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Power Runs Through States

For national grid and off-shore drilling proposals, the federal government is not the only official decision-maker.

ENERGY LAW

By Adam J. White

As a candidate, President-elect Barack Obama promoted U.S. energy independence and infrastructure reform—projects that will demand significant coordination between public and private interests. Discussions among lawmakers, regulators, and business executives will receive much attention. But some of the most challenging energy issues may arise within government—specifically, between the federal government and the states.

Wind, Sun, and the Grid

Throughout the campaign, Obama called for greater reliance on alternative energy sources such as wind and solar power. Because wind and solar farms often are located far from the urban and suburban populations they serve, greater reliance upon such sources will require further development of the interstate power transmission grid.

Thus, Obama's campaign also called for "major investment in our national utility grid" and the establishment of a "Grid Modernization Commission." Similarly, Commissioner Suedeen Kelly of the Federal Energy Regulatory Commission—possibly the next FERC chairwoman—has said the country needs "an interstate transmission superhighway system."

But the success of grid development proposals may require substantial reallocation of federal and state authority. Traditionally, the siting of interstate transmission lines has not been controlled by the federal government. Congress has permitted the states to retain broad authority here, owing to the grid's origins not as one coordinated national network but as a panoply of local and regional networks. Efforts to increase federal authority have faced stiff political resistance from the states.

The litigation arising from FERC's exercise of new transmission-siting authority under the Energy Policy Act of 2005 offers a useful example. In passing that legislation, the Senate found that "[s]iting challenges, including a lack of meaningful coordination among States, impede the improvement of the electric system." Thus, Congress and the president gave FERC new authority to approve certain transmission projects when the states have "withheld approval." States have filed challenges to that authority in the 4th Circuit, arguing that FERC cannot approve projects rejected by state regulators.

Meanwhile, there have been calls to expand federal transmission-siting jurisdiction even further. Last summer, FERC Chairman Joseph Kelliher called on Congress to give FERC "exclusive siting authority." He reasoned, "If the network is national, siting should be done at the national level."

Pressure for greater federal authority may only intensify if the Obama administration pursues a renewable-energy agenda dependent upon a more efficient transmission grid—as will the counter-pressure to preserve the states' domain.

Looking Seaward

Until recently, oil and gas leasing was prohibited on portions of the Outer Continental Shelf located off the East and West coasts and the eastern Gulf Coast. But the long-standing statutory moratorium has expired, and President George W. Bush rescinded a similar administrative ban. Some voices now call for reimposition of the moratorium, and others for intense development of the OCS's energy resources. Obama has signaled his intent to chart a middle course, endorsing "compromise in terms of a careful, well thought-out drilling strategy … carefully circumscribed to avoid significant environmental damage."

If Obama and Congress open the door to new OCS development, they will run into questions of states' authority and interests. The interests most often noted are those of the coastal states: Should they be allowed to veto OCS development near their shores, even when it is supported by the federal government? Should they be allowed to authorize OCS

development opposed by the federal government? To what extent should they share in its financial rewards or be relieved of its burdens?

But another set of state interests also will be at issue—those of the landlocked states, whose energy security may depend on the prudent use of OCS resources held in trust for the benefit of all Americans. As Congress said when it enacted the Coastal Zone Management Act of 1972, there is "a national interest" in the protection and development of our coastal resources.

OCS issues will arise in a variety of forums, including Congress, the Interior Department, the Commerce Department, FERC, and the federal courts. Thus, their resolution will turn not merely on legal authority, but also on the facts and policies underlying officials' decisions.

Furthermore, energy infrastructure development often implicates environmental laws by which Congress delegated federal authority or participatory rights to the states, such as the National Environmental Policy Act, the Coastal Zone Management Act, and the Clean Water Act. Programs under these laws have substantial state input; some even give the states a limited "veto" over federally regulated infrastructure, subject to review by the executive branch and the courts.

Thus, Obama may find that the success of national grid and OCS development proposals will turn on whether he can convince the states to support them—or whether he can muster the factual and legal arguments to supersede their opposition. Indeed, if the next administration determines that a particular infrastructure initiative is sufficiently important, it may try to amend the pertinent federal statutes or to otherwise exempt the proposal from the coverage of generally applicable rules. For example, the Supreme Court recently affirmed the Bush administration's invocation of a law exempting certain national security activities from the requirements of the National Environmental Policy Act.

Listen and Decide

As the federal government pursues its energy priorities next year, it should keep a few general principles in mind.

First, the federal government should give a fair hearing to the states as legislation and regulations are debated. If the states conclude their interests are not being given due weight, then they will strike back by leveraging their authority in other forums—in particular, through the environmental programs noted here.

Second, new statutes and regulations should unambiguously give ultimate decision-making authority to a single body—and in a manner conducive to appropriate judicial review. The authority of state and federal agencies must be clearly defined; otherwise, critical reforms can be hampered by quarrels among state and federal governments. Infrastructure proposals involving federal and state permits must be crafted to ensure that regulatory decisions are made in a timely manner and then addressed in the federal courts when appropriate.

Energy infrastructure reform may prove to be one of the highest priorities of the Obama administration and Congress. But if they want their efforts to bear fruit, they must resolve federalism issues at the outset, lest state challenges undermine their top energy initiatives.

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