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A Dormant Commerce Clause Approach to Interstate Electricity Transmission

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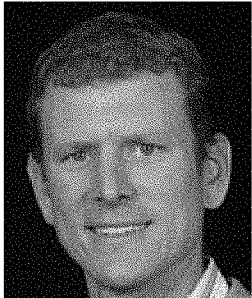
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Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 *Minn. L. Rev.* 129 (2015).



Felix Mormann

In a 2013 report, the American Society of Civil Engineers awarded the U.S. electricity grid the grade “D+” noting that aging components and limited maintenance contribute to a growing number of brownouts and blackouts. Indeed, the 450,000 miles of high-voltage transmission lines that connect America’s nearly 7,000 power plants with some 6 million miles of lower-voltage distribution networks are based on a grid architecture that dates back to the 1880s. The average transformer in the national power grid is 42 years old and, hence, two years past its projected useful life. Every year power outages cost the economy billions of dollars in lost output and wages, spoiled inventory, production delays, among others. Meanwhile, successful mitigation of global climate change urges the transition to a low-carbon energy economy fueled by solar, wind, and other renewables. But the best renewable resources are often located far from population centers, such as wind resources in the upper Midwest and Plains states or solar resources in the desert southwest. As a result, the U.S. electricity grid requires both modernization and expansion calling for \$1 trillion of investment to maintain even current levels of grid reliability. In *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, professors Alexandra B. Klass and Jim Rossi take stock of the regulatory impediments to upgrading and expanding the electricity grid, and propose a fresh take on dormant Commerce Clause review to incentivize greater interstate coordination on long-distance transmission projects.

Notwithstanding the vast macroeconomic benefits of an upgraded and expanded electric grid, transmission lines remain highly unpopular and subject to strong “not-in-my-backyard” reactions – at the individual and institutional level alike. Drawing on a series of precedents, professors Klass and Rossi illustrate how states use their virtually exclusive authority over electric transmission line siting and eminent domain to block and, ultimately, defeat interstate transmission projects. “In the context of multi-jurisdictional energy infrastructure projects, a single state or local holdout can keep an infrastructure project from going forward.” Such regulatory holdouts are especially popular among “pass-through” states that often struggle to identify benefits to local constituents from transmission lines that originate and end out-of-state. In the words of Klass and Rossi, “interest group dynamic[s] along with many existing siting and eminent domain laws enable, and may even encourage, these kinds of state and local government holdouts.”

The article identifies three different patterns by which state regulation and, in some cases, legislation facilitate regulatory hold-outs. First, regulators may refuse to issue the required certificate of convenience and necessity based on a narrow assessment of the benefits associated with a proposed interstate transmission project. Second,

regulators may refuse to grant eminent domain authority based on post-*Kelo* legislation or by requiring local need in order to establish “public use.” Third, regulation and/or legislation may limit the procedural rights of out-of-state applicants if not expressly ban them from transmission line siting permits or eminent domain authority in the state.

Professors Klass and Rossi make a compelling case for dormant Commerce Clause review as a doctrinal opening for courts to resolve state regulatory hold-outs – in electricity transmission and beyond. Building on the rich history of related jurisprudence, the article adds to the literature in at least two important ways. First, it revives the dormant Commerce Clause’s role as a catalyst not only for inter-state competition but, critically, also for coordination among states. Klass and Rossi draw on *Rocky Mountain Farmers v. Corey* to argue that coordination among state policies, as reflected in energy market initiatives that take into account out-of-state benefits, is allowed under dormant Commerce Clause doctrine and, in fact, “ought to be encouraged and, in some instances, required.” Second, the article calls on disfavored out-of-state applicants for electricity transmission siting and eminent domain to harness dormant Commerce Clause doctrine to challenge state legislation and regulation not only on substantive but also on procedural grounds.

In *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, professors Klass and Rossi offer a roadmap for states to better coordinate on multi-jurisdictional transmission projects and, where such coordination fails, devise an enticing litigation strategy for disfavored applicants based on a reinvigorated interpretation of dormant Commerce Clause doctrine. I, for one, look forward to seeing both in action.

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