

# Transmission and Generation Siting and Exercise of Eminent Domain Powers Background Perspective, and the Case for a Federal Role

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## Transmission Issues Context

Holy Trinity of Issues:  
Pricing, Access, and Siting

- Pricing: Being Seriously Addressed
- Access: Resolved
- Siting: Not Yet Addressed

## Current Jurisdictional Status for Siting

- Limited Federal Authority (e.g. federal lands, river crossings) with Scattered Agency Jurisdiction
- State Powers
  - 28 States Have Siting Statutes
  - Local Role in the Remaining States

## Legal Status of Eminent Domain

- Very Limited Federal Power
- States:
  - Majority Position: Comes with Legal Status as Utility
  - Minority Position: Obtained with Siting Approval

## Purpose of Siting Laws

1. Preemption of Local Powers
2. One Stop Shopping with Jurisdictional State Agencies
3. Coherent and Transparent Decision Making Process with Formalized Public Input

## Historical Reasons for Jurisdictional Arrangements

1. Local Nature of Electric Utilities
2. Vertically Integrated Nature of Electric Utilities
3. Reliability Backup and Trading of Relatively Recent Vintage
4. Monopoly Status of Utilities
5. Policy Reluctance to Use Eminent Domain for Private Purposes

## Nature of Siting Process

1. Establish Need
2. Establish Prudence of Utility  
Planning/Exposure of Consumers to  
Increased Costs
3. Non-Economic Review (e.g. Environment,  
Health, Aesthetics)
4. Route Approval

## Definition of “Need”

- Historical Definition: Necessary for  
Provision of Service by Monopoly Provider
- Definition in Competitive Market:  
Uncertain but “Necessary” Seems Archaic

## Context of “Need”

Tampa Electric et al. vs. Joe Garcia et al.  
(Florida Supreme Court, April 2000)

1. Limited to Florida Utilities Serving Florida Customers
2. Requires 100% Contractual to or Service Obligation by Florida Utility

## Context of “Need”

TransEnergie Application to Connecticut  
Siting Council (March, 2001)

1. In State Need Paramount (out of state benefits = lesser magnitude of importance)
2. Beneficial Competitive Effects Weighed Very Lightly

## Context of “Need”

Point of Pines Beach Association vs. Energy  
Facilities Siting Board et al. (Supreme Judicial  
Court of Massachusetts, January, 1995)

1. Relevant Need = Within the Commonwealth
2. Existence of Power Purchase Agreement Does Not Establish Need (Contract Must be Proved to be the “Product of Market Forces”)

## Context of “Need”

Mississippi Power and Light vs. Louis A.  
Conerly et al. (Supreme Court of  
Mississippi, October, 1984)

1. Eminent Domain Powers May Not Be Exercised Unless Mississippi Customers are Benefited.

## Parochialism/Response to Emergence of Competitive Market

1. Only Tiny Minority of States Statutorily Require Consideration of Neighboring States' Needs.
2. Minority of States Have Modified Definition of Need to Reflect the Rise of Competition.
3. 22 States Lack Any Coherent Siting Regime, Often Allowing Local Interests to Block.
4. Most States Look at Benefits Primarily in Internalized Terms.

## Dynamics of Existing Regime

1. Discourages Investors From Seeking Approval of Facilities That Cross Multiple States.
2. Do Not Reflect Current Structure and Scope of Electricity Markets.
3. Effectively Skews Resource Choices in Favor of Course of Least Resistance Rather than Economic Optimization
4. Provides Effective Tool for Monopolies to Impede and Perhaps Prevent New Entrants.

## Conclusions

1. States Should Not Retain Sole Say Over the Siting of Facilities With Multi-State Implications
2. Need Determination Must be Made by an Entity With a National or Regional Perspective
3. Multi-State Facilities are Entitled to Same Exercise of Eminent Domain Powers as are Intra-State Facilities

## Options

1. Complete Federal Preemption (relevant federal agencies?)
2. Regional Compact/Joint Board Approaches
3. Bifurcation: FERC Determination of Need/State Decides Actual Route Within Time and Cost Constraints