I have done some studying on other states policies and situations involving siting of power plants. One thing I discovered where a lot of differences, but one glaring constant, they all require ***local approval before building***.

An article published by Duke Environmental Law titled Transmission Siting in Deregulated Wholesale Power Markets 3-22-2005 focused on these items. State and local regulatory bodies ***coordinate*** in the ***siting*** of power plants and transmission lines. These bodies focused on determination of need to avoid unnecessary economic duplication of costly infrastructure. Very similar situation to the Aries plant & the South Harper plant only 17 miles apart. The other thing they focus on is protection of ***Local Land Use and other environmental concerns***. They have ***input*** on the placement of necessary generation and transmission facilities. This is the constant in almost all states. ***A power plant must have approval from local government before it can proceed to the state level for state approval and before it can be built.***

In the state of California, due to previous brownouts and blackouts, the state has realized an increased need for power. California government has created a "fast track" for approval for siting of power plants. The state of California still requires all proposed power plants have local approval before coming to the state for the siting process, to prevent chaos.

In the state of Oregon, legislators have teamed up to introduce Bill SB527, the ***Oregon Fair Energy Bill.*** This Bill gives counties and cities the authority to rule on whether a plant meets local land use rules when an energy developer seeks to build a gas-fired power plant within their jurisdiction. The significant points of this bill are:

#1 Applicant must obtain land use approval from local government.
#2 Requires State Department of Energy to generate Environmental impact statement
#3 Applicant must show regional need for generating capacity.
#4 Requires disclosure of financial ability and criminal history of applicant

Under the previous law, Energy Facility Siting Council would make the final determination. Energy developers could choose between going through local government or a 7 member government – appointed panel. The panel tended to award without consideration of local authority or citizen input. This angered city and county governments and citizens who want control over their land use, hence the bill. Does this sound familiar? I hope so.

Large industrial developments ought to be consistant with local land use rules as interpreted by local land use authorities. No community should be forced to accept a power plant against its will, and against its better judgement. Local governments deserve a chance to represent their constituents when someone wants to build a power plant in their neighborhoods. (Quoted from "Power over Power Plants" The Register Guard 4-13-2005.)

In the state of Kentucky as early as 2002, Governor Paul Patton unveiled a plan for "Good Oversight" for new power plants.

#1 2000-3000 foot setback from homes, hospitals, historical sights, nursing homes, etc.
#2 A seven member siting board that would include members of the Public Service Commission, Secretaries of the Natural Resources and Economic Development Cabinets and 2 members of the community in which the plant wants to be sited.

Representative Jon Draud accused utilities of using "Scare Tactics" about higher electric rates and other dangers if they were subjected to regulation on power plant siting. "There has been a tremendous amount of misinformation by the utilities". (This is also very familiar to me.) Draud said, " The big problem is with smaller gas-fired plants known as peaking plants, which are used only a few weeks in the summer to meet peak cooling demands." He said, "the plants produce a sound that is essentially nothing more than the sound of 2 jet engines." (This is exactly what we have been telling you).

Recently in Kentucky (3-3-2006), Legislators are beginning discussions for 2 provisions designed to spur the development of more technologically advanced and environmentally sound coal power plants.

Kentucky is one of a dozen other states vying for the Future Gen project. A proposed coal-fueled power plant that would generate electricity and hydrogen from coal with nearly no emissions. The House Tourism Development & Energy Committee approved House Bill 665 that would remove the project from the State siting process, but it would still have to be approved by the local planning and zoning commission.

The indications of these examples are that it is appropriate for electric companies who want to build a power plant to go through ***local approval before going to state government for approval before building*** the power plant. Even in the face of emergency, proper steps for authorization must be maintained in order to prevent chaos. I see no emergency in the situation involving Aquila and the South Harper plant. Since Aquila did not get local approval before getting state (MPSC) approval before building the South Harper Facility you should not award it now.

Resources:

#1 Transmission siting in deregulated wholesale markets: Duke Environmental Law & Policy Forum 3-22-2005 author- Jim Rossi

#2 State speeds power plant development (California) Paul Shigley &-1-2001

#3-4-5 Support grows for more support over power plants—Register Guard 4-2004 thru 6-2005 Joe Harwood & David Steves

#6 Oregon SB527

7-8-9 Kentucky Post 1-2002 thru 2-2002 Courtney Kinney

#10 More battles lie ahead for Power Plant siting bill in Kentucky Paducah Sun Bill Bartman 3-26-2002

#11 Bills may spur cleaner coal power plants - Messenger-Inquirer 3-3-2006 Owen Covington

Transmission siting in deregulated wholesale power markets: re-imagining the role of courts in resolving federal-state siting impasses.(Environmental Regulation, Energy, and Market Entry)

Source: Duke Environmental Law & Policy Forum
Date: 3/22/2005
Author: Rossi, Jim

INTRODUCTION

During most of the twentieth century, state and local regulatory bodies coordinated the siting of power plants and transmission lines. (1) These bodies focused on two important issues: (1) the determination of "need," so as to avoid unnecessary economic duplication of costly infrastructure; and (2) environmental protection, so as to provide local land use and other environmental concerns input on the placement of necessary generation and transmission facilities. (2) With the rise of a deregulated wholesale power market, the issue of need is increasingly determined by the market, not regulators. Environmental concerns with siting, however, frequently remain contested, especially locally, but the regulatory apparatus for processing these concerns faces new challenges in deregulated markets. As this Article suggests, environmental concerns in transmission line siting will increasingly be addressed at the federal level, with federal concerns predominating consideration of the issues. The dormant commerce clause does much of the work towards making this a predominantly federal concern, but eventually the Federal Energy Regulatory Commission's ("FERC's") jurisdiction over such matters must be expanded by statute.

Even if Congress does not expand FERC's jurisdiction, this Article argues that courts can play a positive role to

facilitate the resolution of state-federal siting conflicts. A recent siting dispute involving a power line in the Long Island Sound illustrates this fundamental shift in the environmental discourse of siting proceedings, as a well as a need for modifications to federal law regarding transmission siting. (3) Ultimately, FERC may need authority to preempt state siting laws, but absent congressional action, courts might empower state and local siting boards to take into account federal goals in competitive markets in making siting decisions.

I. THE CROSS-SOUND KEYSPAN TRANSMISSION LINE SITING DISPUTE

A recent example of the conflict between state siting and deregulated wholesale power markets involves the Cross-Sound KeySpan transmission project. Regulatory officials in the state of Connecticut have strongly opposed the Cross-Sound Cable, a 23-mile merchant transmission line that would allow Long Island Power Authority to import power to Brook Haven, Long Island from New Haven, Connecticut, leading to significant delays in the operation of the project. (4) The project sponsor built the line in 2002, following FERC's approval of retail sales at negotiated transmission rates, (5) as well as permit approvals by the Army Corp of Engineers, the New York Public Service Commission, the Connecticut Siting Council, and the Connecticut Department of Environmental Protection. (6) The project complied with all state siting and environmental statutes, except for a provision of its state-issued permit that required the lines to be buried at a certain depth. (7) Expansion of transmission access to locations such as New York City would provide important capacity, and may have helped in absorbing some of the transmission shortages that exacerbated the Summer 2003 blackout. (8)

In burying the transmission line, the project sponsor encountered some problems. It discovered hard sediments and bedrock protrusions along portions of the route, and immediately notified the Army Corps and the Connecticut Department of Environmental Protection. (9) Some Connecticut officials cited environmental concerns in opposing the project, such as impacts on shellfish beds and operations in the New Haven Harbor. (10) The transmission line was built, however, and according to the project sponsor's CEO the line was "buried to the permit depth along 98 percent of the entire span and over 90% of the route with the Federal Channel to an average of 50.7 feet below mean low water, well below the required level of minus 48 feet." (11)

Nevertheless, the opposition of Connecticut officials kept the transmission line from becoming operational until 2004. (12) This may be a well-intended dispute over environmental regulation, but the line was opposed not only by environmental interests in the state of Connecticut. As often is the case with blocking a new entrant to a state's power industry, there is also an anti-competitive angle to opposition to the Cross-Sound line. Northeast Utilities, a major investor-owned utility whose customers reside primarily in Connecticut (and which also services customers in Massachusetts and New Hampshire), owns an older, competing transmission line (the 1385 cable) that runs parallel to the Cross-Sound Cable. (13) Northeast Utilities favored updating its line over approving the Cross-Sound line, with which it would compete, and requested FERC to use its authority under Section 210 of the FPA to order New York to assist in replacing the 1385 cables. (14)

After the Cross-Sound transmission line was built, Connecticut passed a moratorium on the siting of new or expanded transmission lines across Long Island Sound, (15) effectively limiting the project sponsors' ability to make the project comply with Connecticut's understanding of the permits. The Cross-Sound Cable was authorized to operate under an emergency order issued by the U.S. Secretary of Energy following the August 2003 blackout, but that order was lifted in early 2004, leaving the Cross-Sound line without permission to go live. (16) So effectively, the Cross-Sound cable was completed in 2002, but remained dormant as a permanent transmission alternative until Summer 2004, due to a regulatory impasse between the state of Connecticut, on the one hand, and Cross-Sound's investors and the state of New York, on the other. As of Summer 2004, a settlement between the parties allowed the line to go live. (17)

As FERC Chairman Pat Wood indicated before Congress in May 2004, Federal regulation seems ill-equipped to resolve the issue. (18) In the context of the 1385 line dispute, Long Island Power Company requested that FERC use its authority under the Federal Power Act to direct KeySpan to recommence commercial operation of the Cross-Sound line, notwithstanding the objections of state regulators. (19) However, although FERC has embraced wholesale deregulation, FERC lacks the authority to preempt the state environmental siting process for the transmission line. (20) Connecticut's Attorney General, backed by environmental interest groups and Northeast Utilities, threatened litigation if the Cross-Sound line is allowed to go live again, instead favoring expansion of the existing transmission line, owned by Northeast Utilities. (21)

To the extent that transmission remains entirely within the control of local, rather than national, regulators, states

have strong incentives to protect their own incumbent firms or citizens, rather than supporting interstate cooperative market norms. Only after threatening to approve expansion of the 1385 cables, was FERC able to force the parties to the bargaining table. (22) FERC could not preempt the states and mandate operation of the Cross-Sound transmission line, but the threat of it making a decision elsewhere led stakeholders to negotiate a settlement that allowed the line to operate. (23)

The Cross-Sound transmission line is not a unique example of state or local regulation blocking the expansion of infrastructure that is critical to interstate power markets. As Ashley Brown reports, transmission expansion projects spawn massive NIMBY concerns, frequently generating state and local opposition. (24) To make matters worse, many state legislatures fail to authorize state siting boards to even take into account interstate concerns and some states even allow localities to block transmission expansion projects. (25)

II. THE DORMANT COMMERCE CLAUSE AS A NECESSARY CONSTITUTIONAL SOLUTION

Although it is not an express mandate of the text of the U.S. Constitution's Commerce Clause, (26) the dormant commerce clause doctrine limits of the power of a state government to impair flee trade. As Oliver Wendell Holmes once remarked:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress Void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end. (27)

Among recent judicial skeptics, such as Justices Scalia and Thomas, the doctrine is referred to as the "negative" commerce clause, indicating its lack of textual basis in the Constitution. (28) Notwithstanding the lack of textual support for the doctrine in the Constitution, the jurisprudence of the dormant commerce clause has a long-standing basis in American constitutional jurisprudence. As Justice Cardozo famously remarked in striking down a New York Law that set minimum prices all milk dealers were required to pay New York milk producers, the Commerce Clause prohibits a state law that burdens interstate commerce "when the avowed purpose of the [law], as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." (29) The Court invoked this general principle to strike a New York regulatory scheme that had been used to deny a license to an out-of-state milk processing facility. (30) Since the licensing provision had been enacted "solely [for] protection of local economic interests, such as supply for local consumption and limitation of competition," the Court found it to be unconstitutional. (31)

Since the 1980's, when deregulation began to take hold in a variety of industries, the Supreme Court has had several occasions to address dormant commerce jurisprudence. In one of its cases on the topic, General Motors v. Tracy, (32) the Court evaluated Ohio's differential tax burdens for in-state and out-of-state natural gas suppliers, but refused to find a violation of the dormant commerce clause on the particular facts that had been raised. General Motors, which mounted a legal challenge to Ohio's differential tax, was a large enough customer to purchase its gas from the open market (rendered competitive by national regulators) rather than bundled gas from a state regulated local distribution company ("LDC"). (33) However, absent competition between the LDC and the open market serving General Motors, the Court reasoned, "there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." (34) The case illustrates how intra-state regulation, which may impede competition (as where, for example, state regulators retain jurisdiction over retail rates), poses a potential tension under the dormant commerce clause, which protects interstate competition where national regulators have made a policy decision favoring competitive markets. FERC clearly has made such a decision in the context of the wholesale power market, making the dormant commerce clause relevant.

Other recent cases extend the dormant commerce clause beyond merely protecting the external (interstate) market. In C&A Carbone, Inc. v. Town of Clarkstown, the Supreme Court invalidated a municipally-imposed

monopoly over non-recyclable solid waste collected for processing and transfer. (35) To guarantee a minimum stream of revenues for the project, the Town of Clarkstown, New York adopted a flow control ordinance, allowing the private operator of a transfer station to collect a fee of $81 per ton in excess of the disposal cost of solid waste in the private market. (36) C&A Carbone, Inc. processed solid waste and operated a recycling center, as it was permitted to do under the Clarkstown flow control ordinance. (37) The flow control ordinance required companies like Carbone to bring nonrecylable waste to the locally-franchised transfer station and to pay a fee, while prohibiting them from shipping the waste themselves. (38) "[A] financing measure," the flow control ordinance ensured that "the town-sponsored facility will be profitable so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years." (39) The Court reasoned that the local law violates the dormant commerce clause because "in practical effect and design" it bars out-of-state sanitary landfill operators from the participating in the local market for solid waste disposal. (40) In so reasoning, the majority drew from a 1925 case, written by Justice Brandeis, which held unconstitutional a statute prohibiting common carriers from using state highways over certain routes without a certificate of convenience and necessity. (41)

If a municipal government created and owned the facility itself, this would bring the monopoly within an exemption to the dormant commerce clause-the market-participant exemption. (42) In creating monopolies, however, local governments frequently work with private firms, using the advantages of the state--subsidies, below-market interest rates from non-taxable bonds, bypassing state or local restrictions on use of municipal tax powers, etc.--to assist firms and provide incentives for them to provide service. Since municipal governments often help to pay for privately-operated infrastructure, such as waste disposal facilities, through the issuance of bonds, it is understandable that a local government may want to create a monopoly, in order to ensure that the facility maintains sufficient revenues to cover its costs and to avoid jeopardizing the government's bond rating. Such facilities are allowed to collect charges, which serve the same basic function as a tax. If the government itself were to build, own, and operate a facility, the political process would impose a general tax, but with private operations subsidized by a state or locally enforced monopoly, the tax implications of such projects are obscured. The Town of Clarkstown, New York, for example, guaranteed revenue for its solid waste transfer station--it promised a minimum of 120,000 tons of waste per year, allowing the firm to make more than $9.7 million in annual revenue-and, after a period of five years, the town agreed to buy it for $1. (43) One way of understanding the Court's rejection of the Clarkstown flow control ordinance is based on its concerns with impermissible government-assisted monopolies against the backdrop of interstate competition.

The basic animating principle of the recent dormant commerce clause cases has frequently been described as the protection against discrimination between in-state and out-of-state competitors. (44) If these decisions are taken at face value, the Supreme Court's dormant commerce clause jurisprudence might be said to embrace a pro-competition stance, consistent with the ideology and goals of a neoclassical economic conception of federalism. In Tracy, for example, Justice Souter, writing for the Court, stated, "[t]he dormant commerce clause protects markets and participants in markets, not tax payers as such." (45) He bolstered this vision of the dormant commerce clause by referencing the famous words of Justice Jackson:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders: such has been the doctrine of this Court which has given it reality. (46)

This--the neoclassical view of the dormant commerce clause-sees the role of federal courts as protecting states from interfering with the economic exchange of a free market economy. (47) On this view, its primary purpose is to guard against balkanization by protecting free trade from state government interference in the external market.

It would be a mistake, however, to read the dormant commerce clause as a constitutional mandate for competition, let alone deregulation. As dormant commerce clause jurisprudence itself recognizes, there are exceptions to the dormant commerce clause where the state itself takes on the role of market participant. (48) Further, the dormant commerce clause allows substantial state government intervention in the setting of prices, subsidies, and taxes, so long as a state does not engage in differential treatment in the same market in ways

that burden interstate competition. (49) Moreover, since the dormant commerce clause is not derived from the express language of the U.S. Constitution, Congress can override it by adopting a national policy that preempts, or overrides, the competitive market between individual states. General Motors v. Tracy, for example, seems to carve out a safe harbor for state regulation of natural gas distribution. (50) Under the Commerce Clause, Congress has the express authority to establish an agency such as the Interstate Commerce Commission, giving it the jurisdiction to regulate railroad rates previously left to individual states. "Our Constitution," the late Julian Eule wrote, "did not attempt to solve economic parochialism by an express prohibition against interference with free trade. Instead, it shifted legislative power over economic matters that affect more than one state to a single national body". (51)

To take a more modern example than the now-defunct ICC railroad regulation regime, Congress has created FERC, which has made a major policy choice to implement regional competitive wholesale power markets. (52) Congress has the power to override FERC's decision to implement regional competitive wholesale markets, but no one has seriously proposed this. Alternatively, Congress might expand FERC's jurisdiction, taking some or all regulatory authority over retail markets away from state regulators. If it did so, by occupying the lawmaking field, Congress might preclude states from enacting some laws that discriminate against out-of-state suppliers in deregulated wholesale markets. But again, Congress has not done so. Congress' inaction, however, does not mean that preemption plays no role in this context. Congress' acquiescence in FERC's competitive policies serves as one legal source for a type of federal preemption of individual states acting in ways that impair commerce between the states. Absent a change in federal policy, state efforts to curtail competition in wholesale electric power markets could be suspect under the dormant commerce clause, to the extent that they undermine the interstate markets created by FERC. While a federal preemption argument for interstate market norms is based in a positive legal source of congressional or federal agency enactments which preclude contrary state laws, the dormant commerce clause also arguably finds some source in the cooperative behavior between two or more states that have adopted a competitive norm of exchange in which Congress acquiesces. (53)

Many have suggested that the neoclassical account of the dormant commerce clause-as a legal source of free trade policies between the states-is flawed. (54) An alternative view understands the dormant commerce clause not as inherently protecting competition itself, let alone free markets, but as protecting a political process that makes markets possible. For instance, in West Lynn Creamery, Inc. v. Healy, the Supreme Court struck down a Massachusetts tax and rebate scheme for milk, even where the tax operated neutrally without regard to the milk's place of origin, but where tax revenues went into a subsidy fund and were distributed solely to Massachusetts milk producers. (55) In writing for the majority, Justice Stevens embraced a political process account of the dormant commerce clause, in which its role is seen as representative-enforcing in a manner similar to Carolene Product's famous footnote 4. (56) As Justice Stevens remarked in striking down the tax and subsidy regime in West Lynn Creamery:

> Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because 'the existence of major in-state interests adversely affected ... is a powerful safeguard against legislative abuse.' However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a state's political process can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy. (57)

Rather than inherently protecting competition and free markets, the purposes of the dormant commerce clause doctrine can be understood with the framework of Madisonian democracy as well as efficiency--specifically, limiting welfare-reducing interest group rentseeking in the state regulatory process. (58)

Unlike the traditional public choice critique, which condemns all state and local rent-seeking, the political process account of the dormant commerce clause targets only those rent-seeking laws that restrain commerce pursuant to implicit or explicit contracts between other states. The state political process allows states, like the U.S. Congress, to adopt rent-seeking legislation, in the form of regulation, subsidies, and taxes. However, an *individual state cannot enact a law* that undermines a desirable pro-commerce regime that has been put into place through the implicit or explicit cooperation of states, any more than it can undermine a pro-commerce

regime adopted formally by Congress or a federal agency (under the preemption clause).

Some rent transfers are permissible, if not desirable, in state and local political processes. For example, rent-seeking in the form of a neutral corporate tax exemption for utilities, or rent-seeking in the setting of utility rates to favor industrial growth, is likely permissible, and subject only to the safeguards of the local political process. However, rent-seeking in the form of exclusionary regulation that limits access to the interstate market is more suspect as an approach to regulating economic matters, especially where market exchange is the background norm as a matter of national policy. Florida's Supreme Court rejected a dormant commerce clause challenge to use of the state's restrictive power plant siting statute to restrict the building of new plants by out-of-state suppliers, (59) but the inadequacy of a record establishing discrimination against out-of-state merchant suppliers may have impeded the development of this legal argument. At a minimum, dormant commerce clause jurisprudence requires states and localities to explain how regulatory actions and legislation restricting power supply in the wholesale market or transmission expansion might serve legitimate purposes, such as environmental or consumer protection.

More challenging is the constitutional status of state or local-franchised monopolies against the backdrop of dormant commerce clause jurisprudence. On the political process account, the Town of Clarkstown, New York violated the dormant commerce clause by granting a monopoly that imposed a veiled tax on users of waste disposal outside of the locally-sponsored facility, including out-of-state facilities. Its monopoly franchise was invalidated. In Carbone, Justice Souter wrote a dissent, joined by Chief Justice Rehnquist and Justice Blackmun, arguing that the majority had ignored the distinction between private and public enterprise and that the monopoly created by the flow control ordinance is easily distinguished from the "entrepreneurial favoritism" the Court has previously condemned as protectionist. (60) What distinguishes this monopoly from a constitutionally permissible monopoly, or do local and state electric, natural gas, and telecommunications monopolies risk the same fate if they do not open their service territories and network facilities to competitors? The historical lack of a background norm of competition excuses many historical monopolies from the constitutional reach of the dormant commerce clause: if there is no interstate market, a state or locally imposed monopoly cannot discriminate against out-of-state commerce. With the development of interstate markets in telecommunications and electric power, however, more difficult questions emerge. Will any state or local monopoly raise dormant commerce clause problems? For example, is it unconstitutional for a utility to impose a surcharge on all users of distribution service, regardless of whether they purchase their power from local or out-of-state suppliers?

If a municipality, such as the City of Clarkstown, operates a government-owned monopoly over telecommunications or electric distribution service, the market participant exception to the dormant commerce clause shields its conduct from the reach of the commerce clause. (61) Franchised private utilities--such as investor-owned utilities--pose a potential problem but are not necessarily unconstitutional, even under the political process account of the dormant commerce clause. The political process account, however, warns state and local governments to approach the financing of such operations with care. In the Carbone case, the Town of Clarkstown promised to make up losses from operating the transfer facility at competitive rates, presumably by taking these losses out of its general revenues. (62) What the dormant commerce clause seems to prohibit is a local government explicitly indemnifying a private monopoly out of the public fisc, even where these impose the same monopoly and fees on both in-state and out-of-state providers of service. The Takings Clause does not require governments to take on such obligations, but the dormant commerce clause may prohibit them if they are the result of rent-seeking that imposes burdens on the interstate market. Further, as in Carbone, authorizing above-market fees solely for purposes of maintaining the monopoly may be constitutionally suspect. (63) As we move from local to state monopoly franchises, concerns with a single firm capturing the political process are weaker--a single firm that dominates municipal politics may have little power in state-wide regulatory and political processes--so state-franchised monopolies may be more likely to pass constitutional muster; but even neutral financing arrangements may be suspect if they favor local enterprise and have the "practical effect and design" of impeding out-of-state competitors.

To return to the Cross-Sound example and other state moratoria on siting new facilities, to the extent that FERC has deregulated wholesale power, such disputes raise potential issues of great concern under the dormant commerce clause. While the state of Connecticut certainly may impose legitimate environmental restrictions on permits, its moratorium raises serious anticompetitive concerns--particularly where it is used to keep a project that has already been built from becoming operational. The dormant commerce clause will be a likely tool for challenging such restrictions, especially where, as in Connecticut, competitors stand to benefit from the restriction. State and local environmental regulation can survive such dormant commerce clause challenges. However, refusing siting due to state-based claims of need, or where in-state competitors are aligned with

environmental interests, will increasingly raise concerns under the dormant commerce clause.

III. LOOKING TO CONGRESS AND COURTS TO OVERCOME IMPASSES

While the dormant commerce clause may be a necessary limit on states' ability to limit siting, it is not sufficient to ensure competitive interstate power markets. The dormant commerce clause will invalidate only the most blatantly protectionist state regulations. It certainly does not deal well with the problem of state inaction, or state stonewalling against interstate power markets due to a lack of state legislative authorization to approve new transmission projects. (64) Given the combination of prevalent state inaction in expanding transmission facilities, along with the many legitimate environmental concerns behind state and local siting laws, the dormant commerce clause will probably not be sufficient to overcome impasses between states, or between state and federal regulators. Dormant commerce clause principles will likely be under enforced in this context.

In this context, federal preemption is one way of bolstering the interstate market coordination goals of the dormant commerce clause. Ideally, Congress needs to expand FERC's authority over transmission line siting. If Congress does not do so--and Congress certainly is not the institution on which we should rely--federal courts have the power to nudge states towards action by empowering state siting boards to take into account federal goals in interstate transmission markets, even absent state legislative authorization.

A. Congress' Obstacles

Proposals to expand FERC's authority over transmission siting are not new. For more than a decade, industry experts have recognized that such modifications to the FPA will be necessary for competition to thrive. (65) The most recent proposals do not vest FERC with primary authority over siting, but envision FERC as playing a backup role where individual states fail to reach closure on siting disputes on their own. (66) Regional transmission operators ("RTOs") will provide an important forum for the resolution of these disputes, with FERC having the ultimate authority to order expansion where states fail to do so on their own. (67) It is likely that such proposals will continue to be proposed to Congress, although it is questionable whether they will be adopted into law.

As many have suggested, FERC's authority to preempt state siting of transmission lines needs to be modified. (68) Unfortunately, Congress faces some institutional obstacles of its own in implementing reforms. In a recent defense of the "presumption against preemption," which would empower states to take the initiative to solve many of these issues on their own, Roderick Hills summarizes three main failures in the federal government, and particularly Congress, in setting statutory reform agendas. (69) Each of these applies to energy legislation, such as recent proposals to expand FERC's transmission jurisdiction.

First, Hills observes that collective action problems allow narrowly focused interest groups to control even national regulatory processes, echoing what Richard Stewart has referred to as "Madison's Nightmare" (70)--a faction-ridden maze of capture of national majoritarian political processes by interest groups. In the context of energy legislation, it is quite common for Congress to bundle together multiple unregulated reforms, producing logrolling solutions that may confront obstacles due to one or two high-profile objectionable provisions. For example, the main energy bill before Congress in 2003 contained provisions that would have more clearly expanded FERC's authority over transmission in order to enhance reliability. (71) This bill failed to pass primarily because of unrelated statutory provisions limiting state tort liability for the fuel oxygenate methyl tertiary-butyl ether (MTBE). (72)

In addition, as Hills suggests, individual representatives are frequently preoccupied with pleasing constituents--by approving earmarks and pork-loaded packages--leading Congress to neglect general policymaking. (73) Again, energy legislation provides an example of the failures of the national political process. The 2003 energy bill contained multiple provisions on different topics aimed at local or regional constituents, such as provisions aimed to provide federal aid for a Shreveport, Louisiana shopping mall which houses the chain restaurant "Hooters." (74) Senator John McCain dubbed the proposed legislation a bill for "Hooters and polluters." (75)

Finally, Hills observes, what Samuel Beer has called "political overload" (76) plagues the ability of Congress to set the regulatory agenda, since only a small number of issues can effectively occupy Congress' decision agenda. (77) In the energy context, again, Congress is unlikely to even consider national energy legislation unless a major national or international crisis brings it to the agenda--the OPEC oil embargo (leading to passage

of Carter's energy plan in 1978), the Gulf War (leading to passage of the Energy Policy Act of 1992), or post-September 11 concerns over the relationship between terrorism and oil (leading to Congress' failed energy bill in 2003). On occasion, individual members of Congress propose stand-alone bills designed to expand FERC's authority, but these generally have little support in Congress and frequently disappear without a hearing. (78)

Even if Congress fails to expand FERC's authority--as much of the political science Roderick Hills cites to would predict--the Cross-Sound line dispute illustrates that FERC may increasingly play a role in related regulatory proceedings over which it has jurisdiction and can play a positive role in the process. The Cross-Sound dispute illustrates how FERC has some limited powers to do things on its own, absent Congressional authorization through new statutes. For example, in the Cross-Sound dispute, FERC threatened to make a decision in a related proceeding that would involve updating an older transmission line, and this threat of regulatory action brought the state regulators to the negotiation table. (79) FERC's cognate authority over related projects is a powerful tool to bring parties to the bargaining table. Although not every environmental concern was placated by the resulting settlement, Long Island Power Authority ("LIPA"), Cross-Sound and Connecticut Light & Power Company ("CL&P") each agreed to contribute $2 million to a fund, to be administered jointly by New York and Connecticut, which would be dedicated to the study and preservation of Long Island Sound. (80) In some instances, FERC may be able to use its clear regulatory authority--over mergers, transmission tariffs, and RTOs--to bring parties to the table when impasses occur, even if it is unable to preempt state siting processes. Yet, it is well recognized that FERC cannot solve these disputes on its own. (81)

As counterintuitive as it might sound, absent action by Congress and FERC, the presumption should be in favor of state siting boards acting to solve the problems with interstate transmission. If nothing else, a presumption in favor of state jurisdiction might work to set the national lawmaking agenda, but more important, it might place clear incentives with state regulators, making action more likely in contexts where state and federal regulators seem to have reached an impasse.

B. How Federal Courts Can Overcome Recalcitrant State Legislatures

Many state siting statutes were adopted with old regulatory structures--a nationally-uniform cost-of-service structure--in mind. In many states, siting statutes do not authorize state or local regulators to act to open up their network access facilities to out-of-state competitors. (82) In this sense, one barrier to interstate power markets is state legislatures, which lack the institutional incentive to modify old regulatory statutes. To the extent the problem is state legislature recalcitrance (whether tacit or explicit), federal courts might attempt to draw on preemption principles to overcome the impasses by introducing greater competition in the state political process, reducing the power of any one branch or level of state or local government to be recalcitrant through inaction.

As an illustration, consider the issue of a state legislature's failure to authorize regulatory action by state or local agencies under state siting statutes. State siting bodies may not be able to act to site facilities, or even to consider the interstate implications of siting, absent authorization by a state legislature. In the context of deregulated wholesale power markets individual states frequently face strong incentives to protect firms in their own internal market, such as local utilities. Several states have adopted moratoria on exempt wholesale generators, or have limited regulators' authority to site such plants to in-state utilities only. (83) Florida's Supreme Court, for example, has interpreted a state power plant siting statute to limit plant siting to those suppliers who are Florida utilities or who have contracts with Florida utilities. (84) Effectively, merchant power plants are precluded from siting in Florida for purposes of entering the interstate market. Perhaps taking a cue from Florida's success in blocking the development of new wholesale power plants that do not directly serve in-state customers, other state and local governments, particularly in the Southeastern United States, have imposed moratoria on merchant plants. (85) Pursuant to the siting statute passed by the Florida Legislature, Duke Energy's application was rejected by the state Supreme Court, even though the state agency initially had accepted the application under a belief that it had the legal jurisdiction to do so. (86)

However, even where a state legislature is recalcitrant and fails to authorize local or state-wide regulatory agencies to take into account federal goals (such as concerns with reliability in deregulated wholesale power markets) while siting transmission lines or power plants, courts could presumptively authorize such officials to act to pursue federal goals. Roderick Hills has argued for a presumption against preemption (87)--and the political science reasons he gives for it have particular resonance in the context of electric power--but in many instances (as in Florida), state officials and local political bodies lack the authority to act. As Hills has argued elsewhere, *state regulatory initiative on issues might be facilitated by "dissecting the state" if state and local agencies are presumptively authorized to implement federal goals, even where state enabling legislation is ambiguous as to*

state agency jurisdiction. (88) When a federal program gives grant money directly to a state governor or local governments, it plays the executive branch or local governments off against the state. Similarly, when Congress has passed a statute such as the Federal Power Act and a federal agency has clearly articulated general goals in implementing this statute (as FERC has articulated the goal of deregulated interstate wholesale power markets), (89) even if Congress has not delegated specific implementation authority to the agency, it might be implied that it has given remedial implementation authority to state agencies, overriding state constitutional doctrines such as separation of powers. Presumptive preemption of structural constraints in state constitutions serves the function of allowing states to work towards correcting congressional failures that may remain in statutes.

Instead of deferring to state court interpretations of limited authority for siting boards, an alternative approach to reviewing the agency's jurisdiction would ignore the ambiguous jurisdictional limits in the state statute, presumptively authorizing the state officials to consider the application--and to site the facility--if this were related to the pursuit of clear (albeit general) federal goals in reliable deregulated wholesale power markets. This presumption would be overcome only if the state legislature is explicit in its recalcitrance, adopting a statute that precludes consideration of the issue by state regulators.

By simultaneously embracing a presumption against federal preemption in interpretation of statutes and regulations and a presumption in favor of state or local regulatory action (i.e., authorizing state and local officials to act, notwithstanding a tacitly recalcitrant legislature), public law could align incentives to favor national reform of statutes or regulations in the context of economic regulation. In contrast to the current approach, a presumption against preemption would leave responsibility clearly in the hands of state actors. State and local officials would presumptively be authorized to act to pursue federal goals, although if a state legislature wishes to override the authority of a state agency to implement a federal program, it would possess the authority to do so expressly. So understood, a judicially-imposed set of default rules could promote coordinated federalism, even where Congress has not acted. Judicially-led coordinated federalism would replace court-mediated competition between the federal government and the states, which often leads to regulatory impasse, with cooperation. Simultaneously, federal courts may stimulate some regulatory action to address interstate network problems in states where none currently exits by introducing competition within the branches of state government. There are two primary objections to such a set of default rules: first, that federal courts lack the power to implement them and that they are internally inconsistent; and second, that this approach glorifies states' rights or idealizes states as innovators.

To address the second objection first, this is not a states' rights view of economic regulation. Indeed, there is no such thing, given that Congress has broad power to override states on most, if not all, issues of economic regulation. Even this, though, does not make states black boxes in discussion of the allocation of jurisdictional authority. States have an important role to play. The point is not, however, that states are inherently superior over the national government as innovator. Nor is it to promote decentralization as an end state of affairs. Instead, states would act as facilitators and agenda-setters in national lawmaking, helping national solutions to adapt to regulatory problems where the national lawmaking process fails to do so on its own. Judicially-led coordinated federalism is a second-best solution to congressional reforms of national regulatory statutes that fail to give federal agency regulators the necessary jurisdiction, but it also may prove necessary to overcome existing obstacles to regulatory reform in network industries.

The first objection--that federal courts lack the power to apply these default rules and they are internally inconsistent--also does not withstand scrutiny. These proposals are not premised on any constitutional power that that the conventional set of default rules in public law do not also rely on. The power to vest state and local officials with authority to implement federal goals, like conventionally-accepted judicial power to create implied preemption, can be derived from the Commerce Clause. (90) Where Congress or federal regulators, within their constitutional authority, have stated a general goal, courts presumably would look to state or local regulators to implement it. (91) This is not coercive, as state political actors still would have to make the choice to regulate. If the state political process, such as by legislative action, explicitly overrides this choice, state action is more likely to exist for purposes of mounting a dormant commerce clause challenge if the state approach imposes spillover costs on interstate commerce. (92) This approach downplays the significance of "independent" state constitutions, but many states already recognize in their constitutional jurisprudence that state constitutions are not to be interpreted in isolation where a state is implementing a federal program. (93) As a matter of constitutional law, federal courts have as much power to implement such a set of default rules as they do to read *implied* preemption of state law into federal statutes and regulations. (94) In fact, to the extent that the presumptive authorization of state executive or local agency regulation to implement federal goals is based on

political process considerations, rather than a substantive legal mandate that altogether precludes state regulation, it should be less controversial than implied preemption of substantive law, under which a federal court forces a state to make a substantive policy choice that is consistent with federal law even where Congress has not clearly spoken. Rather than reading judicial power broadly by expansive jurisdictional readings of federal statutes and regulations--as traditional jurisdictional federalism would envision-the default rules for preemption envision a more modest role for the courts, as they align political incentives to favor cooperative federalism approaches even where Congress has not explicitly done so. While a presumption against preemption of substantive statutes and regulations may seem at odds with a presumption that preempts state constitution allocations of powers, these default rules are no less inconsistent than the conventional public law approach, which favors preemption of substantive law but disfavors preemption of state constitutions.

Such an approach gives state and local governments a more positive role to play in deregulated markets than judicial federalism currently envisions under public law. It creates a political process that is more likely to clarify jurisdictional responsibility, while also lowering the costs of using state government to implement federal goals. In the long run, it might also promote a more stable national solution on important issues than the conventional approach of relying on courts to draw the lines between incomplete federal regulation and the states.

For example, in the context of electricity transmission siting, if state and local regulatory commissions are granted presumptive authority to consider national goals in reliable wholesale power markets, states would clearly share responsibility with Congress for transmission expansion. At least some state regulator in each state would clearly possess the regulatory power to expand transmission to accommodate deregulated markets. States might also be implicitly authorized to build pricing for such transmission expansion into their own regulatory structures for retail rates. This will not solve every problem with regulation of electric power transmission, for which a national solution is necessary. Some states may choose to expand transmission, allowing deregulated markets to work, while others may not, creating chokehold regions that could force consideration of a more national solution to state-based transmission regulation. At the same time, responsibility for the lag clearly would sit with the states or Congress. If states are presumptively authorized to take such goals into account, presumably a state's failure to act to site transmission in response to requests for transmission expansion could be brought within the realm of the dormant commerce clause, ultimately facilitating the emergence of more cooperative solutions between states where national regulators fail to take action. At a minimum, recalcitrant state legislatures would be required to explicitly reject state participation in national markets. Designing default rules for judicial review with these bargaining problems in mind will not bring an end to all jurisdictional conflicts and impasses. Such design can, however, make explicit previously hidden institutional preferences within states for recalcitrance with national competition policies, better facilitating disruption of the jurisdictional impasses that plague the current approach to federal preemption.

IV. CONCLUSION

FERC's wholesale competition policies increasingly make dormant commerce clause principles relevant. This will have important implications for state siting processes, in which many environmental concerns with power plants and transmission lines are raised. But there is reason to think that the dormant commerce clause will not be strong enough as a legal norm to overcome siting impasses. Ultimately, Congress needs to act to expand FERC's authority over transmission siting. As FERC Chairman Pat Wood stated before Congress in 2004:

> The view of one State should not be the sole determinant of whether a region's electrical customers receive the economic and reliability benefits of facilities that have already been built. In these narrow circumstances, the protection of interstate commerce may warrant a greater federal role.
>
> This suggestion is related to, but separate from, the issue in the pending energy bill of having a federal backstop for siting of significant new interstate power transmission projects.... (95)

FERC itself has recognized the need for expanded jurisdiction. Once Congress approves it--and that may take some time--the expansion of FERC's authority over transmission siting may require modification of state environmental regulation in the context of power plant transmission statutes. Environmental regulation will not necessarily be rendered redundant, although some modification of state laws will be necessary. States may

retain the authority to consider local land use concerns, as well as pure environmental protection concerns under state siting statutes. Protectionist barriers to siting, even those that are politically aligned with environmental protection, will increasingly bump up against the dormant commerce clause. Further, with modification to the FPA, FERC will increasingly play some role in overriding states where impasses result. One solution may be for states to play a more coordinated role in raising environmental concerns in the context of an RTO.

As Chairman Woods has recognized, FERC has some role under existing law to arbitrate siting disputes where states are at an impasse, even where Congress fails to act. Even if Congress does not act to expand FERC's jurisdiction over transmission siting, FERC has some important tools at its disposal which can help to bring states and stakeholders to the bargaining table. The Cross-Sound dispute illustrates the positive role that FERC may be able to play in this process. However, FERC may not be able to solve impasses on its own. If Congress does not expand FERC's jurisdiction and role, it is entirely appropriate for federal courts to step up to the plate in resolving siting impasses by looking to the dormant commerce clause and to federal preemption principles to override recalcitrant state legislatures.

(1.) See THE ENERGY FOUNDATION/THE HEWLETT FOUNDATION, SITING POWER PLANTS: RECENT EXPERIENCES IN CALIFORNIA AND BEST PRACTICE IN OTHER STATES (2002), at http://www.ef.org/documents/Siting_Report.pdf (describing the traditional power plant siting practices in California and other states); EDISON ELECTRIC INSTITUTE, STATE-LEVEL ELECTRIC TRANSMISSION LINE SITING REGULATIONS (2001), at http://www.eei.org/industry_issues/energy_infrastructure/transmission/siting_directory.pdf (noting that siting of transmission lines has traditionally been regulated at the state level). See also Linda L. Randell & Bruce L. McDermott, Chonicle of a Transmission Line Siting, PUB. UTILS. FORTNIGHTLY, Jan. 1, 2003, at 1 (referring to the "good old days" of transmission line siting).

(2.) Ashley C. Brown & Damon Daniels, Vision Without Site; Site Without Vision, ELEC. J., Oct. 2003, at 23, 24 ("The traditional siting regime ... envisioned a two-part analysis: one to ascertain need and one to judge the environmental effects of available options.").

(3.) See infra Part I.

(4.) See Randall & McDermott, supra note 1.

(5.) TransEnergie U.S., Ltd., 91 F.E.R.C. [paragraph] 61, 230 (2000).

(6.) See Regional Energy Reliability And Security: Doe Authority To Energize The Cross Sound Cable: Hearing before the Subcomm. on Energy and Commerce, House Comm. on Energy and Commerce, 108th Cong. 55-56 (May 19, 2004) [hereinafter Hearing] (statement of Jeffrey A. Donahue, Chairman & CEO, Cross-Sound Cable Co.).

(7.) Id. at 18 (referring to Connecicut DEP refusal to modify permit).

(8.) The technical advantage to operating two transmission lines between Connecticut and Long Island, as opposed to one, is that this would allow electric power to travel in a semi-circular loop--in and out of Long Island, depending on load.

(9.) Id. at 56.

(10.) Id. at 59.

(11.) Id. at 56.

(12.) Linda Randell & Bruce McDermott, Cross-Sound Blues: Legal Challenges Continue for the Undersea Transmission Line, PUB. UTILS. FORTNIGHTLY, Feb. 2004, at 20.

(13.) Bruce W. Radford, Cross-Sound Cable Puts Feds on the Spot, FORTNIGHTLY'S SPARK, June 2004, at 1, 3.

(14.) Id. at 10.

(15.) Conn. Governor Signs Moratorium on Grid Projects, Keeping Cross Sound in Limbo, POWER MARKETS WEEK, June 30, 2003, at 31.

(16.) Under Section 202(c) of the FPA, the U.S. Secretary of Energy can mandate operation of a transmission line over objections of state regulators, but only in the context of an emergency--not where it is merely found to be in the public interest.

(17.) Parties Set Deal to Energize Cross Sound Cable, INSIDE F.E.R.C., June 28, 2004, at 1 [hereinafter Parties Set Deal].

(18.) Hearing, supra note 6 (statement of Patrick Wood, III, Chairman, FERC).

(19.) Radford, supra note 13, at 10.

(20.) See supra notes 1 & 2 (describing state siting process). See also Donald F. Santa & Richard Sikora, Open Access and Transition Costs': Will the Electric Industry Transition Track Natural Gas Industry, Restructuring, 25 ENERGY L. J. 113, 123 (2004) (noting "state regulators' jurisdiction over a traditional electric utility's retail operations include: retail rate setting, construction and siting of generating and transmission facilities").

(21.) Radford, supra note 13.

(22.) Parties Set Deal, supra note 17.

(23.) New York and Connecticut Agree to End Cable Dispute, N.Y. TIMES, June 25, 2004, at B6. Interestingly, the most vocal opponent of the transmission line, Connecticut Attorney General Richard Blumentha], was excluded from the negotiations. They Can Bury the Cable, But Not the Controversy, HARTFORD COURANT, July 7, 2004, at A9.

(24.) Brown & Daniels, supra note 2.

(25.) Id.

(26.) The Commerce Clause provides that "the Congress shall have power ... to regulate Commerce ... among the several States...." U.S. CONST. art. I, [section] 8, cl. 3.

(27.) OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).

(28.) Skeptics believe that the purposes of the dormant commerce clause can readily be served by other more textually explicit constitutional doctrines, such as the Import-Export Clause of Article I. Section 10 or the Privileges and Immunities Clause of Article IV, Section 2. These alternatives are not without their own critics. See, e.g., Brannon P. Denning, Why the Priveleges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine, 84 MINN. L. REV. 284 (2003); Brannon P. Denning, Justice Thomas, The Import-Export Clause, and Camps Newfound/Owatonna v. Harrison, 70 U. COL. L. REV. 155 (1999). However, for purposes of this Article, let it suffice to emphasize that the alternatives would make protections against interstate regulatory barriers much narrower.

(29.) Balwdin v. G.A.F. Selif, Inc., 294 U.S. 511, 522 (1935).

(30.) Id.

(31.) H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531 (1949).

(32.) 519 U.S. 278 (1997).

(33.) Id. at 281-82.

(34.) Id. at 301.

(35.) 511 U.S. 383 (1994).

(36.) Id. at 386-87.

(37.) Id. at 387-88.

(38.) Id. at 386-87.

(39.) Id. at 393.

(40.) Id. at 389, 394.

(41.) Buck v. Kuykendall, 267 U.S. 307 (1925). Justice Brandeis wrote for the Court:

> [The statute's] primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the very same purpose and in the same manner.

Id. at 315-16.

(42.) Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). While many have criticized this exemption to dormant commerce clause jurisprudence, it is defended as a pragmatic balance between competing federalism concerns. Dan T. Coenen, Untangling the Market-Participant Exception to the Dormant Commerce Clause, 88 MICH. L. REV. 395 (1989). The exemption is limited, and is not automatically available where the state could expand into the market; To avail itself of the exemption the state must establish that it is a market participant and may not use mere contractual privity to immunize downstream regulatory conduct in a market in which it is not a direct participant. South-Central Timber Dev. v. Wunnicke, 467 U.S. 82 (1984).

(43.) C&A Carbone, 511 U.S. at 387.

(44.) Paul E. McGreal, The Flawed Economics of the Dormant Commerce Clause, 39 WM. & MARY L. REV. 1191, 1223 (1998).

(45.) General Motors Corp v. Tracy, 519 U.S. 278,300 (1997).

(46.) H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525,539 (1949).

(47.) McGreal, supra note 44; Steven Gey, The Political Economy of the Dormant Commerce Clause, 17 NYU REV. OF L. & SOC. CHANGE 1 (1989-90); Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L. J. 425 (1982).

(48.) See supra note 42 (discussing the market participant exception).

(49.) For example, one of the leading cases suggesting that the dormant commerce clause allows the setting of rates is Munn v. Illinois, 94 U.S. 113 (1876) (upholding legislative approval of joint price agreement by grain

elevators in Chicago against a dormant commerce clause challenge, given concern with regulating a common carrier as a monopoly in the "public interest").

(50.) 519 U.S. at 825.

(51.) Eule, supra note 47, at 430.

(52.) Order No. 888, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities and Recovery of Stranded Costs by Public Utilities, 61 FED. REG. 21,540 (May 10, 1996).

(53.) Jim Chen, A Vision Softly Creeping: Congressional Acquiesence and the Dormant Commerce Clause, 88 MINN. L. REV. 1764 (2003).

(54.) See supra note 47.

(55.) 512 U.S. 186 (1994).

(56.) United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). John Hart Ely has applied the representation-reinforcing role of Carolene Products to equal protection jurisprudence. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

(57.) 512 U.S. at 200 (citing Minnesota v. Clover Leaf Creamery Co., 499 U.S. 456, 473 n.17 (1981) and other cases).

(58.) For elaboration of this view, see Maxell L Stearns, A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine. 45 WM & MARY L. REV. 1 (2003).

(59.) Tampa Elec. Co. v. Garcia, 767 So. 2d 428, 436 (Fla. 2000).

(60.) C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 416 (1994) (Souuter, J., dissenting). According to the dissent, "The Commerce Clause was not passed to save the citizens of Clarkstown from themselves." Id. at 432. Thus, the dissent rejects extending the political process account beyond scenarios that discriminate between local and out-of-town participants.

(61.) See supra note 42 (describing the market participant exception),

(62.) See supra notes 35-43.

(63.) Id.

(64.) As Ashley Brown and Damon Daniels observe, "Because very few states include explicit reference to regional considerations in the substantive law governing eminent domain or siting authority, it is left to siting officials and reviewing courts to factor regional effects into the calculation of which projects serve the public interest." Brown & Daniels, supra note 2, at 26. If a state legislature fails to delegate such authority to a regulator, there is a potential problem of inaction on the part of both state legislatures and regulators.

(65.) Judge Richard Cudahy sees federal regulation of electric power transmission "more or less inherent in the scheme of deregulation and competition, which depends for its functioning upon widespread access to the transmission network." Richard D. Cudahy, Full Circle in the Formerly Regulated Industries?, 33 LOY. U. CHI. L.J. 767, 768 (2002). Richard Pierce embraces expanded congressional authorization for the Federal Energy Regulatory Commission to resolve transmission siting disputes, noting the inevitable incentives states face to erect impediments to interstate commerce. Richard J. Pierce, Jr., Environmental Regulation, Energy & Market Entry, 15 DUKE ENVTL. L. & POL'Y FORUM 167 (2005) (Duke Environmental Law & Policy symposium contribution). For more than a decade, Pierce has been arguing for the same basic congressional solution. Richard J. Pierce, Jr., The State of the Transition to Competitive Markets in Natural Gas and Electricity, 15

ENERGY L. J. 323 (1994). Jim Chen advocates increased federal authority over telecommunications for similar reasons. Jim Chen, Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls, 2 J. TEL. & HIGH TECH. L. 307 (2003).

(66.) Edward Comer, FERC and the States: A Marriage of Necessity, ELEC. J., November 2004, at 85, 87 (advocating "national energy legislation that contains a provision for the Commission to have limited backstop transmission siting authority to help site transmission lines in 'interstate congestion areas' designated by the Department of Energy is states have been unable to agree or move forward.").

(67.) Id. at 86 ("Regional transmission organizations can play an important part in planning and expanding transmission systems to meet the needs of regional electricity markets.").

(68.) In this symposium issue, for instance, Professor Pierce embraces expanded congressional authorization for FERC to resolve transmission siting disputes. Pierce, Environmental Regulation, Energy & Market Entry, supra note 65. However, Congress has consistently failed to act to adopt such proposals.

(69.) Roderick M. Hills, Jr. Against Preemption: How Federalism Can Improve the National Lawmaking Process, available at http://papers.ssrn.corrt/sol3/papers.cfm?abstract_id=412000 (last visited Mar. 5, 2005).

(70.) Richard B. Stewart, Madison's Nightmare, 57 U. CHI. L. REV. 335. (1990).

(71.) Peter Berh & Dan Morgan, Without Energy Legislation, Grid, Power Policy in Limbo, WASH. POST, Nov. 27, 2003, at E01.

(72.) Carl Hulse, Even With Bush's Support Wide-Ranging Legislation May Have Been Sunk With Excess, N.Y. TIMES, Nov. 26, 2003, at A17.

(73.) Bruce Cain, John Ferejohn, & Morris Fiorina, THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE (1987).

(74.) Dan Morgan, The GOP Congress, High on the Hog, WASH. POST, Jan. 18, 2004, at B01.

(75.) Id.

(76.) Samuel H. Beer, Political Overload and Federalism, 10 POLITY 5 (1977).

(77.) JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 16-18 (1995).

(78.) In 2004, Senator Hillary Clinton proposed a stand-alone reliability bill, presumably because she had concluded that the larger energy bill was doomed. See Senator Clinton to Push Reliability Bill, Urges Lawmakers to Pass It Apart from the Energy Bill, ELEC. UTIL. WEEK, Jan. 20, 2004 at 3. However, with an election year in 2004, many considered a more streamlined bill unlikely to pass Congress unless it was very modest.

(79.) See supra note 65 (describing the prospect of federal intervention).

(80.) Parties Set Deal, supra note 17.

(81.) See, e.g., Pierce, Environmental Regulation, Energy & Market Entry, supra note 65; Comer, supra note 66.

(82.) See Brown & Daniels, supra note 2.

(83.) Concerned with their states becoming transmission superhighways or power plant siting grounds for others, many states have considered or adopted such moratoria. See, e.g., Conn. Governor Signs Moratorium on Grid Projects, Keeping Cross Sound in Limbo, POWER MARKETS WEEK, June 30, 2003, at 31 (describing Connecticut's moratorium on new transmission lines); Florida County Imposes Power Plant Moratorium, ELEC,

DAILY, July 2, 2001, at 1 (describing Broward County, Florida, moratorium that stalled a 511 MW merchant power plant that had been approved by city officials in Deerfield Beach, Florida); Indiana Communities Press for Power Plant Moratorium, INDIANAPOLIS STAR, March 1, 2000 (indicating governor's support for power plant moratorium).

(84.) Tampa Elec. Co. v. Garcia, 767 So. 2d 428, 435 (Fla. 2000) (holding that state's power plant siting statute "was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates,").

(85.) Deisinger, 2000; Nervous of NOx, Southern Govs. Put Plants on Hold, ELEC. DALLY, Aug. 28, 2001; State Limits on Merchant Plants a Growing Worry, GENERATION WEEKLY, Aug. 22, 2001.

(86.) Tampa Elec. Co. v. Garcia, 767 So. 2d 428, 435 (Fla. 2000).

(87.) See Hills, supra note 69.

(88.) Roderick M. Hills, Jr. Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures' Control, 97 MICH. L. REV. 1201 (1999).

(89.) See supra note 52 (referencing Order No. 888).

(90.) The Commerce Clause authorizes Congress to regulate activities such as electric power transmission. Federal Courts interpret the scope of delegations to federal agencies. Thus, under federal preemption doctrine, federal courts have the authority to override state legislatures where national interests authorized by Congress warrant it.

(91.) Much as Hills envisions courts presumptively authorizing state and local officials to pursue national goals. Hills, supra note 88.

(92.) See supra Part II (discussing dormant commerce clause).

(93.) See, e.g., Ex Parte Elliott, 973 S.W.2d 737 (Tex. App. 1998); McFaddin v. Jackson, 738 S.W.2d 176 (Tenn. 1987); Dep't of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976). Thus, even where federal courts do not exercise such authority, state courts might authorize such action as the best interpretation of state constitutional separation of powers doctrine. As I have argued elsewhere, implicit authorization for state executive and local agencies to act on behalf of federal goals is the best interpretation of state separation of powers--a matter of state constitutional law. Jim Rossi, Dual Constitutions and Constitutional Duels,--WM. & MARY L. REV.-- (forthcoming 2005).

(94.) See supra note 90.

(95.) Hearing, supra note 6 (statement of Patrick Wood, III, Chairman, FERC).

Jim Rossi, Harry M. Walborsky Professor and Associate Dean for Research, Florida State University College of Law. Email: jrossi@law.fsu.edu.

Title: State Speeds Power Plant Development.(California)

Date: 7/1/2001; Publication: California Planning & Development Report; Author: SHIGLEY, PAUL

Doubters Feel Powerless In Hurry-Up Process Backed By Governor, Legislature

California is experiencing a wave of power plant construction unlike it has ever seen before. If all plants now in the pipeline are constructed - and most of them are going forward quickly - the state's electricity-generating capacity will increase by roughly one-third by the end of 2003. The rush comes after 10 years of no private power plant construction.

Many, but by no means all, of the new power plants have received approval under expedited review processes urged by the Legislature and Governor Davis. State officials say they are doing their best to review environmental impacts of the plants and to give affected communities chances to participate in project reviews. However, some critics say the process has become skewed toward producing more megawatts. Environmentalists and some local officials complain that they have had little time to react to some projects.

Of greatest concern are plants intended to produce electricity only during times of peak demand. An executive order signed by Davis in March gave the California Energy Commission only 21 days to review emergency "peaker" plants that operators promised to have on-line by September 30. As of mid-June, the commission had permitted 10 peaker plants capable of generating 827 megawatts under the executive order, according to the governor's office.

"My biggest concern," said Sandra Spelliscy, general counsel for the Planning and Conservation League, "is that we have really taken the California

Environmental Quality Act out of the process of siting these power plants." For the 21-day process, the governor suspended CEQA and gave state analysts 7 days to complete an environmental review.

Esther Feldman, president of Community Conservancy International, which is spearheading a proposed park in Los Angeles's Baldwin Hills, said the 21-day review process for a peaker plant in the planned park made public involvement difficult.

"The process is untenable. There essentially is no process," Feldman said. "When you're talking 21 days, it's a ram-through. The deal has been done. It's just a formality."

Feldman, former chair of the Los Angeles County Regional Planning Commission, appeared to win her battle when the applicant for the Baldwin Hills project withdrew. But, she said, the process should have included local oversight and extensive public outreach. Instead, "the dates on the public hearings changed five times," she said.

In June, the City of Chula Vista found out how quickly the process can move. Ramco, Inc., which had received city approval for a 49-megawatt power plant from the city last year, filed an application for a 62-megawatt peaker plant in mid-May.

In a letter to the Energy Commission, the city complained that the state had taken exclusive authority, "as if the local jurisdiction's comments do not matter."

After receiving the six-page letter from the city outlining concerns, as well as last-minute comments from the San Diego Air Pollution Control District, the Commission did postpone its final decision to approve the Ramco project -- by two days.

Energy Commission spokeswoman Mary Ann Costmagna said officials did conduct an informational hearing in San Diego and a site tour that was open to the public. The state sent out media advisories and provided an electronic list-serve for individuals and the press.

"Every effort has been made to keep it an inclusive process," Costmagna said.

Multiple Tracks

Last year, the Legislature passed AB 970, which established a four-month review process for "peaker" plants. However, because of a short window in which the plants had to come on line and because of various data problems with applications, the state approved only one peaker plant under this system, according to Chris Tooker, siting policy program manager for the Energy Commission.

In addition to the four-month process for peakers, AB 970 also required the Energy Commission to develop a six-month process for proposed power plants that met a number of criteria, including full compliance with federal and state air quality standards and evidence that there would be no unmitigated environmental impacts. The commission has since adopted regulations for the six-month review.

Since February, Davis has issued four executive orders regarding power plant licensing. He extended the four-month review process for plants that can be on-line by next summer, and he ordered the 21-day, CEQA-exempt process for plants that can be on-line by September 30. Also, the Legislature approved SB 28X (Sher) that extended the four-month review process for certain projects through 2003.

Thus, the commission now has four different review processes, depending on project size, timing and environmental factors: A 21-day process for peakers that

can be on-line by September 30; a four-month process for peakers that can be running fairly quickly; a six-month process for larger, long-term power plants; and the normal 12-month process. All of the expedited processes (less than 12 months) expire at the end of 2003. Several of the biggest and most controversial projects, including the 600-megawatt Metcalf Energy Center in south San Jose, and a 1,000-megawatt expansion of the Moss Landing facility near Watsonville, are proceeding under the normal yearlong review process.

The 21-day process is available only to projects on sites that were pre-screened by the Energy Commission, Tooker explained. The sites must have infrastructure in place, and there can be no known environmental issues, he said.

"We have not ignored environmental concerns, we just have been exempted from following the normal timelines in the environmental review process," Tooker said. "It's not like there is not public involvement. It's just curtailed because you are cutting out review time."

For the 4-, 6-, and 12-month processes, the Energy Commission is still following its normal environmental review process, which is the equivalent of CEQA, Tooker said. The expedited processes have fewer public workshops than the normal 12-month process, but the public still has at least four opportunities to provide input, he said. Most cities limit their participation to comments on the draft environmental impact report, he said.

Tooker expects some of the streamlining to remain in place even after the 2003 sunset date.

The Warren-Alquist Act allows the state to override local zoning for power plants, However, only twice in the commission's nearly 27-year history has it overridden local zoning, and one time it was requested by the county, Tooker said. None of the recently approved projects has been incompatible with local zoning. And,

Tooker added, "In most of the cases, the commission has licensed with all of the impacts mitigated."

Doubts Exist

Michael Boyd, president of Californians for Renewable Energy, questioned whether emissions from the new power plants will be as clean as they could be. The state is allowing peaker plants to operate for months before they comply with clean air regulations, and some major plants are relying on questionable "offsets," he charged. Furthermore, many of the plants are being approved in poor communities, raising environmental justice issues.

"The governor is letting the companies who are gouging us get away with murder," Boyd said.

The Chula Vista peaker approved in mid-June provides something of a case in point for environmentalists. The Energy Commission license allows Ramco to emit five times as much NOx (nitrogen oxide, the chief pollutant from power plants) from the time the plant comes on line until June 30, 2002. Moreover, the plant is planned in an area that already has one power plant and more siting proposals.

City officials contend the state does not know what the cumulative impacts will be because there has been no time for analysis.

Michael Lake, chief of the engineering division for the San Diego Air Pollution Control District, said, in fact, his agency has analyzed cumulative impacts for the Chula Vista and Otay Mesa area. The agency found no concerns. However, if there is a natural gas shortage -- a distinct possibility for the area -- those plants would burn oil, which might be a concern. The agency is studying that scenario, he said.

Lake said the expedited processes have proven frustrating, although the plants proposed for his district are all gas-fired with efficient turbines -- far cleaner than oil-powered plants of the past. He said the quick process has caused some agency coordination and communication problems, and has led to projects receiving little review by the public.

Lake added, "Because these projects are moving so quickly, the project developers themselves are making changes -- such as changing the height of a stack -- and some of those changes affect our air quality modeling."

Some people question the rush for emergency peakers that are not required to be on-line until September 30 -- after the hottest season has passed. Spelliscy, of the PCL, said that some peaker plants are receiving licenses for combination-cycle plants, even though they are really the dirtier single-cycle turbines. The idea is that the plants will be converted to the combination cycle plants later. In the meantime, the local air district will issue abatement notices.

"It's a huge shell game, playing fast and loose with the federal Clean Air Act," Spelliscy charged. "It's just being done outside the normal processes and being done so quickly that no one can get a hold of it."

An additional concern of some people is that the plants being approved as emergency peakers or under less-than-strict scrutiny will not go away when their permits expire in 2003. There will probably be enormous political pressure to extend these power plants' lifespans, Spelliscy said.

Feldman, of Community Conservancy International, agreed with that concern. "There has not been a power plant in California that has been taken down yet," she said. "It's impossible to write a permit condition that can require one of these to be taken down. You can only lawyer it so far."

Certainly there is enormous political pressure right now to build electricity generating facilities, and Gov. Davis is making no apologies for the construction boom. In April, the governor appointed Richard Sklar, a former president of San Francisco construction management company O'Brien-Kreitzberg, to work with power plant developers. And the governor emphasizes that no environmental standards are being compromised.

Despite the governor's build-it-now approach and environmentalists' feeling of unease, adequate public pressure can kill -- or at least stall -- a proposed power plant. In late June, La Jolla Energy Development Inc. announced it was withdrawing its application for a 53-megawatt power plant on a former oil field in the Baldwin Hills. A politically powerful coalition, including Feldman, has formed behind the idea of creating a 1,200-acre park in the Baldwin Hills, and the state last December allocated $41 million to buy 68 acres in the area -- reportedly the largest state grant ever for the purchase of urban parkland.

Park supporters said the power plant would conflict with the park and, pointing to the mostly poor neighborhoods in the immediate area, they raised environmental justice concerns.

"We listened to the community," La Jolla President Steve Wilburn told the Los Angeles Times. "We need to find another place for this equipment." Still, Stocker Resources, the oil company that controls much of the land proposed for a park, indicated it might pursue a power plant anyway.

HighBeam Research

Title: Support grows for local power over plants.(Legislature)(Legislation would give cities and counties the authority to decide if gas-fired energy facilities meet their land use laws)

Date: 4/8/2005; Publication: The Register-Guard (Eugene, OR);

Byline: Joe Harwood The Register-Guard

SALEM - Legislation that would strip some of a state panel's authority to site power plants even when local governments oppose them is picking up bipartisan support in both legislative chambers.

The Oregon Fair Energy Bill would give counties and cities the authority to rule on whether a plant meets local land use rules when an energy developer seeks to build a gas-fired power plant within their jurisdiction.

Under current law, the state Energy Facility Siting Council makes the final determination on nearly every aspect of permitting gas-fired power plants, such as the one proposed north of Coburg. Energy developers can choose between having the governor-appointed, seven-member panel rule on whether a plant meets local land use regulations, or take their case to local jurisdictions such as the Lane County Board of Commissioners.

In almost every case, including the Coburg proposal, applicants have chosen to have the council review land use criteria rather than local officials, according to state records.

This so-called super-siting authority has angered residents and lawmakers in Turner, Lane County and the Klamath Falls area, where various companies are trying to win permits for gas-fired power plants.

Opponents of those facilities, who testified before a House committee last week and before the Senate Committee on Environment and Land Use on Thursday, maintain that the council and the Department of Energy ignore citizen input - and frequently Oregon law - in approving power plants.

"I think currently the Oregon Department of Energy has no restraint on their legal authority to impose their will on local communities," said state Sen. Doug Whitsett, R-Klamath Falls. "Having appointed commission members making decisions that are not answerable to the laws of Oregon is not a good idea."

Whitsett and Sen. Bill Morrisette, D-Springfield, are sponsoring Senate Bill 527 to try to give local officials more input in such decisions. Rep. Phil Barnhart, D-Eugene, and Rep. Bill Garrard, R-Klamath Falls, are pushing the House version of the bill, HB 3135.

Barnhart said that he grew concerned after realizing that the 900-megawatt power plant proposed on farmland north of Coburg could win approval even if county commissioners decided the plant did not meet land use regulations. That proposal is now on hold and the size of the planned plant could shrink.

"I think the biggest concern I had is the process moves along without reference to local land use laws and without reference to local decision-makers who are charged with interpreting land use requirements," Barnhart said.

At Thursday's hearing, Whitsett said the "council's power is absolute." He and citizens of the Langell Valley east of Bonanza have been fighting the proposed 1160-megawatt California-Oregon Border power plant for two years.

His wife, Gail Whitsett, a petroleum geologist, said the energy department and siting council systematically ignored land use, water and other state laws in voting unanimously to approve the plant.

She said the council allowed People's Energy of Chicago, which wants to build the plant, to locate it on a 10-mile-long seismic fault without requiring the structural assessment mandated by law.

Residents of Klamath County will file an appeal with the state Supreme Court next week in an attempt to get the approval overturned.

Whitsett and her husband both told the committee that they do not oppose gas-fired plants as long as those facilities are sited according to the law.

"Because of their super-siting authority, they are now an out-of-control department who will listen to no one," Gail Whitsett said. "The Oregon Department of Energy is well on the way to a totalitarian or authoritarian form of gov- ernment."

The energy agency's director, Mike Grainey, said that the department is attentive to citizen concerns. "We try to make the (permitting process) as responsive as possible to local governments," he said, adding that the agency always follows the law.

A lobbyist for Portland General Electric said that adopting the bill would bury local governments under a mountain of paperwork and make it tougher for energy generating facilities to win approval.

In addition to giving local governments authority to veto an application if it did not meet local land use regulations, the bill would require the department to collect environmental review information and make it available to the public, said Lisa Arkin, executive director of the Eugene-based Oregon Toxics Alliance and the primary advocate for the bill.

Applicants would also have to demonstrate that there is a regional need for the power a plant would generate, and they would have to prove that they have the technical expertise and financial ability to construct and tear down a power plant.

"They will have to prove that it (a plant) would serve the greater public good," Arkin said.

Barnhart and Whitsett both said that they expect the parallel bills to make it out of the respective House and Senate committees and for the full Legislature to vote on a consolidated bill.

"I have high hopes for this one," Barnhart said. "It has support from members of both parties."

Title: Power over power plants.(Editorials)(Local governments deserve a say in siting)(Editorial)

Date: 4/13/2005; Publication: The Register-Guard (Eugene, OR);

Byline: The Register-Guard

Legislators from Lane and Klamath counties have teamed up to sponsor bills that would give local governments more control over power plant construction. The character of this coalition - urban and rural, Democratic and Republican, west and east of the Cascades - suggests that most communities in Oregon would resent being relegated to the sidelines when proposals to build power plants come forward. Local governments deserve a bigger voice.

Lane County legislators' interest arises from a proposal to build a natural-gas-fired power plant near Coburg. Power plant developers can choose whether to go through a local land-use review process, or submit their applications to the state Energy Facilities Siting Council. In every recent case, including the Coburg plant, developers have chosen the option of a state review. While Lane County officials have been invited to comment on whether the Coburg plant conforms to local land-use regulations, the authority to approve its construction is in the hands of the siting council.

Sen. Bill Morrisette, D-Springfield, and Rep. Phil Barnhart, D-Eugene, are sponsoring bills in their respective chambers to give cities and counties the right to veto power plants that do not conform to local land-use regulations.

They've been joined by two Klamath Falls Republicans, Sen. Doug Whitsett and Rep. Bill Garrard. A proposed power plant in Klamath County has aroused local

opposition, but as with the Coburg project, the siting council has final licensing authority.

The Legislature created the siting council in 1975, when the Northwest was believed to be on the threshold of an energy crisis. The power plant construction business has changed dramatically since then. Independent producers, not utilities, now build most projects, and gas-fired facilities have replaced nuclear plants on the drawing boards. The siting council is not a rubber stamp for developers - it recently canceled a proposed project near Salem - but it was designed for another era.

A well-designed electrical power system would not always have its generating plants located where political support can be found. Indeed, giving cities and counties a say in siting decisions all but guarantees that power plants will be clustered far from population centers.

Yet large industrial developments ought to be consistent with local land-use rules, as interpreted by local land-use authorities. And no community should be forced to accept a power plant against its will, and against its better judgment. Local governments deserve a chance to represent their constituents when someone wants to build a power plant in their neighborhood.

Title: Senate OKs strict power plant rules.(Legislature)(Efforts by activists in Coburg and around the state spur the 29-0 vote)

Date: 6/14/2005; Publication: The Register-Guard (Eugene, OR);

Byline: David Steves The Register-Guard

SALEM - Citizen-led campaigns against power plants in Coburg and other Oregon communities paved the way to a unanimous vote by the state Senate on Monday to set tougher approval standards for future energy generation developments.

The 29-0 vote came after a South Dakota energy company pulled the plug on its plans for a natural gas-fired power plant on farmland two miles north of Coburg. That project, along with similar developments in the Marion County community of Turner and in south-central Oregon's Klamath County drew broad opposition from area residents.

Beyond that, the controversies stirred up criticisms - which Senate Bill 527 is meant to address - from activists and local government officials that their opinions carried no weight in the state-controlled plant-siting process. Critics also complained that the state's land use goals weren't given adequate consideration by the state Energy Facility Siting Council.

Under SB 527, before the siting agency could authorize a new power plant, Oregon law would require that:

Local governments conduct public hearings and file a report to the state in cases where a proposed facility doesn't comply with local land use laws.

If local governments and the siting council differ, the disagreement would be resolved through binding arbitration.

A task force be created on regional energy planning policy. It would make a report to the 2007 Legislature on how energy facility siting rules should accommodate state policy on conservation, renewable energy and regional energy production.

A Eugene-based environmental group that worked with citizens opposed to the Coburg facility and other plants cheered the bill's unanimous approval in the Senate.

"It was clear to us that the current laws were thwarting proper public process," said Lisa Arkin, executive director of the Oregon Toxics Alliance.

"The public wasn't allowed to have a voice in the siting process in a way that would have been effective. And when they had a voice, they certainly were not listened to."

Under current law, an applicant can choose to bypass local planning laws and instead have the matter decided by the state siting council.

In the case of the proposed Coburg plant, local land use and other rules would have posed major obstacles for the plant, so the proponent went instead to the siting council.

The bill heads to the House with strong bipartisan Senate support.

Sen. Bill Morrisette, a Springfield Democrat, carried the bill, saying local governments should have a stronger role in seeing that land use rules aren't overrun by the plant-siting authority.

Sen. Doug Whitsett, R-Klamath Falls, said he didn't consider SB 527 to tilt the balance unfairly to benefit local activists with a "not in my backyard" agenda. Whitsett said that with his strong libertarian political leanings, he has no problems with new energy plants.

But he said the law needed to be changed to give local citizens more say.

73rd OREGON LEGISLATIVE ASSEMBLY--2005 Regular Session

NOTE: Matter within { + braces and plus signs + } in an amended section is new. Matter within { - braces and minus signs - } is existing law to be omitted. New sections are within { + braces and plus signs + } .

LC 1792

A-Engrossed

Senate Bill 527
Ordered by the Senate June 9
Including Senate Amendments dated June 9

Sponsored by Senators MORRISETTE, WHITSETT, Representatives GARRARD, BARNHART

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Requires applicant for energy facility site certificate to obtain land use approval from local government. { - Requires State Department of Energy to generate environmental impact statement. Allows site certificate to be granted only if applicant can show need for generating capacity. - } { + Modifies provisions relating to exception process if local government fails to concur with Energy Facility Siting Council decision. Requires council to direct State Department of Energy to review environmental impact of proposed facility. Allows site certificate to be granted if facility meets council's recommended guidelines for energy generation, conservation and regional consumption. Specifies factors council must consider in adopting guidelines. + } Requires disclosure of financial ability and criminal history by applicant. { + Directs Energy Facility Siting Council to adopt standards requiring site certificate applicants to submit certain seismic risk information.

Creates Task Force on Regional Energy Policy and specifies duties and powers of task force. Sunsets task force on date of convening of next regular biennial legislative session. + }

A BILL FOR AN ACT

Relating to energy facility siting; creating new provisions; and amending ORS 469.310, 469.330, 469.350, 469.360, 469.370, 469.373, 469.401, 469.441, 469.501, 469.503 and 469.504.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 469.310 is amended to read:

469.310. In the interests of the public health and the welfare of the people of this state, it is the declared public policy of this state that the siting, construction and operation of energy facilities shall be accomplished in a manner consistent with protection of the public health and safety and in compliance with

the energy policy and air, water, solid waste, land use and other environmental protection policies of this state. It is, therefore, the purpose of ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992 to exercise the jurisdiction of the State of Oregon to the maximum extent permitted by the United States Constitution and to establish in cooperation with the federal government a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state. { - It is furthermore the policy of this state, notwithstanding ORS 469.010 (2)(f) and the definition of cost-effective in ORS 469.020, that the need for new generating facilities, as defined in ORS 469.503, is sufficiently addressed by reliance on competition in the market rather than by consideration of cost-effectiveness and shall not be a matter requiring determination by the Energy Facility Siting Council in the siting of a generating facility, as defined in ORS 469.503. - }

SECTION 2. ORS 469.330 is amended to read:

469.330. (1) Each applicant for a site certificate shall submit to the Energy Facility Siting Council a notice of intent to file an application for a site certificate. The notice of intent must provide information { + :

(a) + } About the proposed site and the characteristics of the facility sufficient for the preparation of the State Department of Energy's project order { + ; and

(b) Documenting the applicant's technical expertise, the applicant's history in energy facility construction and operation and the financial backing for the facility construction. The applicant's history shall provide information about any fines or penalties, including criminal penalties, assessed against the applicant that pertain to the siting, construction or operation of an energy facility + }.

(2) The council shall cause public notice to be given upon receipt of a notice of intent by the council. The public notice shall provide a description of the proposed site and facility in sufficient detail to inform the public of the location and proposed use of the site.

(3) Following review of the notice of intent and any public comments received in response to the notice of intent, the department may hold a preapplication conference with state agencies and local governments that have regulatory or advisory responsibility with respect to the facility. After the preapplication conference, the department shall issue a project order establishing the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application. A project order is not a final order.

(4) A project order issued under subsection (3) of this section may be amended at any time by either the department or the council.

SECTION 3. ORS 469.360 is amended to read:

469.360. (1) The Energy Facility Siting Council shall evaluate each site certificate application. As part of its evaluation, the council { + :

(a) + } May commission an independent study by an independent contractor, state agency, local government or any other person, of any aspect of the proposed facility within its statutory authority to review.

{ + (b) Shall direct the State Department of Energy to review, in a process that includes provisions for public hearings

and comment and for consideration of the public comment:
(A) The environmental impact of the proposed facility;
(B) Any adverse environmental effects that cannot be avoided if the facility is sited;
(C) Alternatives to the proposed facility, including modifications to the facility that would lessen any adverse environmental effects;
(D) The relationship between the local, short-term benefits of siting the proposed facility and the maintenance and enhancement of the long-term productivity of the environment; and

(E) Any matter that the council determines essential to the adequate appraisal of the effects of the proposed facility on the environment.
(2) + }The council { - may - } { + shall + } compensate a state agency or local government for expenses related to:
(a) Review of the notice of intent, { + an application for land use approval, + } the { + site certificate + } application or a request for an expedited review;
(b) The state agency's or local government's participation in a council proceeding; and
(c) The performance of specific studies necessary to complete the council's statutory evaluation of the application.
{ - (2) - } { + (3) + } The council may enter into a contract under subsection (1) of this section only after the council makes a determination that the council is unable to fully evaluate the application without assistance and identifies specific issues to be addressed and only pursuant to a written contract or agreement with the independent contractor, state agency, local government or other person. The council shall compensate the independent contractor, state agency, local government or other person only to the extent the costs are directly related to issues identified by the council.
{ - (3) - } { + (4) + } The council shall provide funding to state agencies, cities or counties required to contract with another entity to complete comments and recommendations pursuant to ORS 469.350.
{ - (4) - } { + (5) + } In addition to compensating state agencies and local governments pursuant to { - subsection - } { + subsections + } (1) { + and (2) + } of this section, the council may provide funding to the Department of Environmental Quality for the department to conduct modeling and provide technical assistance to expedite preparation, submission and review of applications for permits under ORS 468A.040 required for energy facilities.
SECTION 4. ORS 469.370 is amended to read:
469.370. (1) Based on its review of the application and the comments and recommendations on the application from state agencies and local governments, the State Department of Energy shall prepare and issue a draft proposed order on the application.
(2) Following issuance of the draft proposed order, the Energy Facility Siting Council shall hold one or more public hearings on the application for a site certificate in the affected area and elsewhere, as the council considers necessary. Notice of the hearing shall be mailed at least 20 days before the hearing { + to interested parties and to businesses and residences within a four-mile radius of the facility + }. The notice shall, at a minimum:

(a) Comply with the requirements of ORS 197.763 (2), with respect to the persons notified;

(b) Include a description of the facility and the facility's general location;

(c) Include the name of an agency representative to contact and the telephone number where additional information may be obtained;

(d) State that copies of the application and draft proposed order are available for inspection at no cost and will be provided at a reasonable cost; and

(e) State that failure to raise an issue in person or in writing prior to the close of the record of the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue precludes consideration of the issue in a contested case.

(3) Any issue that may be the basis for a contested case shall be raised not later than the close of the record at or following the final public hearing prior to issuance of the department's proposed order. Such issues shall be raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue. A statement of this requirement shall be made at the commencement of any public hearing on the application.

(4) After reviewing the application, the draft proposed order and any testimony given at the public hearing and after consulting with other agencies, the department shall issue a proposed order recommending approval or rejection of the application. The department shall issue public notice of the proposed order, that shall include notice of a contested case hearing specifying a deadline for requests to participate as a party or limited party and a date for the prehearing conference.

(5) Following receipt of the proposed order from the department, the council shall conduct a contested case hearing on the application for a site certificate in accordance with the applicable provisions of ORS chapter 183 and any procedures adopted by the council. The applicant shall be a party to the contested case. The council may permit any other person to become a party to the contested case in support of or in opposition to the application only if the person appeared in person or in writing at the public hearing on the site certificate application. Issues that may be the basis for a contested case shall be limited to those raised on the record of the public hearing under subsection (3) of this section, unless:

(a) The department failed to follow the requirements of subsection (2) or (3) of this section; or

(b) The action recommended in the proposed order, including any recommended conditions of the approval, differs materially from that described in the draft proposed order, in which case only new issues related to such differences may be raised.

(6) If no person requests party status to challenge the department's proposed order, the proposed order shall be forwarded to the council and the contested case hearing shall be concluded.

(7) At the conclusion of the contested case, the council shall issue a final order, either approving or rejecting the application based upon the standards adopted under ORS 469.501 and any additional statutes, rules or local ordinances determined to be applicable to the facility by the project order, as amended. The council shall make its decision by the affirmative vote of at least four members approving or rejecting any

application for a site certificate. The council may amend or reject the proposed order, so long as the council provides public notice of its hearing to adopt a final order, and provides an opportunity for the applicant and any party to the contested case to comment on material changes to the proposed order, including material changes to conditions of approval resulting from the council's review. The council's order shall be considered a final order for purposes of appeal.

(8) Rejection or approval of an application, together with any conditions that may be attached to the certificate, shall be subject to judicial review as provided in ORS 469.403.

(9) The council shall either approve or reject an application for a site certificate:

(a) Within 24 months after filing an application for a nuclear installation, or for a thermal power plant, other than that described in paragraph (b) of this subsection, with a nameplate rating of more than 200,000 kilowatts;

(b) Within nine months after filing of an application for a site certificate for a combustion turbine power plant, a geothermal-fueled power plant or an underground storage facility for natural gas;

(c) Within six months after filing an application for a site certificate for an energy facility, if the application is:

(A) To expand an existing industrial facility to include an energy facility;

(B) To expand an existing energy facility to achieve a nominal electric generating capacity of between 25 and 50 megawatts; or

(C) To add injection or withdrawal capacity to an existing underground gas storage facility; or

(d) Within 12 months after filing an application for a site certificate for any other energy facility.

(10) At the request of the applicant, the council shall allow expedited processing of an application for a site certificate for an energy facility with an average electric generating capacity of less than 100 megawatts. No notice of intent shall be required. Following approval of a request for expedited review, the department shall issue a project order, which may be amended at any time. The council shall either approve or reject an application for a site certificate within six months after filing the site certificate application if there are no intervenors in the contested case conducted under subsection (5) of this section. If there are intervenors in the contested case, the council shall either approve or reject an application within nine months after filing the site certificate application. For purposes of this subsection, the generating capacity of a thermal power plant is the nameplate rating of the electrical generator proposed to be installed in the plant.

(11) Failure of the council to comply with the deadlines set forth in subsection (9) or (10) of this section shall not result in the automatic issuance or denial of a site certificate.

(12) The council shall specify in the site certificate a date by which construction of the facility must begin.

(13) For a facility that is subject to and has been or will be reviewed by a federal agency under the National Environmental Policy Act, 42 U.S.C. Section 4321, et seq., the council shall conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review (+ , except when reviewing the environmental effects of the facility pursuant to ORS

469.360 + }.

{ - Such - } { + The + } coordination shall include, but need not be limited to:

(a) Elimination of duplicative application, study and reporting requirements;

(b) Council use of information generated and documents prepared for the federal agency review;

(c) Development with the federal agency and reliance on a joint record to address applicable council standards;

(d) Whenever feasible, joint hearings and issuance of a site certificate decision in a time frame consistent with the federal agency review; and

(e) To the extent consistent with applicable state standards, establishment of conditions in any site certificate that are

SECTION 5. ORS 469.503 is amended to read:

469.503. In order to issue a site certificate, the Energy Facility Siting Council shall determine that the preponderance of the evidence on the record supports the following conclusions:

(1) The facility complies with the standards adopted by the council pursuant to ORS 469.501 or the overall public benefits of the facility outweigh the damage to the resources protected by the standards the facility does not meet.

(2) If the energy facility is a fossil-fueled power plant, the energy facility complies with any applicable carbon dioxide emissions standard adopted by the council or enacted by statute.

{ - Base load gas plants shall comply with the standard set forth in subsection (2)(a) of this section. Other fossil-fueled power plants shall comply with any applicable standard adopted by the council by rule pursuant to subsection (2)(b) of this section. Subsections (2)(c) and (d) of this section prescribe the means by which an applicant may comply with the applicable standard. - } { + The emissions standards and means for compliance with the applicable standards are as follows: + }

(a) { + For base load gas plants, + } the net carbon dioxide emissions rate of the proposed base load gas plant shall not exceed 0.70 pounds of carbon dioxide emissions per kilowatt hour of net electric power output, with carbon dioxide emissions and net electric power output measured on a new and clean basis. Notwithstanding the foregoing, the council may by rule modify the carbon dioxide emissions standard for base load gas plants if the council finds that the most efficient stand-alone combined cycle, combustion turbine, natural gas-fired energy facility that is commercially demonstrated and operating in the United States has a net heat rate of less than 7,200 Btu per kilowatt hour higher heating value adjusted to ISO conditions. In modifying the carbon dioxide emission standard, the council shall determine the rate of carbon dioxide emissions per kilowatt hour of net electric output of such energy facility, adjusted to ISO conditions, and reset the carbon dioxide emissions standard at 17 percent below this rate.

(b) { + For fossil-fueled power plants other than base load gas plants, + } the council shall adopt carbon dioxide emissions standards for other types of fossil-fueled power plants. Such carbon dioxide emissions standards shall be promulgated by rule. In adopting or amending such carbon dioxide emissions standards, the council shall consider and balance at least the following principles, the findings on which shall be contained in the rulemaking record:

(A) Promote facility fuel efficiency;

(B) Promote efficiency in the resource mix;
(C) Reduce net carbon dioxide emissions;
(D) Promote cogeneration that reduces net carbon dioxide emissions;
(E) Promote innovative technologies and creative approaches to mitigating, reducing or avoiding carbon dioxide emissions;
(F) Minimize transaction costs;
(G) Include an alternative process that separates decisions on the form and implementation of offsets from the final decision on granting a site certificate;
(H) Allow either the applicant or third parties to implement offsets;
(I) Be attainable and economically achievable for various types of power plants;
(J) Promote public participation in the selection and review of offsets;
(K) Promote prompt implementation of offset projects;
(L) Provide for monitoring and evaluation of the performance of offsets; and
(M) Promote reliability of the regional electric system.
(c) The council shall determine whether the applicable carbon dioxide emissions standard is met by first determining the gross carbon dioxide emissions that are reasonably likely to result from the operation of the proposed energy facility. Such determination shall be based on the proposed design of the energy facility. The council shall adopt site certificate conditions to ensure that the predicted carbon dioxide emissions are not exceeded on a new and clean basis. For any remaining emissions reduction necessary to meet the applicable standard, the applicant may elect to use any of subparagraphs (A) to (D) of this paragraph, or any combination thereof. The council shall determine the amount of carbon dioxide emissions reduction that is reasonably likely to result from the applicant's offsets and whether the resulting net carbon dioxide emissions meet the applicable carbon dioxide emissions standard. If the council or a court on judicial review concludes that the applicant has not demonstrated compliance with the applicable carbon dioxide emissions standard under subparagraphs (A), (B) or (D) of this paragraph, or any combination thereof, and the applicant has agreed to meet the requirements of subparagraph (C) of this paragraph for any deficiency, the council or a court shall find compliance based on such agreement.
(A) The facility will sequentially produce electrical and thermal energy from the same fuel source, and the thermal energy will be used to displace another source of carbon dioxide emissions that would have otherwise continued to occur, in which case the council shall adopt site certificate conditions ensuring that the carbon dioxide emissions reduction will be achieved.
(B) The applicant or a third party will implement particular offsets, in which case the council may adopt site certificate conditions ensuring that the proposed offsets are implemented but shall not require that predicted levels of avoidance, displacement or sequestration of carbon dioxide emissions be achieved. The council shall determine the quantity of carbon dioxide emissions reduction that is reasonably likely to result from each of the proposed offsets based on the criteria in sub-subparagraphs (i) to (iii) of this subparagraph. In making this determination, the council shall not allow credit for offsets that have already been allocated or awarded credit for carbon dioxide emissions reduction in another regulatory setting.

In addition, the fact that an applicant or other parties involved with an offset may derive benefits from the offset other than the reduction of carbon dioxide emissions is not, by itself, a basis for withholding credit for an offset.

(i) The degree of certainty that the predicted quantity of carbon dioxide emissions reduction will be achieved by the offset;

(ii) The ability of the council to determine the actual quantity of carbon dioxide emissions reduction resulting from the offset, taking into consideration any proposed measurement, monitoring and evaluation of mitigation measure performance; and

(iii) The extent to which the reduction of carbon dioxide emissions would occur in the absence of the offsets.

(C) The applicant or a third party agrees to provide funds in an amount deemed sufficient to produce the reduction in carbon dioxide emissions necessary to meet the applicable carbon dioxide emissions standard, in which case the funds shall be used as specified in paragraph (d) of this subsection. Unless modified by the council as provided below, the payment of 57 cents shall be deemed to result in a reduction of one ton of carbon dioxide emissions. The council shall determine the offset funds using the monetary offset rate and the level of emissions reduction required to meet the applicable standard. If a site certificate is approved based on this subparagraph, the council may not adjust the amount of such offset funds based on the actual performance of offsets. After three years from June 26, 1997, the council may by rule increase or decrease the monetary offset rate of 57 cents per ton of carbon dioxide emissions. Any change to the monetary offset rate shall be based on empirical evidence of the cost of carbon dioxide offsets and the council's finding that the standard will be economically achievable with the modified rate for natural gas-fired power plants. Following the initial three-year period, the council may increase or decrease the monetary offset rate no more than 50 percent in any two-year period.

(D) Any other means that the council adopts by rule for demonstrating compliance with any applicable carbon dioxide emissions standard.

(d) If the applicant elects to meet the applicable carbon dioxide emissions standard in whole or in part under paragraph (c)(C) of this subsection the applicant shall identify the qualified organization. The applicant may identify an organization that has applied for, but has not received, an exemption from federal income taxation, but the council may not find that the organization is a qualified organization unless the organization is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code as amended and in effect on December 31, 1996. The site certificate holder shall provide a bond or comparable security in a form reasonably acceptable to the council to ensure the payment of the offset funds and the amount required under subparagraph (A)(ii) of this paragraph. Such security shall be provided by the date specified in the site certificate, which shall be no later than the commencement of construction of the facility. The site certificate shall require that the offset funds be disbursed as specified in subparagraph (A) of this paragraph, unless the council finds that no qualified organization exists, in which case the site certificate shall require that the offset funds be disbursed as specified in subparagraph (B) of this paragraph.

(A) The site certificate holder shall disburse the offset funds

and any other funds required by sub-subparagraph (ii) of this subparagraph to the qualified organization as follows:

(i) When the site certificate holder receives written notice from the qualified organization certifying that the qualified organization is contractually obligated to pay any funds to implement offsets using the offset funds, the site certificate holder shall make the requested amount available to the qualified organization unless the total of the amount requested and any amounts previously requested exceeds the offset funds, in which case only the remaining amount of the offset funds shall be made available. The qualified organization shall use at least 80 percent of the offset funds for contracts to implement offsets. The qualified organization may use up to 20 percent of the offset funds for monitoring, evaluation, administration and enforcement of contracts to implement offsets.

(ii) At the request of the qualified organization and in addition to the offset funds, the site certificate holder shall pay the qualified organization an amount equal to 10 percent of the first $500,000 of the offset funds and 4.286 percent of any offset funds in excess of $500,000. This amount shall not be less than $50,000 unless a lesser amount is specified in the site certificate. This amount compensates the qualified organization for its costs of selecting offsets and contracting for the implementation of offsets.

(iii) Notwithstanding any provision to the contrary, a site certificate holder subject to this subparagraph shall have no obligation with regard to offsets, the offset funds or the funds required by sub-subparagraph (ii) of this subparagraph other than to make available to the qualified organization the total amount required under paragraph (c) of this subsection and sub-subparagraph (ii) of this subparagraph, nor shall any nonperformance, negligence or misconduct on the part of the qualified organization be a basis for revocation of the site certificate or any other enforcement action by the council with respect to the site certificate holder.

(B) If the council finds there is no qualified organization, the site certificate holder shall select one or more offsets to be implemented pursuant to criteria established by the council. The site certificate holder shall give written notice of its selections to the council and to any person requesting notice. On petition by the State Department of Energy, or by any person adversely affected or aggrieved by the site certificate holder's selection of offsets, or on the council's own motion, the council may review such selection. The petition must be received by the council within 30 days of the date the notice of selection is placed in the United States mail, with first-class postage prepaid. The council shall approve the site certificate holder's selection unless it finds that the selection is not consistent with criteria established by the council. The site certificate holder shall contract to implement the selected offsets within 18 months after commencing construction of the facility unless good cause is shown requiring additional time. The contracts shall obligate the expenditure of at least 85 percent of the offset funds for the implementation of offsets. No more than 15 percent of the offset funds may be spent on monitoring, evaluation and enforcement of the contract to implement the selected offsets. The council's criteria for selection of offsets shall be based on the criteria set forth in paragraphs (b)(C) and (c)(B) of this subsection and may also consider the costs of particular types of offsets in relation to the expected benefits of such offsets. The

council's criteria shall not require the site certificate holder to select particular offsets, and shall allow the site certificate holder a reasonable range of choices in selecting offsets. In addition, notwithstanding any other provision of this section, the site certificate holder's financial liability for implementation, monitoring, evaluation and enforcement of offsets pursuant to this subsection shall be limited to the amount of any offset funds not already contractually obligated. Nonperformance, negligence or misconduct by the entity or entities implementing, monitoring or evaluating the selected offset shall not be a basis for revocation of the site certificate or any other enforcement action by the council with respect to the site certificate holder.

(C) Every qualified organization that has received funds under this paragraph shall, at five-year intervals beginning on the date of receipt of such funds, provide the council with the information the council requests about the qualified organization's performance. The council shall evaluate the information requested and, based on such information, shall make any recommendations to the Legislative Assembly that the council deems appropriate.

(e) As used in this subsection:

(A) 'Adjusted to ISO conditions' means carbon dioxide emissions and net electric power output as determined at 59 degrees Fahrenheit, 14.7 pounds per square inch atmospheric pressure and 60 percent humidity.

(B) 'Base load gas plant' means a generating facility that is fueled by natural gas, except for periods during which an alternative fuel may be used and when such alternative fuel use shall not exceed 10 percent of expected fuel use in Btu, higher heating value, on an average annual basis, and where the applicant requests and the council adopts no condition in the site certificate for the generating facility that would limit hours of operation other than restrictions on the use of alternative fuel. The council shall assume a 100-percent capacity factor for such plants and a 30-year life for the plants for purposes of determining gross carbon dioxide emissions.

(C) 'Fossil-fueled power plant' means a generating facility that produces electric power from natural gas, petroleum, coal or any form of solid, liquid or gaseous fuel derived from such material.

(D) 'Generating facility' means those energy facilities that are defined in ORS 469.300 (11)(a)(A), (B) and (D).

(E) 'Gross carbon dioxide emissions' means the predicted carbon dioxide emissions of the proposed energy facility measured on a new and clean basis.

(F) 'Net carbon dioxide emissions' means gross carbon dioxide emissions of the proposed energy facility, less carbon dioxide emissions avoided, displaced or sequestered by any combination of cogeneration or offsets.

(G) 'New and clean basis' means the average carbon dioxide emissions rate per hour and net electric power output of the energy facility, without degradation, as determined by a 100-hour test at full power completed during the first 12 months of commercial operation of the energy facility, with the results adjusted for the average annual site condition for temperature, barometric pressure and relative humidity and use of alternative fuels, and using a rate of 117 pounds of carbon dioxide per million Btu of natural gas fuel and a rate of 161 pounds of carbon dioxide per million Btu of distillate fuel, if such fuel

use is proposed by the applicant. The council may by rule adjust the rate of pounds of carbon dioxide per million Btu for natural gas or distillate fuel. The council may by rule set carbon dioxide emissions rates for other fuels.

(H) 'Nongenerating facility' means those energy facilities that are defined in ORS 469.300 (11)(a)(C) and (E) to (I).

(I) 'Offset' means an action that will be implemented by the applicant, a third party or through the qualified organization to avoid, sequester or displace emissions of carbon dioxide.

(J) 'Offset funds' means the amount of funds determined by the council to satisfy the applicable carbon dioxide emissions standard pursuant to paragraph (c)(C) of this subsection.

(K) 'Qualified organization' means an entity that:

(i) Is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code as amended and in effect on December 31, 1996;

(ii) Either is incorporated in the State of Oregon or is a foreign corporation authorized to do business in the State of Oregon;

(iii) Has in effect articles of incorporation that require that offset funds received pursuant to this section are used for offsets that will result in the direct reduction, elimination, sequestration or avoidance of carbon dioxide emissions, that require that decisions on the use of such funds are made by a body composed of seven voting members of which three are appointed by the council, three are Oregon residents appointed by the Bullitt Foundation or an alternative environmental nonprofit organization named by the body, and one is appointed by the applicants for site certificates that are subject to paragraph (d) of this subsection and the holders of such site certificates, and that require nonvoting membership on the decision-making body for holders of site certificates that have provided funds not yet disbursed under paragraph (d)(A) of this subsection;

(iv) Has made available on an annual basis, beginning after the first year of operation, a signed opinion of an independent certified public accountant stating that the qualified organization's use of funds pursuant to this statute conforms with generally accepted accounting procedures except that the qualified organization shall have one year to conform with generally accepted accounting principles in the event of a nonconforming audit;

(v) Has to the extent applicable, except for good cause, entered into contracts obligating at least 60 percent of the offset funds to implement offsets within two years after the commencement of construction of the facility; and

(vi) Has to the extent applicable, except for good cause, complied with paragraph (d)(A)(i) of this subsection.

(3) Except as provided in ORS 469.504 for land use compliance and except for those statutes and rules for which the decision on compliance has been delegated by the federal government to a state agency other than the council, the facility complies with all other Oregon statutes and administrative rules identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility. If compliance with applicable Oregon statutes and administrative rules, other than those involving federally delegated programs, would result in conflicting conditions in the site certificate, the council may resolve the conflict consistent with the public interest. A resolution may not result in the waiver of any applicable state statute.

(4) The facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission.

{ + (5) The facility meets recommended guidelines for energy generation, conservation and consumption in the region. In adopting the recommended guidelines, the council shall consider the benefits of using renewable energy resources instead of fossil fuel resources and prioritize siting approval for projects that generate energy by sources other than fossil fuels. + }

SECTION 6. ORS 469.504 is amended to read:

469.504. (1) { - A proposed facility shall be found in - } { + An applicant may demonstrate + } compliance with the statewide planning goals { - under - } { + for purposes of + } ORS 469.503 (4) if:

(a) { - The facility has received - } { + The applicant receives + } local land use approval { + for the facility + } under the acknowledged comprehensive plan and land use regulations of the affected local government; { - or - }

{ - (b) The Energy Facility Siting Council determines that: - }

{ - (A) The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes directly applicable to the facility under ORS 197.646 (3); - }

{ - (B) For an energy facility or a related or supporting facility that must be evaluated against the applicable substantive criteria pursuant to subsection (5) of this section, that the proposed facility does not comply with one or more of the applicable substantive criteria but does otherwise comply with the applicable statewide planning goals, or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section; or - }

{ - (C) For a facility that the council elects to evaluate against the statewide planning goals pursuant to subsection (5) of this section, that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section. - }

{ + (b) After public hearings to gather information on the applicable substantive criteria from the acknowledged comprehensive plan and land use regulations of the affected local government, a special advisory group established under ORS 469.480 reports to the Energy Facility Siting Council that the facility complies with the applicable substantive criteria; or

(c) For a facility that is a pipeline or transmission line that is located in two or more local government jurisdictions, or a wind power generation project, after public hearings to gather information on the applicable substantive criteria from the acknowledged comprehensive plans and land use regulations of the affected local governments, a special advisory group established under ORS 469.480 reports to the council regarding the information gathered during the hearing process and the council determines that:

(A) The facility complies with the applicable substantive criteria from the acknowledged comprehensive plans and land use regulations; or

(B) Compliance with the statewide planning goals may be

achieved by taking an exception to the applicable goal, but only after the significant environmental, economic, social and energy consequences anticipated as a result of the facility are identified and the adverse effects of the facility are mitigated in accordance with rules of the council applicable to the siting of the facility. + }

(2) The council may find goal compliance for a facility that does not otherwise comply with one or more statewide planning goals by taking an exception to the applicable goal. Notwithstanding the requirements of ORS 197.732, the statewide planning goal pertaining to the exception process or any rules of the Land Conservation and Development Commission pertaining to an exception process goal, the council may take an exception to a goal if { + , after a joint public hearing held by the council and a special advisory group and after a determination by the affected local government concurring in the decision, + } the council finds:

(a) The land subject to the exception is physically developed to the extent that the land is no longer available for uses allowed by the applicable goal;

(b) The land subject to the exception is irrevocably committed as described by the rules of the Land Conservation and Development Commission to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or

(c) The following standards are met:

(A) Reasons justify why the state policy embodied in the applicable goal should not apply;

(B) The significant environmental, economic, social and energy consequences anticipated as a result of the proposed facility have been identified and adverse impacts will be mitigated in accordance with rules of the council applicable to the siting of the proposed facility; and

(C) The proposed facility is compatible with other adjacent uses or will be made compatible through measures designed to reduce adverse impacts.

{ + (3) If the affected local government fails to concur with the decision of the council to take an exception to a goal under subsection (2) of this section and the council determines that an exception is necessary, the affected local government and the council shall meet to determine whether the parties can resolve the issues that block the affected local government from concurring in the decision. If the council and the affected local government are unable to resolve the issues, the parties shall have the issues resolved by binding arbitration. + }

{ - (3) - } { + (4) + } If compliance with applicable substantive local criteria and applicable statutes and state administrative rules would result in conflicting conditions in the site certificate or amended site certificate, the council shall resolve the conflict consistent with the public interest. A resolution may not result in a waiver of any applicable state statute.

{ - (4) An applicant for a site certificate shall elect whether to demonstrate compliance with the statewide planning goals under subsection (1)(a) or (b) of this section. The applicant shall make the election on or before the date specified by the council by rule. - }

{ - (5) Upon request by the State Department of Energy, the special advisory group established under ORS 469.480 shall recommend to the council, within the time stated in the request,

the applicable substantive criteria under subsection (1)(b)(A) of this section. If the special advisory group does not recommend applicable substantive criteria within the time established in the department's request, the council may either determine and apply the applicable substantive criteria under subsection (1)(b) of this section or determine compliance with the statewide planning goals under subsection (1)(b)(B) or (C) of this section. If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300 or a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the council shall apply the criteria recommended by the special advisory group. If the special advisory group recommends applicable substantive criteria for an energy facility as defined in ORS 469.300 (11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the council shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals. In making its determination, the council shall consult with the special advisory group and shall consider: - }

{ - (a) The number of jurisdictions and zones in question; - }

{ - (b) The degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process; and - }

{ - (c) The level of consistency of the applicable substantive criteria from the various zones and jurisdictions. - }

{ - (6) - } { + (5) + } The council is not subject to ORS 197.180 and a state agency may not require an applicant for a site certificate to comply with any rules or programs adopted under ORS 197.180.

{ - (7) - } { + (6) + } On or before its next periodic review, each affected local government shall amend its comprehensive plan and land use regulations as necessary to reflect the decision of the council pertaining to a site certificate or amended site certificate.

{ - (8) - } { + (7) + } Notwithstanding ORS 34.020 or 197.825 or any other provision of law, the affected local government's land use approval of a proposed facility { - under subsection (1)(a) of this section - } and the special advisory group's { - recommendation of applicable substantive criteria - } { + report + } under subsection { - (5) - } { + (1) + } of this section shall be subject to judicial review only as provided in ORS 469.403. If the applicant elects to comply with subsection (1)(a) of this section, the provisions of this subsection shall apply only to proposed projects for which the land use approval of the local government occurs after the date a notice of intent or an application for expedited processing is submitted to the State Department of Energy.

{ - (9) - } { + (8) + } The State Department of Energy, in cooperation with other state agencies, shall provide, to the extent possible, technical assistance and information about the siting process to local governments that request such assistance or that anticipate having a facility proposed in their jurisdiction.

SECTION 7. ORS 469.373 is amended to read:

469.373. (1) Notwithstanding the expedited review process established pursuant to ORS 469.370, an applicant may apply under the provisions of this section for expedited review of an application for a site certificate for an energy facility if the energy facility:

(a) Is a combustion turbine energy facility fueled by natural gas or is a reciprocating engine fueled by natural gas, including an energy facility that uses petroleum distillate fuels for backup power generation;

(b) Is a permitted or conditional use allowed under an applicable local acknowledged comprehensive plan, land use regulation or federal land use plan, and is located:

(A) At or adjacent to an existing energy facility; or

(B)(i) At, adjacent to or in close proximity to an existing industrial use; and

(ii) In an area currently zoned or designated for industrial use;

(c)(A) Requires no more than three miles of associated transmission lines or three miles of new natural gas pipelines outside of existing rights of way for transmission lines or natural gas pipelines; or

(B) Imposes, in the determination of the Energy Facility Siting Council, no significant impact in the locating of associated transmission lines or new natural gas pipelines outside of existing rights of way;

(d) Requires no new water right or water right transfer;

(e) Provides funds to a qualified organization in an amount determined by the council to be sufficient to produce any required reduction in carbon dioxide emissions as specified in ORS 469.503 (2)(c)(C) and in rules adopted under ORS 469.503 for the total carbon dioxide emissions produced by the energy facility for the life of the energy facility; and

(f)(A) Discharges process wastewater to a wastewater treatment facility that has an existing National Pollutant Discharge Elimination System permit, can obtain an industrial pretreatment permit, if needed, within the expedited review process time frame and has written confirmation from the wastewater facility permit holder that the additional wastewater load will be accommodated by the facility without resulting in a significant thermal { + or contaminant + } increase in the facility effluent or without requiring any changes to the wastewater facility National Pollutant Discharge Elimination System permit;

(B) Plans to discharge process wastewater to a wastewater treatment facility owned by a municipal corporation that will accommodate the wastewater from the energy facility and supplies evidence from the municipal corporation that:

(i) The municipal corporation has included, or intends to include, the process wastewater load from the energy facility in an application for a National Pollutant Discharge Elimination System permit; and

(ii) All conditions required of the energy facility to allow the discharge of process wastewater from the energy facility will be satisfied; or

(C) Obtains a National Pollutant Discharge Elimination System or water pollution control facility permit for process wastewater disposal, supplies evidence to support a finding that the discharge can likely be permitted within the expedited review process time frame and that the discharge will not require:

(i) A new National Pollutant Discharge Elimination System

permit, except for a storm water general permit for construction activities; or

(ii) A change in any effluent limit or discharge location under an existing National Pollutant Discharge Elimination System or water pollution control facility permit.

(2) An applicant seeking expedited review under this section shall submit documentation to the State Department of Energy, prior to the submission of an application for a site certificate, that demonstrates that the energy facility meets the qualifications set forth in subsection (1) of this section. The department shall determine, within 14 days of receipt of the documentation, on a preliminary, nonbinding basis, whether the energy facility qualifies for expedited review.

(3) If the department determines that the energy facility preliminarily qualifies for expedited review, the applicant may submit an application for expedited review. Within 30 days after the date that the application for expedited review is submitted, the department shall determine whether the application is complete. If the department determines that the application is complete, the application shall be deemed filed on the date that the department sends the applicant notice of its determination. If the department determines that the application is not complete, the department shall notify the applicant of the deficiencies in the application and shall deem the application filed on the date that the department determines that the application is complete. The department or the council may request additional information from the applicant at any time.

(4) The State Department of Energy shall send a copy of a filed application { + for review and comment + } to the Department of Environmental Quality, { - the Water Resources Department, - } the State Department of Fish and Wildlife, the State Department of Geology and Mineral Industries, the State Department of Agriculture, the Department of Land Conservation and Development, the Public Utility Commission and any other state agency, city, county or political subdivision of the state that has regulatory or advisory responsibility with respect to the proposed energy facility. The State Department of Energy shall send with the copy of the filed application a notice specifying that:

(a) In the event the council issues a site certificate for the energy facility, the site certificate will bind the state and all counties, cities and political subdivisions in the state as to the approval of the site, the construction of the energy facility and the operation of the energy facility, and that after the issuance of a site certificate, all permits, licenses and certificates addressed in the site certificate must be issued as required by ORS 469.401 (3); and

(b) The comments and recommendations of state agencies, counties, cities and political subdivisions concerning whether the proposed energy facility complies with any statute, rule or local ordinance that the state agency, county, city or political subdivision would normally administer in determining whether a permit, license or certificate required for the construction or operation of the energy facility should be approved will be considered only if the comments and recommendations are received by the department within a reasonable time after the date the application and notice of the application are sent by the department.

(5) Within 90 days after the date that the application was filed, the department shall issue a draft proposed order setting forth:

(a) A description of the proposed energy facility;

(b) A list of the permits, licenses and certificates that are addressed in the application and that are required for the construction or operation of the proposed energy facility;

(c) A list of the statutes, rules and local ordinances that are the standards and criteria for approval of any permit, license or certificate addressed in the application and that are required for the construction or operation of the proposed energy facility; and

(d) Proposed findings specifying how the proposed energy facility complies with the applicable standards and criteria for approval of a site certificate.

(6) The council shall review the application for site certification in the manner set forth in subsections (7) to (10) of this section and shall issue a site certificate for the facility if the council determines that the facility, with any required conditions to the site certificate, will comply with:

(a) The requirements for expedited review as specified in this section;

(b) The standards adopted by the council pursuant to ORS 469.501 (1)(a), (c) to (e), (g), (h) and (L) to (o); { + and + }

(c) The requirements of ORS 469.503 (3) { + and (5). + }

{ - ; and - }

{ - (d) The requirements of ORS 469.504 (1)(b). - }

(7) Following submission of an application for a site certificate, the council shall hold a public informational meeting on the application. Following the issuance of the proposed order, the council shall hold at least one public hearing on the application. The public hearing shall be held in the area affected by the energy facility { + and shall provide an opportunity for the public and affected local governments to present written evidence, arguments or testimony regarding the application + }. The council shall mail notice of the hearing at least 20 days prior to the hearing. The notice shall comply with the notice requirements of ORS 197.763 (2) and shall include, but need not be limited to, the following:

(a) A description of the energy facility and the general location of the energy facility;

(b) The name of a department representative to contact and the telephone number at which people may obtain additional information;

(c) A statement that copies of the application and proposed order are available for inspection at no cost and will be provided at reasonable cost; and

(d) A statement that the record for public comment on the application will close at the conclusion of the hearing and that failure to raise an issue in person or in writing prior to the close of the record, with sufficient specificity to afford the decision maker an opportunity to respond to the issue, will preclude consideration of the issue, by the council or by a court on judicial review of the council's decision.

(8) Prior to the conclusion of the hearing, the applicant may request an opportunity to present additional written evidence, arguments or testimony regarding the application. In the alternative, prior to the conclusion of the hearing, the applicant may request a contested case hearing on the application. If the applicant requests an opportunity to present written evidence, arguments or testimony, the council shall leave the record open for that purpose only for a period not to exceed 14 days after the date of the hearing. Following the close of the

record, the department shall prepare a draft final order for the council. If the applicant requests a contested case hearing, the council may grant the request if the applicant has shown good cause for a contested case hearing. If a request for a contested case hearing is granted, subsections (9) to (11) of this section do not apply, and the application shall be considered under the same contested case procedures used for a nonexpedited application for a site certificate.

(9) The council shall make its decision based on the record and the draft final order prepared by the department. The council shall, within six months of the date that the application is deemed filed:

(a) Grant the application;

(b) Grant the application with conditions;

(c) Deny the application; or

(d) Return the application to the site certification process required by ORS 469.320.

(10) If the application is granted, the council shall issue a site certificate pursuant to ORS 469.401 and 469.402. Notwithstanding subsection (6) of this section, the council may impose conditions based on standards adopted under ORS 469.501 (1)(b), (f) and (i) to (k), but may not deny an application based on those standards.

(11) Judicial review of the approval or rejection of a site certificate by the council under this section shall be as provided in ORS 469.403.

SECTION 8. ORS 469.441 is amended to read:

469.441. (1) All expenses incurred by the Energy Facility Siting Council and the State Department of Energy under ORS 469.360 (1) { + and (2) + } and 469.421 that are charged to or allocated to the fee paid by an applicant or the holder of a site certificate shall be necessary, just and reasonable. Upon request, the department or the council shall provide a detailed justification for all charges to the applicant or site certificate holder. Not later than January 1 of each odd-numbered year, the council by order shall establish a schedule of fees which those persons submitting a notice of intent, a request for an exemption, a request for a pipeline described in ORS 469.405 (3) or a request for an expedited review must submit under ORS 469.421 at the time of submitting the notice of intent, request for exemption, request for pipeline or request for expedited review. The fee schedule shall be designed to recover the council's actual costs of evaluating the notice of intent, request for exemption, request for pipeline or request for expedited review subject to any applicable expenditure limitation in the council's budget. Fees shall be based upon actual, historical costs incurred by the council and department to the extent historical costs are available. The fees established by the schedule shall reflect the size and complexity of the project for which a notice of intent, request for exemption, request for pipeline or request for expedited review is submitted, whether the notice of intent, request for exemption, request for pipeline or request for expedited review is for a new or existing facility and other appropriate variables having an effect on the expense of evaluation.

(2) If a dispute arises regarding the necessity or reasonableness of expenses charged to or allocated to the fee paid by an applicant or site certificate holder, the applicant or holder may seek judicial review for the amount of expenses charged or allocated in circuit court as provided in ORS 183.480,

183.484, 183.490 and 183.500. If the applicant or holder establishes that any of the charges or allocations are unnecessary or unreasonable, the council or the department shall refund the amount found to be unnecessary or unreasonable. The applicant or holder shall not waive the right to judicial review by paying the portion of the fee or expense in dispute.

SECTION 9. { + (1) There is created the Task Force on Regional Energy Policy consisting of nine voting members appointed by the Director of the State Department of Energy. The director shall appoint members in the following manner:

(a) One member to represent the Public Utility Commission;

(b) One member to represent consumer-owned utilities;

(c) One member to represent investor-owned utilities;

(d) One member from the Oregon delegation to the Northwest Power and Conservation Council;

(e) Four members from nongovernmental entities that have a program focus on renewable energy or the environment;

(f) One member with experience in energy policy to represent the general public; and

(g) One nonvoting member to represent the State Department of Energy.

(2) The task force shall:

(a) Discuss and formulate recommendations on long-term regional energy policies as those policies relate to and are relevant to energy facility siting in Oregon;

(b) Recommend administrative rules to the department relating to the implementation of ORS 469.503 (5) and the prioritizing of siting approval for projects using renewable energy resources instead of fossil fuel resources; and

(c) Recommend administrative rules to the department that would create a standard for renewable energy development.

(3) A majority of the members of the task force constitutes a quorum for the transaction of business.

(4) Official action by the task force requires the approval of a majority of the members of the task force.

(5) The task force shall elect one of its members to serve as chairperson.

(6) If there is a vacancy for any cause, the director shall make an appointment to become immediately effective.

(7) The task force shall meet at times and places specified by the call of the chairperson or of a majority of the members of the task force.

(8) The task force may adopt rules necessary for the operation of the task force.

(9) The task force shall submit a report, including recommendations for legislation relating to the duties of the task force under subsection (2)(a) of this section, to an interim committee related to the environment or land use as appropriate no later than October 1, 2006.

(10) The department shall provide staff support to the task force.

(11) Members of the task force are not entitled to compensation or reimbursement for expenses and serve as volunteers on the task force.

(12) All agencies of state government, as defined in ORS 174.111, are directed to assist the task force in the performance of its duties and, to the extent permitted by laws relating to confidentiality, to furnish such information and advice as the members of the task force consider necessary to perform their duties. + }

SECTION 10. { + Section 9 of this 2005 Act is repealed on the date of the convening of the next regular biennial legislative session. + }

SECTION 11. { + The amendments to ORS 469.503 by section 5 of this 2005 Act become operative January 1, 2008, and apply to applications for a site certificate submitted to the Energy Facility Siting Council on or after January 1, 2008. + }

SECTION 12. ORS 469.501 is amended to read:

469.501. (1) The Energy Facility Siting Council shall adopt standards for the siting, construction, operation and retirement of facilities. The standards may address but need not be limited to the following subjects:

(a) The organizational, managerial and technical expertise of the applicant to construct and operate the proposed facility.

(b) Seismic hazards { + , including requiring applicants for site certificates to submit, as part of the application under ORS 469.350, adequate characterization of the site as to seismic risk to the proposed facility during maximum credible and probable seismic events + }.

(c) Areas designated for protection by the state or federal government, including but not limited to monuments, wilderness areas, wildlife refuges, scenic waterways and similar areas.

(d) The financial ability and qualifications of the applicant.

(e) Effects of the facility, taking into account mitigation, on fish and wildlife, including threatened and endangered fish, wildlife or plant species.

(f) Impacts of the facility on historic, cultural or archaeological resources listed on, or determined by the State Historic Preservation Officer to be eligible for listing on, the National Register of Historic Places or the Oregon State Register of Historic Properties.

(g) Protection of public health and safety, including necessary safety devices and procedures.

(h) The accumulation, storage, disposal and transportation of nuclear waste.

(i) Impacts of the facility on recreation, scenic and aesthetic values.

(j) Reduction of solid waste and wastewater generation to the extent reasonably practicable.

(k) Ability of the communities in the affected area to provide sewers and sewage treatment, water, storm water drainage, solid waste management, housing, traffic safety, police and fire protection, health care and schools.

(L) The need for proposed nongenerating facilities as defined in ORS 469.503, consistent with the state energy policy set forth in ORS 469.010 and 469.310. The council may consider least-cost plans when adopting a need standard or in determining whether an applicable need standard has been met. The council shall not adopt a standard requiring a showing of need or cost-effectiveness for generating facilities as defined in ORS 469.503.

(m) Compliance with the statewide planning goals adopted by the Land Conservation and Development Commission as specified by ORS 469.503.

(n) Soil protection.

(o) For energy facilities that emit carbon dioxide, the impacts of those emissions on climate change. For fossil-fueled power plants, as defined in ORS 469.503, the council shall apply a standard as provided for by ORS 469.503 (2).

(2) The council may adopt exemptions from any need standard

adopted under subsection (1)(L) of this section if the exemption is consistent with the state's energy policy set forth in ORS 469.010 and 469.310.

(3) The council may issue a site certificate for a facility that does not meet one or more of the standards adopted under subsection (1) of this section if the council determines that the overall public benefits of the facility outweigh the damage to the resources protected by the standards the facility does not meet.

(4) Notwithstanding subsection (1) of this section, the council may not impose any standard developed under subsection (1)(b), (f), (j) or (k) of this section to approve or deny an application for an energy facility producing power from wind, solar or geothermal energy. However, the council may, to the extent it determines appropriate, apply any standards adopted under subsection (1)(b), (f), (j) or (k) of this section to impose conditions on any site certificate issued for any energy facility.

SECTION 13. ORS 469.350 is amended to read:

469.350. (1) Applications for site certificates shall be made to the Energy Facility Siting Council in a form prescribed by the council and accompanied by the fee required by ORS 469.421.

(2) Copies of the notice of intent and of the application shall be sent for comment and recommendation within specified deadlines established by the council to the Department of Environmental Quality, { - the Water Resources Commission, - } the State Fish and Wildlife Commission, the Water Resources Director, the State Geologist, the State Forestry Department, the Public Utility Commission of Oregon, the State Department of Agriculture, the Department of Land Conservation and Development, any other state agency that has regulatory or advisory responsibility with respect to the facility and any city or county affected by the application.

(3) Any state agency, city or county that is requested by the council to comment and make recommendations under this section shall respond to the council by the specified deadline. If a state agency, city or county determines that it cannot respond to the council by the specified deadline because the state agency, city or county lacks sufficient resources to review and comment on the application, the state agency, city or county shall contract with another entity to assist in preparing a response. A state agency, city or county that enters into a contract to assist in preparing a response may request funding to pay for that contract from the council pursuant to ORS 469.360.

(4) The State Department of Energy shall notify the applicant whether the application is complete. When the department determines an application is complete, the department shall notify the applicant and provide notice to the public.

SECTION 14. ORS 469.401 is amended to read:

469.401. (1) Upon approval, the site certificate or any amended site certificate with any conditions prescribed by the Energy Facility Siting Council shall be executed by the chairperson of the council and by the applicant. The certificate or amended certificate shall authorize the applicant to construct, operate and retire the facility subject to the conditions set forth in the site certificate or amended site certificate. The duration of the site certificate or amended site certificate shall be the life of the facility.

(2) The site certificate or amended site certificate shall contain conditions for the protection of the public health and

safety, for the time for completion of construction, and to ensure compliance with the standards, statutes and rules described in ORS 469.501 and 469.503. The site certificate or amended site certificate shall require both parties to abide by local ordinances and state law and the rules of the council in effect on the date the site certificate or amended site certificate is executed, except that upon a clear showing of a significant threat to the public health, safety or the environment that requires application of later-adopted laws or rules, the council may require compliance with such later-adopted laws or rules. For a permit addressed in the site certificate or amended site certificate, the site certificate or amended site certificate shall provide for facility compliance with applicable state and federal laws adopted in the future to the extent that such compliance is required under the respective state agency statutes and rules.

(3) Subject to the conditions set forth in the site certificate or amended site certificate, any certificate or amended certificate signed by the chairperson of the council shall bind the state and all counties and cities and political subdivisions in this state { + , other than the Water Resources Commission, + } as to the approval of the site and the construction and operation of the facility. After issuance of the site certificate or amended site certificate, any affected state agency, county, city and political subdivision { + , other than the Water Resources Department, + } shall, upon submission by the applicant of the proper applications and payment of the proper fees, but without hearings or other proceedings, promptly issue the permits, licenses and certificates addressed in the site certificate or amended site certificate, subject only to conditions set forth in the site certificate or amended site certificate. After the site certificate or amended site certificate is issued, the only issue to be decided in an administrative or judicial review of a state agency or local government permit for which compliance with governing law was considered and determined in the site certificate or amended site certificate proceeding shall be whether the permit is consistent with the terms of the site certificate or amended site certificate. Each state or local government agency that issues a permit, license or certificate shall continue to exercise enforcement authority over the permit, license or certificate.

(4) Nothing in ORS chapter 469 shall be construed to preempt the jurisdiction of any state agency or local government over matters that are not included in and governed by the site certificate or amended site certificate. Such matters include but are not limited to employee health and safety, building code compliance, wage and hour or other labor regulations, local government fees and charges or other design or operational issues that do not relate to siting the facility.

SECTION 15. { + The amendments to ORS 469.350 and 469.401 by sections 13 and 14 of this 2005 Act apply to applications for site certificates submitted to the Energy Facility Siting Council on or after the effective date of this 2005 Act. + }

Bills may spur cleaner coal power plants.

Source: Messenger-Inquirer (Owensboro, Kentucky) (via Knight-Ridder/Tribune Business News)
Date: 3/3/2006

Byline: Owen Covington

Mar. 3–FRANKFORT – Legislators began discussions Thursday of two provisions designed to spur the development of more technologically advanced and environmentally sound coal power plants. The House Tourism Development and Energy Committee approved House Bill 665 that would remove an administrative hurdle to power plant construction and could help Kentucky land a $1 billion zero-emissions coal-based power plant. "The effort here is to put us in the best position possible at bidding for that billion-dollar federal demonstration project," said Rep. Tanya Pullin, a South Shore Democrat and the bill's sponsor.

Kentucky is one of about a dozen states that is vying for the FutureGen project, a proposed coal-fueled power plant that would generate electricity and hydrogen from coal with nearly no emissions. The FutureGen Industrial Alliance, a public-private partnership that is heading the project, will be accepting proposals in May and should select a site by next year. Andrew McNeill, chief of staff for the state Commerce Cabinet secretary, said the state has already been evaluating potential sites for the plant, and it is possible it could land in western Kentucky if the state is awarded the project. House Bill 665 would remove the project from the state siting process, but it would still have to be approved by the local planning and zoning commission, McNeill said. The committee also began discussion on House Bill 585, which would provide more incentives for the construction of clean coal power plants, but which opponents say could drive up energy prices in the short term. The bill would allow a company that is approved to construct a "clean coal" power plant, which has fewer emissions that regular coal-fired power plants, to raise power rates once they begin construction of the plant. Currently, the Public Service Commission only allows power companies to recoup construction costs once the plant is operational, which could take as many as four years, McNeill said.

"There are facilities that need to be built," said Rep. Robin Webb, a Grayson Democrat who sponsored the bill. "This bill will hopefully allow that technology in electricity production to proceed with environmental considerations." The measure would encourage companies to construct more technologically advanced coal-fueled power plants that require a more significant investment than traditional coal-fired power plants, McNeill said. However, stricter environmental regulations are requiring power companies to retrofit their coal-fired plants to reduce emissions, a process that can be expensive. "They can go ahead and invest on the equipment on the front end," McNeill said. "It's a matter of pay more now or pay more later for a cleaner environment." Dave Boehm, a lawyer representing more than 30 industrial groups in the state, said allowing companies to pass along construction costs through rate increases before a new plant is operational will lead to increases of more than 30 percent in rates. "The bill is intended to radically change about 65 to 70 years of tradition in rate making in Kentucky, rate making that has served Kentucky very well," Boehm said. Webb said the Public Service Commission will still retain oversight over how much the company can raise its rates, and will review the rate increase annually to ensure it is not excessive. "The PSC involvement will not change," Webb said. "The criteria is there as a safeguard."

Discussion on House Bill 665 will likely continue next week before the bill is voted on by the committee.

More Battles Lie Ahead for Power Plant Siting Bill in Kentucky.

Source: The Paducah Sun (Paducah, Kentucky) (via Knight-Ridder/Tribune Business News)
Date: 3/26/2002

Byline: Bill Bartleman

Mar. 26--FRANKFORT, Ky.--A political battle is looming over what Gov. Paul Patton and others say is one of the most important issues of the legislative session: regulating where power plants may be built.

The issue is important to western Kentucky where large coal-fired plants are being considered in Marshall, McCracken and Muhlenberg counties.

Consideration of permits for those plants are on hold because of a moratorium imposed last summer by Patton. The moratorium, set to expire in June, was to give lawmakers time to enact legislation to protect neighborhoods and the environment.

Late last month, the issue appeared headed for easy passage when the House approved a bill based on the work of a six-month study and weeks of legislative hearings.

However, that bill met its death in the Senate, because Republicans not only bickered with Democrats, but also were dissatisfied with Rep. Jon Draud, R-Crestview Hills, the main sponsor of the bill.

Draud said some of his fellow Republicans were upset that he worked too closely with Democrats, including Patton, to draft the bill.

Two weeks ago, the Senate passed its own version of the power plant siting bill 36-0. Draud initially said he would work to kill that measure but has changed his mind. "I realized that it was childish for me to have that attitude," he said. "It is too important a bill."

When the measure is considered Monday by the House Local Government Committee, Draud said he will propose about a half-dozen amendments to restore some the important provisions cut from the Senate bill.

If approved by the House, the bill is likely to end up in a conference committee, which will attempt to work out differences. James Bickford, secretary of the Natural Resources and Environmental Protection Cabinet, is worried that the issue won't be resolved this session.

The major differences are the make-up of a board to review and approve plant locations, the setback requirements from the nearest neighborhood or business, and the regulation of transmission lines into the plants.

If conflicts aren't worked out, Bickford isn't sure what will happen. "The only thing I know at this point is that the governor's moratorium will expire in June," he said. "If that happens, it apparently would allow plants to be built anywhere."

Draud said the big problem is with smaller gas-fired plants known as "peaking plants," which are used only a few weeks in the summer to meet peak cooling demands.

Draud said he became interested in the issue after one of those plants was proposed in his district near a residential area and next to a nursing home. He said the plants produce a sound that is "essentially nothing more than two big jet engines."

Bickford doubts Patton will extend the moratorium. "The only reason the governor did it was to give the legislature time to enact regulations," he said.

Also, another moratorium is likely to result in a legal action from power companies that earlier questioned Patton's right to block consideration of new permits. Officials in the Patton administration said they could have a difficult time prevailing if a suit is filed.

Patton also could impose his own regulations through an executive order, but those would be only temporary, Bickford said.

Industry officials, meanwhile, prefer legislative action. "We don't know what kind of regulations the governor would impose," said Randy Bird, spokesman and lobbyist for EnviroPower of Lexington, the company planning a 500-megawatt plant in Calvert City.

Bird said that his company supports most of the provisions in the House and Senate bills, and that the regulations would not interfere with construction of the Calvert City plant. Given a choice, he said he prefers the Senate bill, because it is more specific on siting guidelines and leaves little room for interpretation to the Public Service Commission or the Natural Resources Cabinet.

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Title: HOUSE OKS REGULATIONS FOR NEW POWER PLANTS.(NEWS)

Date: 2/26/2002; Publication: The Kentucky Post (Covington, KY);

Byline: Associated Press

FRANKFORT -- The House on Monday voted overwhelmingly to regulate the siting of new electric generating plants and transmission lines, but only after narrowly defeating a proposal to exempt Kentucky utilities.

The debate strayed across a variety of topics, from warnings about California-style power shortages to help for beleaguered coal miners as well as some control of where new plants and high-tension wires might be placed.

Rep. Jon Draud, R-Crestview Hills, accused utilities of using "scare tactics" about higher electric rates and other dangers if they were subjected to regulations on power plant siting.

"There's been a tremendous amount of misinformation by the utilities," Draud said. "Any reasonable proposal in this state will be built."

Others staunchly defended the utilities that have provided electricity at the lowest rates in the nation.

"I can't understand why we don't trust the regulated utilities that have provided excellent service for more than a century," said Rep. Charlie Walton, R-Florence.

The disagreement cut across party lines, and the exemption from siting regulation for utilities that are already regulated by the Public Service Commission was defeated on a 49-49 vote. A motion to reconsider the matter lost by an even larger margin.

The House, though, also refused to extend the moratorium on new power plants that Gov. Paul Patton signed last year, indicating some sentiment for electric generators, but with more oversight.

The legislation would create a panel of members of the Public Service Commission, secretaries of the Economic Development and Natural Resources cabinets and two citizens from the community where the plant is proposed. The panel would be able to recommend against approval of the power plant.

The bill now goes to the Senate for its consideration.

CAPTION(S):

Photo

The Associated Press - Rep. Jon Draud, R-Crestview Hills, left, responded Monday to comments by Rep. Thomas Kerr, D-Taylor Mill, about Draud's bill to regulate new power plants.

Title: BILL PUTS LIMITS ON POWER PLANTS.(NEWS)

Date: 2/15/2002; Publication: The Kentucky Post (Covington, KY); Author: Kinney, Courtney

Byline: Courtney Kinney Post Frankfort Bureau Chief

FRANKFORT -- A bill that would give the state more say over where power plants can be built was approved by a House committee Thursday, but not without objection from utility companies it would affect.

"There was considerable opposition from regulated utilities," said Rep. Jon Draud, R-Crestview Hills, who sponsored the bill. "They want out of the bill."

The bill, backed by Gov. Paul Patton, would require power plants to build at least 3,000 feet from residential areas, historic sites and many other specified areas.

It also would set up a siting board that would have to approve the location and require companies wanting to build "merchant" plants, those that generate power to sell on the wholesale market, to get approval from the state Public Service Commission.

Some power companies that are already regulated by the commission said additional oversight wasn't necessary for their plants since regulation was already in place. Under Draud's bill, any new power plant - merchant or otherwise - would have to win approval from the seven-member siting board, which would include representatives from the PSC, the state Natural Resources Cabinet and residents of the area where the plant would be located.

The legislation was sparked by a wave of applications for new merchant plants in the state, including one in Northern Kentucky.

Draud sponsored the legislation because he said he's worried that under current law, plants can build so close to residential areas, such as a plant proposed by Cinergy in Erlanger. The proposed site is several hundred feet from a neighborhood, a nursing home and the a Kenton County Library branch.

Patton has issued a moratorium on construction of new plants until July. Patton and Draud will be at the Baptist Village home in Erlanger on Monday to rally support for the bill.

Draud said he isn't sure how the bill will fare, but that the members of the House State and Local Government Committee, who passed the bill out Thursday, didn't seem to have many problems with it.

"Nobody spoke out real strongly," he said.

The bill now goes to the full House for a vote.

Title: HURDLES MAY BE HIGHER FOR MINI-POWER PLANTS.(NEWS)

Date: 1/25/2002; Publication: The Kentucky Post (Covington, KY); Author: Kinney, Courtney

Byline: Courtney Kinney Post Frankfort Bureau Chief

FRANKFORT – A state panel that advises Gov. Paul Patton on the environment has endorsed his proposed legislation to better regulate where power plants are built, but said the regulations could be even stronger.

The Kentucky Environmental Quality Commission said Thursday that it supported Patton's plan, which would give the state oversight in the location of merchant plants - those that generate power to sell to other states but aren't now regulated by the Kentucky Public Service Commission. Patton's plan calls for the plants to locate at least 2,000 feet away from a residential area. The commission said Thursday it would rather Patton call for the companies that want to build merchant plants to consider the impact on the community, not just abide by the 2,000-feet setback.

"I don't want to propose anything that's unreasonable," said Aloma Dew, who heads the commission.

"I just want good oversight."

Patton last week unveiled a plan that included the minimum 2,000-feet setback and a requirement that new plants comply with local planning and zoning requirements.

It also would set up a seven-member siting board that would include members of the Public Service Commission, the secretaries of the Natural Resources and

Economic Development cabinets, and two members of the community in which a plant wants to locate.

The Environmental Quality Commission said it supported a siting board and other efforts the governor has made to mitigate the impacts of new power plants that want to locate in Kentucky.

Patton has issued a moratorium on construction of new plants, which ends in July. The stay gives the 2002 General Assembly time to consider Patton's proposed legislation, which will be filed by Rep. Jon Draud, R-Crestview Hills.

Draud has been at the forefront of the merchant plant siting issue since Cinergy announced plans to build a natural-gas fired merchant plant on the Erlanger-Crestview Hills border. The proposed site is within 600 feet of a nursing home and Kenton County's new Erlanger Branch Library and 800 feet from homes.

Draud and many residents have fought Cinergy on the plant, saying it is too close to residential areas and would be harmful to their health.

Draud had pre-filed legislation during the interim that dealt only with siting issues. Patton's plan is more comprehensive.