effect on the Public Interest

Alexander T. Dadok

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**On the Pulse of America: The Federal Government’s Assertion
of Jurisdiction over Electric Transmission Planning and Its
Effect on the Public Interest***

*“It is declared that the business of transmitting and selling electric
energy for ultimate distribution to the public is affected with a
public interest”*

—16 U.S.C. § 824(a) (2006)

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INTRODUCTION

Electricity is essential for our modern life, but paying a monthly electric utility bill significantly affects the financial situation of a great many Americans, from lower-income families to mighty industries. America's electricity grid—that network of towering transmission lines, transformers, and telephone-pole distribution that delivers electricity on demand to consumers nationwide—is an awe-inspiring machine that requires significant investments in modernization to ensure system reliability for residents, businesses, and critical medical and communications infrastructure.¹

Given the potential for substantial benefits and costs for American communities and industry, it is essential to carry out this investing equitably and efficiently. Planning how to invest, however, is fraught with controversy. That controversy is especially present in deciding whether to build additional transmission lines or make non-transmission investments such as more local “distributed” electric generation. The controversy in planning is amplified by a controversy over how to pay for whichever investment choice is made.

Proponents of constructing additional transmission, including some utility companies, federal policymakers, consumer groups, and many renewable energy advocates, contend that transmission can help ensure the long-term reliability of the grid.² Transmission can

1. See generally Ashley Halsey III, *Decrepit U.S. Power Grid Starts to Sputter*, WASH. POST, Aug. 2, 2012, at A1 (suggesting that the power grid is fragile enough that an overhaul is imminently necessary). The electric power supply chain from manufacturing to consumption can be separated into three parts. See LORRIN PHILIPSON & H. LEE WILLIS, *UNDERSTANDING ELECTRIC UTILITIES AND DE-REGULATION* 3 (2d ed. 2006). “Generation” is the actual manufacture of power. See *id.* “Transmission” is moving electric power on higher-voltage, larger lines to substations that step down the voltage for distribution. See *id.* at 6–7 (“Higher voltage lines cost more, require bigger towers and equipment and thus have a greater negative esthetic impact, but carry *much* more power: A line with twice the voltage carries four times as much power.”); DENISE WARKENTIN-GLENN, *ELECTRIC POWER INDUSTRY IN NONTECHNICAL LANGUAGE* 56 (2d ed. 2006). “Distribution” is distinguished from transmission as it involves moving power from those substations to homes and businesses, usually over the familiar poles on the side of the road. See PHILIPSON & WILLIS, *supra*, at 8.

2. See FRED BOSSELMAN ET AL., *ENERGY, ECONOMICS, AND THE ENVIRONMENT: CASES AND MATERIALS* 930 (3d ed. 2010) (noting the large distance from renewable power sources to concentrations of customers); Halsey III, *supra* note 2 (noting that power company executives, as well as James J. Hoecker, chairman of the Federal Energy Regulatory Commission during the Clinton administration, warned that without “significant . . . investment,” the country was “headed for some serious financial and economic difficulties”); Carl Zichella, *The Future of the Grid: Why Modernizing Our Nation's Aging Grid Is Critical*, SWITCHBOARD: NAT. RESOURCES DEF. COUNCIL STAFF BLOG (July 19, 2012), http://switchboard.nrdc.org/blogs/czichella/the_future_of_the_grid_why_mod.html. See generally JOSEPH P. TOMAIN & RICHARD D.

also provide consumers with access to lower-cost power.³ And productive yet remote sources of renewable wind and solar energy require transmission to reach population centers.⁴

Against these benefits, utility companies and consumer advocates, industry groups, and regulators worry about who will bear the substantial cost of additional transmission line construction.⁵ Concerned advocates and regulators fear subsidization of faraway energy sources and loss of control to the federal government, and landowners fear loss of their land to new construction.⁶ Some say that proponents' claimed benefits can be achieved without construction of large-scale transmission lines.⁷

Although some advocates support transmission so long as they do not feel unfairly burdened by the costs, others support non-transmission alternatives. These supporters claim that electricity may be better sourced locally to avoid costly transmission lines, avoid efficiency losses from long-distance transportation of electricity, promote growth and scaling of local renewable energy sources, and

CUDAHY, *ENERGY LAW* 367 (2d ed. 2011) (identifying utility interconnection as an accepted method to "promote economic efficiency and reliability").

3. See Promoting Regional Transmission Planning and Expansion to Facilitate Fuel Diversity Including Expanded Uses of Coal-Fired Resources, FERC Docket No. AD05-3-000 (May 13, 2005) (testimony of Karl Pfirrmann, President, PJM Western Region, PJM Interconnection, L.L.C.) (noting that wholesale power markets may offer better prices to consumers).

4. 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, 705-06 (2010) (noting the importance of increased transmission for renewable generation).

5. Historically, transmission costs are about twelve percent of total costs of electric power to consumers. See WARKENTIN-GLENN, *supra* note 1, at 55.

6. Cf. Request for Clarification, or in the Alternative, Rehearing of the Coalition for Fair Transmission Policy at 11, FERC Docket No. RM10-23-001 (Aug. 22, 2011) [hereinafter Coalition for Fair Transmission] (contending in the context of FERC Order No. 1000 that if transmission costs are broadly distributed, economic outcomes will be worsened as consumers of electric generation services do not price the cost of transmission into their buying decisions); Rachelle Channell, *Who Am I?*, PATH OF DESTRUCTION (POTOMAC APPALACHIAN TRANSMISSION HIGHLINE), <http://www.pathofdestruction.org/who-am-i.html> (last visited Feb. 21, 2013) (describing the efforts of one determined landowner, Rachelle Channell of West Virginia, to oppose a line which would take a 2200-foot right-of-way through her property).

7. See, e.g., Press Release, Coal. for Fair Transmission Policy, Coalition for Fair Transmission Policy's Sheridan Discusses Senate RES Decision (July 26, 2010), <http://www.thecftp.org/uploads/JM1.pdf>; John Farrell, *Why Developing Better Renewable Energy Isn't Enough*, CLIMATE PROGRESS (Sept. 22, 2011, 1:31 PM), <http://thinkprogress.org/romm/2011/09/22/325559/renewable-energy-roadblocks/>.

encourage local economic development that can accrue from nurturing those local sources.⁸

This Comment analyzes the technical transmission planning processes used to make decisions about this much-debated electric transmission system. Nationwide, no uniform process exists for making transmission construction decisions; planning processes are carried out in diverse variations by public utilities and transmission management entities, with varying levels of participation by regulating entities and stakeholder groups.⁹ Many of those who believe that benefits may be gleaned from increased transmission think that, in too many of these processes, the parties act parochially, slowing construction of new transmission needed to cope with increasing demands on the grid.¹⁰

The Federal Energy Regulatory Commission (“FERC”), the major federal regulator of electricity markets,¹¹ believes transmission decisions have not exhibited sufficient coordination.¹² FERC has worked for the past several decades to build competitive wholesale electricity markets to provide consumers with better rates, but those markets’ functionality depends on the existence of adequate infrastructure.¹³ FERC has found that existing planning processes can slow construction of needed transmission, permit higher selection of suboptimal transmission projects, and allow utilities more potential to discriminate and self-deal in electricity markets.¹⁴ FERC sees

8. See Press Release, Coal. for Fair Transmission Policy, *supra* note 7; Farrell, *supra* note 7. See generally Sanya Carley et al., *Energy-Based Economic Development*, 15 RENEWABLE & SUSTAINABLE ENERGY REVS. 282–95 (2011) (providing support for this claim).

9. See *infra* Part I.A. The term “stakeholder group” refers to any party that is a part of a transmission planning process but is not a “public utility transmission provider” as defined by FERC. See *infra* note 17.

10. See, e.g., Brown & Rossi, *supra* note 4, at 711; Hoang Dang, *New Power, Few New Lines: A Need for a Federal Solution*, 17 J. LAND USE & ENVTL. L. 327, 328 (2002) (“[I]n order to truly . . . expand the transmission system, federal jurisdiction over transmission must be expanded to allow the federal government to address the problems associated with expansion of the transmission grid.”).

11. See REGULATORY ASSISTANCE PROJECT, ELECTRICITY REGULATION IN THE US: A GUIDE 11 (2011), available at www.raonline.org/document/download/id/645; see also TOMAIN & CUDAHY, *supra* note 2, at 380.

12. See TOMAIN & CUDAHY, *supra* note 2, at 390.

13. See *infra* Part I.B. Just as a market for grain must be served by adequate roads, railroads, or waterways to make trade efficient enough to lower prices, electricity markets also require a sound infrastructure.

14. See TOMAIN & CUDAHY, *supra* note 2, at 391–92; *infra* Part I.B.; see also *Hearing on Legislation Regarding Electric Transmission Lines Before the S. Comm. on Energy & Natural Res.*, 111th Cong. 2 (2009) (statement of Jon Wellinghoff, Acting Chairman, Federal Energy Regulatory Commission) (“We need a national policy commitment to

electricity markets as regional, from which it follows that transmission planning must also be regional.¹⁵ FERC has therefore promulgated Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*,¹⁶ requiring “public utility transmission providers”¹⁷ to join regional transmission planning processes and to create a regional plan for transmission projects that regionally allocates those projects’ costs.¹⁸

Order 1000 has reverberated through the electric energy industry and the nation’s capital.¹⁹ It provoked widespread calls for rehearing and clarification by some utilities, states, and other parties interested in the consequences of transmission planning.²⁰ These opponents attack Order 1000 as bad policy and as an unlawful assertion of FERC’s authority that is not based on a proper factual foundation; they claim that Order 1000 will lead to higher costs for consumers, overconstruction of transmission lines, and impermissible subsidization of certain preferred renewable energy sources.²¹ Opponents are now appealing Order 1000.²²

develop an extra-high voltage, EHV, transmission infrastructure to bring renewable energy from remote areas where it’s produced most efficiently to our large metropolitan areas, where most of this Nation’s power is consumed.”).

15. Audio recording: Scott Hempling et al., *FERC’s Order 1000 Sets Transmission Policy: Landmark, Land Mine, or Both?*, National Regulatory Research Institute (Aug. 11, 2011) (on file with the North Carolina Law Review).

16. FERC Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35), *order on reh’g and clarification*, FERC Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012) (codified at 18 C.F.R. pt. 35), *order on reh’g and clarification*, FERC Order No. 1000-B, 141 FERC ¶ 61,044 (Oct. 18, 2012) (codified at 18 C.F.R. pt. 35). Although FERC Order 1000 mandates regional and interregional planning processes, FERC Order No. 1000, 77 Fed. Reg. at 49,846, this Comment avoids the clunky usage of the phrase “regional and interregional,” and instead simply discusses regional planning processes. An interregional process is a planning process between two regions approved under Order 1000. *Id.* at 49,842.

17. “Public utility transmission providers” are entities that own or operate transmission infrastructure, which are also regulated by FERC as public utilities under the Federal Power Act. *See* FERC Order No. 1000, 76 Fed. Reg. at 49,884 (“The term ‘public utility’ . . . means any person who owns or operates facilities subject to the jurisdiction of the [Federal Energy Regulatory] Commission under this subchapter. . . .” (citing 16 U.S.C. § 824(e) (2006))).

18. *See id.* at 49,844–45.

19. *See generally The American Energy Initiative: Electric Transmission Issues, Including Topics Related to the Siting, Planning, and Allocation of Costs for Electricity Transmission Infrastructure: Hearing Before the H. Comm. on Energy & Commerce*, 112th Cong. (2011) (dealing almost exclusively with FERC Order 1000).

20. *See* Linda R. Evers, *NARUC and 62 Others Concerned About FERC Order 1000*, SMART GRID LEGAL NEWS (Sept. 2, 2011), <http://www.smartgridlegalnews.com/transmission-1/naruc-and-62-others-concerned-about-ferc-order-1000/>.

21. *See, e.g.*, Petition for Rehearing of the Ad Hoc Coalition of Southeastern Utilities at 43, FERC Docket No. RM10-23-000 (Aug. 22, 2011) [hereinafter *Southeastern*].

This Comment argues, first, that although FERC is asserting new authority over transmission planning, a reviewing court would likely hold that FERC has not exceeded its statutory powers in this regard. Although FERC has historically not asserted its full grant of statutory jurisdiction in this area, Order 1000 more likely than not is consistent with FERC's authority to regulate transmission of electricity in interstate commerce. Second, this Comment argues that the changing nature of the industry and FERC Order 1000 itself may have exacerbated an existing problem with public interest representation in transmission planning. Public interest groups, such as consumer, renewable energy, and landowner groups, lack the time, expertise, and funding to adequately inform themselves and ensure that they are heard in the transmission planning process. Better including these groups in the transmission planning process offers a way toward a more equitable and efficient modernization strategy by reducing acrimony and making transmission planning and construction a more positive process. This Comment therefore proposes the creation of a regional planning "Public Staff Model" advocate to provide public interest representation in the Order 1000 process, which could help make Order 1000 a more beneficial policy change.²³

Part I of this Comment introduces the electric energy industry and its regulators, paying special attention to the interaction between the industry's transformation and the renewed interest in transmission planning. Part II analyzes FERC's statutory authority to promulgate Order 1000, and concludes that a reviewing court will likely find the Order to be consistent with FERC's statutory authority. Part III discusses the lingering public interest representation problem. It notes that regionalization does not remedy the representation problem, and may even decrease the opportunities for public interest parties to represent their interests as compared to other parties with greater resources. This Part posits that better

Utilities]; Request for Rehearing of the North Carolina Utilities Commission and the Public Staff of the North Carolina Utilities Commission at 6, FERC Docket No. RM10-23-000 (Aug. 22, 2011) [hereinafter North Carolina Utilities Commission].

22. S.C. Pub. Serv. Auth. v. FERC, No. 12-1232 (D.C. Cir. filed May 25, 2012).

23. This regional planning public advocate is a new iteration of the "Regional Public Advocate" idea proposed in 2007 in a more limited context by Michael H. Dworkin and Rachel A. Goldwasser. See Michael H. Dworkin & Rachel A. Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 595-96 (2007). Such a concept is now needed even more than when Dworkin and Goldwasser wrote in 2007, as regional planning will become mandatory nationwide. FERC Order No. 1000, 76 Fed. Reg. at 49,843.

including public interest groups in the transmission planning process would help confer the maximum benefits from Order 1000. In proposing the Public Staff Model reform to address the public interest representation problem, this Part also delves into the institutional considerations necessary to protect the public interest in this central sector of the economy.

I. STATE, LOCAL, AND INCREASING FEDERAL REGULATION OF THE TRANSFORMING ELECTRIC POWER INDUSTRY

A. *A Brief Introduction to the Structure of the Electric Power Industry and Its Regulation by States and Localities*

The historic state and local regulation over the developing electric power industry likely informs states' thinking about the deference they should be afforded in the regulation of electric power. In the initial development of electric utilities in the late nineteenth century and early twentieth century, local authorities carried out most utility regulation.²⁴ State regulators soon preempted local regulators after widespread problems of corruption, controversy over siting decisions, and utilities' frustration with the multiplicity of local regulations.²⁵

States' electric utility regulation traditionally consisted of common law rules, which had previously been imposed on public utilities by the courts.²⁶ These rules included a duty to serve the public within a fixed territory, over which the utility was given monopoly power, and a concurrent duty to provide adequate service and charge only reasonable rates.²⁷ The regulating authority set the rates that electric utilities could charge, and these rates could only cover the costs of those investments in utility infrastructure and other essential expenses that the regulatory authority approved for cost recovery.²⁸ Electric utility companies were traditionally vertically integrated, meaning that a utility company owned the three parts of the electric supply chain—generation, transmission, and distribution—and

24. See Brown & Rossi, *supra* note 4, at 707. Regulation of utilities by local governments focused mostly on land use issues. *Id.*

25. See BOSSELMAN ET AL., *supra* note 2, at 62.

26. See *id.* at 46.

27. *Id.*

28. See *id.*

included in its regulator-approved rate the costs of all parts of the supply chain “bundled” together.²⁹

In the 1980s, state regulators began to require utilities to submit to more vigorous regulation, which in many states took the form of a state integrated resource planning process.³⁰ The states that developed these integrated resource planning processes did so non-uniformly, but generally, the processes share certain characteristics: each is a “planning and selection process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency . . . and renewable energy resources, in order to provide adequate and reliable service to its electric customers at the lowest system cost.”³¹

Under state integrated resource planning, utilities must receive approval from the state utility regulator for their integrated resource plan, which usually describes the company’s projected loads and investments over a ten- to twenty-year time horizon.³² Pursuant to the requirements of integrated resource planning, utilities in most states must also return to the state regulator every several years to have updates approved.³³ Where states have required integrated resource planning processes, the plans are important in securing a state commission’s approval of utilities’ certificates of public convenience and necessity that utilities must obtain to construct.³⁴ Because

29. See *New York v. FERC*, 535 U.S. 1, 1 (2002) (noting that utilities were traditionally regulated over their “bundled” services, which included rate regulation over the cost of generation, transmission, and distribution); TOMAIN & CUDAHY, *supra* note 2, at 368–70 (describing the nature of the electric industry and how rates are regulated by states).

30. See RACHEL WILSON & PAUL PETERSON, SYNAPSE ENERGY ECONOMICS, A BRIEF SURVEY OF STATE INTEGRATED RESOURCE PLANNING 1 (2011), http://www.cleanskies.org/wp-content/uploads/2011/05/ACSF_IRP-Survey_Final_2011-04-28.pdf. Clean Skies Foundation is a non-profit advocating for greater use of natural gas. *About*, CLEAN SKIES, <http://www.cleanskies.org/about/> (last visited Feb. 21, 2013).

31. Energy Policy Act of 1992, Pub. L. No. 102-486, § 111(d)(19), 106 Stat. 2776, 2796 (codified as amended at 16 U.S.C. § 2602 (2006)) (defining the contours of the integrated resource plan that the federal government would use for evaluating public power systems, which was based on the states’ experiences).

32. See WILSON & PETERSON, *supra* note 30, at 7.

33. *Id.* at 8. For example, North Carolina requires a planning horizon of fifteen years and requires the utilities to return to the North Carolina Utilities Commission for approval every two years. Integrated Resource Planning and Filings, 4 N.C. ADMIN. CODE 11.R8-60 (2012).

34. See *State ex. rel. Util. Comm’n v. N.C. Elec. Membership Corp.*, 105 N.C. App. 136, 141, 412 S.E.2d 166, 169 (1992) (clarifying that in North Carolina, although the integrated resource plan is required of public utilities, it is no substitute for the requirement to obtain a certificate of public convenience and necessity); Preliminary Plans and Certificates of Public Convenience and Necessity, 4 N.C. ADMIN. CODE 11.R8-61

integrated resource planning requires that the full range of alternatives be included, a discussion of the transmission infrastructure to serve those alternatives must take place within the integrated resource planning process.³⁵ In addition, utilities must show that their investments were prudently incurred so that they can include the infrastructure costs in the rate base and recover those costs from ratepayers in their next general rate case.³⁶

The general increase in state regulatory oversight during the 1970s and 1980s also manifested itself in greater state assertion of authority over transmission siting.³⁷ Congress has generally not given federal regulators siting jurisdiction for electric transmission, and FERC is thought not to have siting authority in all except the narrowest of cases.³⁸

Transmission planning, however, remained primarily the function of individual utilities in almost all parts of the country until the 1990s.³⁹ And, in significant parts of the country, individual utilities have retained control over their transmission planning,⁴⁰ and will continue to do so until Order 1000 is implemented.⁴¹ Some utilities

(2012); Brown & Rossi, *supra* note 4, at 714–16 (noting that Colorado and many other states require a certificate of public convenience and necessity before major electric infrastructure may be constructed).

35. See, e.g., *N.C. Elec. Membership Corp.*, 105 N.C. App. at 139, 412 S.E.2d at 168 (summarizing North Carolina's integrated resource plan, where "[e]ach plan filed was required to . . . [give] due consideration to existing and new generating facilities, alternative energy resources, conservation and load management programs, purchased power, and transmission and distribution facilities"); cf. N.C. TRANSMISSION PLANNING COLLABORATIVE, REPORT ON THE NCTPC 2010–2020 COLLABORATIVE TRANSMISSION PLAN 12, 15 (2011), <http://www.nctpc.org/nctpc/document/REF/2011-01-19/2010-2020%20NCTPC%20Report%201-18-11%20FINAL.pdf> (recognizing the integration of transmission planning into overall integrated resource planning, the North Carolina state-level transmission planning process explicitly provides that "[t]he Collaborative Transmission Plan information is available to Participants for identification of any alternative least cost resources for potential inclusion in their respective Integrated Resource Plans").

36. REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 40–41.

37. See Brown & Rossi, *supra* note 4, at 708–10.

38. See *id.* at 745. Congress did grant limited backstop siting authority in 2005, but even this limited authority has been further circumscribed by the Fourth Circuit to the point where its practical effect is negligible. See *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 315 (4th Cir. 2009).

39. See REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 66; see also, e.g., *Miss. Power & Light Co. v. Conerly*, 460 So. 2d 107, 111 (Miss. 1984) (describing the public utility transmission working group's meeting minutes where the public utility determined the need for transmission construction and the transmission line that would fulfill that need).

40. See REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 66–67.

41. See FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,842 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

that retained individual control over their transmission planning did embark on voluntary collaborative planning processes with others in their states or regions.⁴² The projects that result from these processes represent the utilities' forecasts of where transmission is needed to connect generation to consumers or otherwise support demand or achieve reliability.⁴³ The utilities can recover only the costs of approved infrastructure from ratepayers, so each individual utility has an incentive to build their preferred transmission into their state integrated resource plan.⁴⁴

The importance of transmission planning is that, subject to state regulatory approval, any utility's or other transmission-managing entity's transmission plan effectively makes the decisions about transmission construction, the generation that will serve consumers, and cost allocation of transmission lines.⁴⁵ For example, *Mississippi Power & Light Co. v. Conerly*⁴⁶ relates a tale of how important transmission planning is for approval of a utility's infrastructure. There, Mississippi Power & Light ("MP&L") had planned to build the high-voltage line from Mississippi to the Louisiana border, where it would connect to another line to sell power to New Orleans customers.⁴⁷ MP&L justified the need on reliability grounds.⁴⁸ The utility had included the line in its regional planning process, and the line had been granted cost recovery by the Mississippi Public Service Commission.⁴⁹ MP&L planned to charge the \$24 million cost of the line to Mississippi ratepayers "even though not one Mississippi

42. For example, there is a North Carolina Transmission Planning Collaborative (NCTPC) consisting of Duke Energy Carolinas, Progress Energy Carolinas, Inc., North Carolina Electric Membership Corporation, and Electricities of North Carolina, as well as other stakeholders. N.C. TRANSMISSION PLANNING COLLABORATIVE, *supra* note 35, at 1. These groups, all within the state of North Carolina, work together for enhanced transmission planning, reliability, and least-cost cost allocation. *See id.* This program has a detailed iterative planning process, with several committees that meet to consider the issues of reliability and enhanced transmission access. *See id.* at 4, 7–8. Because the planning groups are located within North Carolina, the transmission projects approved by the planning process are overwhelmingly focused on in-state transmission planning. *See id.* at 65 (listing the projects considered by the transmission planning collaborative).

43. *See, e.g., id.* at 65–80 (providing a list of projects resulting from one planning process and noting the progress in each project).

44. *See* Southeastern Utilities, *supra* note 21, at 42 ("Historically, transmission planning has been the basis for the long-term expansion of the [transmission] system, leading to transmission siting and construction decisions and the effectuation of resource planning decisions."); REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 36.

45. *See* Southeastern Utilities, *supra* note 21, at 42–44.

46. 460 So. 2d 107 (Miss. 1984).

47. *Id.* at 108.

48. *See id.* at 112.

49. *See id.*

customer [would] receive electricity” from the proposed transmission line.⁵⁰ Because the line would not provide electricity to Mississippi customers, the Supreme Court of Mississippi ruled that the line did not constitute a sufficiently public purpose and revoked the project’s eminent domain authority.⁵¹ The case illustrates how easily the results of a utility’s transmission planning processes can move through the normal regulatory process and gain cost recovery.

It is true that a utility need not bring the projects approved in any utility’s (or group of utilities’) transmission planning process to the states’ integrated resource planning process,⁵² to the cost recovery determination in a rate case, or to a attempt to secure siting approval. Nevertheless, these projects are the ones that will be available in any formal, planned manner. It is these proposals the utilities will take to the state regulators for siting approval and cost recovery decision-making and based upon need to move power to customers.⁵³ Thus, the projects that emerge from transmission planning processes have a disproportionate likelihood of being approved in the other state regulatory processes.⁵⁴ Once the transmission planning is complete, groups that might like to change the nature of the transmission system, rather than just the precise location of a proposed line, have effectively already lost the opportunity for meaningful input. Their

50. *Id.*

51. *Id.* at 113.

52. For one example of how the transmission planning process interacts with the integrated resource plan process on paper, see N.C. TRANSMISSION PLANNING COLLABORATIVE, *supra* note 35, at 12 (“The Collaborative Transmission Plan information is available to Participants for identification of any alternative least cost resources for *potential* inclusion in their respective Integrated Resource Plans.” (emphasis added)). The reality, as this Comment explains, is quite different.

53. See Southeastern Utilities, *supra* note 21, at 42. These planned projects are also the ones that will enter the National Environmental Policy Act (NEPA) process if a major new transmission line is contemplated. But once the NEPA process is embarked upon, the project is already envisioned and the most effective times for changing the nature of the project have passed. See generally *Siting, NEPA, and Permitting: Understanding the Process*, TRI-STATE GENERATION & TRANSMISSION ASS’N, http://www.tristategt.org/transmission/documents/NEPA_Siting_T-S_general.pdf (last visited Feb. 21, 2013) (providing an example of how public utility transmission providers see the NEPA process as part of the post-planning siting process).

54. See generally *Miss. Power & Light Co.*, 460 So. 2d 107 (providing an example of state public utility commission approval of a utility’s transmission construction plan to fit the utility’s planning process, even though it arguably did not directly benefit in-state consumers). Cf. *Report of the System Reliability, Planning, and Compliance Committee*, 30 ENERGY L.J. 831, 862 (2009) (“Transmission planning is a critical function . . . because it is the means by which customers consider and access new sources of energy and have an opportunity to explore the feasibility of non-transmission alternatives.” (quoting FERC Order No. 890, 72 Fed. Reg. 12,266, 12,267 (Mar. 15, 2007) (codified at 18 C.F.R. pts. 35, 37))).

absence in the early stages of the process has negative effects later in the process.

Given the importance of utilities' decision-making in the transmission planning processes, it is understandable why FERC believes that the transmission planning process is a central focus for reform. Some utilities that control transmission planning have low-cost generation and at the same time are not interested in building additional generation capacity to export their power.⁵⁵ These utilities fear that transmission capacity would simply add costs to their rates. Consequently, the utilities may not favor construction of large transmission lines and can manage their planning process accordingly. Other utilities that want to emphasize local sources of power, local renewables development, or energy efficiency could have relatively little interest in regional transmission lines.⁵⁶ And utilities that have higher-cost generation may have little impetus to open discussions about interstate transmission lines that would allow less-expensive generation to undercut their own.⁵⁷ On the other hand, some utility companies might be more interested in constructing large transmission lines if these utilities can export their power and can show that benefits will flow in part toward other utilities, and therefore hope that other utilities will bear some of the costs.⁵⁸ In sum, the ability to plan and operate transmission allows transmission owning and operating entities to have a great say in the decision of how grid modernization and capacity growth will occur, and who will pay.

55. See Comments of Southern Company Services, Inc. at 9–13, FERC Docket No. RM10-23-000 (Sept. 29, 2010) (describing planning in the Southeast that results in “construct[ing] generation near to load, resulting in there being little need for vast, interregional transmission lines”); REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 66.

56. See Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1041–43 (2009) (noting likely ramifications of overbuilding transmission lines for some utilities and ratepayers).

57. See FERC Order No. 890, 72 Fed. Reg. at 12,318 (“A transmission provider also does not have an incentive to increase the import or export capacity of its transmission system if doing so would allow cheaper power to displace its higher cost generation or otherwise make new entry more profitable by facilitating exports.”).

58. See, e.g., Farrell, *supra* note 7 (pointing to the ratepayer-funded subsidization of long-distance transmission lines that was protested by ten eastern state governors in a letter to Congress).

B. The Move to Competitive Wholesale Power Markets, the Federal Government's Increased Regulatory Role, and FERC Order 1000

Pursuant to the Commerce Clause of the United States Constitution,⁵⁹ Congress passed Part II of the Federal Power Act ("FPA") in 1935.⁶⁰ Since then, FERC has had authority over "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce."⁶¹ FPA section 201(d) defines wholesale electricity sales as "a sale of electric energy to any person for resale."⁶² Wholesale sales mostly consist of electric generators selling power to each other on the wholesale electric markets, and to load-serving entities pursuant to long-term contracts, as electric utilities attempt to secure the lowest price of electricity to resell to their retail customers at state commission-approved retail rates.⁶³ In contrast, retail electricity sales are sales to end users,⁶⁴ and FPA section 201(b) states that federal regulation "shall not apply to any other [non-wholesale] sale of electric energy."⁶⁵ Congress provided that federal authority would "extend only to those matters which are not subject to regulation by the states."⁶⁶ Congress specifically exempted from federal regulation "facilities used for the generation of electric energy or over facilities used in local distribution."⁶⁷ Thus, the 1930s-era electric supply chain industry was divided, with generation and distribution and bundled retail service to be controlled by the states, and wholesale and unbundled transmission in interstate commerce controlled by the federal government.

Congress also gave FERC the responsibility, which continues today, of ensuring that the electric rates subject to its jurisdiction (i.e.

59. U.S. CONST. art. I, § 8, cl. 3.

60. Ch. 687, tit. II, 49 Stat. 838 (codified as amended in scattered sections of 16 U.S.C.). Federal regulation of interstate electricity transmission was carried out through the Federal Power Commission (FPC), which after 1977 was reorganized into FERC. *See* Department of Energy Organization Act, Pub. L. No. 95-91, §§ 401–402, 91 Stat. 565, 582–83 (codified as amended at scattered sections of 42 U.S.C.); TOMAIN & CUDAHY, *supra* note 2, at 142, 159. This Comment will refer to FERC, although it may be that only the FPC existed during the referenced time period.

61. Federal Power Act, 16 U.S.C. § 824(b)(1) (2006); *see also* TOMAIN & CUDAHY, *supra* note 2, at 374.

62. 16 U.S.C. § 824(d).

63. *See* REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 10 (noting that distribution-only utilities buy their power from upstream wholesale providers).

64. *See* PHILIPSON & WILLIS, *supra* note 1, at 304.

65. 16 U.S.C. § 824(b)(1).

66. *Id.* § 824(a).

67. *Id.* § 824(b)(1).

“the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce”⁶⁸) are just and reasonable, and not discriminatory, in FPA section 205.⁶⁹ Complimentarily, FPA section 206 requires that “for any transmission or sale subject” to FERC’s jurisdiction, when FERC finds rates, or a “practice . . . affecting such rates,” unjust, unreasonable, or exhibiting undue discrimination, it “shall determine the just and reasonable rate [or] practice . . . and shall fix the same by order.”⁷⁰ These two sections have formed the basis for FERC’s recent regulation at issue in this Comment.⁷¹

The dual federal authority in two overlapping but distinct spheres—transmission and wholesale electric energy sales—has been a source of conflict. The problem was litigated in the United States Supreme Court as recently as 2002 in *New York v. FERC*.⁷² Here, FERC claimed that FPA section 206’s grant constituted sufficient authority to order public utility transmission providers to provide open access to any transmission lines, i.e. transmit any generator’s electricity, over any interstate transmission facility used to offer unbundled service,⁷³ whether wholesale or retail.⁷⁴ This assertion under FPA section 206 seemed, to opponents of FERC’s action, to exceed the statutory language dealing with rates or practices in wholesale sales given that FPA section 201(a) withheld federal authority from extending to matters regulated by the states, such as retail sales.⁷⁵ Nevertheless, on the logic that the electrons’ physical flow in the transmission system does not conform to state

68. *Id.*

69. *See id.* § 824d(a) (“All rates . . . by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.”); *id.* § 824d(b) (“Preference or advantage unlawful—No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.”).

70. *Id.* § 824e(a).

71. *See infra* notes 86–112 and accompanying text.

72. 535 U.S. 1 (2002).

73. When utilities “unbundle” their services (i.e., generation, transmission, distribution, etc.), they separate the operations and accounting of each service and seek rate recovery for each service separately. *See* BOSSELMAN ET AL., *supra* note 2, at 511, 522–23.

74. *New York v. FERC*, 535 U.S. at 11.

75. *See id.* at 22–24. *See generally* Federal Power Act, 16 U.S.C. § 824(a) (2006) (limiting the scope of FERC’s authority to matters not subject to regulation by the states); *id.* § 824(b)(1) (limiting the scope of FERC’s authority over sales for wholesale).

boundaries,⁷⁶ the Court upheld FERC's authority over unbundled transmission of electric energy for *retail* sales in interstate commerce, despite that such authority was not explicitly granted by FPA section 206 and could be said to be undermined by the FPA section 201(a) language.⁷⁷ The Court held that FERC had authority to ensure just and reasonable rates in electric transmission in interstate commerce.⁷⁸ The majority explained in dicta that "the landscape of the electric industry has changed since the enactment of the FPA" and that the Court had in the past interpreted FERC's authority over transmission broadly,⁷⁹ implying it would do so again.

Indeed, since the late 1970s, with the passage of the Public Utility Regulatory Policies Act of 1978 ("PURPA"),⁸⁰ the electric industry has been transforming. Congress, the executive branch, and especially FERC have been steadily moving the industry toward using competitive wholesale markets for electricity sales.⁸¹ Many energy regulators believe that wholesale markets offer robust benefits to consumers, where wholesale buyers can reliably purchase less expensive energy from suppliers across the nation and then sell at

76. *New York v. FERC*, 535 U.S. at 32 n.5, 33.

77. *Id.* at 22–24.

78. *Id.* at 14, 19–20.

79. *Id.* at 15–16 ("The Court of Appeals concluded that the plain language of § 201 of the FPA, which this Court has construed broadly, supported FERC's regulation of transmissions in interstate commerce [through § 206] that were part of unbundled retail sales, as § 201 gives FERC jurisdiction over the 'transmission of electric energy in interstate commerce.' Even if the FPA were ambiguous, the Court of Appeals explained that, given the technological complexities of the transmission grid, it would have deferred to the Commission's interpretation of § 201 'as giving it jurisdiction over both wholesale and retail transmissions.' " (citation omitted)); see also Isaac D. Benkin, *Who Makes the Rules? Federal and State Jurisdiction over Electric Transmission Access*, 13 ENERGY L.J. 45, 49 (1992); cf. William L. Massey et al., *Reliability-Based Competition in Wholesale Electricity: Legal and Policy Perspectives*, 25 ENERGY L.J. 319, 325–26 (2004) (arguing that the recognition of FERC's broad authority over transmission implicates FERC's authority in other areas regulated by the FPA, such as mandatory reliability).

80. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 7, 15, 16, 42, and 43 U.S.C.).

81. See Samuel R. Brumberg, Note, *Getting the Camel out of the Tent: Behind the Federal Energy Regulatory Commission's Rise to Power and the Importance of States' Continued Regulatory Oversight*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 691, 698–99 (2006) (describing the major consequences of PURPA, including the implications for wholesale competition). With respect to wholesales, PURPA's main contribution was to require public utility companies to purchase electricity from co-generation sources under certain circumstances. *Id.* For example, if a paper mill produced steam as a by-product, it could use co-generation to generate electricity and a public utility company would have to buy that electricity. *Id.*

better prices to consumers.⁸² However, other market participants do believe that wholesale competition has seriously harmed consumers by allowing companies to overcharge consumers.⁸³

FERC and proponents of wholesale markets made some progress toward competitive markets when Congress provided the regulatory framework to force open the competitive market for all wholesale power generators in the Energy Policy Act of 1992 ("EPAAct 1992").⁸⁴ EPAAct 1992 amended the FPA to give FERC authority to order utilities, on a case-by-case basis, to provide open access to their transmission lines.⁸⁵ Up to this point, vertically integrated utilities controlled their entire transmission infrastructure for their proper benefit; they could blatantly discriminate and even forbid other generators from selling power through their lines.⁸⁶

In 1996, FERC concluded that to remedy this still-ongoing discrimination, it needed to open up the wholesale markets by requiring all utilities to provide open access, for wholesale purposes, to their transmission lines.⁸⁷ Finding the limited remedial authority granted in EPAAct 1992 insufficient, FERC depended on its FPA section 206 authority to issue Order No. 888 to require open-access transmission on a wholesale market-wide basis.⁸⁸ Order 888 also required that utilities unbundle transmission and generation, which

82. See, e.g., Cassandra Burke Robertson, Article, *Bringing the Camel into the Tent: State and Federal Power over Electricity Transmission*, 49 CLEV. ST. L. REV. 71, 87 (2001). There are additional reasons that competitive wholesale markets are desirable public policy. See BOSSELMAN ET AL., *supra* note 2, at 612–14. Competition in wholesale power markets can be more efficient than regulating utilities as monopolies, if carried out correctly. David B. Spence, *The Politics of Electricity Restructuring: Theory v. Practice*, 40 WAKE FOREST L. REV. 417, 418, 442 (2005). Although electric distribution and transmission are almost universally considered natural monopolies—monopolies justified economically by their increasing returns to scale—the sale of that electricity is not a natural monopoly. See *id.* at 422. This was amply demonstrated when public utilities were forced to buy power from smaller co-generation plants and smaller renewable power producers beginning in the late 1970s, and these smaller plants were able to operate as efficiently as the larger utilities. TOMAIN & CUDAHY, *supra* note 2, at 379–82 (describing the effects of PURPA). Therefore, from an economic perspective, the sale of generated power on wholesale markets need not be regulated as if it were a natural monopoly. *Id.*

83. See, e.g., AM. PUB. POWER ASS'N, CONSUMERS IN PERIL: WHY RTO-RUN ELECTRICITY MARKETS FAIL TO PRODUCE JUST AND REASONABLE ELECTRIC RATES 1–4 (2008), available at <http://appanet.cms-plus.com/files/PDFs/ConsumersinPeril.pdf>.

84. Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 12, 16, 26, and 42 U.S.C.).

85. *Id.* § 721, 106 Stat. at 2915.

86. See TOMAIN & CUDAHY, *supra* note 2, at 384–85.

87. See *New York v. FERC*, 535 U.S. 1, 10–12 (2002).

88. FERC Order No. 888, 61 Fed. Reg. 21,540, 21,541 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

vertically integrated utilities had previously managed and offered as a bundled service.⁸⁹

After ordering open-access transmission, FERC saw the absence of construction of new transmission lines as a major remaining barrier to a fully competitive wholesale electricity market, including bringing renewables online.⁹⁰ In December 1999, FERC promulgated Order No. 2000 to create the requirements for an entity to be known as a Regional Transmission Organization (“RTO”) and to encourage public utilities to join these new entities.⁹¹ RTOs were created as organizations of two or more “public utilities . . . that own, operate, or control interstate transmission facilities” and meet the requirements set out by FERC.⁹² The idea behind the RTO concept was to move the management of transmission assets away from public utilities, which might be tempted to discriminate in making transmission decisions, including where and when to construct transmission.⁹³

To that end, FERC required all public utility transmission providers to file a proposal for becoming part of an RTO, or “a description of efforts to participate in an RTO, any existing obstacles to RTO participation, and any plans to work toward RTO participation.”⁹⁴ To be designated as an RTO under Order 2000, an organization needed to possess twelve minimum characteristics and functions focusing on the organization’s independence from utilities,

89. See WARKENTIN-GLENN, *supra* note 1, at 124; see also FERC Order No. 888, 61 Fed. Reg. at 21,552.

90. See TOMAIN & CUDAHY, *supra* note 2, at 390–91; cf. Catherine Connors, *Transmission Preemption*, PUB. UTILITIES FORTNIGHTLY, Nov. 2010, at 48 (noting that the major goal of FERC Order No. 2000 was more efficient transmission planning).

91. FERC Order No. 2000, 65 Fed. Reg. 810, 811 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35). FERC acted under its FPA section 205 authority to ensure that rates, terms, and conditions of transmission for interstate commerce are just, reasonable, and not unduly discriminatory, as well as FERC’s authority under FPA section 202(a) to promote voluntary interconnection of transmission facilities by public utilities and non-public utilities. *Id.*

92. FERC Order No. 2000, 64 Fed. Reg. 31,390, 31,391 (proposed June 10, 1999) (codified at 18 C.F.R. pt. 35); see also FERC Order No. 2000, 65 Fed. Reg. at 945; TOMAIN & CUDAHY, *supra* note 2, at 390 (describing RTOs generally). RTOs typically take the form of non-profit Independent System Operators (ISOs), which existed and were regulated prior to Order 2000; however, Order 2000 imposed additional process and planning conditions for RTOs. See TOMAIN & CUDAHY, *supra* note 2, at 392–93.

93. *Id.* at 392–95.

94. FERC Order No. 2000, 65 Fed. Reg. at 812. FERC claimed the integration into RTOs to be voluntary, and although parties disputed the voluntariness, the D.C. Circuit ultimately affirmed the Order and the voluntary nature of RTO relationship in *Public Utility District No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 616 (D.C. Cir. 2001).

capacity, and engagement in coordination.⁹⁵ These requirements made the RTO a defined institution with certain characteristics and a set governance structure.⁹⁶ Some utilities voluntarily joined together to create RTOs, but in parts of the country, utility companies resisted joining RTOs for some of the same reasons they have resisted Order 1000.⁹⁷

In 2002, FERC proposed a new rulemaking, Standard Market Design (“SMD”), the relevant part of which mandated that all public utilities under FERC’s jurisdiction join an RTO and for all RTOs to carry out regional transmission expansion policies.⁹⁸ Given the strong objections to SMD from the states that believed the federal government was exceeding its authority,⁹⁹ FERC abandoned this effort when it decided to focus on securing passage of the EPAct of 2005.¹⁰⁰

The most recent major FERC Order on transmission planning before Order 1000 was Order No. 890,¹⁰¹ initially promulgated in 2007, which applied to the planning processes of all public utility transmission providers (and in certain cases, to those of non-public

95. The minimum characteristics for an RTO included independence, scope and regional configuration, operational authority, and short-term reliability. FERC Order No. 2000, 65 Fed. Reg. at 152. The minimum functions for an organization to be approved as an RTO as outlined under Order 2000 were: “administer[ing] its own tariff and employ[ing] a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities;” ability to manage congestion; ability to address parallel path flow issues within the grid; ability to offer ancillary services of last resort; the degree of total transmission capability and available transmission capability; and abilities to engage in market monitoring, planning, and coordination of expansion of transmission. *Id.* at 323–24.

96. See generally Dworkin and Goldwasser, *supra* note 23 (discussing the structure of RTOs).

97. See, e.g., Rosy Lum, *Duke Progress Deal Hits Roadblocks*, ENERGYBIZ (Dec. 19, 2011), <http://www.energybiz.com/article/11/12/duke-progress-deal-hits-roadblocks> (reporting that “[t]he South has traditionally had some of the lowest rates in the country,” and that “[t]he South says there’s nothing for it to gain from [joining an RTO], and the RTOs are expensive”).

98. TOMAIN & CUDAHY, *supra* note 2, at 399.

99. Telephone Interview with Gisele Rankin, Staff Attorney, Pub. Staff of the N.C. Util. Comm’n (Nov. 3, 2011).

100. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified in scattered chapters of the U.S.C.); TOMAIN & CUDAHY, *supra* note 2, at 399–400 (“[I]n connection with efforts to secure the passage of the 2005 Energy Policy Act, the FERC terminated the SMD proceeding.”).

101. FERC Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007) (codified at 18 C.F.R. pts. 35, 37), *order on reh’g*, Order No. 890-A, 73 Fed. Reg. 2,984 (Dec. 28, 2007) (codified at 18 C.F.R. pts. 35, 37), *order on reh’g*, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008) (codified at 18 C.F.R. pts. 35, 37), *order on reh’g*, Order No. 890-C, 74 Fed. Reg. 12,540 (Nov. 25, 2009) (codified at 18 C.F.R. pts. 35, 37), *order on clarification*, Order No. 890-D, 74 Fed. Reg. 61,511 (Nov. 19, 2009) (codified at 18 C.F.R. pts. 35, 37).

utility transmission providers), including those of FERC-approved RTOs.¹⁰² The Order implemented more specific guidelines and specified stakeholder treatment in the transmission planning process.¹⁰³ Among other characteristics, it aimed to ensure that any transmission planning process engaged in by transmission providers was well-coordinated, open, and transparent.¹⁰⁴ In terms of openness, Order 890 required that the planning process generally be open to all stakeholders in addition to transmission providers and state regulators.¹⁰⁵ Order 890 also required transparency: data, methodology, and transmission modeling had to be reducible to writing and made available to any stakeholder.¹⁰⁶

FERC Order 1000 thus represents the latest iteration of a series of FERC reforms that FERC hopes will support competitive wholesale markets, reduce any opportunities for discrimination, and provide lower rates to consumers. The transmission planning regime under Order 1000 strikingly differs from Order 890 and previous orders because Order 1000 requires that *all* public utility transmission providers participate in a regional transmission planning process with regional cost allocation.¹⁰⁷ It does not generally allow entities to file in their FERC tariff a reason for not joining the process, like Order 2000, nor does it modify the existing RTO structure and again encourage voluntary collaboration, like Order 890.¹⁰⁸ Order 1000 universally requires public utility transmission providers to create a regional transmission plan that incorporates the majority of the Order 890 planning principles, and to allocate the costs of transmission

102. FERC Order No. 890, 72 Fed. Reg. at 12,279, 12,285.

103. *See id.* at 12,279.

104. *Id.* Order 890 emphasized eight principles, of which principles (1)–(6) and (8) were then incorporated as required into the Order 1000 regional transmission planning processes: (1) coordination; (2) openness; (3) transparency; (4) information exchange; (5) comparability; (6) dispute resolution; (7) regional participation; and (8) congestion studies. *Id.* at 12,319; FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,854–55 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

105. FERC Order 890, 72 Fed. Reg. at 12,323.

106. *Id.* at 12,324 (“[T]ransmission providers will be required to reduce to writing and make available the basic methodology, criteria, and processes they use to develop their transmission plans.”). Order 890 further stated that this “information should enable customers, other stakeholders, or an independent third party to replicate the results of planning studies and thereby reduce the incidence of after-the-fact disputes regarding whether planning has been conducted in an unduly discriminatory fashion.” *Id.* at 12,324–25.

107. *See* FERC Order No. 1000, 76 Fed. Reg. at 49,854, 49,868–69.

108. *See id.* at 49,868.

projects regionally through this planning process.¹⁰⁹ In the sense of being universally required, Order 1000 more closely resembles the aborted SMD proceeding, albeit with a more nuanced touch, as it focuses only on requiring certain parameters for planning processes.

Order 1000 builds on the Order 890 principles. It emphasizes coordination and communication between transmission providers in the regional transmission plan, as well as coordination with customers, affected state authorities, and other stakeholders.¹¹⁰ Order 1000 directs that customers and other stakeholders be given a meaningful opportunity to participate, and not merely to comment, which means participating early enough in the process to matter,¹¹¹ but it stops short of requiring any set number of meetings or mandating the content of those meetings.¹¹² It requires that the transmission planning process be open and transparent.¹¹³ Order 1000 also requires that non-transmission solutions be considered on a comparable basis with transmission solutions.¹¹⁴ With their emphasis on coordination, openness, transparency, and comparability, these Order 1000 planning principles mark a clear good-faith attempt to prioritize inclusion of all stakeholder groups in the new, required regional planning processes.

FERC Order 1000 was promulgated under FPA section 206 and its directive to FERC to remedy practices affecting a rate in wholesale electric energy sales that are unjust, unreasonable, or unduly discriminatory.¹¹⁵ FERC continues to believe that consumers benefit from “just and reasonable rates” when vigorous wholesale

109. *See id.* at 49,868–69. FERC does not stipulate how large the regions must be, but says they must be larger than the geographic scope of one utility. *Id.* at 49,868. The regions are listed in the compliance tariffs filed at FERC. The decisions about cost allocations are critical to determining whether a transmission project will go forward because they will determine whether the project can be paid for. *See* Southeastern Utilities, *supra* note 21, at 43.

110. *See* FERC Order No. 1000, 76 Fed. Reg. at 49,868–70; James J. Hoecker, *Transmission Planning—A New Lever for the FERC?*, NAT. GAS & ELECTRICITY, Aug. 2007, at 21.

111. FERC Order No. 1000, 76 Fed. Reg. at 49,868.

112. *Id.*

113. *Id.*

114. *Id.*

115. 16 U.S.C. § 824e(a) (2006). Order 1000 is “intended to improve transmission planning processes and cost allocation mechanisms . . . to ensure that the rates, terms and conditions of service provided by public utility transmission providers are just and reasonable and not unduly discriminatory or preferential.” FERC Order No. 1000, 76 Fed. Reg. at 49,844–45.

competition is present, and it hopes to support that competition with planning processes that facilitate better infrastructure decisions.¹¹⁶

II. FERC'S ORDER 1000 TRANSMISSION PLANNING REFORMS ARE UNLIKELY TO BE REVERSED FOR EXCEEDING THE AGENCY'S STATUTORY AUTHORITY

Despite the emphasis on coordination and openness of Order 1000's required planning process, some utilities, states, and other groups remain opposed to FERC's transmission planning reforms.¹¹⁷ These opponents have a number of understandable concerns. Some believe that FERC's regional planning process directives will complicate the utilities' own transmission planning and redistribute the costs of transmission from remote renewable energy sources to states that have other policy priorities, including encouraging local renewables or prioritizing lower rates.¹¹⁸ Some utilities are also concerned about overbuilding transmission because it might make state regulators reluctant to include the vertically integrated utilities' own prioritized transmission projects in cost recovery.¹¹⁹ These utilities, together with states, worry about the *de facto* FERC regulation of transmission siting decisions, previously discussed, which would constrain the utilities' overall business strategy and state regulators' own siting power.¹²⁰ Finally, some states see the regional planning process as unaccountable and one that will indirectly and unlawfully preempt state jurisdiction over core public utility services

116. Hempling et al., *supra* note 15, at 5:50.

117. Perhaps not surprisingly, many of the critics of Order 1000 hail from areas where it affects the greatest change from business-as-usual: the Western and Southeastern United States, where the electric utilities have generally participated less in RTOs. See *Regional Transmission Organizations (RTO)/Independent System Operators (ISO)*, FERC, <http://www.ferc.gov/industries/electric/indus-act/rto.asp> (last visited Feb. 21, 2013). The transmission planning requirements of Order 1000 are similar to those requirements already implemented by the RTOs' transmission planning processes. Hempling et al., *supra* note 15.

118. See Southeastern Utilities, *supra* note 21, at 42; Coalition for Fair Transmission, *supra* note 6, at 5; Rossi, *supra* note 56, at 1041–43; Press Release, Statement on the Introduction of the Electric Transmission Customer Protection Act, Coal. for Fair Transmission Pol'y (Feb. 18, 2011), available at http://thecftp.org/uploads/CFTP_Corker_statement_2-18-11_Final.docx ("Socializing the costs of transmission lines to access remote renewable resources amounts to an expensive subsidy for some renewable energy developers that distorts the marketplace, and ultimately results in higher electricity prices for everyone.").

119. See Southeastern Utilities, *supra* note 21, at 57.

120. See *id.* at 43; South Carolina Office of Regulatory Staff, RE: Docket No. RM10-23-000—Transmission Planning and Cost Allocation by Transmission and Operating Public Utilities at 2, FERC Docket No. RM10-23-000 (Aug. 22, 2011); North Carolina Utilities Commission, *supra* note 21, at 1–2.

and protection of consumers.¹²¹ Although as discussed above, there is a possibility that some opponents could be taking a self-serving position against efficient and equitably funded transmission construction, that does not diminish the force of these critiques of FERC Order 1000. However, the true extent of the actual economic benefits and costs of this newly promulgated reform is outside the scope of this Comment.

To avoid these perceived undesirable policy outcomes, opponents of Order 1000 filed comments with FERC containing legal arguments to position themselves for appellate review. Many of these parties have appealed Order 1000 to the United States Court of Appeals for the D.C. Circuit.¹²² Critics hope for at least a remand of Order 1000 for being an agency action “not in accordance with law” and “arbitrary and capricious” under Administrative Procedure Act (“APA”) section 706(a)(2).¹²³

This Part proceeds to analyze whether FERC is likely to be reversed for exceeding its statutory authority. It concludes, applying the familiar framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹²⁴ and its progeny,¹²⁵ that Congress has probably not directly spoken to the issue, that Order 1000 is a reasonable interpretation of the statute, and that FERC is not likely to be

121. See, e.g., North Carolina Utilities Commission, *supra* note 21, at 9–10; Request for Rehearing and Clarification of the National Association of Regulatory Utility Commissioners at 3–4, FERC Docket No. RM10-23-000 (Aug. 22, 2011); cf. South Carolina Office of Regulatory Staff, *supra* note 120, at 2 (supporting the comments of the Petition for Rehearing of the Ad Hoc Coalition of Southeastern Utilities).

122. S.C. Pub. Serv. Auth. v. FERC, No. 12-1232 (D.C. Cir. filed May 25, 2012).

123. 5 U.S.C. § 706(2)(A) (2006). This Comment does not reach the argument that Order 1000 was arbitrary and capricious under *Motor Vehicle Manufacturers Association of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), either for failure to address an important regulatory alternative or failure to respond to important evidence presented against the agency. See *id.* at 30–31. It is beyond this Comment’s scope to evaluate the voluminous evidence required to make a determination of such a question. It should be noted that in denying rehearing in Order 1000-A, released in May 2012, FERC paid greater attention to addressing whether Order 1000 was in fact based on substantial evidence rather than conjecture, and spent relatively less time discussing whether it exceeded its statutory authority. See FERC Order No. 1000-A, 77 Fed. Reg. 32,184, 32,185–32,302 (May 31, 2012) (codified at 18 C.F.R. pt. 35). For example, Order 1000-A summarizes many of the following type of comment: “NARUC argues that Order No. 1000 does not identify actual concerns or problems or rely on any factual record, but relies entirely on the conclusory statement that planning and cost allocation may be impeding the development of beneficial transmission lines.” *Id.* at 32,191.

124. 467 U.S. 837, 842–43 (1984).

125. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 226 (1994).

reversed for acting outside the FPA. This Part then briefly discusses some of the likely policy consequences.

A. The Standard of Review of Order 1000 Will Be Chevron

As a formal agency rulemaking, petitions for review of FERC Order 1000 are presumptively evaluated under *Chevron* and its progeny.¹²⁶

From a positive legal standpoint, FERC's interpretation of the FPA will likely not be subject to the presumption against preemption, nor held to be a fundamental and avulsive change in the interpretation of Congress's regulatory structure by FERC, either of which could cause FERC's interpretation to lose *Chevron* deference.¹²⁷ The presumption against preemption reflects the idea that a federal statute should not preempt state law unless Congress has created a clear statement of intent to preempt.¹²⁸ This Subpart of the Comment will proceed by discussing the presumption against preemption and whether Order 1000 is a fundamental and avulsive change, concluding that these doctrines should not apply, and then proceeding to the *Chevron* analysis.

Order 1000 should not be evaluated under the presumption against preemption such that *Chevron* would not apply. In *New York v. FERC* the Court held that there is no presumption against preemption when the question is one of defining the scope of congressionally delegated authority.¹²⁹ The FPA clearly delegates congressional authority over transmission in interstate commerce to FERC,¹³⁰ so the preemption analysis should collapse into a typical

126. See, e.g., *Detroit Edison Co. v. FERC*, 334 F.3d 48, 53 (D.C. Cir. 2003) ("FERC's interpretation of its own statutory jurisdiction is entitled to *Chevron* deference.").

127. See Gregory M. Dickinson, *Calibrating Chevron for Preemption*, 63 ADMIN. L. REV. 667, 680–81 (2011) ("[T]hough the cases generally seem to suggest that full, *Chevron*-style deference is inappropriate in preemption cases, and at least a few Justices are willing to formally renounce the doctrine, the Court has yet to disavow *Chevron*'s applicability in preemption cases."). Dickinson cites *Wyeth v. Levine*, 555 U.S. 555, 577 (2009), which itself cites *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and rejects full *Chevron* deference for an agency's determination of pre-emption. *Wyeth*, 555 U.S. at 576–77. *Brown & Williamson Tobacco Corp.* and *MCI* stand for the proposition that if the agency attempts to make an avulsive change, no *Chevron* deference applies. See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 121; *MCI*, 512 U.S. at 225–26.

128. Dickinson, *supra* note 127, at 673 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

129. *New York v. FERC*, 535 U.S. 1, 18 (2002) ("[D]efining the proper scope of the federal power . . . does not involve a 'presumption against pre-emption,' as New York argues, but rather requires us to be certain that Congress has conferred authority on the agency.").

130. 16 U.S.C. § 824(a)–(b) (2006).

Chevron analysis of making certain that Congress did in fact confer authority over transmission planning to the extent that FERC claims it.¹³¹ Because of the FPA's clear delegation, the situation here is arguably quite different from other cases where the courts have been unsure of Congress's intent and have been willing to apply the presumption against preemption.¹³²

The argument that Order 1000 should be remanded for being a fundamental change to the statutory scheme (called *Chevron* Step Zero) under *MCI Telecommunications Corp. v. AT&T*¹³³ and *FDA v. Brown & Williamson Tobacco Corp.*¹³⁴ is not likely to succeed because the "change" FERC is making is not fundamental.¹³⁵ In *MCI*, the Supreme Court remanded an FCC Order that interpreted the Communications Act of 1934, which required rate regulation through tariffs, in a way that would have allowed non-dominant long distance carriers to omit filing rate tariffs.¹³⁶ The Court in *Brown & Williamson* noted that over the years, both congressional language and the FDA itself had agreed that the Food, Drug, and Cosmetic Act gave no power to the FDA to regulate tobacco products.¹³⁷ Hence, the FDA's assertion of authority was ruled a reinterpretation of the statute fundamentally inconsistent with what Congress had intended.¹³⁸

In Order 1000, FERC claims authority to mandate regional transmission planning under its FPA section 206 grant to set the just and reasonable rates and practices in interstate transmission by order when unjust or discriminatory rates or practices are found.¹³⁹ However, FPA section 206 is not the only statutory measure bearing on FERC's authority in this regard. FERC's authority may be tempered by FPA section 202(a)'s language, which empowers FERC "to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation,

131. See *New York v. FERC*, 535 U.S. at 18.

132. See *id.*; Dickinson, *supra* note 127, at 687 ("Where Congress expressly indicates an intent to preempt all state law that poses an obstacle to a particular statutory objective, for instance, it intentionally leaves the scope of preemption vague. Under such circumstances, the grant of rulemaking authority to the administering agency indicates a desire to have that gap filled by the agency.").

133. 512 U.S. 218 (1994).

134. 529 U.S. 120 (2000).

135. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

136. *MCI*, 512 U.S. at 234.

137. *Brown & Williamson*, 529 U.S. at 126, 133.

138. *Id.* at 160.

139. See FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,844-45 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

transmission, and sale of electric energy.”¹⁴⁰ This language suggests that there is some type of transmission coordination between geographical “districts” that must be voluntary. Opponents might argue that FERC is trying to make a fundamental change from the voluntary transmission coordination scheme in place under Order 2000 and permitted by FPA section 202(a)’s “voluntary interconnection and coordination” language, to a mandatory scheme of coordination of regional planning under Order 1000.

Unlike in *MCI* and *Brown & Williamson*, FERC’s interpretation of the FPA may likely be characterized as the continuation of reforms in transmission policy under FPA section 206 that courts have consistently upheld.¹⁴¹ For example, the Supreme Court in *New York v. FERC* unanimously upheld FERC Order 888, which mandated wholesale market-wide open access transmission under FPA section 206.¹⁴² FPA section 202(a) does not state that FERC may only engage in voluntary activity regarding transmission planning, as that section “does not mention planning, and nothing in it can be read as impliedly establishing limits on the Commission’s jurisdiction.”¹⁴³ The FPA section 202(a) term “coordination” could instead refer to the coordination of the real-time operation of facilities to supply power,¹⁴⁴ which in practice is distinguishable from “the planning process for the identification of transmission facilities” at issue in Order 1000.¹⁴⁵ The first represents the coordination between companies to reliably provide electric power on a daily basis, and the second represents long-range planning and cost allocation of transmission lines.¹⁴⁶ Therefore, FERC’s interpretation seems not to exhibit the same change from a regulatory regime to a deregulatory regime as in *MCI*, and unlike in *Brown & Williamson*, there is no

140. 16 U.S.C. § 824a(a) (2006).

141. See, e.g., *New York v. FERC*, 535 U.S. 1, 5 (2002).

142. See *id.* at 5, 28. Justices Thomas, Scalia, and Kennedy concurred in the part discussed here and dissented to the part deferring to FERC’s decision not to examine further whether the FPA required public utilities to unbundle their transmission services. *Id.* at 28, 30–34 (Thomas, J., concurring in part and dissenting in part). FERC Order 890’s implementation of system-wide adjustments to its open access transmission tariff that required more involved transmission planning processes went legally unchallenged as a valid exercise of FERC authority under FPA § 206. See FERC Order No. 1000, 76 Fed. Reg. at 49,846.

143. FERC Order No. 1000, 76 Fed. Reg. at 49,860.

144. *Id.* at 49,860–61.

145. *Id.*

146. For example, although many utilities planned their own transmission systems, electric companies have long coordinated their operations to provide reliability and lower costs to customers. See, e.g., *Cent. Iowa Power Coop. v. FERC*, 606 F.2d 1156, 1160–61 (D.C. Cir. 1979).

catalogue of congressional and agency statements that transmission planning is outside of FERC's jurisdiction. Order 1000 should provide no real opportunity to secure a *Chevron* Step Zero analysis.

B. Chevron Step One: Congress Has Not Directly Spoken to the Precise Question at Issue

Under *Chevron*, a reviewing court evaluating whether a formal agency rulemaking such as Order 1000 is within the statutory powers granted by Congress first examines whether "Congress has directly spoken to the precise question at issue;"¹⁴⁷ "[i]f the intent of Congress is clear, that is the end of the matter" (*Chevron* Step One).¹⁴⁸ However, "[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute" (*Chevron* Step Two).¹⁴⁹ In interpreting the statute, the court will look to the traditional tools of statutory construction,¹⁵⁰ which include statutory text and the legislative history.¹⁵¹

The prospects for opponents of Order 1000 at *Chevron* Step One¹⁵² are not particularly strong, due to the unspecific statutory language and the recent FERC-supportive Supreme Court decision in *New York v. FERC*.¹⁵³ This Comment argues that the three aspects of the precise question at issue are: (1) whether FERC's authority under FPA section 206 to fix by order just and reasonable rates and practices supports mandating regional transmission planning; (2) whether FPA section 202(a) requires a reform for regional transmission planning and cost allocation to be voluntary; and (3) whether FERC is limited from asserting the authority to mandate processes for transmission planning and cost allocations by the congressional reservation of power to the states over generation, siting, sales of electricity at retail, and associated services under FPA section 201(a) or over electric sales at retail under FPA section 201(b).

147. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

148. *Id.*

149. *Id.* at 843.

150. *Id.* at 843 n.9.

151. *Cf. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 106 (2007) (Stevens, J., concurring) ("Analysis of legislative history is, of course, a traditional tool of statutory construction. There is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue.").

152. *Chevron*, 467 U.S. at 842.

153. *See supra* notes 73–80 and accompanying text.

Before proceeding, this Comment will briefly observe how the precedent pronouncing Congress's intention may be used in statutory construction under a *Chevron* analysis. For the D.C. Circuit, likely to be reviewing Order 1000, only Supreme Court precedent and D.C. Circuit decisions that declare the relevant statutory construction to be unambiguous with regards to the matter at issue can serve as binding precedent on statutory interpretation.¹⁵⁴ Otherwise, *National Cable & Telecommunications Association v. Brand X Internet Services, Inc.*¹⁵⁵ holds that when conducting a formal agency action, an agency is free to change its interpretation of the statute and courts must apply *Chevron* deference to that new interpretation.¹⁵⁶

In support of its authority for Order 1000 under FPA section 206, FERC will be able to draw on a long list of transmission reforms permitted by courts (and implicitly by Congress).¹⁵⁷ Against this list, opponents will likely contend that FPA section 206 authority is limited by a line of cases holding that some actions are too far removed from a practice affecting a wholesale or unbundled transmission rate to fall under section 206 authority.¹⁵⁸ In a 2004 case, *California Independent System Operator Corp. v. FERC*¹⁵⁹ (“CAISO”), the D.C. Circuit held at *Chevron* Step One that in FPA section 206, Congress had clearly precluded FERC from altering the structure of the California ISO's corporate governance by replacing its board of directors.¹⁶⁰ After citing FERC decisions and case law

154. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (holding that a reviewing court may not depend on its own prior construction of an ambiguous statutory grant as trumping a conflicting agency construction unless the reviewing court can cite “judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill.”). In *Brand X Internet*, the United States Court of Appeals for the Ninth Circuit had held that a prior Ninth Circuit panel's construction of the Federal Communications Act of 1934 was entitled to *stare decisis* treatment given that the prior panel had held its interpretation was the *best* reading of the statute. *Id.* at 969. The Supreme Court reversed on the grounds that the Ninth Circuit's prior holding had neither declared that the prior holding was “the only permissible reading” nor was required unambiguously by the Communications Act, and held that “the Ninth Circuit erred in refusing to apply *Chevron*.” *Id.*

155. 545 U.S. 967 (2005).

156. *Id.* at 982–83.

157. See *supra* Part I.B.

158. See, e.g., *NAACP v. FPC*, 425 U.S. 662, 669–71 (1976) (holding in part that FPC/FERC's charge to ensure just and reasonable rates does not include practices too far removed from those affecting a rate).

159. 372 F.3d 395 (D.C. Cir. 2004).

160. *CAISO*, 372 F.3d at 404. ISOs carry out the transmission and related services for all users of a transmission system. *Id.* at 397. The ISO therefore replaces the “conduct of such services by the system owners—that is, the integrated electric utilities whose market

limiting the scope of the word “practice” in the context of FERC’s wholesale or unbundled transmission rate-making power,¹⁶¹ the court held that FERC’s FPA section 206 authority was “limited to those methods or ways of doing things on the part of the utility that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so.”¹⁶²

On the merits, a reviewing court will likely conclude that Congress did not speak to the precise question at issue and FERC’s action will be found to be related to a practice affecting rates closely enough to fall within FERC’s FPA section 206 authority. First, the statutory language of FPA section 206 is ambiguous and has been interpreted expansively.¹⁶³ The legislative history of FPA section 206 seems unhelpful because, as the Supreme Court has noted, Congress at the time of the passage of the FPA did not imagine the functional separation of transmission from generation.¹⁶⁴ Thus, it is difficult to

power FERC was attempting to control by encouraging the creation and operation of the ISOs.” *Id.* As such, its functions are very similar to an RTO with respect to transmission planning and services.

161. *Id.* at 402–03. This section cited various precedent interpreting the Interstate Commerce Commission’s statutes on which the Federal Power Act, including section 206, was based. The court related, for example, that the Interstate Commerce Commission could not regulate the number of men to be employed by crews as a “practice,” *Mo. Pac. R.R. Co. v. Norwood*, 283 U.S. 249, 257 (1931), nor could a “practice” encompass regulation outside the “terms of service.” *United States v. Pa. R.R. Co.*, 242 U.S. 208, 228–33 (1916). The *CAISO* court continued by citing FERC’s past interpretations of its authority under a similar provision of the Natural Gas Act, when FERC defined a

“practice . . . affecting [a] rate” as a “consistent and predicable course of conduct of the supplier that affects [the utilities’] financial relationship with the consumer.” *Mich. Wisc. Pipeline Co.*, 34 F.P.C. 621, 626 (Aug. 30, 1965). *See also Transwestern Pipeline Co.*, 26 F.E.R.C. ¶ 63,008 (Jan. 20, 1984) (describing the *Michigan Wisconsin Pipeline Co.* construction as the [FERC’s] “full[] articulat[ion]” of the meaning of the statutory language.).

CAISO, 372 F.3d at 403. FERC often has applied precedent from gas regulation to electric regulation questions to inform its reasoning. *See, e.g.,* *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2004).

162. *CAISO*, 372 F.3d at 403.

163. *See supra* Part I.B.

164. *Cf. New York v. FERC*, 535 U.S. 1, 21–24 (2002) (discussing how the legislative history of the FPA, specifically section 201(a) and inferentially section 206 as the foundation for Order No. 888, did not preclude upholding Order 888). Given that Congress did not imagine unbundled transmission services, it is not surprising that Congress might not have clearly spoken to the precise question at issue with regards to whether FPA section 206’s just and reasonable rates standard could support mandating regional transmission planning. *Cf. id.* (noting that Congress could not have foreseen the changes occurring in the electric power industry). The legislative history of FPA § 202(a),

credit the legislative history with any pronouncement about how FPA section 206 might apply to practices affecting an ISO's provision of unbundled transmission services, although bundled retail services regulated by the states have not been functionally separated so *New York's* findings about legislative history do not necessarily extend to bundled retail service. A reviewing court will probably distinguish FERC's action in Order 1000 from FERC's effort to change the board of directors in *CAISO* because "[i]t is through the transmission planning process that public utility transmission providers determine which transmission facilities will more efficiently or cost-effectively meet the needs of the region, the development of which directly impacts the rates, terms and conditions of jurisdictional service."¹⁶⁵ Although *CAISO* is good persuasive authority from the D.C. Circuit invalidating FERC action at *Chevron* Step One, FERC should be successful in distinguishing it given transmission planning's close impacts on transmission construction decisions and therefore the rates to be charged consumers.¹⁶⁶

The second aspect is whether Congress spoke to the precise question at issue when it enacted FPA section 202(a) and directed that FERC "divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy."¹⁶⁷ When read in context, this section could be read to limit FERC authority under FPA section 206 by delineating some activities related to coordination of transmission that must be voluntary.¹⁶⁸ Opponents will likely argue to the court that the language of FPA section 202(a) means that Congress spoke directly to the issue that "coordination of facilities for . . . transmission" must be voluntary, and therefore that transmission planning must be voluntary. In addition to the statutory text, opponents can look to legislative history, which discusses the "enlightened *self-interest*," as opposed to mandate, that will lead utilities to "planned coordination."¹⁶⁹

discussed *infra* note 176 and accompanying text, is potentially more applicable, but even it is ambiguous.

165. FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,862 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

166. See *supra* notes 56–58 and accompanying text.

167. 16 U.S.C. § 824a(a) (2006).

168. See North Carolina Utilities Commission, *supra* note 21, at 6–7.

169. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) (citing S. REP. NO. 621, at 49 (1935)).

In interpreting FPA section 202(a), opponents will also rely on *Central Iowa Power Cooperative v. FERC*,¹⁷⁰ where a party in a formal adjudication sought to have FERC mandate that power pool participants draw up plans for larger generation units and engage in single system planning and electricity dispatch.¹⁷¹ The court ruled that FERC did not have authority to mandate any specific level of power pooling, given “the expressly voluntary nature of coordination under section 202(a).”¹⁷² Perhaps most troublesome for FERC is the court’s dicta: “Notwithstanding the desirability of coordination of electric systems, however, Congress decided to make such coordination voluntary Congress was convinced that ‘enlightened self-interest’ would lead utilities to engage *voluntarily in power planning arrangements*, and it was not willing to mandate that they do so.”¹⁷³ Opponents of Order 1000 will argue that *Central Iowa*’s holding shows that transmission planning was included in the “coordination” that must be voluntary, and therefore that Congress spoke to the precise question at issue.¹⁷⁴

As with the FPA section 206 question, FERC should also be able to show that Congress did not speak precisely to the aspect of the question of whether FPA section 202(a) limits its authority to promulgate mandatory regional transmission planning processes.¹⁷⁵ There are quite a few reasons why FERC will prevail, first among those being that the statutory language of FPA section 202(a) is ambiguous regarding the long-range transmission planning Order 1000 mandates.¹⁷⁶ From the statutory language, it is not clear what the term “coordination” encompasses, and FPA section 202(a) does not mention “planning” a single time.¹⁷⁷ Second, the legislative history

170. 606 F.2d 1156 (D.C. Cir. 1979).

171. *Id.* at 1166. Power pooling is a practice whereby utilities join in an agreement to cooperate in the provision of certain services, but the variation between arrangements is vast. *Cf. id.* at 1161 (describing the particular arrangement of the power pool at issue in this case but noting some of the characteristics of other power pools that the arrangement here did not possess).

172. *Id.* at 1168.

173. *Id.* (emphasis added).

174. *See, e.g.*, North Carolina Utilities Commission, *supra* note 21, at 6–7.

175. *See supra* notes 142–46 and accompanying text.

176. In Order 1000-A, FERC on rehearing noted that section 202(a) was ambiguous and stated that it had provided a reasonable interpretation of the statute. FERC Order 1000-A, 77 Fed. Reg. 32,184, 32,206 (May 31, 2012) (codified at 18 C.F.R. pt. 35).

177. *See* FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,860 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35). In Order 1000-A, FERC clarified that planning an activity and engaging in an activity were two different things, analogizing planning for coordination and “coordination” to planning a trip and taking a trip. FERC Order No. 1000-A, 77 Fed. Reg. at 32,206.

does not speak to the question at issue, but instead discusses the “enlightened self-interest” that will lead utilities to “planned coordination.”¹⁷⁸ Third, *Central Iowa* is not binding precedent under *Brand X Internet* because the Court did not hold that FPA section 202(a) unambiguously required voluntariness with respect to regional transmission planning.¹⁷⁹ This ambiguity means that FERC may now act based on its new construction of the statute and will receive *Chevron* deference.¹⁸⁰ Fourth, *Central Iowa*’s relevance at all is questionable, given that it is not clear whether the court in *Central Iowa* was thinking about only operational planning or whether it included long-range planning for transmission.¹⁸¹ Fifth, even assuming that the court in *Central Iowa* was considering transmission planning within its definition of “coordination,” *Central Iowa* is not particularly persuasive precedent; it is a dated decision issued prior to *Chevron*.¹⁸² Taking these reasons into account, and given *FERC*’s dicta suggesting that a broad interpretation should be applied to FERC’s authority over ensuring just and reasonable practices affecting wholesale or unbundled transmission rates, a reviewing court is unlikely to reverse FERC at *Chevron* Step One on these grounds.

The third aspect of Congress’s intent is whether jurisdiction was reserved to the states under the FPA for intrastate activities and retail sales. This aspect of Congress’s intent is a closer question than the others. FPA section 201(a) reserved to the states the powers under

178. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) (citing S. REP. NO. 621, at 49 (1935)).

179. See *Cent. Iowa Power Coop. v. FERC*, 606 F.2d 1156, 1167–68 (D.C. Cir. 1979).

180. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

181. See *Cent. Iowa*, 606 F.2d at 1166–68.

182. See generally *id.* at 1168 (*Central Iowa* was decided in 1979, prior to the Supreme Court’s *Chevron* decision). To reach the conclusion that FERC was not required to mandate certain power pool conditions, the *Central Iowa* court applied a version of the standard of review of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), asking whether FERC had made “an informed and reasoned decision consistent with congressional purposes.” *Cent. Iowa*, 606 F.2d at 1167. *Central Iowa* has been cited post-*Chevron* in the text of a case for the provision at issue only once by the D.C. Circuit, and that decision did not elaborate on the ambiguous language relating to the extent of the term “coordination” at issue here. *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 12 (D.C. Cir. 2002). In *Atlantic City*, the court held in pertinent part that FERC could not require a certain condition on a petitioner separating itself from an ISO, which as in *Central Iowa* could be construed to relate to the coordination of operations for the ISO, as opposed to transmission planning. *Id.* The *Atlantic City* court did not expand upon the nature of “coordination” in support of petitioners, instead simply quoting *Central Iowa*’s statement that “[g]iven the expressly voluntary nature of coordination under section 202(a), the Commission could not have mandated adoption of the [coordination] Agreement.” *Id.* (quoting *Cent. Iowa*, 606 F.2d at 1167–68).

their jurisdiction at the time of the passage of the FPA,¹⁸³ which included generation and distribution, as well as primary siting authority.¹⁸⁴ FPA section 201(b)(1) sets out that federal regulation “shall not apply to any other [non-wholesale] sale of electric energy,” i.e. retail sales.¹⁸⁵ FPA section 201(a) and (b) therefore provide two limits to FPA section 206.¹⁸⁶

As to the first of these limits, FERC’s interpretation of the statute could conflict with FPA section 201(a) based either on the planning process itself or on cost allocation. In both of these similar potential FPA section 201(a) conflicts, the regional planning process could essentially determine available transmission siting or cost allocation options for state utility commissioners. State commissioners’ options would be limited to a choice resembling an up or down vote on a pre-planned or cost pre-allocated transmission plan. FERC would, through its approved regional transmission processes, exercise “indirect regulation of . . . siting, construction, permitting, and resource planning decisions”—exactly the powers reserved to the states under FPA section 201(a), in contravention of the statute.¹⁸⁷ FERC has not been given statutory authority to mandate generation or transmission siting,¹⁸⁸ and courts have held

183. 16 U.S.C. § 824(a)(1) (2006).

184. See REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 67 (noting that in some states, authority is vested in a single state agency, while in others, states have allowed local governments to exercise control).

185. 16 U.S.C. § 824(b)(1).

186. See REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 67.

187. FERC Order No. 1000-A, 77 Fed. Reg. 32,184, 32,203, 32,214–15 (May 31, 2012) (codified at 18 C.F.R. pt. 35). Although utilities certainly may build their infrastructure without cost recovery, they must recover costs so their owners, whether investors or the public, will receive the returns needed to finance necessary capital and operating expenditures. TOMAIN & CUDAHY, *supra* note 2, at 174. As one commenter notes, the choice between going forward with a project that will not receive cost recovery or conforming to the product of a FERC-endorsed regional planning process is really no choice at all. See Southeastern Utilities, *supra* note 21, at 43 (citing Assoc. Gas Distribs. v. FERC, 824 F.2d 981, 1024 (D.C. Cir. 1985) (“[W]hen a condemned man is given the choice between the noose and the firing squad, we do not ordinarily say that he has ‘voluntarily’ chosen to be hanged.”)).

188. See Southeastern Utilities, *supra* note 21, at 43 (“In this regard, [Order 1000] is silent regarding the preemptive effect of its regional cost allocation decisions upon retail rate payers—if (for example) they are going to be forced to pay for a non-incumbent’s transmission line chosen through the FERC-regulated regional transmission planning process, then it would seem difficult (if not imprudent) for the incumbent owner to pursue an alternative project, meaning that the FERC-regulated regional transmission planning process would have effectively made the substantive transmission planning decision due to its preemptive effect on retail rates.”).

that FERC is not allowed to “[do] indirectly what it cannot do directly.”¹⁸⁹

This argument’s weaknesses result from an overgenerous construction of state authority at the time of the passage of the FPA. Even leaving aside the explicit FPA grant to FERC over “the transmission of electric energy in interstate commerce,”¹⁹⁰ the fundamental problem with opponents’ FPA section 201(a) argument is that the states *never* explicitly regulated interstate transmission planning and therefore that jurisdiction could not be reserved to the states on the passage of the FPA Part II in 1935.¹⁹¹ States regulated generation and transmission siting, but utilities themselves planned their transmission facilities to serve their geographic area and built to the extent they could receive cost recovery from the states.¹⁹² States possessed some indirect authority over transmission planning through their approval for the utilities’ cost recovery when the vertically integrated utilities offered bundled services for generation, transmission, and distribution.¹⁹³ The Supreme Court has commented on this indirect authority, guarded by FPA section 201(a). It has said that FPA section 201(a) is a mere policy declaration and cannot prevail against a clear statutory grant to the contrary, such as the one over wholesale and unbundled transmission in interstate commerce.¹⁹⁴ Although it is true that FERC did not in the past assert authority over transmission planning, this past non-assertion does not mean the states possessed the authority, or that FERC cannot now assert it.¹⁹⁵

The second argument that Order 1000 is incompatible with the reservation of jurisdiction to the states under the FPA is that FERC is

189. See, e.g., *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992) (commenting that the rationale of the filed rate doctrine, which is to prohibit a regulated entity from charging for services other than those approved by the regulatory Commission, also meant that the Commission could not adjust the entities rates retroactively—in essence ensuring that FERC is prohibited “from doing indirectly what it cannot do directly” (quoting *Associated Gas Distribs. v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (Williams, J., concurring) (per curiam))). In *Towns of Concord*, the D.C. Circuit held that FERC did not violate the rule against retroactive ratemaking because the statute at issue gave FERC discretionary power to order refunds for utility overcharging. *Id.* at 72.

190. See *New York v. FERC*, 535 U.S. 1, 18–19 (2002) (quoting 16 U.S.C. § 824(a) (2000)).

191. See *supra* Part I.A.

192. See *supra* notes 39–41 and accompanying text.

193. See *supra* note 44 and accompanying text.

194. *New York v. FERC*, 535 U.S. at 22.

195. Cf. *id.* at 20–21 (describing how the grant of statutory authority under the FPA is in no way limited by the specific facts and issues of the United States Supreme Court case that gave rise to passage of the FPA in 1935).

indirectly influencing the conditions of retail sales, in violation of FPA section 201(b)(1). By requiring regional cost allocation schemes, FERC may cause costs to be allocated to retail ratepayers regardless of state commissions' authority in this area. States will roundly protest any impact on retail sales of this kind, and this issue is the closest jurisdictional question. Although FERC has never asserted all of its potential jurisdiction over transmission in interstate commerce, the states' argument is weakened by the fact that the FPA may grant FERC this authority, and a court has never held that FERC could not exercise it because of its indirect impact on sales at retail.¹⁹⁶ In *New York v. FERC*, the majority of the Court opined that this question might be a difficult jurisdictional one,¹⁹⁷ but they also stated that "the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer."¹⁹⁸ Additionally, three Justices, all of whom remain on the Court, partially dissented on the grounds that they believed the majority did not construe FERC's jurisdiction expansively enough.¹⁹⁹ They stated that FERC's jurisdiction *must* extend to *all* interstate transmission, no matter what type of sale is at issue.²⁰⁰ The next year, in *Detroit Edison Co. v. FERC*,²⁰¹ the D.C. Circuit said, "In sum, FERC has jurisdiction over *all* interstate transmission service and over all wholesale service."²⁰²

196. *New York v. FERC* held that FERC's decision to treat bundled retail sales, including the transmission aspect of those sales, as falling under state jurisdiction was a permissible policy choice entitled to deference. *Id.* at 5, 15. Nevertheless, under *Brand X Internet*, FERC's "new" construction of its statutory grant in FPA section 206 to remedy unjust and discriminatory rates in transmission in interstate commerce is also entitled to deference. *See supra* note 155–56 and accompanying text.

197. *New York v. FERC*, 535 U.S. at 27. The Court stated, "It is obvious that a federal order claiming jurisdiction over *all* retail transmissions would have even greater implications for the States' regulation of retail sales—a state regulatory power recognized by the same statutory provision that authorizes FERC's transmission jurisdiction." *Id.* at 28 (citing 16 U.S.C. § 824(b) (2000)); *cf.* *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 529–31 (1945) (interpreting the FPA and its legislative history to conclude that the reservation to state power in the FPA, although more general than the federal grant over interstate transmission, retained significance). More recently, a FERC white paper associated with the SMD proceeding identified that an assertion of authority over the transmission component of bundled retail service could entail "unintended issues." FERC, WHITE PAPER: WHOLESALE POWER MARKET PLATFORM 4–5 (2003), http://www.hks.harvard.edu/hepg/Standard_Mkt_dsgn/FERC_White_paper_042803.pdf.

198. *New York v. FERC*, 535 U.S. at 20.

199. *Id.* at 29 (Thomas, J., concurring & dissenting in part).

200. *Id.* ("FERC has jurisdiction over all interstate transmission, regardless of the type of transaction with which it is associated.").

201. 334 F.3d 48 (D.C. Cir. 2003).

202. *Id.* at 51 (emphasis added). In *Detroit Edison*, the D.C. Circuit held that FERC could not assert jurisdiction over an unbundled retail service that FERC had not

The interstate transmission regulation in which FERC engages can, to a greater or lesser extent, affect sales terms to the ultimate retail ratepayers and thus can indirectly preempt aspects of state commission jurisdiction. Because FERC has never asserted regulatory authority over unbundled retail transmissions, a reviewing court will have to decide whether Congress spoke clearly to preclude FERC from having the authority to mandate transmission planning—reforms designed to serve the wholesale market—that could affect unbundled retail transmission rates. That Order 1000’s planning processes are focused on just and reasonable wholesale rates makes it more likely that a court would conclude that Congress has not spoken clearly against FERC’s authority. And, given the recent trend in the industry and corresponding trend toward more permissive readings of FERC’s authority in the case law, this indirect effect on retail sales is probably not enough to prevail.

That FERC Order 1000 is not too far removed from a practice affecting wholesale rates, while still permitting voluntary coordination for operations and not exceeding FERC’s authority with respect to state jurisdiction, is reconcilable. As long as FERC’s FPA section 206 authority may be construed broadly enough to enable it to mandate market-wide transmission planning, i.e. not limited as a practice too far removed from rates or needing to be voluntary, FERC may exercise its longstanding authority over transmission in interstate commerce. Further, such authority is not limited to only wholesale sales. FERC has historically forborne from asserting its full authority over interstate transmission, but at a time when FERC would like to shepherd the interstate transmission system to support wholesale markets, it may choose to assert not-yet-asserted regulatory powers.

C. Chevron Step Two: Order 1000’s Reading of FPA Section 206 Is a Reasonable Interpretation of the Statute

Once Order 1000 survives the first step of the *Chevron* analysis, FERC’s interpretation will be evaluated under the *Chevron* Step Two reasonableness standard.²⁰³ As is the usual case with *Chevron* Step Two inquiries, FERC’s construction of the FPA will be held a permissible construction of the statute. FERC can reason that,

determined was “FERC-jurisdictional” rather than being a local distribution facility—and thus subject to state control—as defined in Order 888. *Id.* at 54. This holding applies to a direct assertion over sales at retail, which is not the interstate transmission planning to support wholesale markets reform proposed under Order 1000.

203. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11 (1984).

because of the lack of regional planning and cost allocation, some public utility transmission providers are not proceeding with construction of transmission that could lead to more just and reasonable rates. In this context, a nationwide requirement of regional transmission planning processes fulfills Step Two's undemanding criteria of being a merely reasonable response. That FERC's reasoning would succeed is made more likely by the broad interpretation the Supreme Court gave FPA section 206 in *New York v. FERC*.²⁰⁴ Recall that it unanimously upheld FERC's authority to mandate open access transmission for wholesale purposes under the statute as transmission under FPA section 206, and that three sitting Justices stated that FERC must have jurisdiction over transmissions in bundled retail service.²⁰⁵

This assertion of authority to mandate transmission planning is indeed new, and it will have important effects. The states and utilities opposed to Order 1000 are correct in their claim that this federal assertion will affect utilities' and states' transmission and generation decisions, and it will likely raise some utilities' and some consumers' costs.²⁰⁶ For FERC, this assertion of authority, and even the collateral distribution of costs, is precisely the point.²⁰⁷ In exercising its FPA section 206 authority, FERC wanted to support competitive wholesale markets by encouraging the construction of additional transmission.²⁰⁸ FERC also believed that the public utility transmission providers had the latitude to avoid sufficiently building

204. See *New York v. FERC*, 535 U.S. at 2–3.

205. *Id.* at 28–29 (Thomas, J., concurring & dissenting in part) (concurring in the holding that the FPA supports allowing FERC to mandate open access transmission).

206. By definition, if the regional planning and cost allocation favors some utilities' plans by requiring transmission lines to be built where they otherwise would not be, some party will bear an increase in costs. Cf. Scott Hempling, Exec. Dir., Nat'l Regulatory Research Inst., *Interconnection Animus: Do Regulatory Procedures Create a "Tragedy of the Commons"?* Address to the Forum, "New Challenges in Siting Transmission Lines," sponsored by the Center for Energy Economics, University of Texas at Austin and The Terra Group 4 (Jan. 29, 2009), http://scotthemplinglaw.com/files/pdf/ppr_nnri_trans_interconnection_animus0110.pdf (querying why some states that benefit from lower rates by virtue of geographically serendipitous proximity to inexpensive energy sources insist on keeping those rates so low when their assumption of a greater portion of improvement costs would produce benefits outweighing the costs) [hereinafter Hempling Speech].

207. Cf. NAT'L REGULATORY RESEARCH INST., *FERC'S ORDER 1000 SETS REGIONAL TRANSMISSION POLICY: LANDMARK, LAND MINE, OR BOTH?* 7 (Aug. 11, 2011), http://nnri.org/pubs/seminars/FERC_1000_Conference_Manual.pdf ("Why does FERC feel it needs to promise that its [Order 1000 regional planning] processes won't affect state-level planning when the entire purpose, a proper purpose aimed at getting consumers the benefits of greater efficiencies, is to do just that?").

208. See FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,845 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

out transmission, or even to discriminate in construction of transmission facilities so as not to effectively serve the potential electric generation competitors that sought to add robustness to the wholesale market.²⁰⁹ At the same time, FERC believes that this state of affairs has been too slow to change.²¹⁰ FERC's assertion of authority is premised on its belief that despite the protests, overall the rates to consumers will be more "just and reasonable" as a result of Order 1000.²¹¹

Should the Order be found to be within FERC's statutory powers and to not be arbitrary and capricious, the public's general hope must be that the overall benefits in terms of reliability, lower cost of wholesale electricity, and more usage of renewables in fact outweigh the costs.²¹² One expert has suggested a method for Order 1000 to allow states (and utilities) a better opportunity to ensure that these goals are met.²¹³ He argues that a state's policy preferences could be so served if a state commission specifically ensures that a state-regulated public utility transmission provider works to have them considered in the FERC regional planning process.²¹⁴ FERC Order 1000 might in fact benefit states that have utilities with electricity supply needs that depend on regional cooperation.²¹⁵ It is true that one state or utility might very well end up paying some portion of the monetary cost for benefits to another state—as well as assuming environmental, ambient, and economic development consequences.²¹⁶ But if in the aggregate Order 1000 offers benefits, then perhaps the best way to seize those benefits is to attempt to bring the interested parties into the decision-making early in the process and to try to mitigate the negative impacts to the extent

209. See TOMAIN & CUDAHY, *supra* note 2, at 391–92.

210. Cf. FERC Order No. 1000, 76 Fed. Reg. at 49,849 ("The Commission stated its intention was . . . to address remaining deficiencies in transmission planning and cost allocation processes so that the transmission grid can better support wholesale power markets and thereby ensure that Commission-jurisdictional services are provided at rates . . . that are just and reasonable and not unduly discriminatory or preferential.").

211. See *id.* at 49,845.

212. See generally Hempling Speech, *supra* note 206 (arguing that in transmission disputes, our society overemphasizes tangible costs, such as the construction impacts of transmission lines, and underemphasizes the intangible benefits of long-term economic development and electric reliability, among others).

213. See NAT'L REGULATORY RESEARCH INST., *supra* note 207, at 2.

214. *Id.*

215. *Id.*

216. See Coalition for Fair Transmission, *supra* note 6, at 5 ("[States and public utilities] should not be involuntarily assigned costs for projects selected in a regional transmission plan for which they have no need, even if there is some incidental, amorphous 'benefit' ascribed by those seeking broad cost socialization.").

possible.²¹⁷ Giving parties a meaningful ability to examine opportunities for benefits constructively should reduce the opposition and acrimony that characterizes many transmission projects.

There is, however, a hole in this state of affairs. It is the mechanism by which the consumer, environmental, landowner, and local economic development interests may actually inform themselves and contribute to the transmission planning process. Addressing this representation problem could improve the final transmission decisions overall, while potentially mitigating the most negative effects of transmission construction.

III. NORMATIVE IMPLICATIONS OF MANDATED REGIONAL PLANNING AND A PROPOSAL FOR PROTECTING THE PUBLIC INTEREST

A. *The Lingering Public Interest Representation Problem, Potentially Exacerbated by FERC Order 1000*

As it stands now, some of the very policies that FERC's Order 1000 is designed to serve may be critically shortchanged by the transmission planning process embodied in FERC's orders.²¹⁸ The underlying goal of FERC policies is to serve the public interest,²¹⁹ which FERC hopes to do in part by encouraging wholesale markets that provide just and reasonable, i.e. lower, rates.²²⁰ Just and reasonable rates are surely a central part of the public interest in the context of utility regulation, but the public interest is broader and more multifaceted than rates alone, a proposition that courts have upheld.²²¹ In this discussion, this Comment adopts a definition of

217. See Hempling Speech, *supra* note 206, *passim*.

218. Despite FERC's public interest-minded goals of providing "just and reasonable rates" that are not "unduly discriminatory or preferential," FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,845 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35), observers have raised numerous concerns about Order 1000. See, e.g., NAT'L REGULATORY RESEARCH INST., *supra* note 207, at 8 (raising questions about how little funding Order 1000 provides for public interest groups and other stakeholders to recoup the costs they incur during the planning process); see also Dworkin & Goldwasser, *supra* note 23, at 578 (discussing the difficulties in securing the public interest for RTO governance).

219. See 16 U.S.C. § 824(a) (2006).

220. See FERC Order No. 1000, 76 Fed. Reg. at 49,845; Dworkin & Goldwasser, *supra* note 23, at 578 ("In the broadest sense, the RTO is accountable to each and every citizen for ensuring that they receive just and reasonable rates.").

221. See Dworkin & Goldwasser, *supra* note 23, at 581–82 (noting that the public interest in RTO contexts is often "extremely difficult to particularize" because "stakeholders' interests diverge dramatically" given the wide array of customers, geographic diversity, and temporal interests). For an example of how courts have interpreted FERC's ability to serve the public interest through its specifically enumerated

“public interest” as shorthand for the interest of parties who may have an interest in transmission outcomes but could have trouble participating meaningfully in a transmission planning process. This group includes consumers, landowners, land protection groups, local economic development groups, and small-scale renewable energy advocates.²²² These groups stand in contrast to what are called “market participants”²²³—entities such as utilities, trade groups, merchant providers, and other RTO insiders, who traditionally have had both an interest in the outcome and the resources to fully integrate into the process. Order 1000’s new and uncertain institutional structure exacerbates the difference in sophistication that already exists between public interest groups and the market participants that might be able to more adroitly navigate the system.

authority, see generally *NAACP v. FPC*, 425 U.S. 665 (1976) (holding that the FPC/FERC could not stretch its focus on the public interest into a broad mandate for combating racial discrimination, but also recognizing that FERC was fully empowered to account for such discriminatory practices in its decision-making if it determined that these practices might impair its mission of providing reliable service at “just and reasonable rates”). FERC may take into account practices that affect providing reliable service at just and reasonable rates. First, the equity of cost allocation, in which these groups might like a say, is directly related to rates. Second, unlike the question of whether the FPA public interest directive included eradicating discrimination, at issue in *NAACP*, the interests of the consumers, landowners, land protection groups, local economic development groups, and small-scale renewable energy advocates directly bear on the substantive transmission planning decisions themselves. The substantive planning decisions directly affect rates and practices affecting rates.

222. Defining “public interest” precisely is a quest that could fill many tomes. In one sense, “public interest” includes the entire public, which would encompass FERC’s point of view, utilities and their shareholders, and the national economy, in addition to the consumers, landowners, environmental advocates, citizens’ groups, and small-scale clean energy advocates. This Comment uses “public interest” as a shorthand for groups that are not market participants because these groups’ lack of resources and monetary interest is a significant difference in their ability to participate and their interest in participation. As Mr. Hempling counsels, however, the concept of the public interest should not be narrowed too much, as the sacrifices of some are required or society will be deprived of any net benefits of transmission construction. See Hempling Speech, *supra* note 206, at 4. For discussion of the public interest standard in utility regulation and its relation to environmental goals, see generally Michael Dworkin et al., *Revisiting the Environmental Duties of Public Utility Commissions*, 7 VT. J. ENVTL. L. 1 (2006) (discussing state public utility commissions and environmental considerations) and Jeremy Knee, *Rational Electricity Regulation: Environmental Impacts and the “Public Interest”*, 113 W. VA. L. REV. 739 (2011) (discussing why, although FERC does not centrally consider environmental decision-making, such decision-making should be part of the public interest standard). See also generally JIM ROSSI, *REGULATORY BARGAINING AND PUBLIC LAW* (2005) (contending regulatory compact is no longer only about consumer protection).

223. See Dworkin & Goldwasser, *supra* note 23, at 562 (differentiating market participants from other stakeholders who do not possess a commercial stake in the RTO process).

The public interest was already a concern prior to the issuance of Order 1000 because the “complicated, technical, and expensive structure” of infrastructure and energy planning, including transmission planning, gave rise to a public interest representation problem.²²⁴ For any person or entity that would hope to influence the process, participating in transmission planning has extremely high “monitoring costs,” including technical understanding and time.²²⁵ Only entities with large amounts of resources can easily afford these costs.²²⁶ Michael Dworkin and Rachel Goldwasser spoke to this

224. *Id.* at 583; *see also, e.g.*, Motion of Indicated Joint PJM State Consumer Advocate Agencies to Propose Apportionment of Monies in PJM Fund and Proposal at 3, FERC Docket No. IN12-7-000 (July 10, 2012) [hereinafter CAPS Proposal] (proposing creation of a regional consumer advocate in the PJM RTO process). FERC eventually approved this proposal. *See generally* Order Confirming Rulings from the Oct. 4, 2012 Oral Argument, FERC Docket No. IN12-7-000 (Oct. 10, 2012). The CAPS Proposal describes the need for participation of consumer interest, noting that FERC itself discussed this need in its order accepting the compliance filing in PJM Interconnection, L.L.C., 133 FERC ¶ 61,071, ¶ 38 (2010) [hereinafter PJM Interconnection Compliance Order]. CAPS Proposal, *supra*, at 5–6. There, FERC recognized that

[E]xisting RTO/ISO stakeholder and board processes present resource challenges for certain stakeholders, including many consumer advocates, and may present barriers to the full, open participation of stakeholders in RTO/ISO governance matters. In light of such concerns and consistent with our statement in Order No. 719 with respect to the ongoing responsiveness criterion, RTOs/ISOs, including PJM, should continually evaluate their governance policies and stakeholder processes and consider how they may be improved. If parties continue to have concerns in these areas that are not being addressed, the Commission may revisit these issues. The Commission will also continue to monitor these matters and take appropriate action, as required.

Id.; *see also* Dworkin & Goldwasser, *supra* note 23, at 583–86 (describing the “technical world of acronyms, complex engineering, and economics” that limits stakeholder participation in RTO decisions).

225. Dworkin & Goldwasser, *supra* note 23, at 584 (arguing that public interest groups and individual energy users face “extremely high costs of participation in stakeholder processes compared to potential benefits” (citing Michael Levine & Jennifer Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167 (1990))); *see also* AM. PUB. POWER ASS’N, ON THE GROUND: PUBLIC POWER UTILITY EXPERIENCES IN WHOLESALE ELECTRICITY MARKETS 6, 12 (2007), <http://www.publicpower.org/files/pdfs/ontheground.pdf> (lamenting the difficulty for consumers to become involved in the planning process).

226. *See* CAPS Proposal, *supra* note 224, at 7. The state public advocates proposing the regional public advocate reform noted,

While there is some representation of large industrial customers, the vast majority of customers in PJM, as well as their designated state Consumer Advocates, are absent from most meetings; particularly at the lower-level committees where proposals are first developed and participation is vital to influencing market rule development. Consumer Advocate participation is often limited to higher-level

problem in the context of RTO decision-making in general six years ago,²²⁷ and FERC itself has more recently acknowledged this need.²²⁸ An RTO can serve as the region for FERC Order 1000, and with several RTOs now over a decade old,²²⁹ the RTOs' relatively "longstanding" institutional structure provides an anchor around which to erect a public interest representation process. But FERC Order 1000 requires *all* public utility transmission providers, including those outside the established RTOs, to join a new region. For many parts of the country, these new regions may only be manifested in the filing in their FERC tariff or in voluntary processes between utilities pursuant to Order 890. For the regions in geographical areas outside of the RTO structure, the uncertain institutional structure of the Order 1000 regional planning process makes the issues Dworkin and Goldwasser raised even more important.

Given the technical nature of these planning processes, which are not amenable to public interest participation, it is important to address up front the argument made by some experts that the public interest is best served by limiting the ability of parties opposed to projects to slow those projects down.²³⁰ The argument certainly has some merit, because for our society to reap the benefits of electricity, trade, and communications systems, we must build the infrastructure projects to support those systems.²³¹ However, to the extent that FERC Order 1000 provides a net benefit to consumers from greater efficiencies, this Comment takes the position that expending some resources to ensure that the parties that could be affected can participate is a price worth paying. According basic dignity to members of our society who are impacted by these projects "mak[es] [our] entire nation more civilized."²³² And providing better public interest representation may even lead to better decisions and more

committee meetings, such as the Members Committee where proposals have already been fully-formed and fully vetted.

Id.; see also Dworkin & Goldwasser, *supra* note 23, at 584 (describing monetary, expertise, and time requirements for participation in RTOs).

227. See Dworkin & Goldwasser, *supra* note 23, at 584.

228. See PJM Interconnection Compliance Order, *supra* note 224, at 12 (FERC compliance order noting public interest representation challenges).

229. See REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 17.

230. See, e.g., Hempling Speech, *supra* note 206, at 2.

231. *Id.*

232. *Id.* at 5. Although this quotation relates to how (independently of Order 1000) some states have established low-income assistance programs to assist all citizens in meeting their electrical and other basic needs, Hempling's broader point about generosity applies equally to the issue of ensuring an opportunity for a modicum of participation in transmission planning for less-sophisticated parties.

beneficial outcomes over the longer term. Order 1000 itself embodies those values,²³³ even if the Order does not provide many resources to facilitate the participation of public interest groups.²³⁴

When transmission planning happens at the individual utility level, it can happen as part of a state transmission planning process, in the context of integrated resource planning, or as part of final cost-recovery decision-making. In these cases, there is a certain, if attenuated, level of regulatory control by officials accountable to the electorate.²³⁵ State regulators have influence in the final approval of projects by vertically integrated public utility transmission providers through the state integrated resource plans, transmission siting, and state certificates of public convenience and necessity.²³⁶ Additionally, state regulators and public advocates can potentially monitor utility-based transmission planning processes and keep themselves apprised of the situation more easily.²³⁷ Representatives of the state consumer advocate can report back to the state public utilities commission or the state legislature if something is amiss, and as the processes are made up by parties regulated by the state public utilities commission, the regulators can more directly influence the process.²³⁸ Furthermore, interested parties with fewer resources may be able to more easily participate because of the geographic proximity to the decision-makers.²³⁹ Lastly, when decision-making takes place in

233. FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,848 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35) (discussing progress toward more “inclusive” planning that has “given stakeholders the ability to participate,” which should lead to better and more efficient transmission planning decisions).

234. See, e.g., NAT’L REGULATORY RESEARCH INST., *supra* note 207, at 8 (noting that while FERC does not explicitly require public utility transmission providers to include funding for public interest stakeholder participation in the planning process, “nothing in this Final Rule precludes them from doing so”).

235. This can be a very attenuated degree of political accountability, as the state utilities commissioners are themselves likely appointed for multi-year terms by the governor. See, e.g., N.C. GEN. STAT. § 62-10 (2011) (directing that North Carolina’s utility commissioners be appointed by the Governor and confirmed by the General Assembly by staggered six-year terms).

236. See *supra* Part I.A.

237. Telephone Interview with Gisele Rankin, *supra* note 99.

238. See, e.g., N.C. GEN. STAT. § 62-15(d) (2011) (providing wide-ranging powers to the Public Staff, including “review[ing], investigat[ing], [and] mak[ing] appropriate recommendations to the Commission,” and “interven[ing] on behalf of [North Carolina’s] using and consuming public” in all decisions affecting the rates and services provided by public utilities).

239. Cf. CAPS Proposal, *supra* note 224, at 7 (noting that a large RTO region makes it “particularly difficult for some Advocate Offices to participate directly in PJM meetings”).

smaller districts, there is an opportunity, at least, to give more nuanced attention to the public interest of the local population.²⁴⁰

Numerous caveats exist, however. State regulation of transmission planning is often attenuated, as the utility commissioners indirectly regulate these processes through the integrated regional planning approach. The utility commissioners themselves are only in rare cases directly accountable to the electorate, which poses its own problems.²⁴¹ Additionally, except for participation in the utility's or other voluntary transmission planning process, any state regulation has operated after the utilities or transmission management entities themselves have crafted their own transmission plans.²⁴² Historically, neither utility processes nor state planning processes have emphasized early participation in the planning process by interested groups.²⁴³ Because such utility-based transmission planning processes usually do not include a mechanism that provides funding to cover the costs associated with participation by interested parties, it is difficult for such parties to make time and spend the resources to maintain their participation.²⁴⁴ Finally, this narrower utility-based transmission planning process has, as discussed, permitted a focus on local issues that may not perfectly align with modernizing an overall electric transmission grid.²⁴⁵

The transmission planning regime that Order 1000 requires makes some moves in the right direction to mitigate this representation problem. Order 890 instituted a reform directing that

240. See Dworkin & Goldwasser, *supra* note 23, at 586.

241. See *supra* note 235 and accompanying text.

242. See *supra* Part I.A (discussing how projects are often set in stone by the time public utilities petition state regulators for approval for transmission cost recovery and siting, leaving scant room for state regulators to exercise their discretion and adjust those plans based on public interest considerations).

243. See, e.g., N.C. TRANSMISSION PLANNING COLLABORATIVE, *supra* note 35, at 12 (recognizing the integration of transmission planning into overall integrated resource planning, the North Carolina state-level transmission planning process explicitly provides that "[t]he Collaborative Transmission Plan information is available to Participants for identification of any alternative least cost resources for potential inclusion in their respective Integrated Resource Plans"). Making the plan "available" to "participants" would generally not provide sufficient notice or support so that the planning collaborative would hear alternative viewpoints. See NAT'L REGULATORY RESEARCH INST., *supra* note 207, at 3.

244. Telephone Interview with Gisele Rankin, *supra* note 99.

245. See FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,856 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35) (noting that FERC finds that the existing regional transmission planning processes are not robust enough to necessarily result in a regional transmission plan that achieves FERC's objectives); REGULATORY ASSISTANCE PROJECT, *supra* note 11, at 67.

public utility transmission providers participating in planning processes “should” provide cost recovery for state regulators, i.e. state public utility commissions, to participate in the development of the transmission plans if the state regulator requested, and this reform was adopted by Order 1000.²⁴⁶ Under Order 1000, public utility transmission providers *may*, if they so desire, include in their compliance filings a proposed mechanism for other stakeholders to recover costs associated with this participation,²⁴⁷ which provides an incentive for public utility transmission providers to include a means of participation in the regional planning processes.

It is unclear exactly what force the “should” directive, as applied to providing cost recovery for state regulators, will carry. If the public utility transmission providers come into conflict with the state regulators, and if regional transmission planning decisions become more contentious in the future, this ambiguity could prove a troublesome point of controversy. Moreover, Order 1000 explicitly leaves the decision of whether to provide funding for non-public utility commission stakeholders to the public utility transmission providers themselves.²⁴⁸ Order 1000 acknowledges the preexisting “concerns regarding ‘how [these groups] will recover the costs associated with their participation in the planning process.’”²⁴⁹ Parties had raised these concerns in the rulemaking leading up to the Order 890 regime.²⁵⁰ But Order 1000 states, “We decline to expand that directive here to include funding for other stakeholder interests, as requested by certain commenters.”²⁵¹ By leaving cost recovery of participation for parties other than public utility transmission providers and perhaps state public utility commissions at the discretion of the public utility transmission providers themselves, Order 1000 presents a misalignment of incentives, if not a conflict of interest for the public utility transmission providers.

The need for public interest representation after Order 1000 is likely accentuated because these new regional planning processes appear even *more* amorphous than the imperfect and indirect state regulation of individual utility planning or the RTO structure which

246. See FERC Order No. 890, 72 Fed. Reg. 12,266, 12,338 n.339 (Mar. 15, 2007) (codified at 18 C.F.R. pts. 35, 37). Scott Hempling has questioned the statutory basis for allowing the recovery of costs of participation in the transmission planning process. See NAT'L REGULATORY RESEARCH INST., *supra* note 207, at 8.

247. FERC Order No. 1000, 76 Fed. Reg. at 49,870.

248. *Id.*

249. *Id.* (quoting FERC Order No. 890, 72 Fed. Reg. at 12,338–39).

250. *Id.*

251. *Id.*

concerned Dworkin and Goldwasser. Unlike what is at least indirect accountability of state-monitored utility transmission and integrated resource planning processes, or even the RTO structure, the regional planning processes are embodied and approved by FERC in a public utility transmission provider's FERC tariff and compliance filing.²⁵² FERC itself does not participate or engage in meeting-to-meeting monitoring of each regional stakeholder process, and it does not currently have the resources to do so. Additionally, no natural constituency necessarily exists to advocate for any particular process or for the staying power of the process before FERC.

Although less-sophisticated public interest groups may find themselves afloat in the uncertainty of the new planning processes, the entities with sophisticated "navigational instruments" for the newly turbulent regulatory sea may not feel as overwhelmed. These market participants include public utilities, trade associations, merchant power providers, and others with more resources to invest in these planning processes. Given the utilities' and merchant providers' responsibility to shareholders,²⁵³ and trade associations' responsibility to members, these entities should be active in the new planning processes, and some of these parties' positions are arguably protective of their consumers and in the public interest, at least in the short term.²⁵⁴ But these entities' participation alone may not represent the entirety of the public interest.²⁵⁵ Furthermore, the current environment may not offer public interest participants the opportunity to constructively offer their views, which causes problems later in the permitting process.

The inherent discrepancy in capabilities to influence the planning process between groups can cause problems—such as choosing sub-optimal projects—down the road. A public utility transmission provider might secure approval for construction of transmission lines in the regional planning process and present the state utility

252. See Dworkin & Goldwasser, *supra* note 23, at 587–88 (noting that "there is no elected or appointed representative at the regional level to regulate RTO decisions"). Approval in a FERC tariff means that the transmission planning process is subject to change as simply as filing a request with FERC and securing FERC approval.

253. See TOMAIN & CUDAHY, *supra* note 2, at 174.

254. For example, the utility members of the Coalition for Fair Transmission oppose FERC Order 1000 in part because they fear that they (and their customers) will be forced to pay for long-distance transmission lines, constructed by others, to reach faraway utility-scale renewables. See Coalition for Fair Transmission, *supra* note 6, at 5. However, this position may be exactly the barrier to expanding transmission that FERC seeks to remove.

255. This explains the regulatory requirement on public utility transmission providers to offer just and reasonable rates.

commissions with a transmission plan for cost recovery. The problem for the public utility transmission provider is when citizen suits, political pressure, and acrimony spring up around a project. For public utility transmission providers, this basket of undesirable outcomes can: (1) derail the project; (2) slow the project down immeasurably; and (3) engender bad blood between the public utility transmission providers or regulators that is harmful in future regulatory negotiations. For a public utility transmission provider engaged in a project that serves the public interest, this lack of communication and inclusion of groups could cause needless problems and bad faith. But a public utility transmission provider could also take action outside of the public interest. It could conceivably: (1) secure approval for construction of transmission lines in the regional (or inter-regional) planning process; (2) present the state utility commissions with a difficult-to-deny request that may involve passing the costs (both monetary and environmental) of construction onto the ratepayers of regions where benefits might be marginal;²⁵⁶ and (3) subsidize the transfer of concentrated renewables or fossil fuels from the utility's home service area in a manner that is neither efficient nor equitable.²⁵⁷ Recall the example in *Mississippi Power & Light Co. v. Conerly*, where the utility's transmission planning process produced a line, connecting only to another utility's service area, which may have also been helpful for reliability.²⁵⁸ This transmission line may not have been the product of a transmission planning process where public interest advocates were adequately consulted, given the Mississippi Supreme Court's overturning of eminent domain power because the project was not a "public use."²⁵⁹ In this situation, improving the public interest representation problem can help the public and the region avoid a potentially undesirable

256. Cf. *Miss. Power & Light Co. v. Conerly*, 460 So. 2d 107, 111 (Miss. 1984) (summarizing the public utility transmission working group's meeting minutes where the public utility determined the need for transmission construction and the transmission line that would fulfill that need). FERC Order 1000 Cost Allocation Principle 2 forbids a public utility transmission provider from allocating costs on a non-voluntary basis to those ratepayers who receive no benefit, see FERC Order No. 1000, 76 Fed. Reg. at 49,939, but a proponent can claim benefits of reliability and relieving grid congestion fairly easily, as shown by *Mississippi Power & Light Co.*

257. See Coalition for Fair Transmission, *supra* note 6, at 3, 5 (alleging that under Order 1000, "decision-making in competitive electric markets will be skewed by transmission cost socialization that requires customers to subsidize transmission for which they receive no real benefit").

258. See *Miss. Power & Light Co.*, 460 So. 2d at 111 (noting the utility's claims that the planned line would enhance overall reliability).

259. *Id.*

project and may persuade a wayward transmission provider to reevaluate its priorities sooner in the process.

After regionalization under Order 1000, larger planning processes could amplify the issues discussed in the preceding paragraph. As Dworkin and Goldwasser wrote in 2007 about the faults of the stakeholder process in the context of RTO decision-making, “These criticisms highlight our underlying conclusion—stakeholder processes fail to fully represent the needs of the public interest. Outspent, outnumbered, and procedurally encumbered, representatives of the public interest cannot fairly compete in the stakeholder process even when the process itself is deemed equitable.”²⁶⁰ After Order 1000, the parties that can exercise greater control in planning have a greater ability to influence major infrastructure projects and the efficiency and equity of the modernization of the nation’s electric grid.²⁶¹ Once a plan is decided at the regional level, it will be the one in the record, and it could be difficult for the state regulators or other public interest groups unhappy with this decision to try to jump-start an alternative.

Thus, the quandary: Although this action by FERC to create a new required planning process potentially may help secure more just and reasonable rates overall, consumers, local renewables interests, landowners, and public interest groups may not have the expertise or resources to ensure that the best comprehensive plan is chosen.²⁶² A mechanism to support public participation could ameliorate the weaknesses of these stakeholder processes, which could produce a more equitable and efficient grid modernization outcome.

B. A Policy Proposal to Ameliorate the Public Interest Representation Problem

There are benefits to a regional transmission plan that matches the larger geographic scope of our electric power markets. But if regional planning is here to stay, our country can improve overall grid modernization outcomes by providing a public interest representation mechanism more robust than FERC Order 1000 currently articulates.

Public interest representation before FERC has been an area of concern for several decades. For example, PURPA amended the FPA in 1978 to create an Office of Public Participation at FERC to, among

260. Dworkin & Goldwasser, *supra* note 23, at 586.

261. *See supra* Part II.

262. *Cf.* Dworkin & Goldwasser, *supra* note 23, at 584 (noting the same problem with RTO planning and stakeholder groups).

other duties, “coordinate assistance available to persons intervening or participating” before FERC.²⁶³ Congress never funded this office.²⁶⁴ Dworkin and Goldwasser proposed reforms to respond specifically to the public interest representation problems in the context of RTO stakeholder processes in 2007.²⁶⁵ First, they discussed “regionalizing state oversight” through the use of Regional State Committees.²⁶⁶ The authors noted that such committees had been formed for many RTOs and suggested that proponents of such committees believe that the committees can represent a “consensus view from states in the area.”²⁶⁷ But Dworkin and Goldwasser also noted that Regional State Committees can suffer from funding that is inadequate compared to the amount of funding available to market participants and from an institutional structure that makes agreement between the states difficult.²⁶⁸ Agreement between the states can be particularly difficult given the propensity for the states to disagree with each other on transmission planning and cost allocation issues.²⁶⁹ And in any case, the Regional State Committees are made up of utility commissioners or other representatives of a state’s governor, not the public interest groups that encounter the most trouble participating meaningfully.²⁷⁰

The authors also propose (1) regionalizing utility and transmission regulation, (2) greater FERC enforcement, and (3) state

263. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 212, 92 Stat. 3117, 3148 (codified at 16 U.S.C. § 825q-1(b)(1) (2006)).

264. *Clean Energy Jobs and American Power Act 2009: Hearing on S. 1733 Before the S. Comm. on Env’t and Pub. Works*, 111th Cong. 8 (2009) [hereinafter *Hearing on S. 1733*] (testimony of Jon Wellinghoff, Chairman, FERC).

265. Dworkin & Goldwasser, *supra* note 23, at 588.

266. *Id.*

267. *Id.* at 589 (quoting Clinton A. Vince et al., *What is Happening and Where in the World of RTOs and ISOs?*, 27 ENERGY L.J. 267, 267 (2007)).

268. *Id.* at 590–91.

269. See, e.g., *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 475 (7th Cir. 2009) (illustrating the frequency with which states feud over regional cost allocation schemes). The Order 1000 proceedings show the differences between states on the regional planning issue.

270. See, e.g., Dworkin & Goldwasser, *supra* note 23, at 588–91 (noting that Regional State Committees can have many forms, but giving an example of a Regional State Committee with representatives appointed by the governor of each member state); *Regional State Committee*, SOUTHWEST POWER POOL, http://www.spp.org/committee_detail.asp?commID=35 (last visited Feb. 21, 2013) (showing that RTO Southwest Power Pool’s regional state committee is made up of state utility commissioners). Dworkin and Goldwasser’s summary makes it clear that these committees are to represent the interests of the states, see Dworkin & Goldwasser, *supra* note 23, at 588–89, which can be different than the public interest parties discussed in this paper.

action.²⁷¹ An overall regionalization of utility and transmission regulation might raise constitutional issues, and by inspiring the states' displeasure due to the removal of their authority, might cause more regulatory problems than solutions. Greater FERC enforcement is a possibility, but unless it were independent of FERC and its policy agenda, it could not serve as a viable solution to what should be a ground-up regional planning process.

As part of their state action proposal, Dworkin and Goldwasser describe a "regional public advocate program within the stakeholder process," where what they call "Regional Public Advocates" would monitor the public's interest in the regional process.²⁷² Unlike state advocates that monitor regional processes, these Regional Public Advocates would not have to "juggle both in-state and regional responsibilities."²⁷³ The authors suggest that one option would be for the states themselves to create a joint regional representative, answerable jointly to the states, to guard the public interest.²⁷⁴ One challenge for the Regional Public Advocate proposal is that these entities "would have to answer to some cumulative state-based authority," although as the authors note "it is unclear who this might be."²⁷⁵ The authors suggest the Regional Public Advocate should report to whoever has the role of representing the public interest in each of the members' states, but then note the danger of the Regional Public Advocate's independence being compromised because of tensions between individual states and the Regional Public Advocate.²⁷⁶

Other worthy models have been proposed more recently. For example, the Waxman-Markey Climate Change Bill that passed the House of Representatives in 2009 included a provision creating a federal Office of Consumer Advocate at FERC.²⁷⁷ This office, besides having power to investigate rates, would have had the power to "develop means, such as public dissemination of information, consultative services, and technical assistance, to ensure, to the maximum extent practicable, that the interests of energy consumers

271. Dworkin & Goldwasser, *supra* note 23, at 592–95.

272. *Id.* at 595.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 596.

277. See American Clean Energy and Security Act of 2009 (Waxman-Markey Climate Change Bill), H.R. 2454, 111th Cong. § 194 (2009); see also Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. § 151 (2009) (providing for a similar office).

are adequately represented” in ratemaking matters.²⁷⁸ Although the bill did not define “energy consumer,” it did define “energy customer” to be limited to “residential or small commercial customer” who receives electric service from a utility company.²⁷⁹ Congressman Jim Gerlach and former Congressman Joe Sestak proposed similar legislation in the past, including a version to create such an office within the U.S. Department of Justice.²⁸⁰ They also proposed a law that would require FERC to hold a public hearing before issuing any permit.²⁸¹ And the National Consumer Law Center has proposed the creation of a nearly identical office within the Department of Energy.²⁸² California has an innovative solution: it provides intervenor funding to firms participating on behalf of the public interest in state commission proceedings.²⁸³ Such a plan could be adapted to the regional planning process of Order 1000.

The most recent reform was proposed in late 2012 by several RTOs that secured disgorgement in the market manipulation settlement between Constellation Energy Group and the FERC Office of Enforcement, and this reform proposal has been approved by FERC.²⁸⁴ It is very similar to the Regional Public Advocate proposed in 2007 by Dworkin and Goldwasser.²⁸⁵ RTOs PJM and NYISO requested that FERC approve the allocation of part of the settlement to fund a Consumer Advocate of PJM States and a

278. H.R. 2454 § 194(a)(3)(D).

279. *Id.* § 198.

280. Anne Pickering, *Daily Local: Lawmakers Discuss New FERC Legislation*, CONGRESSMAN JIM GERLACH (Apr. 17, 2009), <http://gerlach.house.gov/news/documentsingle.aspx?DocumentID=123981>. Representative Gerlach reintroduced a bill in 2011, but the proposal focused on the permitting process and non-specifically treated the range or limits of powers in his proposed Office of Consumer Advocate. *See Bill Summary & Status, H.R. 1921, 111th Cong.*, THOMAS, <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.1696.IH>: (last visited Feb. 21, 2013). The bill never attracted co-sponsors, and ultimately died in House committee. *See Bill Summary & Status, H.R. 1696, 112th Cong.*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.01696>: (last visited Feb. 21, 2013).

281. *See* Pickering, *supra* note 280.

282. NAT'L CONSUMER LAW CTR. ET AL., RECOMMENDATIONS, http://www.nclc.org/images/pdf/special_projects/climate_change/recommendations-for-low-income.pdf (recommending provision of funds for FERC proceedings).

283. *See* Tyson Slocum, *Consumer Advocate Position Needed at Top Energy Regulator*, ENERGYVOX (May 16, 2011), <http://www.energyvox.org/2011/05/16/consumer-advocate-position-needed-at-top-energy-regulator/>.

284. *See* Larry Rulison, *State to Get \$78M of Energy Utility's Fine*, ALBANY TIMES UNION (Oct. 29, 2012, 9:33 PM), <http://www.timesunion.com/business/article/State-to-get-78M-of-energy-utility-s-fine-3991620.php>.

285. *See supra* notes 274–76 and accompanying text.

NYISO Consumer Advocate.²⁸⁶ These reforms will pay for the hiring of a small amount of staff to create a non-profit in support the advocacy of retail ratepayers in market design issues to discourage market manipulation.²⁸⁷ But the proposals also explain that they will support greater representation of retail consumers in the regional transmission expansion process.²⁸⁸ This reform is notable because there is real, dedicated regional funding for an advocate on behalf of a public interest—the retail ratepayers. Besides the issues with interstate conflict, independence, and accountability that Dworkin and Goldwasser noted above,²⁸⁹ a disadvantage of this proposal is that the funding comes from a onetime source—the disgorgement—and it may not be sufficient to continue the advocacy process in the longer term.²⁹⁰ Also, such a funding level is almost certainly markedly below that of many market participants, and the technical and legal analyses necessary to come to an independent evaluation of the transmission planning and market design issues are costly.²⁹¹ Additionally, interests besides those of retail ratepayers, such as some economic development or renewable energy interests, would not necessarily be represented. At bottom, the reforms to create this new regional advocate are an exciting development and an indication that the need for better public interest participation is gaining traction, although they could be improved.

This Comment proposes an alternative solution based on Dworkin and Goldwasser's Regional Public Advocate and the very recent regional advocate reforms in PJM and NYISO. Called a "Public Staff Model" advocate, this plan would be modeled on the

286. See CAPS Proposal, *supra* note 224, at 3–4; Rulison, *supra* note 284.

287. CAPS Proposal, *supra* note 224, at 2–3 ("The purpose of CAPS is to facilitate and bolster the representation of retail consumers' interests in PJM stakeholder processes.").

288. *Id.* at 3 n.7 ("Stakeholder processes are also used to develop transmission expansion planning rules to address reliability, economic and policy goals, develop region-wide load forecasts and determine how to best integrate demand side resources such as demand response and energy efficiency.").

289. See *supra* notes 271–77 and accompanying text.

290. The CAPS Proposal's budget is \$350,000 annually, which proponents claim would "attract and retain an executive director at the superior talent level required to represent consumer interests in complex, multi-disciplinary PJM proceedings." CAPS Proposal, *supra* note 224, at 4.

291. See Dworkin & Goldwasser, *supra* note 23, at 590–91 (explaining that the proposed New England Regional State Committee annual budget of \$1.4 million for the first two years and \$2.2 million for the following three was much lower than market participants' expenditures and might not be sufficient to pay for legal and technical analysis).

structure of a state consumer advocate,²⁹² but would be a party standing separate from the state commissions, utilities, or FERC. It would be invested with some of the powers of the state consumer advocates.²⁹³ Specifically, it would have the powers to: (1) intervene in the transmission planning process representing the public interest; (2) obtain information for the public from the transmission planning process, and perhaps from the utilities making up the transmission planning process; and (3) invite members of the public to address and question the stakeholders engaged in transmission planning.²⁹⁴ The advocate would maintain a website with clearly accessible information, as well as a phone number where interested parties could call and receive information about the business of the regional transmission planning process. This proposal would be consistent with FERC Order 1000's requirement of the regional planning process.²⁹⁵

Although adoption of a Regional Public Advocate or Office of Consumer Advocate would improve the amount of information available about the regional planning process, the Public Staff Model might function in a superior manner in important respects. One important way that the Public Staff Model would improve upon the Regional Public Advocate and at the same time address the obscure, technical character of transmission planning is by independently providing important information to any party, including the press and the interest groups that might have incentives to monitor transmission planning. Emphasizing the extra step of improving accountability to affected non-state public interest parties is important because the other proposals limit the reach and discretion of advocates. State utility commissions must balance between what this Comment defines as public interest and shareholder concerns. State public advocates only advocate through their statutorily created powers and only look for retail ratepayer interests, sometimes including large ratepayers whose interests are opposed to smaller parties in important respects.

The Public Staff Model discussed here refines the idea of the Office of Consumer Advocate in FERC by specifically acknowledging

292. There are several models of the state consumer advocate. Consumer advocates can be located in the Attorney General's Office, usually as part of a consumer protection section, they can be a separate office unto themselves, or they can be an independent office within the state utilities commission. *See The History of NASUCA*, NAT'L ASS'N OF ST. UTIL. CONSUMER ADVOCS., <http://www.nasuca.org/archive/about/index.php> (last visited Feb. 21, 2013).

293. *See, e.g.*, N.C. GEN. STAT. § 62-15 (2011) (detailing the structure, authority, and duties of the North Carolina Utilities Commission's Public Staff model).

294. *Id.*

295. *See supra* Part III.A.

the transmission planning process's inherent consideration of broader energy policy issues. These pre-Order 1000 Office of Consumer Advocate proposals tend to define consumers in a way that limits representation to pure consumer protection issues within a narrower definition of rates and practices.²⁹⁶ This focus may not acknowledge the more multifaceted public interests that this Comment argues should be factored into transmission planning decisions. Order 1000 also reinforces the importance of early involvement with transmission planning, which heavily influences cost allocation, includes discussions of state public policy priorities, and generally is where parties need to be involved if they are to maximize consideration of public interest objectives and generate the most equitable and efficient transmission plan.

By dispensing information to those parties interested in safeguarding the public interest in the earliest stages of transmission planning, the Public Staff Model advocate would enable public interest parties to have a say, and to contribute to improving the overall plan, before concrete transmission planning proposals emerge out of the process and become difficult to undo. Likewise, although the proposed Office of Consumer Advocate included in the Waxman-Markey Bill and associated proposals contain important aspects of a successful reform, the promulgation of Order 1000 should refocus reforms on transmission planning, cost allocation, public policy priorities, and other aspects of Order 1000.²⁹⁷ For this reason, the California intervener plan as instituted will likely not serve as well in transmission planning processes as in its current application in agency proceedings because of their spaced-out yet continuous planning meetings.²⁹⁸

296. See *supra* notes 277–79 and accompanying text.

297. See American Clean Energy and Security Act of 2009 (Waxman-Markey Climate Change Bill), H.R. 2454, 111th Cong. § 198 (2009).

298. See Slocum, *supra* note 283; cf. NAT'L CONSUMER LAW CTR. ET AL., *supra* note 282. One issue with providing dedicated funding to public interest groups in the FERC Order 1000 transmission planning context is that these ongoing processes would effectively create a government-funded, quasi-permanent set of interest groups. In addition to the questions of use of resources for a permanent but non-governmental group, questions of the group's independence from their funding source could be more problematic than an independent government advocate and permanent third-party appropriations to watchdogs are likely to be viewed with suspicion and be frequent targets for elimination from appropriations. On the other hand, as the National Consumer Law Center points out, ratepayers fund public utilities and utility commissions' participation in these types of processes, so it is reasonable to fund third-party interest groups. Given the drawbacks discussed above, however, this Comment takes the position that the Public Staff Model's combination of intervention on behalf of the public interest and facilitation

For a Public Staff Model reform to function effectively, it would have to be funded, staffed, and institutionally located in a way that would maximize its efficiency and minimize its political capture. Unlike the Regional Public Advocate proposal, funding by the states would not serve the purpose completely because states could attempt to curtail release to the public and other states. Staffing would also need to be independent of FERC's transmission-construction agenda,²⁹⁹ but this problem exists at the White House level and at the Department of Energy as well.

To remedy these problems, each planning process or group of planning processes, depending upon need, could have Public Staff Model advocates located geographically proximate to a planning process or several processes. The staff could be institutionally housed within a newly created separate FERC Office, an Office of Consumer Advocate, who would be separate from FERC in the manner of the current FERC Office of Administrative Litigation. The Office of Consumer Advocate would provide institutional support to the Public Staff Model advocates around the country in front of FERC and other federal government agencies, which would be necessary for these public advocates to avoid being brushed off in the world of agency politics. The Office of Consumer Advocate could choose the various advocates in consultation with both the state public utility commissions and state consumer advocates. The Consumer Advocate himself would be appointed by the President and confirmed by the Senate, so he would not be beholden to the FERC Commissioners in making the appointments of the Public Staff Model advocates. The confirmation by the Senate, a body made up of people representing all the states, should help to guard against a geographically biased Consumer Advocate that would favor one region's priorities over another region. And because the Consumer Advocate's role would be to merely appoint the staff around the country in consultation with other groups, the risk of a Consumer Advocate's bias would also be reduced.

Another option is to make the appointer of the Public Staff Model advocates a "chief information advocate" within the Energy Information Administration, an independent part of the Department

of access to information for third party advocacy groups, discussed *infra*, would be preferable.

299. See *Hearing on S. 1733, supra* note 264, at 8-9 (testimony of Jon Wellinghoff, Chairman, FERC) (recommending approval of the bill, which included an Office of Consumer Advocacy (OCA), and stating that "[t]o ensure its independence from FERC, OCA should be placed within another agency or created as a separate agency").

of Energy (“DOE”). This would provide greater focus on the information-gathering and dispensing side of the Public Staff Model Advocate, but the Energy Information Administration’s technical and technocratic focus might make it an imperfect home for an office that could incur the wrath of FERC Commissioners and powerful public utility interests.

Given that creation of the Public Staff Model advocate could incur such displeasure, one criticism is that congressional action of this type is extremely difficult to achieve. Congressional action is already elusive in the energy policy area, and likely FERC, DOE, and administration opposition on one side and certain states, state consumer advocates, and consumer-oriented nonprofits on the other make the political odds of creation poor. As to the criticism that FERC will resist this encroachment on its authority, it is understandably difficult to imagine FERC commissioners agreeing to any additional limits on what they see as their central authority over transmission in interstate commerce. But FERC commissioners, and the agency as a whole, are motivated by the public interest, and they might be open to a narrowly designed reform that may spread the benefits of transmission more equitably and lead to better decision-making, while still preserving the coordination and openness that FERC embraced in Order 890 and Order 1000.³⁰⁰

Such a reform would thus almost certainly have to come from Congress. Fortunately, as discussed, these types of reforms have been proposed and included in serious legislation such as the 2009 climate change bills.³⁰¹ Many congressmen vigilantly guard the prerogative of their states in public utility regulation under the federalist system,³⁰² and as state utility commissions have offices of people’s counsel, congressional leaders interested in ensuring equitable, efficient

300. See *FERC 987th Commission Meeting*, at 36 (Nov. 15, 2012), <http://www.ferc.gov/EventCalendar/Files/20121123092051-transcript.pdf> (Comments of Jon Wellinghoff, Chairman, FERC) (“I also want to comment on one item of the disgorgement of some of the [Constellation Energy Settlement] profits that are going to good use. I found out at the NARUC Convention recently that both New York and PJM have decided to use part of that money for a consumer advocate representative in PJM and in New York.”); *Hearing on S. 1733, supra* note 264, at 8–9. Chairman Wellinghoff cautioned against giving the Office of Consumer Advocacy independent investigatory authority. *Hearing on S. 1733, supra* note 264, at 8.

301. See H.R. 2454; Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. § 151 (2009).

302. See *The American Energy Initiative: Electric Transmission Issues, Including Topics Related to the Siting, Planning, and Allocation of Costs for Electricity Transmission Infrastructure: Hearing Before the H. Comm. on Energy & Commerce*, 112th Cong. *passim* (2011).

transmission decision-making with more public interest representation can certainly open negotiations with FERC over some kind of reform to the regional planning process. This Comment sketches a proposal for that reform, updated in the context of FERC's promulgation of Order 1000.

There is also the normative issue of fairly sourcing the revenue that is appropriated to a Public Staff Model advocate. The obvious answer that it should come from FERC as it is FERC that is interested in achieving the just and reasonable rates by promoting wholesale markets is a non-answer because FERC is funded by the fees and charges from the regulated industry.³⁰³ FERC will pass the costs to the regulated entities, who themselves could be benefitting from the lower price of electricity available to be purchased on the wholesale market. The regulated entities would attempt to pass the costs on to the ratepayers. In the end, ratepayers should probably fund this improvement in public interest participation, because the benefits from more equitable and efficient decision-making supporting more robust wholesale transmission should flow to ratepayers. Of course, ensuring that transmission expansion does not unfairly disadvantage certain parties is part of the basic fairness by which our culture evaluates political and administrative institutions.³⁰⁴ Funding the Public Staff Model could be achieved through a regulatory fee assessed on the regulated transmission providers.³⁰⁵ If progressive distributional outcomes are especially important to policymakers, the fee can then be attached to certain FERC tariffs so that smaller or residential users of electricity are not affected.

This Comment concedes that a Public Staff Model will not undo the states' loss of exercised jurisdiction over the transmission planning process, or necessarily enable public interest groups to change the process's outcome. However, given the likelihood of sustained greater federal jurisdiction, the Public Staff Model is a worthy reform to help our nation to maximize the benefits of a

303. *About FERC*, FERC, <http://www.ferc.gov/for-citizens/about-ferc.asp> ("The Commission is funded through costs recovered by the fees and annual charges from the industries it regulates.") (last visited Feb. 21, 2013).

304. See Bo Rothstein, *Political Institutions: An Overview*, in A NEW HANDBOOK OF POLITICAL SCIENCE 135, 138 (Tovert E. Goodin & Hans-Dieter Klingemann eds., 1996) (contending that when evaluating institutions, the normative questions about institutions' ability to create a just society should be an important motivator in the analysis).

305. This mirrors the funding mechanism that North Carolina uses to pay for the work of the Public Staff of the North Carolina Utilities Commission. See N.C. GEN. STAT. § 62-302 (2011); 4 N.C. ADMIN. CODE 11.R15-1 (2012).

modernizing grid while fulfilling the statutory and moral imperative of protecting the public interest.

CONCLUSION

In order to ensure just and reasonable wholesale rates, FERC has encouraged the development of competitive wholesale electricity markets, and these markets have placed higher demands on the electric grid. Many of the barriers to modernization and capacity improvement relate to transmission planning processes and associated cost allocation. In Order 1000, FERC is therefore asserting additional federal authority over these areas. FERC hopes that this reform will facilitate reliability, lower rates, and adoption of large-scale renewables.

The transmission planning reform aspects of Order 1000 will likely not be invalidated for exceeding FERC's statutory powers, as it appears that courts may be willing to read FERC's longstanding authority over all "transmission of electric energy in interstate commerce" to include authority over the transmission rate portion of retail sales. Given this eventuality, both FERC and its opponents have the opportunity to maximize the advantages that Order 1000 can bring. By improving representation of the public interest in the transmission planning process our country can promote the goal of a transmission grid modernized equitably and efficiently. Implementing a reform like the Public Staff Model proposed in this Comment can ensure that the benefits of the modern grid better compensate our nation for those monthly electric bills and other costs. From both an equity and an efficiency standpoint, improving public interest representation is the right thing to do.

ALEXANDER T. DADOK