Takings and Transmission

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ABSTRACT

Ever since the Supreme Court’s controversial 2005 decision in Kelo v. City of New London, courts, state legislatures, and the public have scrutinized eminent domain actions like never before. Such scrutiny has focused, for the most part, on the now-controversial “economic development” or “public purpose” takings involved in the Kelo case itself, where government takes private property to convey it to another private party who promises to develop the property in a way that will increase the tax base, create new jobs, assist in urban renewal, or otherwise provide economic or social benefits to the public. By contrast, until recently, there has been little change in law or public opinion with regard to takings involving publicly-owned projects such as hospitals or post offices or “use by the public” takings that involve condemnation for railroad lines, electric transmission lines, or other infrastructure projects. However, recent changes in electricity markets and the development of the country’s electric transmission system have raised new questions about the validity of “use by the public” takings in the context of electric transmission lines. With some transmission lines now being built by private, “merchant” companies rather than by publicly-regulated utilities, and with the push to build more interstate transmission lines to transport renewable energy to meet state renewable portfolio standards, what was once a classic public use is now subject to new statutory and constitutional challenges. This Article explores the potential impact of these developments on the use of eminent domain for electric transmission lines. Ultimately, it suggests that states should ensure that their eminent domain laws governing transmission lines are consistent with their policy preferences surrounding energy development in the state, and it outlines some ways for states to accomplish this goal.

INTRODUCTION

After the U.S. Supreme Court decided the controversial Kelo v. City of New London case in 2005, Congress, state courts, state legislatures, and the public began a heated debate over what constitutes a “public use” for purposes of exercising eminent domain authority under the 5th and 14th Amendments to the U.S. Constitutions as well as under state statutes and constitutions. In Kelo, the U.S. Supreme Court, in a 5-4 decision, upheld the ability of the City of New London, Connecticut to take private homes by eminent domain for the purpose of transferring them, along with other property, to a pharmaceutical company which intended to develop a corporate headquarters in the area. In reaching the decision, the Court held that economic development in the form of attempting to create jobs and increase the tax base was a recognized “public use” under the 5th Amendment and thus so long as “just compensation” was paid, the taking was

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1 545 U.S. 469 (2005).

2 The City of New London delegated its eminent domain authority for the development to the New London Development Corporation, a private nonprofit corporation created to assist the city in planning economic development. See Kelo, 545 U.S. at 473.
valid. While the case resulted in numerous statutory and constitutional reforms to state eminent domain laws across the country to provide protection for private property rights beyond what the *Kelo* court found available in the U.S. Constitution, those reforms focused primarily on the urban renewal, “economic development” takings at issue in the *Kelo* case. Very few of these reforms attempted to limit eminent domain authority for other types of takings by governments and private actors.

This Article explores what has historically been a fairly non-controversial taking, namely, actions by governments and, more often, by utility companies or other electricity providers, to take private property to build interstate transmission lines. These “public use” takings, unlike the situation in *Kelo*, typically involves the government or public utilities condemning or otherwise occupying property in order to put it directly to public use, rather than to transfer it to a private entity that will engage in an activity to benefit the public. But is a transmission line always a public use? Many state statutes and constitutions state expressly that it is, but what if the line is being built by a private, “merchant” transmission company and not by a public utility? What if the line is being built to provide power solely to customers in other states and will not provide any power to customers in the state in which the eminent domain action must be filed to obtain the easements necessary to build the line? What if the line is to provide power to a single, large, private customer or provide market access to a single, large, private source such as a solar plant or wind farm? Should the power of eminent domain be available for such projects or should the proposer of the project be forced to negotiate with all property owners in the path of the line to obtain the necessary easements?

In order to answer these questions, some background on eminent domain and public use is in order. There remains little debate that government can take private property and transfer it to public ownership such as taking private property to build a school, a road, or a military base, so long as just compensation is paid. There is also a long history in U.S. jurisprudence and state and federal statutes granting certain common carriers, public utilities, and other private actors authority to take private property to create infrastructure or other projects that will be used by the public such as railroads or stadiums, so long as they obtain government approval or the actions are designated a public use by statute. Somewhat more controversial is the ability of mining and other natural resource development companies to take private property to develop natural resources such as coal, gas, and oil. Although these takings may appear to be private in nature, many states in the Interior West, wishing to ensure complete development of their natural resources to build their economies, designated these actions early on as “public uses” in state constitutions and statutes. Finally, the greatest controversy in this area in recent years has been the “economic development” or “public purpose/public benefit” takings at issue in *Kelo*, where the taking will not result in a public project like a highway or a post office, and will not result in a project that the public can use, like a railroad or a stadium.4

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3 Private, merchant transmission companies, unlike regulated public utilities or independent transmission companies, generate revenue solely from contracts they sign with electricity generators to transmit electricity over the merchant lines for delivery to the retail market. Thus, merchant transmission providers do not receive a regulated, cost-based rate of return from electricity users. See Heidi Werntz, *Let’s Make a Deal: Negotiated Rates for Merchant Transmission*, 28 PACE ENVT'L L. REV. 421, 425 n.13 (2011); infra notes 164-75 and accompanying text (discussing the rise of merchant transmission operators).

4 Notably, the *Kelo* majority expressly determined that “public use” need not mean that the public must actually be able to use the property, but rather that the project must simply have a public purpose. See infra notes 24-43 (discussing *Kelo*).
So where do transmission lines fit in this picture? Historically, they fell fairly easily into the “use-by-the-public” category because they were constructed by state-regulated public utilities for the purpose of providing electricity to retail customers in the state within a service territory at rates the state had approved. But easy categorization has become more difficult as electricity markets around the country have been restructured, private actors have entered the electric transmission market, and interstate power lines are being planned and built to bring more renewable energy like wind and solar from sparsely populated parts of the country to population centers. As interstate transmission lines begin to resemble yet another form of economic development that provides a “public purpose” or “public benefit” in terms of increased renewable energy and creation of new, interstate electricity markets, they may not always fulfill the requirement of “use-by-the-public.” As a result, there will be, and have already been, more calls to restrict eminent domain authority in this area.

The issue of eminent domain authority for transmission lines is important beyond its doctrinal implications. First, it provides an example of how courts and legislatures must adapt old institutions and legal structures to new regulatory frameworks and needs. As explained later in this Article, the siting and permitting of electric transmission lines takes place almost exclusively at the state level and sometimes even the local level, even though market restructuring and the desire to integrate more renewable energy into the grid has created significant regional and national markets for transmission and electricity. Accordingly, unlike interstate natural gas pipelines that are reviewed and approved at the federal level, it is still state public utility commissions and state courts that determine public need, public use, and eminent domain authority for interstate transmission lines. This requires a transmission operator to obtain approval for the line from multiple state public utility commissions and obtain eminent domain authority under several states’ laws in order to build an interstate line. While this may have worked well when electricity generation and transmission were provided overwhelmingly by state-regulated public utilities with defined, in-state territories, the fit is more awkward with today’s more diverse, regional electricity markets.

Second, America’s electrical transmission infrastructure is in significant need of upgrade in order to keep up with the demand for electricity and to avoid debilitating and increasingly frequent blackouts. Demand for electricity is up by 25% percent since 1990, but construction of transmission facilities has decreased by 30% over that same period. Between 2000 and 2008, the U.S. added only 668 miles of interstate transmission lines. This deficit of transmission capacity combined with the aging infrastructure is leading to an increase in blackouts and


7 AMERICAN SOCIETY OF CIVIL ENGINEERS, supra note 5, at 136 (“Because the existing transmission system was not designed to meet present demand, daily transmission constraints or ‘bottlenecks’ increase electricity costs to consumers and increase the risk of blackouts.”).

8 “The average age of a substation transformer is 42, two years more than their expected life span.” See Litos Strategic Communication, supra note 6, at 18.
brownouts,\textsuperscript{9} costing the U.S. economy $150 billion annually.\textsuperscript{10} The 2003 Northeast blackout alone cost the United States $10 billion,\textsuperscript{11} and it demonstrated that “the current energy infrastructure cannot always satisfy peak demand and lacks important redundancies that would improve reliability.”\textsuperscript{12} The “chaos” that ensued as a result of this event also showed that “the United States could be especially vulnerable to targeted and deliberate attacks on its power supplies.”\textsuperscript{13} In addition, the extreme weather that caused a massive, multi-day blackout on the East Coast in the summer of 2012 is leading some to question whether America’s infrastructure will be able to withstand the more volatile weather caused by climate change.\textsuperscript{14} FERC Commissioner Cheryl LaFleur has suggested that $300 billion may need to be spent on new transmission facilities by 2030.\textsuperscript{15} But the high cost is not necessarily what is hindering the construction of new transmission infrastructure: “In many cases . . . [o]verly stringent permitting requirements, lawsuits, and other regulatory issues often inhibit construction of transmission lines.”\textsuperscript{16} These regulatory difficulties, including a patchwork of changing state and local laws governing eminent domain authority for electric transmission lines, thus have significant legal and policy implications for the future development of the grid.

Third, eminent domain authority for interstate transmission lines creates a potentially inequitable distribution of costs and benefits among residents of neighboring states. Should a state court in Montana or Arizona allow a transmission line company to take property in those states to build an interstate transmission line with all of the accompanying local environmental and aesthetic harm to transport renewable energy to California so that state can meet its statutory renewable energy mandates?\textsuperscript{17} At various times in the nation’s history, many individuals voluntarily and involuntarily (through the exercise of eminent domain) made significant sacrifices so that the country could create massive, national projects like the interstate highway system in the 1950s. For these projects, many policymakers considered eminent domain authority to be critical to addressing the “assembly” problem, where landowners in the path of the project refuse to sell their land at or near market value because they know their property is

\textsuperscript{9} “There have been five massive blackouts over the past forty years, three of which have occurred in the past nine years,” Litos Strategic Communication, supra note 6, at 7.

\textsuperscript{10} Litos Strategic Communication, supra note 6, at 5. It is important to note that America’s system is still 99.97% reliable. Id. See also infra note 142 and accompanying text.

\textsuperscript{11} Fershee, supra note 6, at 329.

\textsuperscript{12} Id. at 330.

\textsuperscript{13} Id.


\textsuperscript{16} AMERICAN SOCIETY OF CIVIL ENGINEERS, supra note 7, at 136.

\textsuperscript{17} California has one of the most aggressive renewable portfolio standards in the country, requiring utilities and other electricity providers to obtain 33% of their power from renewable sources by 2020. See California Public Utilities Commission, RPS Program Overview, at http://www.cpuc.ca.gov/PUC/energy/Renewables/overview.htm.
critical to the success of the project. Should we expect individual citizens to continue to make similar sacrifices today for “public benefits” such as increasing energy independence and reducing greenhouse gas emissions through the development and transmission of renewable energy? Or should the government and its power of eminent domain stay out of most of these projects, leaving it to the private sector to use markets and voluntary transactions to address these issues? While this Article does not attempt to fully answer these fundamental questions, it raises them in the context of interstate transmission lines to illustrate the difficulty of these issues and suggests various approaches to analyze them.

Part I of this Article explores the different classifications of “public use” under the Fifth and Fourteenth Amendments of the U.S. Constitution. It discusses the Kelo case as well as the public and state legislative backlash to the case which resulted in new legislation across the country limiting economic development takings under state law. Part II turns to the use of eminent domain in the context of electric transmission lines. It explains the process by which public utilities and other transmission operators work within state law to exercise the power of eminent domain to build transmission lines when voluntary contractual negotiations to obtain easements on private property fail. Part III then explores how the transmission grid is changing, both to incorporate more transmission lines built by private actors rather than state-regulated public utilities and to build more multi-state, high-voltage transmission lines to transport renewable energy, particularly wind and solar energy, from resource-rich parts of the country to population centers. It also discusses current disputes involving electricity transmission and eminent domain to show how changes in the electricity grid itself are beginning to drive changes in long-established law in this area. Finally, Part IV considers ways in which to analyze the concept of public use for interstate transmission lines, focusing both on those lines built by private, merchant companies, and for interstate lines that benefit a multi-state region, whether or not they are built by private parties or public utilities. Part IV concludes that under most circumstances, states should grant private, merchant companies the same eminent domain authority to build transmission lines as they grant to public utilities. More important, however, states should ensure under all circumstances that their laws governing eminent domain for transmission lines match their policy preferences with regard to energy development and energy export in light of today’s regional transmission grid and electricity markets.

I. EMINENT DOMAIN AND “PUBLIC USE”

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

18 See infra notes 236-39 and accompanying text.
19 U.S. CONST. amend. V.
This Part first explores the definition of “public use” with a focus on the Supreme Court’s 2005 decision in *Kelo v. City of New London.* It then looks at state legislative and judicial reactions to *Kelo* that in many cases have narrowed the definition of “public use” for takings involving certain types of private development (especially urban economic development) but not necessarily for other types of takings that also involve private development, such as electric transmission lines or mining activities. This Part thus sets the stage for the issues discussed in Parts II and III, namely how changes in the U.S. electricity grid in recent years have impacted the question of public use in the context of eminent domain actions for electric transmission lines.

A. *The Impact of Kelo v. City of New London*

Until the *Kelo* case in 2005, the public use clause of the Fifth Amendment was far from a “must teach” topic among constitutional and property law scholars. The Court had decided only two public use cases in the past forty years: *Berman v. Parker,* in 1954, and *Hawaii Housing Authority v. Midkiff,* in 1984. In both cases, the Court adopted a very broad definition of “public use,” virtually ensuring the failure of subsequent eminent domain challenges on that ground. But in 2005, after a more than 20-year hiatus, the Court once again took up the issue of what constitutes a “public use” sufficient to allow a taking of private property with payment of just compensation. In *Kelo,* the Court reviewed the City of New London’s plan to redevelop its waterfront area “to increase tax and other revenues and to revitalize an economically distressed city.” An important part of the redevelopment plan included a proposed $300 million research facility for the pharmaceutical company, Pfizer. New London planners hoped the creation of a new corporate headquarters in the area would draw new business, create jobs, and provide “a catalyst to the area’s rejuvenation.” New London was unable to negotiate purchase agreements with all the homeowners in the development area, so it proceeded to use its statutory authority to initiate condemnation proceedings against them.

The Court reviewed the case to determine “whether a City’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.” In a 5-4 decision, the Court held that New London’s use of eminent domain for economic development purposes was a public use and was constitutional. Justice Stevens, writing for the majority, reasoned that the taking was executed pursuant to a carefully considered development plan with no evidence of an illegitimate purpose, and that the Court had “long ago rejected any literal requirement that condemned property be put into use for the general public.” Instead, the question of public use turned on whether the City’s development plan served a

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24 *Kelo,* 545 U.S. at 472.
25 *Id.* at 473.
26 *Id.* at 472.
27 *Id.* at 479.
“public purpose,” defined broadly and with deference to legislative judgments. Applying that standard, the city’s economic development plan, which was based on the belief that the project would provide benefits to the community in the form of new jobs and increased tax revenue, was sufficient to meet the Court’s broad public purpose requirement to allow the taking under the U.S. Constitution. Justice Stevens noted that the jurisprudence in this area must recognize the differing needs in different parts of the country, as well as the need to respond to changed circumstances over time. Thus, Justice Stevens relied on past cases where the Court had recognized a public purpose associated with developing private mining, agricultural operations, or removal of urban blight, and found no “principled way of distinguishing” those cases from the economic development goals of New London. Notably though, the Court “emphasized” that nothing in the opinion precluded any state from “placing further restrictions on its exercise of the takings power” and that many states had already done so through their own statutory or constitutional law.

In a concurring opinion, Justice Kennedy agreed that the taking was for a public use but focused on the fact that New London had acted pursuant to a formal development plan for the area, indicating the lack of evidence of government favoritism toward private parties. Thus, Justice Kennedy might reach a different result in situations where the risk of impermissible favoritism is present but the procedural requirements and extensive review of the city’s plan in this case did not warrant such heightened scrutiny.

In a dissenting opinion, Justice O’Connor vehemently disagreed with the proposition that economic development alone can constitute a public use for takings purposes. While she recognized the power of government to take private property to “build a road or railroad or to eliminate a property use that harms the public, . . . it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.” She then set out three categories of takings that comply with the public use requirement: (1) transferring private property to public ownership such as for a road, hospital, or military base; (2) transferring private property to private parties, often common carriers, who make the property available for public use such as for a railroad, a public utility, or a stadium; and (3) transferring private property to serve a broader “public purpose” even if the property is destined for subsequent private use. Without questioning the ability of government to take private property for public ownership or “use by the public” projects, she turned to the more difficult question of when a “public purpose” taking meets the public use requirement. After distinguishing the blight restoration goals of Berman and Hawaii’s land monopoly problems in Midkiff, she found that permitting the City of New London’s taking required too broad a reading of “public purpose,” placing nearly all real property “susceptible to condemnation” and beyond what the Founding Fathers could have intended.

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28 Id. at 480.
29 Id. at 483.
30 Id. at 482-83.
31 Id. at 484.
32 Id. at 489.
33 Id. at 491-92.
34 Id. at 493.
35 Id. at 496.
36 Id. at 497-98.
37 Id. at 498-505.
case, she warned that “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”\textsuperscript{38}

Finally, in his own dissenting opinion, Justice Thomas argued for the elimination of “public purpose” altogether as a basis for eminent domain.\textsuperscript{39} Instead, he concluded that the most natural reading of the public use clause is “that it allows government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.”\textsuperscript{40} Justice Thomas explored the history of eminent domain throughout the country, and found that states had at first limited eminent domain authority to “provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks.”\textsuperscript{41} At the beginning of the 19\textsuperscript{th} century, however, the Court strayed from this foundation and began to use “public purpose” language in approving eminent domain actions for private irrigation, mining operations, and other industrial activity rather than focusing on whether the public had a right to use the irrigation ditch or mining line.\textsuperscript{42} Accordingly, Justice Thomas would have used this case to “revisit” the public use clause cases “and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.”\textsuperscript{43}

\section*{B. State Legislative Responses (and Non-Responses) to Kelo}

The public, legislative, and judicial reaction to \textit{Kelo} was explosive. Throughout the country, state legislatures and state courts were quick to take up Justice Stevens’ invitation to narrow what constitutes a public use as a matter of state law. The Supreme Courts of Oklahoma and Ohio, among others, rejected the broad view of eminent domain expressed in \textit{Kelo} and held that economic development alone was not a public use or public purpose justifying the exercise of eminent domain as a matter of state constitutional law.\textsuperscript{44} The \textit{Kelo} decision also led to state legislation and constitutional amendments around the country to limit economic development takings and otherwise place limits on the power of eminent domain.\textsuperscript{45} These laws sometimes outlawed economic development takings entirely, narrowed the definition of blight, or placed other restrictions on state and local governments.\textsuperscript{46} By 2007, forty-two states had enacted post-\textit{Kelo} reforms, some of which limited significantly the ability of state or local governments to engage in the type of economic development takings the Court found constitutional in \textit{Kelo}.\textsuperscript{47} Despite the rash of post-\textit{Kelo} legislation across the country, some scholars have concluded that the majority of reforms states enacted were “largely symbolic in nature, providing little or no protection for property owners.”\textsuperscript{48} Notably though, these statutes generally did not put

\textsuperscript{38} Id. at 503.
\textsuperscript{39} Id. at 508.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 512.
\textsuperscript{42} Id. at 519-21.
\textsuperscript{43} Id. at 521.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 673-74.
\textsuperscript{47} Id. at 674.
\textsuperscript{48} See Ilya Somin, \textit{The Limits of Backlash: Assessing the Political Response to Kelo}, 93, MINN. L. REV. 2100, 2105 (2009). See also Marc Mihaly & Turner Smith, \textit{Kelo’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later}, 38 ECOLOGY L. Q. 703 (2011) (“Although many states have ostensibly limited
restrictions on eminent domain authority for private projects associated with electricity transmission and other infrastructure development.

For instance, in 2006, Pennsylvania enacted legislation which prohibits the exercise of eminent domain to benefit private enterprise, except where the property is taken for use by a public utility, railroad, or common carrier, if the land is within an incidental area within a public project, or if there is a threat to public health or safety.\(^49\) Likewise, eminent domain reform legislation enacted in Mississippi in 2011, limiting the ability of government to take property for economic development, created a specific exemption for levee facilities, roads, bridges, ports, airports, public utilities, and other projects “used in the generation, transmission, storage, or distribution of telephone, telecommunications, gas, carbon dioxide, electricity, water, sewer, natural gas, liquid hydrocarbons, and other utility products.”\(^50\) Thus, long-standing eminent domain authority granted directly to private industry outside the urban redevelopment context was rarely questioned as part of the post-\textit{Kelo} efforts to narrow the definition of “public use.”

This delegation of eminent domain authority to private parties for industrial and infrastructure projects has a long history in state law, particularly in the Interior West. For instance, the constitutions of Colorado (1876), Idaho (1890), Wyoming (1890), and Arizona (1911) all declare that private property may be taken for private uses that include reservoirs, drains, flumes, or ditches across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes.\(^51\) These provisions allow private companies to bring eminent domain actions on their own behalf in state court to obtain private property for natural resource and other economic development purposes, without any need for state or local government officials to make any determination that the taking is for a public use.\(^52\)

Likewise, statutes in Arizona, Colorado, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming specifically grant eminent domain authority to private companies in connection with mining, oil and gas, and other natural resource development.\(^53\) Even more broadly, virtually every state has statutes granting eminent domain authority to railroads, power companies, and other “common carriers.”\(^54\) While the railroad, power line, or other common carrier project historically was destined for “use by the public,” the land condemned by an oil or mining company is generally not subject to public access or public use and thus meets only the broad definition of “public purpose” under attack by the \textit{Kelo} dissenters.

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  \item \(49\) 26 P.A. CONS. STAT. ANN. § 204 (West 2012).
  \item \(50\) See Mississippi Ballot Initiative 31 (passed by voters Nov. 2011) (prohibiting government transfer of property taken by eminent domain to private parties for a period of ten years but creating exceptions for “drainage and levee facilities and usage, roads and bridges for public conveyance, flood control projects with a levee component, seawalls, dams, toll roads, public airports, public ports, public harbors, public wayports, common carriers or facilities for public utilities and other entities used in the generation, transmission, storage or distribution of telephone, telecommunication, gas carbon dioxide, electricity, water, sewer, natural gas, liquid hydrocarbons or other utility products.”).
  \item \(51\) See Klass, \textit{supra} note 44, at 667 (discussing and citing state constitutions).
  \item \(52\) See \textit{id.} at 657.
  \item \(53\) See \textit{id.} at 659.
  \item \(54\) \textit{Id.}
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Although many may argue that the private “natural resource development” takings allowed in many states in the Interior West is also an abuse of eminent domain authority, few, until recently, would criticize the ability of private parties to take property for railroads, power lines, or highways on the same grounds. These projects were historically undertaken by government-regulated public utilities or common carriers, and thus have generally been seen as falling into the less controversial “use by the public” category of public use. Indeed, even the Kelo dissenters distinguished the economic development takings they would prohibit from these more traditional (and presumably valid) exercises of eminent domain authority.\textsuperscript{55}

The question for this Article, however, is whether the same arguments supporting eminent domain for transmission lines still hold true. First, as described in more detailed below, many states have restructured their electricity markets and the players in those markets are often not public utilities subject to strict public regulation on access and pricing. Instead, merchant transmission companies,\textsuperscript{56} independent transmission companies,\textsuperscript{57} and rural electric cooperatives,\textsuperscript{58} which are not state-regulated utilities, now construct a growing number of the transmission lines that bring electricity to users. Moreover, the new transmission lines needed to transport renewable energy to demand centers cross multiple state boundaries, providing little, if any, electricity or other “public use” to the citizens of the states through which the line passes. What then, is the “public use” or “public purpose” of a transmission line from the perspective of a state court acting under state eminent domain law when that line provides no energy to state citizens? Should those states take into account regional or national benefits in deciding public use? Can they even if they wanted to? These questions are addressed in Parts II and III.

\section{II. The Electric Transmission System and Eminent Domain}

This Part first provides the basics of the U.S. electric transmission regulatory system with a particular emphasis on how restructuring of that system in the 1990s has changed it in ways that are relevant to the role of eminent domain for transmission lines. Specifically, what was once a vertically-integrated system of generation and transmission provided by public utilities with

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  \item \textsuperscript{55} See \textit{Kelo} v. City of New London, 545 U.S. 469, 497-98 (O’Connor, J. dissenting) (describing as “uncontroversial,” the power to take property to give to “private parties, often common carriers, who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium.”); \textit{Kelo}, 545 U.S. at 512-13 (Thomas, J. dissenting) (discussing state use of eminent domain “to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks” as well as private roads and Mill Acts that gave rights to private actors with common carrier duties).
  \item \textsuperscript{56} According to one commentator, “[u]nlike traditional public utilities, merchant transmission providers assume all of a project’s market risk and have no captive pool from which to recoup project costs.” See Heidi Werntz, \textit{Let’s Make a Deal: Negotiated Rates for Merchant Transmission}, 28 PACE ENVTL. L. REV. 421, 424 n.11 (2011). \textit{See also} FERC Order No. 1000, 136 FERC ¶ 61,051, 95 (2011) (“Merchant transmission projects are defined as those for which the costs of constructing the proposed transmission facilities will be recovered through negotiated rates instead of cost-based rates.”).
  \item \textsuperscript{57} \textit{See} \textit{Werntz, supra} note 56, at n.11 (“Merchant transmission projects are distinct from independent transmission projects that request Commission approval for incentive rates, and whose costs are allocated to one or more customers without each customer’s contractual consent.”). \textit{See also} infra notes 164-75.
  \item \textsuperscript{58} Rural electric cooperatives, which are more common in Midwestern and Western states, generate electricity and build associated transmission lines on behalf of the cooperative’s members. Although their rates are not regulated by public utility commissions they are subject to the same state siting requirements as public utilities and other transmission operators. \textit{See} NAT’L GOVERNOR’S ASS’N, STATE STRATEGIES FOR ACCELERATING TRANSMISSION DEVELOPMENT FOR RENWABLE ENERGY 8 (Jan. 23, 2012), at http://www.nga.org/files/live/sites/NGA/files/pdf/1201ENERGYTRANSMISSIONBRIEF.PDF.
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significant oversight by state public utility commissions has evolved into a system with more private actors. After this summary of the electric transmission system, this Part shows how courts in various states have struggled with determining the circumstances under which transmission operators can exercise the power of eminent domain to build transmission lines. While most of these cases were decided before electricity restructuring began in the 1990s, they deal with many issues that have become even more critical to current disputes over eminent domain and public use. These include whether in-state residents will benefit from the transmission line, the role of private actors, and the importance of state government oversight over the transmission provider.

A. The Electric Transmission Regulatory System

The electricity industry in the United States consists of power generation, high voltage transmission of electricity over long distances, and distribution of the power over lower voltage systems to end users. The breakdown of electricity generation sources includes approximately 43% from coal, 26% from natural gas, 19% from nuclear, 8% from hydropower, and 5% from remaining renewable sources such as wind and solar. Approximately 750 gigawatts of electricity travels across the U.S. over 160,000 miles of high voltage transmission lines, connecting with lower voltage distribution systems, linking generator sources to users within single states and across states, and linking into Canada and, to a lesser extent, Mexico.

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

Until recently, electricity was a “natural monopoly,” with most of the industry vertically integrated, whereby utilities owned large centralized generation facilities, transmission lines, and distribution lines and covered an exclusive service territory, delivering electricity to customers for sales. States, through their public utility commissions (PUCs), regulated utilities to ensure that they treated customers fairly and that electricity rates remained “reasonable” and in exchange, utilities obtained exclusive service territories. During the 1920s, utilities increasingly


66 Id. See also RICHARD F. HIRSCH, POWER LOSS 26 (1999).
integrated their systems by constructing interstate transmission lines, creating the regional grids we have today. When states attempted to regulate the sale of electricity over those lines, the Supreme Court held such regulation violated the dormant commerce clause, creating a regulatory gap known as the “Attleboro gap” after one of the Supreme Court’s decisions in this area.67 Congress then filled that gap in 1935 when it enacted the Federal Power Act, which granted exclusive power to the Federal Power Commission (later renamed the Federal Energy Regulatory Commission or “FERC”) to regulate the transmission of electricity in interstate commerce and the sale of electricity at wholesale in interstate commerce.68

The next significant federal regulatory change in this area came in the late 1970s with the passage of the Public Utility Regulatory Policies Act of 1978 (PURPA).69 PURPA included a provision, Section 210, which allowed independent electricity producers with “qualifying facilities” access to the power grid and electricity sales.70 This change gave renewable resource developers access to the grid and challenged the traditional vertical integration model.71 Moreover, with the Energy Policy Act of 1992, Congress directed FERC to promulgate rules requiring utilities to provide access to transmission services on an open and non-discriminatory basis and also encourage significant planning by Regional Transmission Operators (RTOs), states, and industry, particularly with regard to interstate transmission.72 The goal of these efforts was to increase competition in electric generation by ensuring that new, independent generators would have access to utility-owned wires and thus could transmit their product to population centers.

Also in the 1990s, many states began to restructure the regulated utility industry by splitting apart the vertically integrated utility functions of generation, transmission, and distribution of electricity in an effort to create markets and lower costs.73 Today, approximately half the states are still traditionally regulated (with vertically integrated utilities) and the rest are restructured or partially restructured.74 RTOs and Independent System Operators (ISO), voluntary organizations

70 16 U.S.C. § 824u-3; BOSSELMAN ET AL., supra note 69, at 614.
71 BOSSELMAN ET AL., supra note 69, at 614-16; Dworkin, et al., supra note 69, at 535.
created by FERC, manage the grid and regional markets for wholesale power for a majority of states.75 As a result, the electricity generation and transmission system has become more regional and national in nature even while state PUCs retain significant regulatory authority over public utilities and over transmission siting. Moreover, with restructuring in some states, there is a much larger role for private actors rather than public utilities with discrete service areas to create new generation and transmission assets. Thus, while federal law prohibits discrimination in access to transmission and generation regardless of utility status, many of the actors in today’s generation and transmission system do not have a “public” statutory mandate under state law and are subject to far less, if any, state regulation over rates and other factors.

Although FERC has jurisdiction over wholesale power sales and the prevention of discrimination in access to transmission lines, the primary authority governing the permitting and siting of transmission lines, including interstate transmission lines, remains at the state level.76 As a result, any interstate line must obtain siting permission and eminent domain authority from every state through which it passes, following each state’s permitting process and standards.77 In many states, transmission lines are also subject to some degree of local or municipal siting control.78 Most states grant their PUCs authority to review and approve transmission lines as well as electric generating facilities. The transmission siting laws in each state vary, but most of them focus on the “need” for the line, the effect of the line on reliability, alternatives to the new line, and the potential environmental impacts of the line.79 This review process, if successful, generally culminates in a line receiving a certificate called, among other things, a “certificate of need” or a “certificate of public

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76 See Dworkin, supra note 69, at 537-39.
77 Id.
78 The degree to which local governments may exercise control over the siting of transmission lines varies widely. In many states, the PUC is bound to honor local siting regulations unless they are deemed unreasonable, in which case the PUC may preempt a local regulation. See, e.g., Ark. Code Ann. § 23-18-519 (West 2012); Mass. Gen. Laws Ann. Ch. 164, § 69K (West 2012); Mont. Code Ann. § 75-20-301(e) (West 2011); N.M. Stat. Ann. § 62-9-3(G) (West 2012). In other states, local and municipal governments have primary siting authority over all transmission projects, and state agencies have little or no meaningful control. See, e.g. Jefferson Parish, La., Building Related Construction Codes § 8-5-115.26.1(4), available at http://www.jeffparish.net/downloads/4584/5464-BuildingRelatedConstructionCode.pdf (illustrating local siting requirements in Louisiana); Okla. Stat. Ann. Tit. 11, § 45-104, § 43-110 (West 2012) (authorizing municipal planning commissions to enact ordinances regulating installation of utility facilities). In other states, the PUC has exclusive authority over transmission lines above a specified kV capacity and length, while smaller and/or shorter lines remain under exclusive local control. See, e.g., Ohio Rev. Code Ann. § 4906.05, § 4906.01(B)(1)(b) (West 2012) (transmission lines under 125 kV capacity are “not exempt from state or local laws or regulations,” but those over 125 kV are). See generally Tri-State Generation and Transmission Association, Inc., Permitting of High Voltage Electric Transmission Lines: An Overview of Colorado Counties’ Requirements and Other States’ Processes, Appendix III (August 2011), http://www.dora.state.co.us/puc/projects/TransmissionSiting/SB11-45/SitingDocuments/PermittingHighVoltageTransmissionLines_3State08-2011.pdf (providing a 50-state survey of state and local permitting processes).
convenience and necessity. "80 Once a transmission operator receives the necessary certificate to build the line, it can generally exercise the power of eminent domain if it fails to reach voluntary agreements with all landowners over the required easements. 81 As discussed in more detail in Part III.B and Table 1, in some states, only public utilities and not private transmission companies can exercise the power of eminent domain to build transmission lines. 82 In other states, statutes specify transmission lines as a per se public use and thus both private entities and public utilities can exercise eminent domain authority to build the lines. 83 In yet other states, neither the state statutes nor the case law is clear on which entities can and cannot exercise eminent domain authority. 84

B. Eminent Domain Authority for Transmission Lines and the Issue of Public Use

Not surprisingly, landowners have often challenged the power of utility companies and others to take their property by eminent domain for intrastate or interstate transmission lines. While many of these challenges focus on the route of the line or the amount of compensation paid, there have also been challenges regarding whether the line is a "public use." These challenges raise issues such as whether the line is intended to bring electricity to a private party rather than the public at large, whether the transmission operator is a regulated public utility, or whether the line is intended to provide power to out-of-state users rather than in-state users. These cases are significant because they form a legal foundation courts and legislators will need to consider as the industry moves toward more private companies building transmission lines and an increase in interstate lines providing power exclusively to out-of-state users. While this would be less of a problem if the federal government had authority to approve transmission lines taking into account national and regional public benefits, it currently remains up to the state courts, applying state law, to make those determinations, often creating a mismatch between state regulatory authority and an increasingly regional and national transmission system. 85

80 See, e.g., Jim Rossi, The Trojan Horse of Electric Power Transmission Line Siting Authority, 39 ENVTL. L. 1015, 1019-22 (2009) (discussing state siting statutes, certificates of need, and eminent domain authority for transmission lines).
81 Id. Many states first require that the condemnor attempt to negotiate in good faith to purchase the land without the benefit of eminent domain, subject to judicial review. E.g., GA. CODE ANN. § 22-3-161 (2012); MINN. STAT. § 117.036 (2012). If negotiations fail then the condemnor must provide notice of the appraised value and the condemnor’s intent to appropriate the land. E.g., MINN. STAT. § 117.036 (2012). The condemnee may challenge the alleged public purpose after receiving notice. E.g., MINN. STAT. § 117.055 (2012). The condemnor must then file a petition with the court describing the land to be condemned and identifying both the condemnor and condemnee. E.g., MINN. STAT. § 117.055 (2012). After the land is officially appraised, the condemnor must pay the appropriate damages to the condemnee. E.g., MINN. STAT. § 117.155 (2012). Either party may then contest the commissioners’ report via jury trial. E.g., MINN. STAT. § 117.165 (2012). Mechanisms for determining the fair market value of the land include past history of sales, court evaluation, panels of commissioners, and jury trials. Compare, e.g., ALA. CODE § 18-1A-151 (2011) (providing for judicial determination of fair market value by default) with ME. REV. STAT. tit. 23, § 154 (2012) (providing for a state-appointed commission to appraise the property if condemning authority is unable to negotiate a purchase) and S.D. CODIFIED LAWS § 21-35-1 (mandating a jury trial to determine compensation "[i]n all cases.").
82 See supra notes 56-57 (defining merchant transmission companies and independent transmission companies); infra Table 1 and Appendix A (collecting statutes and cases from all 50 states).
83 Id.
84 Id.
Indeed, while the push for more renewable energy and the restructuring of electricity markets has made these tensions even more acute, the case law prior to these developments in the 1990s is notable in that it shows courts struggling to address the same key issues that are prominent today. These include questions such as: (1) is it within a state’s jurisdiction to find a “public use” for purposes of eminent domain authority to build a line partially in that state where the benefit of increased electricity goes primarily or exclusively to out-of-state users or a private party?; and (2) is a transmission line a public use when it is designed to serve the interests of a single, private power user? In both situations, courts must address broader questions of whether transmission lines are a public benefit/public purpose taking because of the general public benefits to the transmission system, including economic development brought about by improved infrastructure, or whether they are a “use-by-the public” taking. Courts must also address whether transmission lines and electricity are state resources that should be guarded against would-be out-of-state “pirates,” or part of a regional or national market that each state should support for the benefit of the public at large, including out-of-state interests. Finally, in many of these cases, whether or not the power company is a public utility subject to significant state regulatory oversight plays a role in whether the project is a public use.

1. In-state benefits v. out-of-state benefits

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

Likewise, in *Clark v. Gulf Power Company*, the Florida Supreme Court held in 1967 that a state’s power of eminent domain exists “only within its territorial limits for the use and benefit of

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86 460 So.2d 107 (Miss. 1984).
87 *Conerly*, 460 So.2d at 108-09.
88 *Id.*
89 *Id.* at 113.
90 *Id.*
91 *Id.* at 112-13.
92 198 So.2d 368 (Fla.1967).
the people within the state.\textsuperscript{93} As a result, the court found that a “one way transmission line” from Florida to Georgia for which Florida citizens “will not derive one iota of benefit” was beyond that state’s eminent domain authority, despite “conjecture” that electrical current flowing back and forth would benefit residents of both states.\textsuperscript{94}

Not all state courts, however, have viewed the “public use” or “public benefit” of transmission through such an in-state lens, at least when some in-state residents are benefitted. For instance, in \textit{Shedd v. Northern Indiana Public Service Corp.},\textsuperscript{95} the Indiana Supreme Court held in 1934 that eminent domain authority existed for a power company to build a transmission line that would serve both in-state and out-of-state residents.\textsuperscript{96} The court rejected the plaintiff’s argument that the state-regulated public utility had no power of eminent domain for uses constituting interstate commerce.\textsuperscript{97} Moreover, it found that evidence supported the conclusion that the property sought to be appropriated was for distribution of power within the utility’s territory in the state as well as for export out of state.\textsuperscript{98} The court, citing a dam case from Alabama, explained that while a state may grant eminent domain authority “for the benefit of its own people, it will not refuse to exercise it for such purpose, because the inhabitants of a neighboring state may incidentally partake of the fruits of the exercise. Such refusal would violate the principles of just public policy, and the neighborly comity which should exist between states.”\textsuperscript{99} Even in this case, however, the court implied that if all of the benefits of the project were solely for residents of other states, there would not be a sufficient public use to justify the utility’s exercise of eminent domain authority.\textsuperscript{100}

The Indiana Supreme Court appeared to relax even further the definition of public benefit necessary to use eminent domain in 1980, in \textit{Oxendine v. Public Service Company}.\textsuperscript{101} In that case, PSI, a public utility, sought eminent domain authority to build a new transmission line it contended was necessary to ensure the stability and reliability of its network in general rather than to provide electricity service to customers in its territory.\textsuperscript{102} Landowners challenged that authority on grounds that the line would not serve the needs of Indiana residents but instead would supply electricity to other power companies with service mostly outside the state.\textsuperscript{103} In rejecting the challenge, the court cited an Indiana statute granting eminent domain authority to companies furnishing or transmitting electrical energy “for the use of the public . . . .”\textsuperscript{104} The court held that this grant of eminent domain authority was to furnish electricity to “the public,

\textsuperscript{93} Clark, 198 So.2d at 371.
\textsuperscript{94} Id.
\textsuperscript{95} 188 N.E. 322 (Ind. 1934).
\textsuperscript{96} Shedd, 188 N.E. at 325-26.
\textsuperscript{97} Id. at 325.
\textsuperscript{98} Id.
\textsuperscript{99} Id. (quoting Columbia Waterworks Co. v. Long, 25 So. 702, 703 ( Ala. 1899)).
\textsuperscript{100} Id. at 326. \textit{See also} Gralapp v. Mississippi Power Co., 194 So.2d 527 ( Ala. 1967) (allowing out-of-state company to exercise eminent domain in Alabama to build a transmission line because: (1) a statute provided the same right of eminent domain to foreign and domestic corporations; (2) the power company established that electricity would flow in both directions along the line, thus benefitting the public in Alabama as well as Mississippi even though most of the projects benefits went to Mississippi; and (3) Alabamans would benefit from more interconnectedness, which would give them alternative sources of energy in an emergency as well as lower cost energy when one system could transfer its cheaper, excess power to the other system that needs it).
\textsuperscript{101} 423 N.E.2d 612 (Ind. 1980).
\textsuperscript{102} Oxendine, 423 N.E.2d at 614.
\textsuperscript{103} Id. at 615.
\textsuperscript{104} Id. at 617 (citing Ind. Code 32-11-3-1).
not to Indiana residents alone."\textsuperscript{105} Thus, the court appeared to embrace a much broader vision of "public use" that encompassed the needs of the regional electricity network in general rather than solely the needs of in-state residents.

Finally, the North Dakota Supreme Court decided a case in 1976, \textit{Square Butte Electric Cooperative v. Hilken},\textsuperscript{106} where the majority opinion embraced a broad, regional vision of public use and public benefit to justify eminent domain while the concurring and dissenting opinions expressed deep reservations about allowing any benefits outside the state to justify eminent domain. In that case, an electrical cooperative in North Dakota which distributed electricity wholesale to its members sought to acquire easements for a transmission line that would provide direct benefits to members in Minnesota while leaving open the possibility that it might provide power to North Dakota members in the future if demand was sufficient.\textsuperscript{107} The court analyzed authority from other states and determined that for a public use to exist, the following requirements must be met: (1) the public in the state must have a right to benefit guaranteed by regulatory control through a public service commission that regulates the actor seeking eminent domain or an actual benefit; (2) the public in the state authorizing the benefit must derive a substantial and direct benefit even if other states are also benefitted; and (3) the public benefit to the state (even if not exclusive) is attached to the territorial limits of the state because the state’s sovereignty is likewise constrained.\textsuperscript{108}

Based on the facts before it, the court found a sufficiently substantial and direct benefit to North Dakota as a result of the line because it would provide additional reliability to the system as a whole and reduce the frequency of outages, even though no witness was able to testify to significant outages in the past.\textsuperscript{109} As a result, the court reversed the district court’s decision not to consider reliability as a factor in determining the benefits to North Dakota residents.\textsuperscript{110} The court also rejected arguments that North Dakota could not possibly receive any power from the line in the future if the need arose because the Minnesota cooperative members outnumbered the North Dakota cooperative members on the board.\textsuperscript{111} Instead, it expressed skepticism that North Dakota’s “needs and advantages” would be “overshadowed by a zealous state patriotism.”\textsuperscript{112} Although the court recognized that the North Dakota PUC did not have regulatory control over the cooperative because it was not a public utility and only sold power wholesale, it refused to let that undermine the public interest in the project without “a showing that the contract is designed only to defraud North Dakota by allowing eminent domain without an attendant benefit to the state . . .”\textsuperscript{113}

In a concurring opinion, Justice Paulson concluded that the broad legislative grant of eminent domain authority to transmission lines foreclosed the district court’s narrower interpretation.\textsuperscript{114} Justice Paulson explained this broad grant historically, stating that at the time the state’s eminent domain rules were written the state’s greatest concern related to the “bolstering of the State’s
“economy” and that the public welfare would be assumed to be “benefitted by anything which would enhance the opportunity to market our natural resources and excess energy.”

He went on to state that although now such economic development must be balanced by conservation and environmental protection, the “energy situation” is still of “crisis proportions” and of national concern, not controllable within the borders of any one state. Thus, he expressed concern that the federal government would completely take over these affairs “if the States adopt too provincial an attitude.”

He then cited to classic economic development public use cases such as *Berman v. Parker*, and found the public use in the current case well within that broad definition.

The dissenters, however, focused on private property rights, particularly private property rights in North Dakota. Justice Sand cited to the public use clause of the North Dakota constitution and stated that it could only refer to the public use of state inhabitants or would otherwise be invalid. Unlike the majority, he did not see the increase in reliability in the transmission system as a whole sufficient to provide the “direct” and “substantial” benefit necessary to justify eminent domain. Because this was a direct current (DC) line rather than an alternating current (AC) line, the power could not be converted until it passed into Minnesota, thus providing no benefits for North Dakota residents. He concluded that the majority opinion “permits pirating North Dakota resources and land primarily for the benefit of persons other than the inhabitants of the State of North Dakota.” For his separate dissent, Justice Vogel also discounted the “public benefit” associated with increased reliability of the interstate transmission system in question and, because it would apply to any line, anywhere, it improperly expanded the right of eminent domain. He also questioned the right of a power cooperative organized by a “private utility” (and not subject to state PUC regulation) to exercise eminent domain for its own private interests.

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115 Id.
116 Id.
117 Id.
118 348 U.S. 26 (1954)
119 *Square Butte Elec. Coop.*, 244 N.W.2d at 533.
120 Id. at 534.
121 Id. at 536-37.
122 Id. at 537. Most electric transmission in the U.S. today is alternating current (AC) which allows power to move in both directions. Over very long distances, however, direct current (DC), where power moves in only one direction, is more efficient and results in less power loss over the length of the line. DC current acts more like an extension cord with no “off ramps” meaning that power cannot be added to the line or used from the line except at each end through special converters. Today, new, high-voltage DC (HVDC) lines are often proposed as the most efficient and economically method of transporting wind power long distances. *See* Clean Line Energy Partners, About HVDC Technology, at http://www.cleanlineenergy.com/technology/hvdc; Sierra Club, Iowa’s Energy Future: Transmission Lines in Iowa, at http://iowa.sierraclub.org/Energy/Transmission.pdf (explaining HVDC lines proposed for wind power transport in Iowa); Michael Heyeck, PE, Senior Vice President, Transmission, American Electric Power, *Interstate Electric Transmission: Enabler for Clean Energy* (April 2008) (explaining the history of development of AC and DC systems and the benefits and drawbacks of both systems).
123 *Square Butte Elec. Coop.*, 244 N.W.2d at 538.
124 Id. at 538-39.
125 Id. at 539.
Another set of public use cases involving transmission lines centers around whether the recipient of the energy transported by the new line is a private entity or “the public.” For instance, in *Montana Power Company v. Bokma,*\(^{126}\) a public utility sought eminent domain authority to construct a power line to serve a pipeline company in the state as well as meet power needs as they developed in the region through normal growth.\(^{127}\) Initially, the proposed line would serve only the pipeline company but service from the line could be available to other customers if requested.\(^{128}\) In responding to landowners’ challenges to eminent domain authority on public use grounds, the Montana Supreme Court, in a 1969 decision, upheld the utility’s eminent domain authority.\(^{129}\) The court recognized the conflicting lines of authority in other jurisdictions between the broad “public benefit” approach to public use and the narrower “use by the public” approach to public use.\(^{130}\) The court found that Montana had always adhered to the broad view, “presumably to promote general economic development.”\(^{131}\) Here though, the court appeared to merge the two approaches, finding that “public benefit” was the standard but that “public benefit” meant “the right of the public to use the proposed facilities for which condemnation is sought,” whether or not the right is exercised.\(^{132}\) Thus, because other customers would have the same right to use the transmission line as the pipeline company, there was sufficient public benefit for the taking.\(^{133}\) Moreover, the court focused on the fact that the Montana Power Company was a public utility, “and as such it has dedicated its property to the public use under regulations imposed by the Montana Public Service Commission.”\(^{134}\) Thus, if it ever refused to serve other customers, “it can be compelled to do so in a proper case.”\(^{135}\)

Likewise, in *Public Service Company v. Shaklee,*\(^{136}\) the Colorado Supreme Court held in 1989 that a public utility could exercise eminent domain authority to build a power line to provide electrical service to the Adolph Coors Company for mining activities.\(^{137}\) In response to landowner contentions that construction of the transmission line was an illegal exercise of eminent domain for a private use, the court found that because the public had the right to use the line on equal terms with Coors, the public use requirement was met.\(^{138}\) As in the *Bokma* case in Montana, the Colorado court focused on the fact that the utility was a regulated monopoly and “is obligated to provide service to the public without discrimination.”\(^{139}\)

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128 Id.
129 Id. at 773-74.
130 Id. at 772-73.
131 Id.
132 Id.
133 Id.
134 Id.
135 Id.
136 784 P.2d 314.
138 Id. at 318-19.
139 Id. at 318-19.
3. Defining the “public”

In both sets of cases described above, courts have struggled with defining what constitutes the public. Does it include out-of-state electricity users as well as in-state users? Does the fact that the transmission operator is a public utility subject to extensive state regulation render the entire project sufficiently “public” even if out-of-state or private users will be the immediate beneficiaries of the line? Moreover, even beyond the eminent domain disputes detailed above, this question of defining the boundaries of “the public” generally arises when state PUCs consider the “public need” or “public necessity” for the line in the first place in the certificate of need process which usually precedes any eminent domain action or line construction. While a few states have redefined public need, benefit, or necessity in recent years to encompass regional need, benefit, or necessity, most have not, maintaining a parochial view on that issue as well. As more private merchant companies enter the transmission market and as both federal and state governments attempt to encourage more interstate transmission lines to increase reliability and integrate renewable energy, these questions will arise with even more frequency. If courts do not view these new transmission projects as sufficiently “public,” the corresponding lack of eminent domain authority in many states will be a significant hurdle to realizing goals of increasing renewable energy and maintaining grid reliability. Part III discusses these concerns in more

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140 Forty-two states require all transmission operators to obtain a Certificate of Need, Certificate of Public Convenience and Necessity (CPCN), or equivalent certificate from the PUC or comparable state agency prior to commencing construction on a new major transmission facility and, either implicitly or explicitly, prior to exercising eminent domain. Eight states do not. Colorado and Wisconsin require a CPCN prior to construction of a transmission line, but not prior to condemnation of the land on which the line will be constructed. COLO. REV. STAT. ANN. § 40-5-101 (West 2012); Pub. Serv. Co. of Colorado v. Shaklee, 784 P.2d 314, 317 (Colo. 1989); Miller v. Pub. Serv. Co. of Colo., 272 P.2d 283, 285 (Colo. 1954); WIS. STAT. ANN. § 196.49(1)(a), § 196.49(3)(c) (West 2012). Georgia and Hawaii require the operator to hold community meetings prior to exercising eminent domain, but do not require a CPCN. GA. CODE ANN. § 22-3-160.1 (West 2012); HAW. REV. STAT. § 269-27.5, § 269-27.6(a-b) (West 2012). In 2006, the Georgia Supreme Court held that the legislature had intentionally left the evaluation of public need up to electric utilities, and that the siting body had no authority to make necessity determinations. See Forsyth County v. Georgia Transmission Corp., 632 S.E.2d 101, 105 (Ga. 2006). Indiana requires state approval of the operator’s status as a public utility before it exercises eminent domain, but does not require approval of a CPCN prior to an established utility’s use of eminent domain. Alabach v. N. Indiana Pub. Serv. Co., 951 N.E.2d 542, 551, 560 (Ind. Ct. App. 2011). Louisiana does not have any state level oversight of transmission lines, and leaves siting and eminent domain decision to the courts. See generally Louisiana Public Service Commission, Notice of Proposed General Order and Request for Comments, Docket R-26018 (Feb. 17, 2012), available at http://lpscstar.louisiana.gov/star/ViewFile.aspx?id=e5ba79e0-e4b3-4828-a1c6-d478e9132b01 (considering introduction of stronger state authority). Utah requires regulated utilities to obtain a CPCN prior to construction of transmission lines, but does not require the same of non-utilities, which may proceed directly with local permit applications. See Ashley C. Brown & Jim Rossi, Siting Transmission Lines in a Changed Milieu: Evolving Notions of the “Public Interest” in Balancing State and Regional Considerations, 81 U. COLO. L. REV. 705, 720 (2010); Barnes v. Lehi City, 279 P. 878, 883 (Utah 1929). And similarly, Wyoming requires public utilities to obtain a CPCN prior to construction of a line, but the Wyoming Supreme Court held in 2005 that a regional electric generation and transmission cooperative, over which the Public Service Commission did not have jurisdiction, did not require a CPCN. WYO. STAT. ANN. § 37-2-205(A), § 1-26-816 (West 2012); Bridle Bit Ranch Co. v. Basin Elec. Power Co-op., 118 P.3d 996, 998, 1003 (Wyo. 2005).

141 See Ashley C. Brown & Damon Daniels, Vision Without Site; Site Without Vision, THE ELECTRICITY JOURNAL 23 (Oct. 2003) (discussing continuing parochial views of most states in certificate of need proceedings as well as a few state courts or legislatures that have begun to consider regional needs in these determinations). See also Brown & Rossi, supra note 140 (discussing the need for a broader definition of “public interest” in states’ transmission siting laws to reflect developing regional and national markets for electricity and transmission).
detail and highlights current disputes in several states over eminent domain authority for various aspects of current transmission projects.

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

This Part explores how the electric generation and transmission system in the United States has developed in recent years. It focuses specifically on the growth of regional interstate transmission markets, and the desire for new, interstate transmission lines. Driving these new interstate lines are efforts to increase the reliability of these regional markets and bring more renewable energy into the system to meet state renewable energy mandates. This Part then turns to recent disputes over the use of eminent domain for transmission lines. These disputes reflect many of the same concerns that courts focused on in the earlier cases discussed in Part II, but raise even more difficult issues surrounding the use of eminent domain for transmission projects that look far less public and appear to have far less “use” for state residents than cases in the past.

A. Transmission Investment, Reliability, and Integration of Renewables

There is a general consensus that more transmission is needed in the United States to maintain grid reliability, to meet growing demand, and to integrate more renewable energy into the grid.\footnote{See National Renewable Energy Laboratory (NREL), Moving Beyond Paralysis: How States and Regions Are Creating Innovative Transmission Projects May 2009 – May 2010 1 (Oct. 2009) (discussing drop in level of transmission investment through the 1990s that is only now beginning to rise); Midwest Independent System Operator (MISO), MISO Transmission Expansion Plan 2011 1 (2011) (recommending $6.5 billion in new transmission expansion through 2021 for the MISO region alone as part of “a continuing effort to ensure a reliable and efficient electric grid that keeps pace with energy and policy demands.”). See also U.S. Dept. of Energy, 20% Wind Energy by 2030 97 (May 2008) (stating that “significant additional transmission capacity would be required to integrate high levels of wind across the country.”); The Brattle Group, Employment and Economic Benefits of Transmission Infrastructure Investment in the U.S and Canada 1 (May 2011) (“[M]eeting economic and public policy goals, in particular congestion relief and renewable energy standards, has created additional growing needs of transmission investment, underscoring the multi-faceted benefits of a robust transmission network, which the recent increase in investments has only started to address.”). See also supra notes 5-16 and accompanying text.}\footnote{NREL, supra note 142, at 1.} New transmission capacity is particularly critical for renewable energy because the best sources of renewable energy are available in more sparsely populated parts of the country (wind in the Midwest and solar in the desert Southwest) with undersized transmission resources, resulting in new renewable generation sources waiting for years in generator interconnection queues without access to the electricity grid in many regions of the country.\footnote{See Marcelino Madrigal & Steven Stoft, Transmission Expansion for Renewable Energy Scale-Up: Emerging Lessons and Recommendations xi (June 2011) (“Unlike fossil-fuel based power sources, renewable energy sources are greatly site-constrained and, for this reason, transmission networks need to be expanded to reach the renewable energy sites.”).} Moreover, it is important to keep in mind that unlike traditional energy sources such as coal, natural gas, or uranium which can be transported by train, truck, or ship to demand centers, renewable energy resources such as wind and solar can only be transported from the point of generation to demand centers through transmission lines.\footnote{See NREL, supra note 142.} New interstate transmission lines are critical to bringing those renewable resources to population centers.
Thus, in order to meet current reliability needs as well as to add measurable amounts of renewable energy to the system, transmission development cannot remain stagnant. The problem, however, is that unlike generation facilities (coal plants, wind farms, etc.) that may take one to three years to plan and construct, a new, interstate transmission line can take over a decade to plan and construct.\(^{145}\) A significant part of that delay is a result of permitting obstacles in the various states that must approve the line but another part is the inevitable challenges by landowners to all aspects of the transmission line, including whether there is eminent domain authority to obtain easements in the absence of voluntary agreements.\(^{146}\) As the parties building the lines become less “public” in nature and the benefits of the line cannot be as easily assigned to the residents of the states through which it will travel, the question of public use becomes increasingly significant.

Much of the urgency surrounding new transmission results from state efforts to require a certain percentage of electricity produced in the state to come from renewable resources. With few federal policies mandating renewable energy development, states have taken an active role in developing their own policies to promote renewable energy.\(^{147}\) Historically, just a small fraction of electricity produced in the U.S. was generated from renewable energy sources. Most of this electricity was generated from biomass combustion, municipal solid waste, and geothermal energy, with solar and wind comprising a small percentage.\(^{148}\) After 2004, growth in renewable energy, primarily wind power, increasing at over 12% a year, has meant that by 2010, non-hydro renewable energy accounted for approximately 5% of all electricity nationwide and well over 10% in several states.\(^{149}\) There is currently over 48,000 MW of installed wind power in the United States and this is beginning to have a significant effect on transmission planning,

\(^{145}\) See NORTH AMERICAN ELECTRIC RELIABILITY COUNCIL (NERC), 2011 LONG-TERM RELIABILITY ASSESSMENT 33 (Nov. 2011) (stating that delays to transmission construction due to permitting and siting continue to limit the industry from building new and vital transmission infrastructure and, once planning is complete, a project can take up to ten or more years to permit, site, and build). See also EDISON ELECTRIC INSTITUTE, TRANSMISSION PROJECTS: AT A GLANCE iv (March 2012) (providing details on a cross-section of transmission projects completed in 2011 and planned for the next ten years, highlighting large, interstate projects representing a $42 billion investment, and which “face significant challenges for siting, permitting, cost allocation, and cost recovery.”).

\(^{146}\) See U.S. DEPT. OF ENERGY, supra note 142, at 99 (noting that local opposition to transmission lines “is often a major challenge to transmission expansion,” that even though AC transmission lines generally benefit all users along its path by increasing reliability, local owners “do not always value such benefits” and that state agencies sometimes reject interstate transmission proposals “if it appears that they would not result in significant benefits for intrastate residents.”).

\(^{147}\) Barry Rabe, States on Steroids: The Intergovernmental Odyssey of American Climate Policy, 25 REVIEW OF POLICY RESEARCH 105-128 (2008).


particularly in the Midwest and the West where wind resources are most significant.\textsuperscript{150} In addition, there are significant but yet-undeveloped wind resources in several other Midwestern and Interior West states including Kansas, Colorado, Nebraska, Montana, and Wyoming.\textsuperscript{151}

At least thirty-nine states have adopted renewable portfolio standards (RPS), alternative energy portfolios, or voluntary goals to spur additional renewable energy development, with significant variation among which types of utilities are included, how they are held accountable, and which resources “count” as renewable.\textsuperscript{152} Typically, state RPSs require that by 2020 or 2030, 15-30\% of electricity sold in the state must be produced from renewable energy sources.\textsuperscript{153} Many states have additional policies to promote renewable energy such as renewable energy credits (RECs),\textsuperscript{154} feed-in tariffs, tax incentives, and taxes.\textsuperscript{155}

RECs allow utilities to fulfill their statutory obligations, potentially at lower cost, by purchasing the “environmental benefit” of renewable energy out of state. RECs are tradable certificates that create a separate market for the “environmental benefit” of renewable energy. Some states allow utilities to purchase RECs to fulfill their statutory obligations and meet their RPS requirements from other states, while others require in-state renewable generation.\textsuperscript{156} Because neighboring or nearby states may have lower cost renewable development, utility-purchased RECs can have a significant impact on renewable energy deployment in neighboring states, and drive the need for additional, interstate transmission projects.\textsuperscript{157}

\section*{B. The Rise of Private Generators and Transmission Operators}

As noted earlier, Congress enacted PURPA in 1978, which allowed independent electric generators to own and operate generation facilities for the first time.\textsuperscript{158} One of Congress’s goals in enacting the legislation was to diversify the electricity market and support the growth of renewable energy.\textsuperscript{159} Congress required utilities to buy electricity from these independent

\textsuperscript{152} PEW CENTER ON GLOBAL CLIMATE CHANGE, 2011, RENEWABLE AND ALTERNATIVE ENERGY PORTFOLIO STANDARDS, \url{http://www.pewclimate.org/what_s_being_done/in_the_states/rps.cfm}; FISCHLEIN, \textit{supra} note 148, at 5.
\textsuperscript{153} FISCHLEIN, \textit{supra} note 148, at 7.
\textsuperscript{154} Id. at 29.
\textsuperscript{156} Fischlein, \textit{supra} note 148, at 29.
\textsuperscript{157} \textit{See} Klass & Wilson, \textit{supra} note 85 (discussing RECs and the impact of various state RPS on renewable energy development in neighboring states).
\textsuperscript{159} FERC v. Mississippi, 456 U.S. at 750-51.
generators at the same rate that it would cost the utilities to produce the power, known as the utility’s “avoided cost.” In 1992, Congress sought to promote even greater competition at the generator level and thus authorized FERC as part of the Energy Policy Act of 1992 to require that utilities allow open and nondiscriminatory access to the transmission grid. FERC responded by promulgating Orders 888 and 889, which require transmission-owning utilities to provide equal access to the transmission system to non-utility generators on a non-discriminatory basis as well as share transmission information to facilitate wholesale power transactions. Non-discriminatory service includes a requirement that all electricity generators connect to the grid for the same price.

In addition, the Energy Policy Act of 2005 (EPAct 2005) altered PURPA to encourage utilities to provide net metering and other smart metering practices to facilitate more distributed transmission, and required utilities to provide interconnection services to any customer in that utility’s service area. This created a market for private or “merchant” transmission lines that compete with public utilities, which historically owned and operated the transmission lines throughout the country to serve their customers. The line between public and private utilities is not always clear and several states have granted “transmission-only utility” status to private independent transmission lines. Such lines may then earn a cost-based fee in the same manner as a traditional public utility, but are thereby subject to greater regulation than a merchant line. Today, approximately 500 private and public entities own transmission facilities in the United States.

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163 Dworkin, et al., supra note 69, at 536.
164 Dworkin, et al., supra note 69, at 536.
165 For a discussion of merchant transmission lines and efforts by FERC to promote merchant transmission in general, see Werntz, supra note 56, at 424-25. See also id at 425 n.13 (“Lacking captive customers, merchant transmission providers do not earn the regulated, cost-based rate of return that captive customers would traditionally pay. Instead, merchant transmission providers’ compensation comes from contracts they sign with customers to transmit electricity over their merchant transmission lines.”).
166 See, e.g., American Transmission Company, LLC, 2003 WL 1995923 (Ill. C.C., 2003) (Illinois Commerce Commission granted ATC, an independent transmission company, the right to operate as a public utility, even though it did not directly provide retail service to the public). See also ATC’s Badger-Coulee Project, a $435-million 345 kV proposed line in Wisconsin. Costs will be allocated to utility customers based on the percentage of energy used in each area. Ultimately, ratepayers would pay for the line as percentage of their electric bill. See Badger Coulee Transmission Line Project, ATC, http://www.atc-projects.com/BadgerCoulee.shtml; 10 Year Assessment: Regional Planning, ATC, http://www.atc10yearplan.com/RP.shtml; Ken Leiviska, Power Play: ATC Seeks Approval for Electrical Transmission Line, REEDSBURG TIMES-PRESS, May 11, 2011, http://www.wiscnews.com/news/local/article_a77c8a7c-7bfe-11e0-8708-001cc4c002e0.html; Transcript of Town of Stark Committee on Energy Planning & Information - Public Meeting with Representatives from ATC (La Farge, WI, March 24, 2011) (Lee Meyerhofer of ATC, affirming that ratepayers will pay a small portion of the cost of transmission).
167 Id. See, e.g., Zephyr Power Transmission, LLC, 139 FERC ¶ 61,020, *13 (2012) (waiving certain filing requirements for a merchant line because it will be charging negotiated rates rather than cost-based rates, and is thereby not subject to FERC’s cost-based data regulations).
States. State-regulated, investor-owned utilities own 66% of transmission assets; rural cooperatives and public power districts own 27%; and private, merchant transmission companies which finance and own transmission facilities independent of generation or customer-serving utilities own approximately 4%.169

Merchant interstate transmission projects at various stages of planning, approval, construction, and operation include: (1) the completed Cross-Sound Cable, a 24-mile, undersea bidirectional high-voltage direct current cable between Connecticut and Long Island, New York, completed in 2004;170 (2) the Montana Alberta Tie Line (MATL), a 215-mile, merchant line running between Lethbridge, Alberta and Great Falls, Montana designed to support development of the region’s wind-energy potential with expected completion by the end of 2012;171 (3) the Zephyr Transmission Project, now owned by Duke-ATC, a proposed $3.5 billion, 1,100-mile 500 kV line from southeast Wyoming to Las Vegas, largely through public lands, with a 2020 proposed completion date;172 (5) The SunZia Southwest Transmission Project, two proposed bidirectional 500 kV lines intended to move 3,000 MW of energy through Arizona and New Mexico, currently in the initial development phase and expected to prompt significant growth in the states’ renewable generation markets;173 (6) the Rock Island Clean Line Energy project, a $1.7 billion, 500 mile, high-voltage direct current transmission line designed to bring up to 3,500 MW of wind power in Iowa as well as other generation in surrounding states to Illinois and other states to the east, with construction expected to begin in 2014 and power to run in 2017;174 and

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169 Id. at 8-9.
175 FAQs, ROCK ISLAND CLEAN LINE, http://www.rockislandcleaneline.com/site/page/faqs; Benefits, ROCK ISLAND CLEAN LINE, http://www.rockislandcleaneline.com/site/page/benefits; Hannah Northey, FERC Approves Iowa-to-Ill. Renewable Power Line, E&E NEWS, May 24, 2012, at http://www.eenews.net/Greenwire/2012/05/24/4. Other Clean Line merchant transmission projects include: (1) the Grain Belt Express Clean Line, a proposed $2 billion, 700-mile line designed to deliver 3,500 MW of wind energy from western Kansas to Missouri, Illinois, Indiana, and other eastern states; (2) the Plains & Eastern Clean Line, a proposed $3.5 billion, 800-mile line proposed to connect 7,000 MW of energy from western Oklahoma, southwestern Kansas, and the Texas Panhandle to Tennessee, Arkansas, and other locations in the mid-South and Southwest; and (3) the Centennial West Clean Line, a proposed $2.5 billion, 900-mile line to connect 3,500 MW of energy from New Mexico to Arizona and California and designed to enable more than 4,000 MW of new renewable energy to be built in that region. All of these projects are in the initial planning, environmental review, and rate approval process. See Regulatory Approvals, GRAIN BELT EXPRESS CLEAN LINE, http://www.grainbeltexpressecleaneline.com/site/page/regulatory_approvals; PLAINS & EASTERN CLEAN LINE, http://www.plainsandeasterncleaneline.com/site/home; Project Description, PLAINS & EASTERN CLEAN LINE,
(7) the Texas Clean Energy Express, a 200-mile, 345 kV transmission line built and operated by NextEra Energy that, since becoming operational in 2009, brings 845 MW of wind energy from Abilene, Texas to Comfort, Texas near load centers in Austin and San Antonio.175

As discussed in Part II, virtually all states grant public utilities the right to exercise eminent domain authority to build transmission lines.176 The states differ, however, as to whether they allow merchant transmission lines to also exercise eminent domain authority. In those states where merchant lines cannot exercise eminent domain authority or, where the law is unclear, as is the case in many states, it may be more difficult for merchant lines to assemble the necessary land to build the line, resulting in less interstate lines built in those states. Table 1 and Appendix A provide a summary of the laws in each of the 50 states with regard to whether they allow merchant lines to exercise eminent domain authority.

### Table 1: State Authority for Merchant Line Eminent Domain

<table>
<thead>
<tr>
<th>Type of Authority</th>
<th>States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority to Merchant Lines</td>
<td>Florida, Kentucky, Michigan, Montana, New Mexico, Oregon, Rhode Island, Vermont, and Wisconsin have granted merchant transmission lines the right of eminent domain</td>
</tr>
</tbody>
</table>

175 See Klass & Wilson, supra note 85 (discussing Texas Clean Energy Express); Jeffrey Ryser, ERCOT Sees Record Highs in Grid Uptake of Wind Generation, Using New Transmission, GLOBAL POWER REPORT (Nov. 19, 2009); Eileen O’Grady, FPL Builds Private Transmission Line in Texas, REUTERS Oct. 6, 2009.

176 See supra note 81 and accompanying text. Such grants of authority generally include independent transmission companies that have been granted the right to act as a public utility. See, e.g. Application of ATC, 2011 WL 6740412 (Wis. P.S.C., 2011) (defining ATC as a “public utility”); Pahl v. Am. Transmission Co., 808 N.W.2d 714 (Wis. Ct. App. 2011) (affirming ATC’s right to use eminent domain).
domain through statutes. Kansas and Oklahoma lack specific statutory grants, but their public utility commissions have granted eminent domain powers to merchant lines.

### State Does NOT Grant Eminent Domain Authority to Merchant Lines

Illinois, Maryland, New Hampshire, and Nebraska expressly prohibit merchant transmission lines from exercising eminent domain clearly exclude such lines from general grants of authority to public utilities. New York has an extremely specific prohibition on eminent domain for intrastate merchant projects that does not necessarily restrict eminent domain for interstate merchant projects. Arkansas and Connecticut lack specific statutory prohibitions, but their

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178 The term “public utility commission” is meant to include any public service commission, corporation commission, or comparable administrative agency tasked with regulation of energy transmission.


180 220 ILL. COMP. STAT. § 5/8-509, § 5/8-406.1(a), § 5/3-105(b)(7) (West 2012) (A “qualifying facility” as defined by PURPA, is not a public utility and thus lacks eminent domain authority; PURPA, 18 C.F.R. § 292.101(b)(i) (noting that a “qualifying facility” includes transmission lines that “directly and indirectly interconnect [with] electric utilities.”); Md. PUBLIC UTIL., § 7-207(b)(3)(i); Md. Office of People’s Counsel Testimony on H.B. 590530, http://www.opc.state.md.us/LinkClick.aspx?fileticket=649JFgzoxuY%3D&tabid=138 (noting that only “electric companies” could build overhead transmission lines in Maryland, and supporting an amendment that would permit construction by a “generator lead line.”) The amendment to § 7-207(b) was successful, but did not expand right to build transmission lines to merchant lines); NEB. REV. STAT. § 70-301, § 70-1014.02(1)(a), § 70-1014.02(6), § 76-710.04(3)(a), 3(h) (West 2011) (stating that only an “electric supplier,” defined as a public power district, municipality, or co-operative may exercise eminent domain); Sen. Deb Fisher, Legislative Notes, LB 1048 Clarifies Wind Power Development in Nebraska, SANDHILLS EXPRESS, Mar. 19, 2010, http://www.sandhillsexpress.com/BuySell/BuySellDetails/tabid/108/smId/384/ArticleID/1500/Default.aspx; N.H. REV. STAT. ANN. § 371:1 (West 2012).

181 N.Y. TRANSP. CORP. LAW § 11(3-a), § 10, § 11(7). The New York law arose in response to the controversial New York Regional Interconnect (NYRI) project, which would have moved energy from upstate New York to New York City and surrounding population centers. In 2006, the right of eminent domain was withdrawn from a “merchant transmission company” which (a) builds a line that begins and ends within New York, (b) has testified that the line may increase electric rates, and (c) which has applied for and been denied early designation as a National Interest Electric Transmission Corridor. Id. The law was unambiguously intended to inhibit NYRI’s use of eminent domain. Anthony DePalma, Pataki Signs Bill Limiting the Use of Eminent Domain to Build High-Voltage Power Lines, N.Y. TIMES, Oct. 4, 2006, http://www.nytimes.com/2006/10/04/nyregion/04power.html. The project’s backers have since withdrawn their application. See New York Indep. Sys. Operator, Inc., 126 FERC ¶ 61320 (Mar. 31, 2009); Leslie Kaufman, Consortium Drops Its Plan to Build New Power Lines, N.Y. TIMES, Apr. 3, 2009, http://www.nytimes.com/2009/04/04/business/energy-environment/04power.html.
public utility commissions or courts have denied eminent domain powers to merchant lines.\textsuperscript{182} Delaware limits eminent domain powers of all electric transmission companies to former railroad rights-of-way, public roads, canals, and highways.\textsuperscript{183}

<table>
<thead>
<tr>
<th>State MIGHT Grant Eminent Domain Authority to Merchant Lines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama, Alaska, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming have statutes that generally confer eminent domain power to “power companies,” companies engaged in “transmission of electricity,” “utilities,” (or similar) and define these terms broadly enough that merchant transmission lines MIGHT be included, but no case law or administrative law firmly suggests the state will or will not grant eminent domain to a merchant transmission line.\textsuperscript{184} Statutes in Arizona, Colorado, Idaho, Indiana, Iowa, Massachusetts, South Dakota, Tennessee, Texas, West Virginia, and Wyoming suggest stronger likelihood that the states would grant eminent domain authority.\textsuperscript{185} Statutes in California, Hawaii, Minnesota, Nevada, and Pennsylvania suggest weaker likelihood that the states would grant eminent domain authority.\textsuperscript{186}</td>
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</table>

The next Section details current controversies regarding eminent domain authority for transmission lines in general and merchant lines in particular, thus providing additional context for the information in Table 1.

\textbf{C. Current Disputes Over Eminent Domain for Transmission Lines}

The rise of merchant transmission lines, the backlash against the U.S. Supreme Court’s \textit{Kelo} decision, and state renewable energy goals requiring ambitious interstate transmission projects, particularly in the Midwest and Interior West, all have brought new focus to the question of

\textsuperscript{182} See ARK. CODE ANN. § 18-15-503(a), (b)(1), § 18-15-512 (West 2012); Plains & Eastern Clean Line, LLC, Docket No. 10-041-U (Ark. P.S.C., Jan. 11, 2011), available at http://www.apscservices.info/pdf/10/10-041-u_41_1.pdf (denying public utility status to a Clean Line project, which was would have been necessary for it to exercise eminent domain); CONN. GEN. STAT. ANN. § 16-50z, § 16-50x(b), § 15-244p (West 2012); Conn. Light & Power Co. v. Huschke, 409 A.2d 153, 155 (Conn. Super. Ct. 1979); Transenergie U.S. Ltd. 2000 WL 33121599 (Conn. D.P.U.C., 2000) (holding that Transenergie was not an “electric distribution company,” and as such, lacked the right of eminent domain).

\textsuperscript{183} DEL. CODE ANN. TIT. 26 § 901, §§ 906-908, § 9501A (West 2012).

\textsuperscript{184} See Appendix A for statutes.

\textsuperscript{185} Id.

\textsuperscript{186} Id.
when transmission lines are a public use sufficient to justify eminent domain authority. This Section details several current controversies over public use and transmission lines to set the stage for a fuller analysis of these issues in Part IV.

1. **Merchant transmission lines and energy destined for out-of-state use**

States continue to grapple with the extent to which private, merchant transmission companies rather than public utilities should be able to exercise eminent domain authority for transmission lines and whether it matters if the energy is destined for in-state or out-of-state use. For instance, in Montana, the state courts, legislature, governor, and members of the public are embroiled in a controversy over the Montana Alberta Tie Line (MATL), a 215-mile merchant transmission line intended to transmit primarily wind energy from Great Falls, Montana to Alberta, Canada. Calgary-based Enbridge Energy acquired the MATL from the project’s original developer in October 2011. A few years earlier, in October 2008, the Montana Department of Environmental Quality issued a Certificate of Compliance for the line and, pursuant to existing law, MATL commenced an eminent domain action to secure easements it was unable to obtain through voluntary agreements. A landowner opposed the eminent domain action and, in December 2010, the trial court granted the landowner’s motion to dismiss the condemnation action on grounds that there was no specific statutory grant of eminent domain power to a merchant transmission line. MATL appealed, and, at the same time, the Montana legislature took up the matter.

Ultimately, in 2011, the state legislature enacted H.B. 198, entitled “An Act Clarifying a Public Utility’s Power of Eminent Domain; Clarifying that a Person Issued a Certificate under the Major Facility Siting Act has the Power of Eminent Domain; and Providing an Immediate Effective Date and Retroactive Applicability Date.” The law clarified that transmission

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191 See Mont. H.B. 198; MONT. CODE ANN. §§ 69-3-101 (defining “public utility” to include every public or private entity which owns or controls any plant or equipment to provide, among other things, “power in any form or by any agency”), 63-3-113 (granting any eminent domain authority to a “public utility” for a “public use authorized by law”), 70-30-102(37) (defining “public use” for purposes of eminent domain authority to include “electrical energy lines”), 75-20-113 (“A person issued a certificate pursuant to this chapter may acquire by eminent domain any interest in property, as provided in Title 70, chapter 30, for public use authorized by law to construct a facility in accordance with the certificate.”); MATL LLP v. Salois, 255 P.3d 158 (Mont. 2011) (discussing impact of H.B. 198).
projects that receive a certificate and are defined as a public use by statute may exercise eminent
domain to construct the facility authorized by the certificate.\textsuperscript{192} The bill was controversial with
Montana citizens, but it received bipartisan legislative support and renewable energy nonprofit
support.\textsuperscript{193} The Montana Governor did not sign the bill on grounds that it failed to adequately
address landowner concerns, but a sufficient majority of the legislature enacted it over the
 governor’s objection.\textsuperscript{194} H.B. 198 explicitly stated that it applied retroactively to all projects that
had received a Major Facility Siting Act certificate after September 20, 2008, and thus applied to
the MATL line.\textsuperscript{195}

Since the bill’s enactment, a group called Concerned Citizens Montana has been collecting
signatures with the goal of putting the eminent domain bill on the 2012 ballot as a referendum.\textsuperscript{196}
In June 2011, the Montana Supreme Court reviewed the trial court’s determination that the line
was not a public use and overruled the decision in light of HB 198.\textsuperscript{197} In a separate lawsuit, landowners sued the state and the transmission line company alleging the new eminent domain law was unconstitutional on due process grounds and because it constituted “special legislation.”\textsuperscript{198} The district court rejected these claims in January 2012.\textsuperscript{199} Notably, in speaking with reporters, the plaintiffs “questioned the logic of allowing a Canadian company to condemn private property in the United States . . . .”\textsuperscript{200} The landowner disputes have resulted in significant additional costs and delays for the project.\textsuperscript{201} The American Wind Energy Association estimates that Montana has the second-largest wind power potential in the country behind Texas but that only a small amount of wind power capacity has been installed in the state primarily because of inadequate transmission capacity.\textsuperscript{202}

In Nebraska the legislature attempted to clarify eminent domain authority for transmission
lines but, unlike Montana, made it clear that private entities do not have eminent domain
authority for such lines. Prior to 2010, Nebraska law was not supportive of any private renewable
energy generation or transmission projects, and policies favored the regulated public power

\begin{footnotes}
\item[192] MONT. CODE ANN. § 75-20-113 (West 2012); Editorial, Group Hails Power Bill, MTSTANDARD.COM (May 12, 2011), \url{http://mtstandard.com/news/opinion/editorial/group-hails-power-bill/article_f9f34498-7c22-11e0-87a5-001cc4c002e0.html}.
\item[193] Id.
\item[194] Charles S. Johnson, Referendum Planned on Eminent Domain, MTSTANDARD.COM (May 18, 2011), \url{http://mtstandard.com/news/local/referendum-planned-on-eminent-domain/article_be8f67a0-8105-11e0-b310-001cc4c03286.html}.
\item[196] Johnson, supra note 195.
\item[197] MATL LLP v. Salois, 255 P.3d 158, ¶7 (Mont. 2011).
\item[201] Dina O’Meara, Montana Alberta Power Line Faltering on Case Crunch, CALGARY HERALD (June 27, 2011), \url{http://www.calgaryherald.com/business/Montana+Alberta+power+line+falling+with+case+crunch/5013322/story.html}.
\end{footnotes}
system. In 2010, the legislature enacted a bill that created new incentives for private renewable energy generation developers to build facilities that would export electricity out of the state. The law provides that only public power entities may exercise eminent domain in the construction of transmission lines which will serve private energy generation facilities: the statute expressly notes that “[n]othing in this section shall be construed to grant the power of eminent domain to a private entity.” This policy reflected the drafters’ desire to create a compromise between private wind generators and the public power system. Private merchant transmission groups were not considered. Thus, while Nebraska expressed a policy in favor of exporting renewable energy from the state, it did not want to grant eminent domain authority to private parties, as opposed to public utilities, in connection with building the related transmission lines.

Legislators in Idaho are similarly concerned with the use of eminent domain for the merchant transmission companies wishing to build lines to transport energy out of the state. Public uses in Idaho for eminent domain authority are defined by statute and include “electrical distribution and transmission lines for the delivery, furnishing, distribution, and transmission of electric current for power, lighting, heating or other purposes; . . . .” In 2011, members of the Idaho House of Representatives introduced House Bill No. 268 in response to several proposed merchant transmission lines designed to reach electricity markets in Arizona, California, and Nevada. The bill provided that entities that were not public utilities, electric cooperatives, or municipalities could not condemn land for transmission lines unless the developer established that the project “materially serves the interests of the citizens of Idaho.” Although the bill did not pass, this effort illustrates public concern over the potential for the exercise of eminent domain authority by private transmission companies as efforts to develop renewable energy in western states and build associated transmission continues.

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205 Id.; Neb. Rev. Stat. § 70-1014.02(6).
207 Idaho Stat. § 7-701(11).
State concerns over using eminent domain authority to meet RPS and other renewable energy goals

With RPS mandates in place in states across the country, there are concerns that governments and private parties may attempt to take advantage of existing, expansive eminent domain authority for power generation and transmission to meet those goals and are creating new limits on this historic eminent domain authority. For instance, in Wyoming, state statutes grant eminent domain authority to both public utilities and private companies that own transmission lines. However, Wyoming expressly denies eminent domain authority to public utilities and private companies alike for the construction of wind farms. In recent years, there has been controversy in Wyoming over whether the state should grant eminent domain authority for the small transmission lines (a.k.a. collector systems) that transmit power directly from a wind farm to a large transmission line. This is because in 2010, the Wyoming Legislature amended the State Eminent Domain Act to create a state-wide moratorium on allowing land for collector systems to be condemned. This moratorium was enacted because there was considerable public opposition to the state’s broad grant of power relating to wind energy development. The State wanted to halt all eminent domain on projects while it reviewed its policies.

The moratorium was scheduled to end in June 2011, but was extended in 2011 until 2013. Also in 2011, state legislators introduced several bills in an attempt to settle the collector systems controversy. The first bill proposed a complete and permanent ban on the power of eminent domain for collector systems for wind energy development, but it was defeated in committee. The second bill would have allowed eminent domain authority for collector systems and wind farms (note that in general, public utilities still have eminent domain authority for collector systems if they receive a certificate of need), but with several conditions. The main condition imposed by this bill would have required a wind energy company to obtain land through

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211 See WYO. STAT. ANN. § 1-26-816; WYO. STAT. ANN. § 37-2-205; Abigail M. Jones, Wind Energy Development and Eminent Domain in Wyoming: Who Has the “Power”? 3 (June 6, 2011), at http://www.buddfalen.com/content/2-Landowners%20and%20Energy%20Development/A.%20%20Wind%20lease%20negotiation/Article%20%20Wind%20Energy%20Development%20and%20Eminent%20Domain%20in%20Wyoming.pdf. Notably, although public utilities in Wyoming must obtain a certificate of public convenience and necessity prior to exercising eminent domain authority for a transmission line, electricity wholesalers and other private entities building transmission lines need not obtain a certificate prior to exercising statutory eminent domain authority. See WYO. STAT. ANN. § 37-2-205(a) (no “public utility” may begin construction of a line, plant or system without having first obtained a certificate); WYO. STAT. ANN. § 1-26-815 (“any person, association, company, or corporation . . . may appropriate by condemnation a way of necessity over, across or on so much of the lands or real property of others . . . . as necessary for the location, construction, maintenance, and use of . . . electric power transmission lines and distribution systems, . . . .”); Bridle Bit Ranch Co. v. Basin Electric Power Cooperative, 118 P.3d 996 (Wyo. 2005) (holding electricity wholesaler was not a public utility and thus did not need to obtain a certificate of public convenience and necessity prior to exercising eminent domain authority to build transmission line).

212 Jones, supra note 211, at 3; see generally WYO. STAT. ANN. §§ 1-26-501 to 1-26-817.


214 Jones, supra note 211, at 5; 2010 Wyo. Sess. Laws, Ch. 48, § 1.


218 Jones, supra note 211, at 5; H.R. 0070, 61st Leg. (Wyo. 2011).
negotiation from 85% of the affected landowners. Only the remaining 15% of land could be obtained through eminent domain.\(^{219}\) This bill also died in committee.\(^{220}\) Without consensus on the best approach to resolve the issue, a third bill was introduced that would extend the moratorium for an additional two years. This bill passed with an overwhelming majority,\(^{221}\) and the moratorium will be in effect until June 30, 2013.\(^{222}\)

Colorado has also considered how far eminent domain authority should extend to meet new renewable energy goals. In 2010, the Colorado legislature amended Colorado Revised Statute Section 40-2-124 to require certain providers of retail electricity in the state, known as “qualifying retail utilities” (QRUs), to generate 30 percent of their electricity from renewable resources by 2020. This increased need for renewable energy is expected to result in a corresponding need to construct new renewable energy projects and associated transmission lines. Colorado law also provides that any corporation formed for the purpose of constructing an electric line has the power of eminent domain.\(^{223}\) However, a separate Colorado statute, Section 40-2-125, enacted with the state’s first RPS in 2005, provides that a QRU does not have the power of eminent domain “to site the generation facilities of a renewable energy system used in whole or in part to meet the electric resource standards . . . .”\(^{224}\)

There is thus a question over whether the 2005 limits on eminent domain authority relating to meeting the state RPS may hamper efforts to use eminent domain for transmission lines within the state.\(^{225}\) At this point, although the separate statutory eminent domain authority for transmission lines would appear to remain intact, issues may arise over (1) whether the transmission line is sufficiently distinct from the generation facility it interconnects; (2) whether a new renewable energy project falls within the statutory eminent domain limits if the QRU has already exceeded the state RPS; and (3) whether the statute has any effect on interstate power producers or other companies who sell power wholesale, and thus are not QRUs.\(^{226}\) As new, interstate transmission projects develop in Colorado to meet the state RPS as well as improve the regional transmission system in general these eminent domain limitations will likely be highly relevant to any disputes.

The Wyoming and Colorado examples show states revisiting their eminent domain laws to carve out new limits on what was historically very extensive authority granted to public utilities and others to take private property for energy generation and transmission purposes. While states may wish to encourage the development of renewable energy through RPSs and other incentives, they appear be less comfortable granting the same blanket eminent domain authority to the energy industry (whether public utilities or private parties) than in years past. This shift can be attributed in part to the impact of \textit{Kelo} and the increased attention now given to eminent domain

\(^{219}\) H.R. 0070, 61st Leg. (Wyo. 2011).
\(^{222}\) H.R. 0230, 61st Leg. (Wyo. 2011).
\(^{223}\) See COLO. REV. STAT. ANN. §§ 38-2-101(1), 38-1-202(2)(l) (West 2012). See also COLO. REV. STAT. § 38-5-105 (granting power of eminent domain to transmission companies and electric light power companies).
\(^{225}\) See, e.g., Casey, supra note 224.
\(^{226}\) See id.
across the board. It can also be attributed to the much more complicated landscape of electricity generation and transmission that now exists throughout the country. Part IV considers these fundamental changes in law, policy, and the electric transmission system and attempts to provide some guidance for states in developing eminent domain laws that will further the states’ policy goals surrounding electricity development and transmission.

IV. DEVELOPING NEW APPROACHES TO EMINENT DOMAIN FOR TRANSMISSION LINES

As an initial matter, in most states, whether public utilities can use eminent domain authority for transmission lines is not subject to significant dispute. The majority of states have statutory or constitutional provisions stating expressly that transmission lines are a public use and can exercise eminent domain. While some states limit that authority to public utilities, many do not, in which case there is less of a role for a court to determine public use, depending on how the statute is worded. Notably, eminent domain actions for transmission lines, railroads, and other infrastructure projects specifically deemed a public use by state statute in many ways more closely resemble a purely “private taking” than the economic development takings states attempted to limit after the *Kelo* case. This is because in urban redevelopment cases like *Kelo*, a government body is bringing the condemnation action in its own name and then transferring the property to a private party. By contrast, in a transmission line taking or other developmental infrastructure taking specifically allowed by state statute, it is a private party rather than any government entity that initiates the taking.

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

Section A begins with a discussion of the justifications for eminent domain in general and for transmission lines in particular. Section B then considers the question of “public use” in the context of lines designed to bring power primarily to out-of-state customers, and draws connections between the disputes in this area with the debate in *Kelo* over whether public use requires “use by the public” or simply a “public purpose.” Finally, Section C considers more specifically the question of merchant lines and whether such lines should be able to exercise eminent domain authority.

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227 See supra note 81, and accompanying text.
228 See supra Table 1 and infra Appendix A.
229 See id.
A. When is Eminent Domain Needed?

Early courts expounded that eminent domain, which allows government to “dispos[e], in case of necessity, and for the public safety, of all the wealth contained in the state,” is necessary for government to function. Courts generally accepted that eminent domain was an “attribute of sovereignty,” an inherent power that the framers took as a “given” that they only sought to limit through the public use and just compensation clauses of the Fifth Amendment. The public use clause and just compensation clauses, “serve to protect ‘the security of Property,’ which Alexander Hamilton described to the Philadelphia Convention as one of the ‘great objects of Government.’ Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government’s eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority’s will.

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

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

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231 See Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) (“The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state.”); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (“. . . [T]here might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent.”); Cincinnati v. Louisville & N. R. Co., 223 U.S. 390, 400 (1912) (“[T]he right of every State to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions.”).
232 See, e.g., Miss. Rum and River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) (“The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right.”). But see Abraham Bell, Private Takings, 76 U. CHI. L. REV. 517, 521 (2009) (“The fact that takings might be thought to have been an unavoidable part of the package of powers granted to a sovereign power in seventeen-century political theory hardly commends itself as a reason to recognize a power of eminent domain today.”).
233 American courts have recognized since the founding that a legislature cannot pass “a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.” Calder v. Bull, 3 U.S. 386, 388 (1798) (emphasis in original).
234 13 POWELL ON REAL PROPERTY § 79F.01 (discussing the inherent power theory and James Madison’s role in limiting the takings clause).
dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.\(^{236}\)

The phenomenon described above is commonly referred to as the “holdout problem,” whereby one property owner takes advantage of the fact that the government needs (or greatly desires) their particular parcel by demanding payment that significantly exceeds the value of the property and thus derailing the project.\(^{237}\) However, not everyone is convinced that the government would cease to function without eminent domain.\(^{238}\) Others note how the potential for condemnation often aids governments and those with delegated powers in the negotiation process so that the need to invoke the power never arises.\(^{239}\)

Putting aside the debate over whether government would cease to function without the power of eminent domain, the fact remains that state legislatures early on granted the power of eminent domain to utility companies and others to generate electricity and build the means of transporting it. Early courts had no difficulty upholding that authority as a public use. For instance, in 1904, the New Hampshire Supreme Court stated “[t]hat the use of land for constructing and maintaining a line of wires to conduct currents of electricity . . . for all persons who may desire such service, or in lighting public streets, highways, and buildings . . . is a ‘public use’ . . . is beyond question.”\(^{240}\) Likewise, in 1912 the Vermont Supreme Court declared that “[t]o hold that the supplying of electric current for heat and power is not . . . ‘proper, useful, and needful for the government to provide,’ is to close our eyes to conditions which surround us.”\(^{241}\) These early judicial sentiments have continued, for the most part, resulting in the enactment of the statutes around the country described in Part II expressly granting eminent domain authority to public utilities and, in many states, even private entities proposing to construct electric transmission lines.

Despite this general rule, however, the discussion in Part II reveals that for many decades there have been situations where landowners have argued, often successfully, that some types of transmission projects should not qualify as a public use, either because the entity building the

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\(^{236}\) Kohl v. United States, 91 U.S. 367, 371 (1875).

\(^{237}\) See County of Wayne v. Hathcock, 684 N.W.2d 765, 781 (Mich. 2004) (“If a property owner between points A and B holds out—say, for example, by refusing to sell his land for any amount less than fifty times its appraised value—the construction of the railroad is halted unless and until the railroad accedes to the property owner's demands. And if owners of adjoining properties receive word of the original property owner's windfall, they too will refuse to sell. The likelihood that property owners will engage in this tactic makes the acquisition of property for railroads, gas lines, highways, and other such ‘instrumentalities of commerce’ a logistical and practical nightmare.”). See also Bell, supra note 232, at 531 (“Imagine that the land in the valley is owned by a number of private individuals. The government must now purchase for the reservoir all the valley parcels in the drainage basin; even one holdout in the middle of the planned reservoir can ruin the project. . . . strategic considerations may block the transaction.”).

\(^{238}\) See William B. Stoebuck, A General Theory of Eminent Domain, 47 WASH. L. REV. 553, 560 (1972) (“It is far from certain that eminent domain power is ‘inherent’ in the sense governments would perish if they did not have it. Natural persons and corporate bodies conduct all sorts of activities with great success without any such power. [Without eminent domain], []land . . . could usually be acquired, though perhaps not always exactly where desired and, no doubt, at a higher average cost than if it could be expropriated.”).

\(^{239}\) See Brown & Rossi, supra note 140, at 760 n.223 (“. . . [T]he negotiating dynamics of acquiring property, and most likely the resulting price, can be heavily influenced by the fact that a seller is aware that the buyer possesses the power to condemn the seller's property in the absence of a mutually acceptable, consensual agreement.”).


line is a private company or because the power on the line is destined for out-of-state use. The remainder of this Part explores these issues in more detail in an effort to analyze “public use” in the context of today’s transmission lines, which are beginning to be built more often by private, merchant companies and serve a broader “public” than exists within a single state’s boundaries.

B. Can and Should State Courts Consider Out-of-State Use and Benefits in Determining a “Public Use”?

As discussed in Part II, for decades, state courts have taken varying approaches regarding whether a transmission line designed to exclusively or primarily bring power to out-of-state customers is a “public use” for purposes of exercising eminent domain authority. This raises an initial question of how to define “the public.” To the extent the public is defined as exclusively state residents, it is easier for courts to conclude that there is no public use to justify eminent domain if no state residents will be able to use or benefit from the line. This is the approach that the courts in Mississippi and Florida have historically taken, making it difficult for either public utilities or private lines to take advantage of eminent domain authority to build interstate lines for renewable energy development or grid reliability in those states. Courts in other states, such as North Dakota and Indiana, however, have taken a broader view of public use, focusing on regional benefits, the benefits to in-state residents of grid reliability in general, and the economic benefits to the state that may be generated from the export of electricity.

242 See supra Part II.B.
243 See Miss. Power and Light Co. v. Conerly, 460 So.2d 107 (Miss. 1984) (blocking a power company’s efforts to use eminent domain to build a line between Louisiana and Mississippi because Mississippi residents would not receive power from the line). It is unclear whether the court would have viewed the line more favorably if some of the power had been designated for Mississippi customers even if Louisiana remained the primary beneficiary, but the court “seemed to suggest that some sort of balancing would have to be applied before eminent domain could be exercised in the . . . state . . . .” See Brown & Daniels, supra note 141, at 27.
244 See Clark v. Gulf Power Co., 198 So.2d 368, 371 (Fla. 1967) (holding that “property in one state cannot be condemned for the sole purpose of serving a public use in another state,” and therefore a “one-way” transmission line from Florida to Georgia that would provide power only to Georgia customers could not be built with the help of eminent domain).
245 See Square Butte Elec. Coop. v. Hilken, 244 N.W.2d 519, 530 (N.D. 1976) (holding that a one-way transmission line from North Dakota to Minnesota served a public use when all the benefits, including the possibility of future use by the public, increased reserve supplies, stabilization of the grid, and lower cost power, were considered together instead of separately).
246 See Oxendine v. Pub. Serv. Co., 423 N.E.2d 612, 615 (Ind. Ct. App. 1980) (finding a public use for a line whose main purpose for Indiana was to provide “reliability to the network” and “stability” for the generating station while most of the electricity would go to Illinois customers). See also Shedd v. Pub. Serv. Co., 188 N.E. 322 (Ind. 1934) (holding that a project that benefits out-of-state residents in addition to in-state residents does not cease to be a public use).
247 See Okla. Gas and Elec. Co. v. Beecher, 256 P.3d 1008 (Okla. Civ. App. 2010) (analogizing an interstate transmission line to an interstate highway and concluding that even though Oklahoma customers would not be the primary users of electricity from an interstate transmission line, they were the “primary intended beneficiaries” of the line because it would “increase the availability of more reliable, efficient, and economical electricity”); Stone v. Pa. Pub. Util. Comm’n, 162 A.2d 18 (Pa. Super. Ct. 1960) (emphasizing the importance of integrating the transmission systems of Philadelphia, Pennsylvania and Baltimore, Maryland to allow each system to “be able to meet, adequately and safely, its varying and growing load demands, and to maintain constant voltage, frequency stability, and reliability of service” and also explaining that the electricity is needed because “the area to be served includes oil refineries, ship building, steel production, and other industries vital to the nation's peacetime economy and national defense”); Grice v. Vermont Elec. Power Co., Inc., 956 A.2d 561 (Vt. 2008) (recognizing that a line
Notably, this debate strongly resembles the “use by the public” versus “public purpose” debate arising out of the *Kelo* case. For the courts in Mississippi and Florida, the fact that the transmission line would not be providing electricity immediately to in-state residents meant that there was no “use by the public” and thus no public use to justify eminent domain, consistent with the *Kelo* dissent. For the courts in North Dakota and Indiana, by contrast, the line could more easily establish a public use by showing the regional economic and grid reliability benefits associated with the line, more equivalent to the “public purpose” analysis in the *Kelo* majority opinion.

These doctrinal differences among the states become more significant as the electricity grid becomes more interstate in nature both as an engineering matter (the existence of more interstate lines) and as a policy matter. With regard to policy, the federal government and many states are now expressly focusing on regional benefits to make decisions regarding the expansion of the transmission grid. For instance, in 2011, FERC issued Order 1000, which requires transmission providers to consider state “public policy requirements” (i.e., state RPSs) in regional transmission planning efforts.248 Likewise, the Midwest Independent System Operator (MISO), which oversees the electricity grid for 11 Midwestern states, also considers “public policy” benefits in determining which transmission projects in the MISO region are “multi-value” projects subject to broader cost allocation across the region.249

Moreover, in addition to the supreme courts of North Dakota and Indiana, which have articulated a more regional approach to public use and public benefit, several states have enacted statutes in recent years that specifically direct the state PUC to consider regional benefits or general economic benefits in reviewing the need for new transmission lines. For instance, New Mexico enacted a law to specifically facilitate interstate transmission corridors in the state.250 The law directs the state’s Renewable Energy Transmission Authority (RETA) to participate in regional transmission forums251 and grants it the power of eminent domain to acquire property or rights of way for public use if needed for regional transmission projects.252 RETA’s website highlights the ample renewable resources in the state and declares that New Mexico “can develop a major renewable energy industry thereby creating permanent jobs, protecting the

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251 *Id.* at b(6) (“The authority may . . . through participation in appropriate regional transmission forums, coordinate, investigate, plan, prioritize and negotiate with entities within and outside the state for the establishment of interstate transmission corridors.”).

252 *Id.* at b(8) (“The authority may . . . pursuant to the provisions of the Eminent Domain Code, exercise the power of eminent domain for acquiring property or rights of way for public use if needed for projects . . . .”).
environment, reducing greenhouse gas emissions, and furthering the nation’s goals toward a sustainable and clean energy resource for generations to come.”

Likewise, the Wyoming legislature created the Wyoming Infrastructure Authority whose purpose is to “diversify and expand the Wyoming economy through improvements in the state’s electricity transmission infrastructure and to facilitate the consumption of Wyoming energy . . . .” The Authority can plan, own, develop, and maintain infrastructure within and outside of Wyoming to accomplish its purpose and acquire property by condemnation for those purposes.

Likewise, in creating the North Dakota Transmission Authority, the North Dakota legislature appeared to articulate economic development as its main purpose, since most of the findings in the statute establishing the Authority emphasize the economic benefits of increasing transmission capacity. The statute states that developing North Dakota’s lignite coal and wind resources will “stabilize and increase revenues to the state, . . . increase[s] employment . . . and improve[e] the state’s economy,” that “[t]ransmission constraints impede the development of the state’s lignite and wind resources,” and that an “essential governmental function and public purpose is to assist with the removal of electric transmission export constraints . . . to facilitate the development of the state’s abundant natural resources.” By contrast, Idaho’s statute establishing its transmission authority focuses more on reliability issues, declaring that the “regional interconnection of electric utilities” and the “restructuring of the electric industry in recent years by the federal government” has “exposed . . . Idaho . . . to volatile market prices [and] reliability concerns,” and that “the ability of . . . utilities to provide reliable and economic electric services at stable prices is essential to the economy and the economic development of the state of Idaho and to the health, safety and welfare of its people.” The statute grants the Energy Resources Authority the power of eminent domain to address these issues. The Kansas Electric Transmission Authority cites both reliability and economic development as purposes for the authority. The legislature acknowledged the importance of cooperating with neighboring states in transmission planning by giving the Authority the power to “participat[e] in and coordinat[e] with” the Southwest Power Pool (SPP) Regional Transmission Organization and SPP Regional Infrastructure Authorities: The Story So Far 7 (NREL May 2008), http://www.nrel.gov/docs/fy08osti/43146.pdf.

Id. at § 67-8908(g).

KAN. STAT. ANN. § 74-99d01 (2012) (“The purpose for which the Kansas electric transmission authority is created is to further ensure reliable operation of the integrated electrical transmission system, diversify and expand the Kansas economy and facilitate the consumption of Kansas energy through improvements in the state's electric transmission infrastructure.”).
Reliability Organization, and it grants the Authority eminent domain power in order to carry out its purpose.

These developments show federal and state efforts to create integrated, regional, electricity markets for renewable energy development, grid reliability, and general economic development purposes. All of these efforts require moving new forms of power across the country through transmission lines in the interests of a broader “public.” The language used by the states to promote renewable energy and grant eminent domain authority focus on developing state resources, expanding state economies, and benefiting the public good through economic growth and environmental protection. At least for the states cited above, these more recent statutes appear to embrace the broad “public purpose” approach to eminent domain rather than a narrower “use by the public” approach as still exists in other states.

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

occupation and enjoyment of the land by a public entity” also states that “nothing in this section shall restrict or impair the right or authority of the . . . Wyoming infrastructure authority to transfer property condemned by the authority to another public or private entity.”

Ironically, the more promoters of interstate transmission for renewable energy tout the “public benefits” of such lines, the more they may ultimately erode one of the bases for eminent domain authority for such lines by placing the lines in the more controversial takings category in the post-Kelo era.

This brings us back to the initial question in this Part of how to define the “public” in “public use.” There is some logic to the approach taken by the courts in Mississippi and Florida that refused to grant eminent domain authority to interstate lines serving out of state residents. As a state court, how can it consider the needs of out-of-state residents in determining state eminent domain authority? Isn’t that beyond a single state court’s jurisdiction? Indeed, in each case, the court cited jurisdicational problems with considering any public use beyond state borders. Even the North Dakota and Indiana courts, which did find a public use for such lines, acknowledged the jurisdictional question before rejecting it as an obstacle based on the facts of each case.

If the United States had a regional or national system for siting transmission lines rather than a state system, this would not be an issue at all. The public would be defined on a regional or national basis and so eminent domain could be justified under even the narrowest form of public use because there would always be some “use by the public.” But the United States does not have a regional or national system for siting transmission lines, and the current political climate does not bode well for a shift toward greater federal authority in this area. As a result, the disputes will continue over public use for interstate transmission lines that do not directly serve residents of all states through which the lines passes.

In order to address such disputes, and assuming no fundamental shift in regulatory siting authority from the states to the federal government, state legislatures and state courts can address the issue as best they can in several ways. First, state legislatures can amend their state siting and eminent domain laws to make it clear whether general economic benefits or regional benefits such as grid reliability will support eminent domain authority for transmission lines. It may be that many states would prefer to keep the language general to consider each transmission line on a case-by-case basis through the siting process and the courts. States should recognize though, that such uncertainty, particularly in light of the frequent legal challenges to transmission lines,

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269 WYO. STAT. ANN. § 1-26-801(c) (2012).

270 See Miss. Power & Light v. Conerly, 460 So.2d 107, 113 (Miss. 1984) (noting that the Mississippi Public Service Commission has jurisdiction over “the intrastate business and property of public utilities,” but “the sale of electric power from Mississippi Power & Light Co. to the Louisiana Power & Light Co. is an interstate sale”); Clark v. Gulf Power Co., 198 So.2d 368, 371 (Fla. 1967) (“The sovereign's power of eminent domain, whether exercised by it or delegated to another, is limited to the sphere of its control and within the jurisdiction of the sovereign. A state's power exists only within its territorial limits for the use and benefit of the people within the state. Thus, property in one state cannot be condemned for the sole purpose of serving a public use in another state.”).

271 See Square Butte Elec. Coop. v. Hilken, 244 N.W.2d 519 (N.D. 1976) (concluding that “the public benefit, while not confined exclusively to the state authorizing the use of the power, is nonetheless inextricably attached to the territorial limits of the state because the state's sovereignty is also so constrained”) (citations omitted).


273 See Klass & Wilson, supra note 85 (discussing failed Congressional attempts to create more federal authority for transmission line siting and comparing state-based siting system for interstate transmission lines with federal siting system for interstate natural gas pipelines).
may hinder the ability of the state to attract investment in interstate lines. This will likely be most important to states with significant renewable resources, like North Dakota and Wyoming, which rely heavily on exporting those resources for economic development purposes. Second, to the extent states wish to retain broad “public use” language in their eminent domain statutes without designating all interstate lines as a per se public use, they can enact statutes like those in New Mexico and Wyoming that explain why the development of renewable energy and the expansion of interstate transmission lines is a public purpose and public benefit to the state.

C. Should Merchant Lines Be Treated Differently Than Public Utility Lines?

As discussed in Part III, legislatures and courts in many states have addressed whether the broad, statutory eminent domain authority for electric transmission projects in general should apply equally to merchant lines. In most states, until electricity restructuring in the 1990s, publicly-regulated utilities had captive customers and owned both generation and transmission assets. Thus, there was little room for merchant transmission companies. In many states now though, both as a result of restructuring as well as the rise of renewable energy and the need to transport it to load centers, there is a growing market for merchant lines. Accordingly, a growing number of states are now forced to consider whether the same eminent domain authority granted to publicly-regulated utilities should also apply to these private lines.

In some states, particularly those states in the Interior West that have a history of granting eminent domain authority to private industry to develop the state’s natural resources, there seems to be little justification to challenge eminent domain authority for private lines. If mining companies and other traditional natural resource development companies may exercise eminent domain authority as a public use under state statutes or constitutions, transmission lines used to develop a state’s wind or solar resources seem no different. Outside the Interior West, however, that history of granting eminent domain authority to private parties to develop natural resources is not nearly so prevalent. Those states have historically limited eminent domain authority to governmental entities or highly-regulated industries or common carriers such as public utilities and railroads. In those states, there may be more distrust of private entities, including merchant transmission companies, exercising eminent domain authority. That distrust is evident in the recent statutory amendments in some states, like New Hampshire and New York, specifically eliminating or limiting eminent domain authority for merchant lines. In any state, however, the legislature certainly has authority to grant private merchant companies eminent domain authority to build electric transmission lines. Indeed, it would not appear to be difficult for a state to justify that such lines would constitute a public use, citing the need to develop state renewable or other electricity resources, increase the reliability of the state’s electrical grid, or otherwise contribute to the state’s economic welfare.

274 See supra notes 51-53 and accompanying text.
275 Id.
276 See Klass, supra note 44, at 665-61 (discussing differences between Interior West states and the rest of the country on this issue).
277 Id.
278 N.H. REV. STAT. ANN. § 371:1 (West 2012); N.Y. TRANSP. CORP. LAW § 11(3-a), § 10, § 11(7). See supra Table 1 for list of other states that prohibit merchant transmission operators from exercising eminent domain, either through general limitations or by judicial or administrative action.
Even if eminent domain authority for merchant lines can be justified as a pure legal matter, however, is it good public policy? Should we be concerned with private lines exercising such authority? Certainly, there is a concern throughout the country over the growing privatization of historically public functions such as schools, prisons, hospitals, police authority, and other public services.\(^{279}\) Without direct political accountability, or an express mission to work in the public interest, many of the safeguards that historically existed for these services often do not exist.\(^{280}\) Moreover, government oversight of these private entities is often lacking, sometimes resulting in inappropriate or excessive government spending on such services provided by the private sector, decreased quality of service, or outright fraud on the public.\(^{281}\)

It is not clear, however, that the same concerns exist for transmission lines, at least where adequate federal and state review approval processes exist. Even private lines must receive FERC approval to enter into contracts with electricity generators and providers, which provides oversight of at least some aspects of the financial viability of the line.\(^{282}\) To the extent states have a certificate of need or siting process through their state PUCs, such review processes provide additional oversight of the economics of a line as well as a review of the potential environmental impacts of the line. Of course, these review processes have many flaws and can often result in lines being built that are not economically justified or that have adverse environmental impacts that outweigh the lines’ benefits. But it is not at all clear that these concerns are more significant for private lines than for lines built by public utilities, particularly since merchant lines are generally subject to the same state review of public necessity and need as public utilities.\(^{283}\)


\(^{282}\) Order No. 1000, 136 FERC ¶ 61,051 (July 21, 2011); Werntz, supra note 56, at 440-70 (describing the evolution of FERC’s approach to evaluating proposals for negotiated rate authority); Energy and Natural Resources Market Regulation 2011 Annual Report, 2011 ABA ENVT ENERGY, & RESOURCES L.: YEAR IN REV. 181 (2011) (explaining that under Order No. 1000, proposed merchant lines must be evaluated in light of openness requirements of Order No. 890). See, e.g., Chinook Power Transmission, LLC Zephyr Power Transmission, LLC, 126 FERC ¶ 61,134, *1, *9 (2009) (in which merchant lines Chinook and Zephyr applied to FERC for authorization to charge negotiated rates on their proposed merchant transmission projects pursuant to 16 U.S.C.A. § 824d and 18 C.F.R. § 35, et seq., and laying out 10 criteria that a merchant line must meet to be granted such authorization.); TransEnergie U.S., Ltd., 91 FERC ¶ 61,230 (2000) (granting the first merchant transmission owner's application for negotiated rate authority in June of 2000). See also 16 U.S.C.A. § 824d(a) (West 2012) (authorizing FERC’s jurisdiction over "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject"); 18 C.F.R. § 35.47 (West 2012) (setting parameters for organized wholesale electric market tariff provisions); 18 C.F.R. § 35.28(g) (as amended by 77 FR 41482-01, July 13, 2012) (West 2012) (setting detailed procedures for approved independent system operators and RTOs regarding tariffs, bids from aggregators of retail customers, and market monitoring).

\(^{283}\) See supra at Part II.A; Jim Rossi, The Trojan Horse of Electric Power Transmission Line Siting Authority, 39 ENVTL. L. 1015, 1019-22 (2009). Most states require both public utilities and non-utilities to obtain a certificate of public convenience and necessity or equivalent approval prior to exercising eminent domain for new transmission lines. The exceptions are Colorado, Georgia, Hawaii, Indiana, Louisiana, Oklahoma, Utah, and Wyoming. See supra note 140 and accompanying text.
Indeed, since merchant lines are not able to recover their costs of construction and operation from ratepayers, there may be less, rather than more concern, that unnecessary lines will be built.\footnote{Brown \& Rossi, \textit{supra} note 140, at 749 (stating that “unless the line is being proposed by a utility for inclusion in rate base, it is difficult to see what is accomplished by requiring a public adjudication of need”).}

Accordingly, it is hard to justify treating merchant lines differently from utility-owned lines for eminent domain purposes other than as a result of a desire to limit eminent domain authority to governmental or highly-regulated entities as a matter of principle or a desire to limit the number of potential lines in general for environmental protection or other reasons.\footnote{For arguments in favor of eminent domain authority for private development of renewable energy, including the renewable energy facilities themselves, see Hannah Wiseman, \textit{et al.}, \textit{Formulating a Law of Sustainable Energy: The Renewables Component}, at \url{http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1830272} at 14-15 and notes 96-99.} At that level, the question is then whether the benefits of facilitating new lines for renewable energy development, grid reliability, or reduced costs\footnote{Increasing transmission capacity in areas like the northeast has the potential to significantly reduce electricity costs, as the increased transmission capacity provides access to less expensive renewable and non-renewable energy sources in low-density areas outside transmission-constrained regions like New York City. \textit{See} \textit{N.Y. INDEP. SYS. OPERATOR, FUEL DIVERSITY IN THE NEW YORK ELECTRICITY MARKET}, at 4-4 (2008), available at \url{http://www.nyiso.com/public/webdocs/newsroom/white_papers/fuel_diversity_11202008.pdf} (explaining that introducing additional wind power into the New York City market could reduce energy prices by roughly 10%); \textit{see also} \textit{ISO NEW ENGLAND, INC., ELECTRICITY COSTS WHITE PAPER}, at 3 (2006), available at \url{http://www.iso-ne.com/pubs/whtpprs/elec_costs_wht_ppr.pdf} (arguing that increasing energy supply from low cost sources (e.g., wind) could save New England consumers $600 million per year); Johannes Pfeifenberger \& Delphine Hou, \textit{Transmission’s True Value}, PUB. UTILS. FORTNIGHTLY, Feb. 2012, at 47, available at \url{http://anbarictransmission.com/wp-content/uploads/2012/02/PUF_TransmissionsTrueValue.pdf} (explaining that limited liquidity of electricity markets results in higher prices and decreased reliability, and that increasing transmission capacity increases liquidity); \textit{BOB FAGAN ET AL., SYNAPSE ENERGY ECONOMICS, INC., THE POTENTIAL RATE EFFECTS OF WIND ENERGY AND TRANSMISSION IN THE MIDWEST ISO REGION} 3 (May 22, 2012), \url{http://cleanenergytransmission.org/wp-content/uploads/2012/05/Full-Report-The-Potential-Rate-Effects-of-Wind-Energy-and-Transmission-in-the-Midwest-ISO-Region.pdf} (explaining that increasing transmission capacity for wind resources will reduce the market price of electricity for Midwest consumers).} outweigh the potential environmental impacts and other harms or costs associated with new lines. This would appear to be a policy question each state may decide for itself, based on state and regional energy development and grid reliability goals, rather than based on any principles inherent in eminent domain doctrine.

This, of course, leads to a patchwork of eminent domain authority across the country for merchant lines, which creates a problem for the development of new, interstate lines to develop renewable energy resources and maintain grid reliability. There will likely be a growing number of instances where the economics support development of a new, interstate merchant line but unfriendly eminent domain policies in certain states may make construction more difficult. One can argue that in the case of a private line, it is incumbent on the line developer to simply pay its way through voluntary contracts with landowners without the threat of eminent domain authority. But the fact remains that if states wish to develop their renewable energy resources and transmit those resources to out-of-state load centers, and those load centers wish to receive the energy, those states may wish to consider any current obstacles to eminent domain authority for private lines. The other approach, of course, is to create federal eminent domain authority for transmission lines similar to what exists for interstate national gas pipelines. In the case of interstate natural gas pipelines, once the project receives federal approval from FERC, there is a
federal grant of eminent domain authority that preempts any state laws that would pose an obstacle to exercising that authority. But there does not appear to be any political support in Congress at the current time for a transfer of eminent domain authority from the states to the federal government in the case of electric transmission lines, so for the time being, these issues will need to develop on a state-by-state basis.

To the extent the law continues to develop on a state-by-state basis, states that wish to attract investment in merchant lines may choose to amend their existing eminent domain statutes to expressly grant eminent domain authority to merchant lines. As shown in Table 1, a few states like Montana have recently amended their statutes to expressly grant eminent domain authority to merchant lines. Other states, like Wyoming, with broad grants of eminent domain authority to transmission lines generally, have court decisions confirming that such authority also applies to merchant lines. In many other states, however, the statutes are unclear and no case law exists interpreting them. For the states that fall into this category, if they wish to be more hospitable to such lines, they should enact legislation clarifying that private companies have the same eminent domain authority to build transmission lines as public utilities after receiving all necessary state approvals. Again, as a policy matter, many states may not wish to grant such authority to merchant lines, choosing instead to limit the use of eminent domain to more highly-regulated public utilities. Indeed, some states, like Nebraska, have enacted such limitations expressly, while Delaware does not even grant eminent domain authority to public utilities to build transmission lines. Still, the bulk of the states have laws that are unclear on the subject and more clarity in this area would undoubtedly aid in planning and decision-making for both regulators and the regulated community.

CONCLUSION

This is a critical time in the development of interstate electricity transmission in the United States. As regulatory policy attempts to encourage the development of renewable energy and create regional electricity markets, there are significant questions surrounding whether the nation’s state-based system of transmission siting is up to the task of facilitating the necessary developments in the electricity grid. As this Article shows, eminent domain law has always played a central role in building transmission lines. Now, however, as merchant transmission companies become more significant players in the field and it becomes more necessary to build interstate transmission lines to integrate these resources into the grid, it is increasingly clear that

287 See Klass & Wilson, supra note 85 (discussing federal eminent domain authority for interstate natural gas pipelines).
288 For a discussion of the politics of federal versus state authority for the siting of interstate transmission lines, see Klass & Wilson, supra note 85.
291 See supra Table 1; infra Appendix A.
293 DEL. CODE ANN. Tit. § 901, §§ 906-908, § 9501A (West 2012) (limiting eminent domain powers of all electric transmission companies to former railroad rights-of-ways, public roads, canals, and highways).
the patchwork of eminent domain law for transmission lines among the states is a potential barrier to meeting current and future goals regarding grid reliability, cost reduction, and renewable energy integration. This Article explores these challenges, particularly in light of the backlash to the *Kelo* decision, and suggests various paths states can follow to ensure their eminent domain laws are consistent with their policy preferences on energy development and export.
APPENDIX A

The following states have statutes that generally confer eminent domain authority to “power companies,” companies engaged in “transmission of electricity,” “utilities,” (or similar) and define these terms broadly enough that merchant transmission lines MIGHT be included, but no case law or administrative law firmly suggests they will or will not grant eminent domain to a merchant transmission line. For states that more clearly do or do not grant eminent domain authority to merchant lines, see supra Table 1.

Alabama: ALA. CODE §§ 18-1B-2, 37-4-130, 10A-21-2.01, 10A-21-2.04 (West 2012).
Arizona*: ARIZ. REV. STAT. ANN. §§ 12-1111(a)(10), 12-1115(c) (West 2012); ARIZ. CONST. art. XV, § 2 (West 2012); Sw. Transmission Co-op., Inc. v. Arizona Corp. Comm’n, 142 P.3d 1240, 1247 (Ariz. Ct. App. 2006) (holding that a transmission co-op that only provided electric power at wholesale to other utilities was defined as a “public service corporation,” even though it did not provide power directly to public, suggesting a flexible definition of “public service corporation”).
California*: CAL. PUB. UTIL. CODE § 610, §612, § 216(e), § 217, § 218(b)(3) (West 2012). Compare Law Revision Commission Comments: “Section 610 is included to make clear that this article extends the right of eminent domain only to ‘public utilities’ […] and not to persons or corporations that are not subject to regulation and rate control....” (reprinted in Westlaw, CAL. PUB. UTIL. CODE § 610) with CAL. PUB. UTIL. CODE § 216(c) (public utility broadly defined as “any person or corporation” that delivers “any commodity to” an entity that serves the public).
Colorado*: COLO. REV. STAT. ANN. §§ 32-12-125, 38-1-202(2)(e), 40-1-103(2)(a), 38-1-202 (2)(l), 38-1-101(1), 38-1-103, 38-1-105 (West 2012) (“If any corporation formed for the purpose of constructing [an], electric line ... is unable to agree with the owner for the purchase of any real estate or right-of-way or easement or other right necessary or required for the purpose of any such corporation for transacting its business or for any lawful purpose connected with the operations of the company, the corporation may acquire title to such real estate or right-of-way or easement or other right in the manner provided by law for the condemnation of real estate or right-of-way.”).
Georgia: GA. CODE ANN §§ 22-3-160, 22-3-160.1, 22-3-161 (West 2012).
Hawaii†: HAW. REV. STAT. §§ 101-4, 269-1(G) (as amended by 2012 HAWAII LAWS ACT 166 (S.B. 2787) on June 27, 2012), § 269-A (West 2012).
Idaho*: IDAHO CODE ANN. § 7-701(11); H.B. 268, 61st Leg., 1st Reg. Sess. (Idaho 2011) (failed 2011 legislation that would have required entities other than public utilities to prove a proposed taking was in the interest of Idaho citizens, strongly suggesting non-utility transmission companies currently have an unencumbered right of eminent domain).
Iowa*: IOWA CODE ANN. §§ 478.1(1), 478.6, 478.15 (West 2012) (grant of franchise by the Utilities Board to “any person, company, or corporation” for the operation of transmission lines vests in that entity the right to exercise eminent domain “to such extent as the board may approve and find necessary for public use”); ITC Midwest LLC, 2011 WL 3796221 at *2 (Iowa U.B. 2011) (granting eminent domain powers to an independent transmission company).
Louisiana: LA. REV. STAT. ANN. § 19:2 (as amended by 2012 LA. SESS. LAW. SERV. ACT 702 (H.B. 274)).


Massachusetts*: MASS. GEN. LAWS ANN. ch. 164, §§ 69R, 1, 69G, 72(a) (West 2012) (in addition to granting broad authority to “electric companies,” the Department of Public Utilities may authorize a “transmission company” to use eminent domain).

Minnesota†: MINN. STAT. ANN. §§ 216E.12(1), 216E.01(1), 117.189 (West 2012); In re Prairie Rose Transmission, LLC, 2012 WL 258025 (Minn. P.U.C., Jan. 13, 2012) (granting a CPCN for a private transmission project that would connect Prairie Rose Wind Farm to the grid, and noting that Prairie Rose Transmission would not have eminent domain authority, but failing to explain why, or whether it had sought eminent domain authority).


Nevada†: NEV. REV. STAT. ANN. §§ 37.010, 704.020(2)(a), 704.021 (West 2011) (noting that persons who produce and sell energy to public utilities are not themselves public utilities).


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


Ohio: OHIO REV. CODE. ANN. § 4933.15 (West 2011); Ohio Power Co. v. Diller, 18 Ohio App. 2d 167, 247 N.E.2d 774 (Ohio Ct. App. 1969) (describing the broad and discretionary nature of the legislature’s grant of authority to electric companies).

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


South Dakota*: S.D. CODIFIED LAWS §§ 21-35-1, 21-35-1.1, 49-34-4 (West 2012); Basin Elec. Power Co-op. v. Payne, 298 N.W.2d 385, 386 (S.D. 1980) (in which the South Dakota supreme court expressed no reservations about construing "utility" so broadly as to include an electric cooperative for purposes of eminent domain authority).

Tennessee*: TENN. CODE ANN. § 7-39-303(a)(4) (granting eminent domain rights to “energy acquisition corporations” that transmit AND distribute energy), §§ 7-39-102(3), 7-39-201, 65-22-101 (West 2012); Webb v. Knox County Transmission Co., 225 S.W. 1046 (Tenn. 1920) (affirming the eminent domain rights of a private company that served only to transmit electricity to an unaffiliated generation facility to a public service corporation, but prior to the enactment of relevant modern statutes). Tennessee courts upheld *Webb* in 1951 and 1990,

**Texas**: TEX. UTIL. CODE ANN. §§ 181.004, 181.004 (West 2011); Complaint of Richard D. Bass Family Against Lone Star Transmission, LLC, 2011 WL 5890724 (Tex. P.U.C. Nov. 16, 2011); Application of Electric Transmission Texas LLC, 2009 WL 3698814 (Tex. P.U.C. Aug. 25, 2009) at Attachment A (revised notice from private transmission developer ETT to landowners informing them ETT has the power of eminent domain under Texas law).

**Utah**: UTAH CODE ANN. §§ 78B-6-501(8), 78B-6-505 (West 2012).

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

**Washington**: WASH. REV. CODE ANN. §§ 80.32.060, 80.32.080, 80.32.090 (West 2012); State v. Superior Court In & For Chelan County, 259 P. 379, 380 (Wash. 1927).


**Wyoming**: WYO. STAT. ANN. §§ 1-26-815(a), 1-26-815(d) (West 2012); Bridle Bit Ranch Co. v. Basin Elec. Power Co-op., 118 P.3d 996, 998, 1003 (Wyo. 2005) (holding that a wholesale electric generation and transmission cooperative was not a public utility, and therefore did not need a certificate of public necessity and convenience, but that it could exercise eminent domain regardless).

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