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## Siting Technology, Land-Use Energized

Steven Ferrey

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## Siting Technology, Land-Use Energized

### **Cover Page Footnote**

Professor of Law, Suffolk University Law School; Distinguished Energy Scholar Vermont Law School 2015; Visiting Professor of Law, Harvard Law School, 2003. Since 1993, Professor Ferrey has been a primary legal consultant to the World Bank and the U.N. Development Program on their renewable and carbon reduction policies in developing countries, where he has worked extensively in Asia, Africa, and Latin America. He holds a B.A. in Economics, a Juris Doctorate, a Master's Degree in Regional Energy & Environmental Planning, and between his graduate degrees was a Fulbright Fellow at the University of London. He is the author of seven books on energy and environmental law and policy, including *Unlocking the Global Warming Toolbox*, 2010, and *The Law of Independent Power*, 41st Ed. 2015. He is the author of more than 100 articles on these topics. Professor Ferrey acknowledges the research assistance of Hilary Borcharding and Kurt Stiegel.

# SITING TECHNOLOGY, LAND-USE ENERGIZED

Steven Ferrey<sup>+</sup>

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“We take for granted electricity, water, even concerts. Count your blessings.”<sup>1</sup>

— Damian Marley

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1. Steve Mitnick, *Singing Electricity*, FORTNIGHTLY, <http://www.fortnightly.com/fortnightly/2015/12-0/singing-electricity> (last visited Aug. 17, 2016).

Electric power is important—extremely important.<sup>2</sup> Nothing is more indispensable than electricity in the foundation of the modern economy.<sup>3</sup> Because the printing press was identified as the only more important invention of all time,<sup>4</sup> that elevates electricity, and the law, which must be developed to govern it, to an even more critical status. Electricity is transmitted over a regulated network. The high-voltage transmission network was recognized by engineers as the most important engineering feat of the 20<sup>th</sup> century.<sup>5</sup> With a delivered value in the United States of approximately \$390 billion annually,<sup>6</sup> exceeding the total amount of corporate income taxes collected in the United States,<sup>7</sup> electricity is a major part of the U.S. economy.

The law regulates how and where we build our electric infrastructure. But when laws overlap or conflict, which level(s) of government—federal, state, and/or local—has jurisdiction, if any, over power generation facility siting? This question opens the cover on a very fractured system of law disaggregated and dissonant in different states:

- The federal government has exclusive authority over certain transactions from electric generation facilities and carried over power transmission lines, but no authority whatsoever over siting—the infrastructure of power generation facilities and lines.<sup>8</sup>

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2. James Fallows, *The Fifty Greatest Breakthroughs Since the Wheel*, ATLANTIC MONTHLY, (Nov. 2013), <http://www.theatlantic.com/magazine/archive/2013/11/innovations-list/309536/>. Electricity finished behind only the printing press. *Id.* Electricity is essential to operate seven other “top 50” inventions of all time: the Internet, computers, air-conditioning, radio, television, the telephone, and semiconductors. *Id.*

3. STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES & EXPLANATIONS 580–84 (6th ed. 2013) [hereinafter FERREY, ENVIRONMENTAL LAW].

4. See Fallows, *supra* note 2.

5. Mason Willrich, *Electricity Transmission Policy for America: Enabling a Smart Grid, End to End*, ELECTRICITY J., 77, 77 (Dec. 2009).

6. U.S. Energy Info. Admin., *Electric Power Annual 2014*, U.S. DEP’T OF ENERGY 11 (Feb. 2016), <http://www.eia.gov/electricity/annual/>. The average delivered price of all electricity nationwide in 2011 was \$0.0966/Kwh, and \$0.1102/Kwh for residential customers. See *Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State, Year-to-Date through February 2011 and 2010*, PUB. POLICY INST. OF N.Y., <http://ppinys.org/reports/jtf/2011/employ/average-retail-price-of-electricity2010-11.htm> (last visited July 31, 2016).

7. Tax Policy Center, *Historical Amount of Revenue by Source*, URBAN INSTITUTE & BROOKINGS INSTITUTE (Feb. 3, 2015), <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=203> (showing that the 2011 revenue from corporate income tax was \$101,085,000).

8. The Federal Energy Regulatory Commission (“FERC”) describes the limit of its own jurisdictional authority by leaving the local distribution of electricity and facility regulation approval as a responsibility reserved for the State Public Utility Commission. *About FERC*, FEDERAL ENERGY REGULATORY COMMISSION (May 24, 2016) <http://www.ferc.gov/about/ferc-does.asp>.

- Local cities and towns exclusively exercise their fundamental police power over all electric facility land-use and siting authority, in very different manners.<sup>9</sup>

A significant subset of U.S. states added an additional layer of state permissions for power facility siting, some either overriding or legally preempting the exercise of traditional municipal police power in their states.<sup>10</sup>

There is direct legal conflict arising from some of these countervailing federal, state, and local exercises of authorities. This Article analyzes jurisdictional issues surrounding this critical invention. The Article distinguishes in comparative detail that half of the states step over their local authorities with separate state regulatory systems. The legal standards are compared as to types of agencies, burden of proof, legal standing, and judicial appeal.

This article analyzes jurisdictional issues surrounding this critical invention. Energy facility siting is jurisdictionally vested in the fifty states plus four territories, and, under traditional law, in thousands of municipal governments, collectively controlling under very divergent and contradictory law the second most important invention in history. The moving jurisdictional pieces of the mosaic create a legal “check-mate,” even more complicated by the new federal Clean Power Plan implemented by the Obama Administration through “executive action” without Congressional approval.<sup>11</sup>

Part I of the Article sets the jurisdictional board on which there is a multi-level government “check-mate.” The Article focuses on the legal impact over the past two decades when one-quarter of the states deregulated their traditional control over retail electric power, changing fundamentally the regulatory landscape of state law. Section I also examines and compares the changing state power-siting laws in multiple dimensions: states are divided between approximately half that exercise state authority over energy facility siting, and half that do not, with multiple variations.

Part II analyzes whether an added layer of state siting jurisdiction preempts local land-use and zoning authority. Some states expressly preempt local jurisdictions, some impliedly preempt local jurisdiction, and some do not. There are fundamental constitutional issues coursing through the manner by which state and local authorities intertwine for power-siting in different states.

Part III examines the mechanics of the regulatory structure. It compares in different states the rights of citizen to participate in a power-siting determination

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9. See FERREY, ENVIRONMENTAL LAW, *supra* note 3, at 487.

10. See *infra* Section III.A.

11. Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64, 510, 64, 524–25 (Oct. 23, 2015) (codified at 40 CFR Parts 60, 70, 71, et al.) (discussing the development of the Clean Power Plan); see also, Justin Worland, *How the Supreme Court Just Slowed Climate Efforts — and Why Environmental Activists Remain Optimistic*, TIME (Feb. 10, 2016), <http://time.com/4215597/clean-power-plan-supreme-court/> (discussing the Supreme Court’s response to the Clean Power Plan).

and appeal. It focuses on the different structures and composition of state decision-making agencies, whether independent or controlled, the degree of public access, and the varying requirements for legal standing and appeal. In one state, the governor makes the decision.<sup>12</sup> In some states, the board is an independent agency, while in others it sits as a panel advising an agency.<sup>13</sup> Not all states even require public hearings.<sup>14</sup> Some states make potential intervenor funding available.<sup>15</sup>

There are critical distinctions of both legal substance and legal process when one compares siting authority across the state mosaic. Even small legal distinctions and variances matter in something as important as electric power. Federal, state, and local law can conflict. Check-mate.

## I. REGULATION OF POWER PLACEMENT: STATE VS. LOCAL JURISDICTION

### A. *The Scope of Regulation*

Every state that has investor-owned public utilities to regulate (all states except Nebraska), regulates its activities through its public utilities commission (PUC).<sup>16</sup> PUCs are designed to protect rate-payers by regulating monopoly investor-owned utilities, control costs, and ensure the reliability of electricity service.<sup>17</sup> PUCs exercise different authority under disparate state law in different states.<sup>18</sup> State authority varies as to:

- Whether states exercise any authority over power facility siting.
- Whether such authority applies only to projects over a certain minimum size.
- Whether it applies only to projects of regulated monopoly utilities, or whether it also includes independent power generation companies.
- Whether states exercise preemptive legal authority over otherwise local land-use decisions.
- Rights to intervene as parties.
- Rights to legal appeal.

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12. See *infra* note 235 and accompanying text (discussing Washington).

13. See *infra* Part III.

14. See *infra* Part III.

15. See *infra* Section IV.B (discussing New York).

16. Nebraska has no private utilities, and is the only state without a PUC. Different states have different names for this agency in their states. See Allan M. Williams, *The Winds of Change: How Nebraska Law Has Stalled the Development of Wind Energy and What Can Be Done to Spur Growth*, 47 CREIGHTON L. REV. 477, 489 (2014) (describing the rise of publicly owned utilities).

17. See Jonas J. Monast & Sarah K. Adair, *A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protection Goals*, 38 COLUM. ENVTL. L. 1, 11 (2013) (tracing the history of Public Utilities Commissions).

18. See *id.* at 12–13.

The platforms generating power have changed significantly. During most of the 20<sup>th</sup> century, power was generated by utilities which enjoyed a monopoly.<sup>19</sup> This began to change with the enactment of the Public Utility Regulatory Policies Act of 1978.<sup>20</sup> Beginning in 1997 in Massachusetts, Rhode Island, and then spreading to thirteen states (see Fig. 1), competition and partial deregulation of retail power was adopted in approximately one-quarter of the states.<sup>21</sup> In a significant number of these thirteen states, this resulted in the regulated monopoly utilities selling their generation units to independent power companies.<sup>22</sup> Now, for more than a decade, more new power generation is constructed each year by independent power (“merchant”) companies than by the regulated utilities.<sup>23</sup> And this trend is expected to continue as more distributed generation, including solar rooftop facilities, continues to proliferate.<sup>24</sup>

This change in the market has significant implications for legal authority over new power generation facilities. Local communities have always exercised the police power to regulate what gets sited and where.<sup>25</sup> There is no power that is more local than the police power, which includes land use and facility siting control.<sup>26</sup> While some may think that new renewable energy technologies eliminate concerns regarding siting, this is not true. Concentrating solar collectors requires ten times as much land area, and wind turbines require up to

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19. See STEVEN FERREY, *THE NEW RULES: A GUIDE TO ELECTRIC MARKET REGULATION*, App. A (2000) [hereinafter FERREY, *THE NEW RULES*].

20. 16 U.S.C. § 824a-3 (2012). See STEVEN FERREY, *LAW OF INDEPENDENT POWER* § 4:25 (38th ed., 2015) [hereinafter FERREY, *LAW OF INDEPENDENT POWER*].

21. See FERREY, *supra* note 19, at 234–39.

22. See, e.g., Office of Coal, Nuclear, Elec. & Alternate Fuels, *The Changing Structure of the Electric Power Industry 2000: An Update*, ENERGY INFORMATION ADMIN. 106 (2000).

23. As one report recognized:

In the 1970s, vertically integrated utility companies (investor-owned, municipal, or cooperative) controlled over 95 percent of the electric generation in the United States. . . . [B]y 2004 electric utilities owned less than 60 percent of electric generating capacity. Increasingly, decisions affecting retail customers and electricity rates are split among federal, state, and new private, regional entities.

*Report to Congress on Wholesale and Retail Competition Markets for Electric Energy*, ELECTRIC ENERGY MARKET COMPETITION TASK FORCE (2007), [http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EPAct\\_sec\\_1815\\_rpt\\_transmittal\\_letter\\_-\\_Epact\\_sec\\_1815\\_rpt\\_to\\_Congress.pdf](http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EPAct_sec_1815_rpt_transmittal_letter_-_Epact_sec_1815_rpt_to_Congress.pdf) [hereinafter *Report to Congress*]; see also STEVEN FERREY, *Sale of Electricity*, in *THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES* 218 (Michael B. Gerrard ed., 2011).

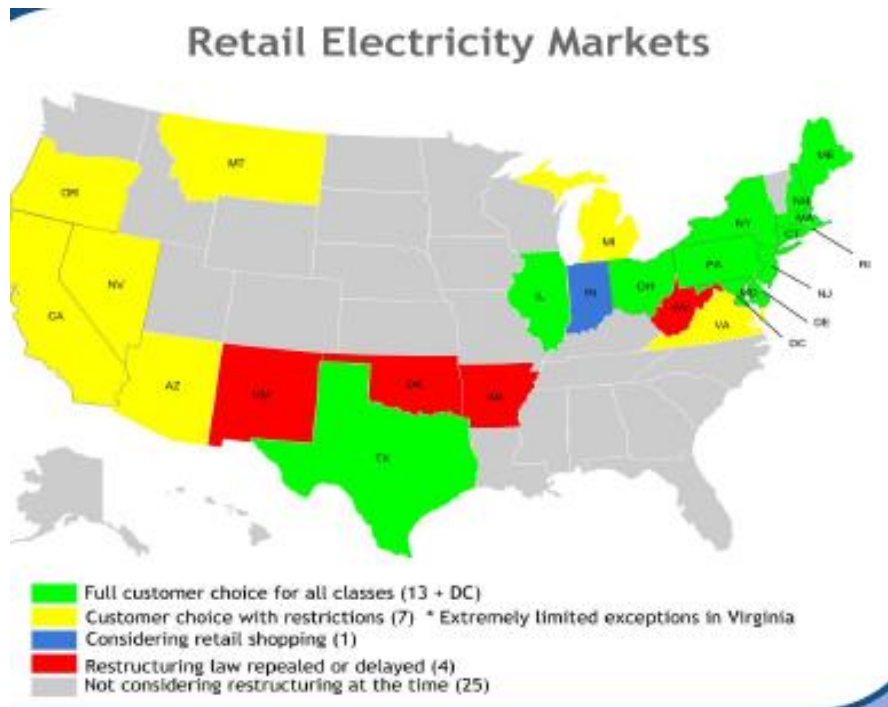
24. See generally Robert Glennon & Andrew Reeves, *Solar Energy's Cloudy Future*, 1 ARIZ. J. ENV'L LAW & POL. 91, 105 (Dec. 2010).

25. See FERREY, *ENVIRONMENTAL LAW*, *supra* note 3, at 487.

26. See Mary A. Moran, *Transmission Line Siting: Local Concerns Versus State Energy Interests*, 19 URB. L. ANN. 183, 185 n.12 (1980) (“‘Police power’ is the term used to describe the inherent right of a state and local government to enact legislation protecting the safety, morals, health or general welfare of the people within its jurisdiction from the unrestrained liberty of some individuals.”).

seventy times as much land area, as does a typical fossil-fuel-fired power plant.<sup>27</sup> This is because solar technology is less dense and less efficient in generating electricity<sup>28</sup> through a centralized turbine technology than concentrated fossil-fuel technologies.<sup>29</sup>

*Figure 1:*



#### *B. A Purely Local Process with No Primary State Siting Agency*

One group of states has a common, uniquely local, legal structure because the state plays no role in the siting process for independent merchant, or investor-owned utility, projects. In these states, either no single state agency is primarily responsible for siting, or any existing agencies have no siting jurisdiction. In Pennsylvania, Oklahoma, Georgia, and Utah, the PUC and other state agencies

27. See Glennon & Reeves, *supra* note 24, at 104.

28. *Id.* at 127.

29. *Id.* at 101.



have no singular jurisdiction or authority over generation facility siting.<sup>30</sup> Georgia, Oklahoma, and Utah have no primary siting agencies; instead a state permit regarding construction rests indirectly in many different state agencies.<sup>31</sup> In Oklahoma and Pennsylvania, municipalities are the only entities that have jurisdiction on siting matters,<sup>32</sup> though, in Pennsylvania the PUC can examine life cycle costs of utility owned units.<sup>33</sup> In Pennsylvania, the PUC can also order cancellation or modification of locally sanctioned projects, and the state can preempt local land-use regulations.<sup>34</sup>

With regard to electric power facility location, it is fundamentally a local determination.<sup>35</sup> All local communities want unlimited electricity, but few want to be the site of power generation facilities.<sup>36</sup> The answer to this legal question is a function of state energy facility siting law. As examined below, some states make such determinations:

- As a joint decision of state and local government agencies.
- Exclusively as a matter of local land-use determinations.
- Exclusively as a preemptive decision of state government.
- As a unique or somewhat odd determination.

Each format sculpts a different outcome under law, and this Article next analyzes each jurisdictional variation.

### C. Required State Certification for All Electric Generation Facilities

Given that forty-nine of the fifty states have PUCs to regulate private investor-owned utilities (and the fiftieth state, Nebraska, has no PUC because there are

30. See, e.g., OKLA. STAT. tit. 17, § 152 (2016) (regulation of new facility construction is notably absent from the statute).

31. Tom Stanton, *Wind Energy & Wind Park Siting and Zoning Best Practices And Guidance for States*, THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONS a-23, a-77, a-93 (Jan. 2012), <http://pubs.naruc.org/pub/539BA6EE-2354-D714-5157-359DDD67CE7F>.

32. *Id.* at a-77, a-81.

33. 66 PA. CONS. STAT. § 515(a) (2016) (requiring connection to public utility). The statute also defines construction as “any work performed on an electric generating unit which is expected to require the affected public utility to incur an aggregate of at least \$100,000,00 of expenses which, in accordance with general accepted accounting principles, are capital expenses and not operating maintenance expenses.” See *id.* § 515(d).

34. See The Brattle Grp., *Survey of Transmission Siting Practices in the Midwest*, EDISON ELEC. INS., 10–11 (2004). Additionally, a corporation can petition the PUC, and after a public hearing, the PUC can “decide that the present or proposed situation of the building is reasonably necessary for the convenience or welfare of the public.” 53 PA. CONS. STAT. § 10619 (2016) (exempting public utilities from municipal zoning regulations if a successful appeal is made to the PUC); *Newton Twp v. Philadelphia Elec. Co.*, 594 A.2d 834 (Pa. Commw. Ct. 1991).

35. See Lydia DePillis, *A Nuclear Power Plant With a View*, SLATE (July 21, 2009, 2:37PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/07/a\\_nuclear\\_power\\_plant\\_with\\_a\\_view.htm](http://www.slate.com/articles/news_and_politics/explainer/2009/07/a_nuclear_power_plant_with_a_view.htm). See generally FERREY, ENVIRONMENTAL LAW, *supra* note 3, at 485–526 (discussing local environmental controls and the local jurisdiction’s control over siting).

36. STEPHEN ANSOLABEHERE & DAVID M. KONISKY, CHEAP AND CLEAN: HOW AMERICANS THINK ABOUT ENERGY IN THE AGE OF GLOBAL WARMING 58–59 (2014).

no investor-owned utilities in the state to regulate<sup>37</sup>), one would assume that forty-nine state PUCs would regulate the siting of new power generation facilities by those regulated utilities. However, barely half of the states exercise such authority. In twenty-eight states, any new electric generation facility of a certain size must obtain pre-requisite state certification before construction of the power generation asset begins.<sup>38</sup> In twenty-two states, there is no state siting permit required for new power generation facilities.<sup>39</sup>

Nor does this legal jurisdiction division correspond directly to those states that have deregulated their retail electric service in part or in whole, as displayed in Figure 1. Nor is there any particular regional trend in these state power facility siting requirements. The states that do regulate siting include: Arizona, California, Connecticut, District of Columbia, Florida, Iowa, Kentucky, Maine,<sup>40</sup> Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Virginia, Wisconsin, and Washington.<sup>41</sup> This includes nine of the approximately thirteen states (seventy percent) which have deregulated retail power, and nineteen of the forty-seven states (forty percent) which have not deregulated.<sup>42</sup> So, the exercise of siting regulation does not correspond directly to the degree of retail regulation that states have chosen in their laws.

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37. *Nebraska Power Review Board Orientation Manual: Historical Perspective*, NEB. POWER REVIEW BRD., <http://www.powerreviewboard.nebraska.gov/prbmanual/2.html> (last visited Sep. 10, 2016).

38. *See generally State Generation & Transmission Siting Directory*, EDISON ELECTRIC INST., (2013), [http://www.eei.org/issuesandpolicy/transmission/Documents/State\\_Generation\\_Transmission\\_Siting\\_Directory.pdf](http://www.eei.org/issuesandpolicy/transmission/Documents/State_Generation_Transmission_Siting_Directory.pdf) (discussing the siting process for generation facilities in all 50 states and the District of Columbia).

39. *See id.*; *see generally* Lee Paddock & Lea Colasuonno, *Minimizing Species Disputes in Energy Siting: Utilizing Natural Heritage Inventories*, 87 N.D. L. REV. 603, 621 (2011) (noting that Wyoming and Idaho leave energy facility siting responsible to local governments).

40. *See* ME. STAT. tit. 38, § 484 (2014). Though Maine has no primary siting authority all generation facilities are subject to some project specific procedure. *See id.* Particular siting requirements vary depending on the facility but nearly all require air emission, wastewater, storm water, wetland, and Site Location Development (Site Law) Permits. *Id.* The Department of Environmental Protection coordinates the review and permitting in areas of the state in which there are incorporated governments, and the Maine Land Use Planning Commission coordinates review and permitting in areas with no local incorporated municipal government, which definitional includes all municipalities that have not had their land use laws approved by the Commission. *See id.* § 343-H (providing an example of the Department of Environmental Protection's power to review permitting and siting among state agencies and state-sponsored institutions). ME. STAT. tit. 38 M.R.S.A. *Id.* § 343-H(B)(2) (2014). The Site Law enabling statute notes that some developments are too important to leave to determination of its owners and the state has an interest in controlling the location to protect the environment. *See* ME. STAT. tit. 38 M.R.S.A. § 481 (2014). The statute further notes that the purpose of the act is for the State, acting through the Department to control the location of "those developments substantially affecting local environment." *See id.*

41. *See* discussion *infra* Section I.D.

42. *See supra* Figure 1.

And this jurisdiction does differ within these twenty-eight states that exercise authority as to whether jurisdiction over siting is vested in the state PUC or in a separate state siting authority. Fifteen of these twenty-eight states have a separate and single-purpose specific energy facility siting authority legally apart from the PUC commission that regulates retail energy transactions in the state.<sup>43</sup> The fifteen states with separate regulatory agencies exercising authority over siting are: Arizona, California, Connecticut, Florida, Maine, Massachusetts, Nebraska, Kentucky, New Hampshire, New York, Ohio, Oregon, Rhode Island, Washington, and Wyoming.<sup>44</sup>

And size matters. Only six of the twenty-eight states that regulate, regulate the siting of any new power generation facility regardless of its size, and impliedly therefore its potential environmental impacts.<sup>45</sup> The other twenty-two states apply varying metrics of size to trigger regulation of a proposed facility.<sup>46</sup> Next, we examine varying legal size siting criteria in these twenty-two states.

#### D. Legal Size Thresholds

There are six states where size of the generating facility does not matter; all new facilities regardless of size must be approved by the state prior to any construction. In Connecticut,<sup>47</sup> District of Columbia,<sup>48</sup> Kentucky,<sup>49</sup> Nebraska,<sup>50</sup>

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43. See generally *State Generation & Transmission Siting Directory*, *supra* note 38.

44. See Stanton, *supra* note 31, at 6–13 tbl.1.

45. See *infra* Section I.D.

46. See *infra* Section I.D.

47. See CONN. GEN. STAT. § 16-50X (2016). Connecticut requires all facilities to obtain a Certificate of Environmental Compatibility and Public Need from the Connecticut Siting Council. See *id.* This Council has exclusive jurisdiction over the location and type of all energy generation facilities. See *id.*

48. See D.C. CODE § 34-302 (2016). “No person shall begin the construction of a gas plant or an electric plant without first having obtained the permission and approval of the Commission.” *Id.* However, D.C. municipal regulations state that they do not govern projects under 69 MW. D.C. MUN. REGS. tit. 15, § 2100.1 (2016) (stating that D.C. municipal regulations govern the construction of electric generating facilities designed to carry 69,000 volts or more). Furthermore, if a generation facility is not solely located within D.C., then FERC, not the Commission, will be responsible for permitting. See *id.* § 2100.2 (“No person shall construct an electric generating facility in the District of Columbia for the purposes of selling electricity unless the Commission first determines . . . that the construction of the facility is in the public interest.”) (emphasis added).

49. 807 KY. ADMIN. REGS. 5:001 § 15(2) (2016) (describing the application process).

50. NEB. REV. STAT. § 70-1003 (2016) (detailing the makeup of the review board and its general responsibilities); NEB. REV. STAT. § 70-1012 (2016) (noting new construction projects must seek approval unless facility will not supply energy to an area outside it currently defined zone). In Nebraska, before construction, a proposed power plant or transmission line over 700 kV must seek approval from the Nebraska Power Review Board, and demonstrate that the plant will service the public convenience and necessity. See *id.* § 70-1014.

New Jersey,<sup>51</sup> and Vermont,<sup>52</sup> all plants regardless of size of the generation unit are subject to some, even if minimal, state siting certification procedures.

And one state does not regulate based on size of electric generation capacity, but based on the amount of land affected. Maine does not use size of the generation facility to determine its state jurisdiction; instead oversight is asserted by the amount of land that the facility occupies—triggered at twenty acres or more—with different processes depending on whether the site is in an incorporated or unincorporated municipality.<sup>53</sup> In some ways, Maine regulates at the state level based on land-use impacts rather than impacts of the power generator facility operation.

In these six states, the details of regulation vary regarding both generation facilities and the power transmission and distribution lines to transmit power generated. In Kentucky, regulated utilities must obtain a Certificate of Public Convenience and Necessity for any new generator construction and transmission lines of size 138 kV or greater that occupy at least one mile in linear length.<sup>54</sup> Merchant plants (not constructed by a regulated utility) with a potential generation capacity of more than 10 MW, as well as transmission lines of 69 kV or greater, require approval from the Kentucky State Board on Electric Generation and Transmission Siting.<sup>55</sup> Therefore, Kentucky does impose a size threshold for privately-owned power plants, excluding most on-site self-generation units by size.

For the other twenty-two states that do impose a size threshold before they regulate the construction of new facilities, the size thresholds for jurisdiction vary greatly without any correspondence to the geographic, population, or land mass of the state. There is an ascending ladder of size thresholds:

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51. NEV. REV. STAT. § 704.890 (2015). All applicants must also receive a Utility Environmental Permit Act (UEPA) permit from the Public Utilities Commission of Nevada for conventional generation. *See id.* There is an exemption of the UEPA for renewable projects under 70 MW gross nameplate rating. *See id.* § 704.860.

52. VT. STAT. ANN. tit. 30, § 248(2)(A) (2016); *see also* Public Serv. Bd., *The Public Service Board's Jurisdiction*, STATE OF VERMONT, <http://psb.vermont.gov/aboutthepsb/jurisdiction#electricity> (last visited July 31, 2016) (listing board responsibilities as “siting and construction of generation and transmission facilities”). Vermont requires all potential generation facilities of all sizes to file a petition before the Vermont Public Service Board. *See* tit. 30, § 248(2). A project application must indicate whether the project is applying for full review under Section 248 or for review of a project of limited size and scope under section 248j of the same Chapter. *See id.* § 248(j).

53. *See supra* note 40 and accompanying text (noting Maine's lack of a primary siting agency, but also their use of Site Law).

54. 807 KY. ADMIN. REGS. 5:001 § 15(2) (2016); *see also* KY. REV. STAT. ANN. § 278.020 (West 2016) (explaining the requirements for a certificate of convenience).

55. KY. REV. STAT. ANN. § 278.700 (West 2016).

- Iowa,<sup>56</sup> New York,<sup>57</sup> Oregon,<sup>58</sup> and Washington<sup>59</sup> require commission approval and certification for electric generation plants with a generation capacity capable of producing 25 MW or more of power output.
- One step up, the New Hampshire Site Evaluation Committee (SEC) has jurisdiction over facilities that could produce more than 30 MW.<sup>60</sup>
- Rhode Island's Public Utilities Commission Energy Facilities Siting Board (EFSB) has jurisdiction over facilities capable of operating at a gross capacity of 40 MW or more and on alterations that will have a major impact on the environment, public health, or safety.<sup>61</sup>

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56. IOWA CODE §§ 476A, 476A.2 (2016). In Iowa a developer cannot begin construction of a project that will produce 25 MW or more of electricity without obtaining a Certificate of Public Convenience, Use, and Necessity from the Iowa Utility Board. *See id.*

57. *See* N.Y. PUB. SERV. LAW § 172 (McKinney 2015); PATRICIA E. SALKIN, N.Y. ZONING LAW & PRAC, § 11:23.10 (2014). The New York Power Plant Act of 2011 created the Multi-Agency Siting Board (Siting Board). The Siting Board established a streamlined permitting process for all electric generation facilities with the capability of producing 25 MW or more of power. *Id.*

58. *See* OR. REV. STAT. § 460.300 (2016) (defining terms). If a thermal or combustion power electric power plant has a normal generation capacity of 25 MW, or if a geothermal, solar, or wind energy plant has a normal generation capacity of 35 MW then the developer of such a plant must apply for a site certificate. *See id.* § 469.300(11)(a) (defining an energy facility as it applies site certification). Smaller plants may also require a certificate if its accumulated effects of development are similar to a single plant with an average electric generation capacity of 35 MW or more. *See id.* § 469.300(12) (defining energy generation area).

59. *See Comparison of Siting Requirements*, OREGON DEPARTMENT OF ENERGY, <http://www.oregon.gov/energy/Siting/Pages/compare.aspx> (last visited July 31, 2016) (comparing consolidated review process in Montana, California, and Oregon) [hereinafter *Oregon Comparison of Siting Requirements*]. Washington's Energy Facility Site Evaluation Council (EFSEC) makes siting decisions, and its jurisdiction covers power plants 250 MW and greater and facilities able to receive greater than 50,000 bbl or process greater than 25,000 bbl per day of crude or refined petroleum. *See id.*

60. N.H. REV. STAT. ANN. § 162-H:2 (2016) (defining an "energy facility" subject to regulation by § 162-H:4).

61. 42 R.I. GEN. LAWS § 42-93-3 (2016) (defining major energy facility as capable of operating at 40 MW or more).

- Minnesota,<sup>62</sup> Montana,<sup>63</sup> North Dakota,<sup>64</sup> and Ohio<sup>65</sup> require plants capable of producing an output capacity of 50 MW or more to obtain approval and certification.
- Maryland<sup>66</sup> and Nevada<sup>67</sup> draw the pre-construction permit line at 70 MW.
- Florida requires pre-construction permits for new electric generation facilities capable of producing 75 MW or more.<sup>68</sup>

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62. MINN. STAT. § 216B.2421 (2016) (defining what size power plants and transmission lines are subject to this process). No person in Minnesota seeking to build a plant producing over 50 MW or lines over 200 kV can begin construction without first filing an application with the Minnesota Public Utilities Commission to obtain a Certificate of Need and a siting permit. *See id.* § 216E.03.

63. *See Oregon Comparison of Siting Requirements, supra* note 59 (comparing consolidated review process in Montana, California, and Oregon). Montana's Natural Resources Board has jurisdiction over power plants of 50 MW and up, any in-sit coal gas facility, energy conversion facility, uranium mines, gas pipelines, and any geothermal developments in excess of \$750,000. *See id.*

64. N.D. CENT. CODE § 49-22-03(5)(b) (2016). An energy conversion facility is defined as a facility that can produce 50 MW or more of power. *See id.*

65. OHIO REV. CODE. § 4906.04 (2016) ("No person shall commence to construct a major utility facility in this state without first having obtained a certificate for the facility."). The Ohio statute defines a major plant as one that has the capacity to produce 50 MW or more. *See id.* § 4906.01.

66. MD. CODE ANN., Public Utilities Code § 7-201.1(a)(1)(i)(1) (West 2016). Maryland plants capable of producing over 70 MW must obtain a Certificate of Public Convenience and Necessity from the Maryland Public Service Commission. *See id.* § 7-201.1(b)(1).

67. NEV. REV. STAT. § 704.860 (2015). There is a Public Utilities Commission of Nevada exemption for renewable projects under 70 MW gross nameplate rating. *See id.*

68. *See* FLA. STAT. § 403.506(1) (2016). Only power plants that produce more than "75 megawatts in gross capacity" are regulated. *See id.*

- Arizona,<sup>69</sup> California,<sup>70</sup> Massachusetts,<sup>71</sup> South Dakota,<sup>72</sup> and Wisconsin<sup>73</sup> require a certification process for all plants over 100 MW.
- New Mexico<sup>74</sup> and North Carolina<sup>75</sup> have by far the highest threshold requiring 300 MW of facility power generation capacity and sale of the output to the public as prerequisites for state siting approval.
- Therefore, the size threshold varies by a factor of 25:300 MW, or a 1200% ratio. Some large population states, like New York, regulate the smallest

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69. See generally ARIZ. REV. STAT. ANN. § 40-360 (2016). A plant is a separate thermal electric, nuclear or hydroelectric generating unit with a nameplate rating of 100 MW or more. *Id.* § 40-360(9). Prior to construction plants must obtain a Certificate of Environmental Compatibility from the Arizona Corporation Commission. *Id.* § 40-360.03.

70. See Eric Garofano, Note, *Losing Power: Siting Power Plants in New York State*, 4 ALB. GOV'T L. REV. 728, 744-45 (2011). In California:

[t]he Commission may exempt from this chapter thermal [power plants] with a generating capacity of up to 100 megawatts and modifications to existing generating facilities that do not add capacity in excess of 100 megawatts, if the Commission finds that no substantial adverse impact on the environment or energy resources will result from the construction or operation of the proposed facility or from the modifications.

CAL. PUB. RES. CODE § 25541 (West 2016).

71. See MASS. GEN. LAWS ch. 164 § 69J (2016). The Massachusetts Energy Facilities Siting Board has jurisdiction over proposed power plants capable of operating at a gross capacity of 100 MW or more and new electric transmission lines having a design rating of 69 kV and with one mile or more in length. See *id.*; see also *id.* § 69G (defining the terms of § 69J).

72. S.D. CODIFIED LAWS § 49-41B-1 (2016). South Dakota requires new conversion, AC/DC conversion, wind energy, and electric transmission facilities to notify the Public Utilities Commission for a certificate that deals with location, construction, and operation. See *id.* A conversion facility is defined as a generation facility designed for or capable of generating 100 MW or more of electricity. See *id.* § 49-41B-2.

73. See WIS. STAT. § 196.491 (2016). Wisconsin requires plants with the capacity of 100 MW or more to obtain a Certificate of Public Convenience and Necessity (CPCN) from the Public Service Commission of Wisconsin. See *id.*; see generally Wis. Dep't of Nat. Res., *Application Filing Requirements Electric Generation Projects in Wisconsin*, PUB. SERV. COMM'N. OF WIS., (2015) <https://psc.wi.gov/utilityinfo/electric/construction/documents/powerPlantAFR.pdf> (informing those attempting to apply for a certificate of their obligations).

74. See N.M. STAT. ANN. § 62-9-3(B) (2016). "The legislature finds that it is in the public interest to consider any adverse effect upon the environment and upon the quality of life of the people of the state that may occur due to plants." *Id.* § 62-9-3(A).

75. See N.C. GEN. STAT. § 62-110.1 (2016) (requiring a certificate for any person generating utility sold to the general public); 4 N.C. ADMIN. CODE 8-61 (2016) (clarifying plants that produce over 300 MW or are included in the rate base are subject to greater scrutiny); *id.* 11-R8-63(a) (2015) (noting that this section only applies to merchant producers). The Statute further defines merchant producers as:

electric generating facility, other than one that qualifies for and seeks the benefits of 16 U.S.C.A. 824a-3 or G.S. 62-156, the output of which will be sold exclusively at wholesale and the construction cost of which does not qualify for inclusion in, and would not be considered in a future determination of, the rate base of a public utility pursuant to G.S. 62-133.

See *id.* 11-R8-63.

size facilities.<sup>76</sup> Some smaller population states, such as New Mexico, regulate only large facilities.<sup>77</sup> Of note, of the twenty-eight states which regulate power generation construction, twenty-two of them regulate construction of facilities that otherwise would qualify as “Qualifying Facilities” of 80 MW or less pursuant to the Public Utility Regulatory Policies Act of 1978, which was designed to exempt such Qualifying Facilities from utility-type regulation.<sup>78</sup>

The rationale to not regulate smaller facilities, is that, *ceteris paribus*, they have diminished environmental and land-use impacts.<sup>79</sup> However, even some of the new renewable power generation facilities, because their power generation is less dense, can have significant environmental or land use implications.<sup>80</sup> Even single turbines wind generators have been the subject of environmental complaints.<sup>81</sup>

And because of its less dense power generation per area of land, flat panel photovoltaic solar generation of even 5 MW AC power occupies approximately twenty-five acres of land, which is approximately what a fossil-fired natural gas facility occupies to generate one hundred times that capacity of power, or 500 MW.<sup>82</sup>

Land-use is a quintessential local ‘police power’ exercised by municipal and county governments.<sup>83</sup> However, some power developers—particularly some of those now developing renewable energy wind projects—complain of the parochialism of local land-use approvals, and instead urge state-level siting

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76. See *supra* note 57 and accompanying text.

77. See *supra* note 74 and accompanying text.

78. See FERREY, LAW OF INDEPENDENT POWERS, *supra* note 20, at Section 4:8; see also *supra* notes 56–75 and accompanying text.

79. See Steven Ferrey, *Earth, Air, Water and Fire: The Classical Elements Confront Land and Energy*, 27 J. LAND USE & ENVTL. L. 259, 290 (2012).

80. See Glennon & Reeves, *supra* note 24, at 104–05.

81. For example, Falmouth, Massachusetts has two turbines. The town has been in a fierce battle with abutters and other residents about the operation of the turbines. See Sean Teehan, *Quick Turn for Falmouth Wind Turbine*, CAPE COD TIMES (Jan. 11, 2012), <http://www.capecodtimes.com/article/20120111/NEWS/201110339>; Sean Teehan, *Hot Debate Expected on Falmouth Wind Turbine Article*, CAPE COD TIMES (Apr. 3, 2012), <https://www.wind-watch.org/news/2012/04/03/hot-debate-expected-on-falmouth-wind-turbine-article/>; Sean F. Driscoll, *Falmouth Wind Turbine to be Shut Down*, CAPE COD TIMES (Sept. 28, 2015), <http://www.capecodtimes.com/article/20150928/NEWS/150929442>; see also Jess Bidgood, *The Falmouth Experience: Life Under the Blades*, CLIMATIDE (March 7, 2011, 7:29 AM), <http://climatide.wgbh.org/2011/03/the-falmouth-experience-life-under-the-blades/> (“People have headaches, people have their sleep disturbed, people are not living well next to them in some situations.”); Energy and Environmental Affairs, *Wind Turbines*, COMMONWEALTH OF MASSACHUSETTS <http://www.mass.gov/eea/agencies/massdep/climate-energy/energy/wind-turbines/> (last visited July 31, 2016) (discussing residents’ complaints leading to sound sample of a wind turbine).

82. See Glennon & Reeves, *supra* note 24, at 103–04 (discussing a solar thermal plant’s large land requirements versus a coal plant’s lesser land requirement).

83. See FERREY, ENVIRONMENTAL LAW, *supra* note 3, at 486–87.



board preemption of local permitting authority.<sup>84</sup> Here, state PUC or siting board authority differs as to whether such state-level preemption is authorized.<sup>85</sup> Before analyzing preemption, this Article next examines the differing legal standards applied by the states.

#### *E. Legal Standards Applied to Siting Approval*

In each of the twenty-eight states with state siting statutes, the siting commission, board, or council applies distinct factors to determine if a siting certificate will be approved. Some state statutes incorporate mandatory factors that must be satisfied for a certificate to be approved, while other states have elements that the agency is directed only to consider and balance before issuing a certificate. Some of the most common of these factors and elements include:

- If the facility will meet current or future need.
- Adequacy of health and safety standards to protect those living in the area of the facility.
- Aesthetic considerations.
- Environmental considerations.
- Economic impact of the facility on the economy of the local area and the effect of construction costs on the utility rate base to be borne by consumers.

Given so many factors, the state patterns are not easily grouped; individual comparison is required. The factors considered by different states with required power facility siting determinations are:

- *Arizona*: In Arizona, the siting commission, through a majority vote, may grant or deny an application without conditions.<sup>86</sup> An appointed committee must consider: (1) existing state and local plans for the site, (2) flora and fauna in the area, (3) noise emissions, (4) public safety and use considerations, (5) existing scenic areas, historic sites, and structures, (6) total environment of the area, (7) technical ability of the facility to meet state goals, (8) cost of facility, and (9) any additional factors.<sup>87</sup> This committee finding is then affirmed and approved by the Public Service Commission.<sup>88</sup>

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84. Patrick Cassidy, *Mass. Wind Energy Siting Bill Dies*, CAPE COD TIMES, (Dec 16, 2011, 6:42 AM), <http://www.capecodtimes.com/article/20111216/NEWS/112160329>; *see also* H.R. 2910, 189th Gen. Ct. (Mass. 2015) (“An Act relative to comprehensive siting reform for land based wind projects.”).

85. *See infra* Part II.

86. *See* ARIZ. REV. STAT. ANN. § 40.360.06(a) (2016); *Arizona Corporation Commission*, ARIZONA CORP. COMM’N., <http://www.azcc.gov/divisions/utilities/electric/linesiting-faqs.asp> (last visited Aug. 22, 2016).

87. *See* ARIZ. REV. STAT. ANN. § 40-360.06(a) (2016).

88. *Id.* § 40-360.07.

- *California*: An advisory committee decision must be based only on the evidence presented during the hearing and the notice must conform with specific portions of the Public Resource Code.<sup>89</sup> The California Energy Commission exercises final approval, but gives weight to findings that the project complies with local or agency standards and laws.<sup>90</sup> After a hearing, the Commission decides whether to issue a decision; adopt, modify, or reject the advisory committee's proposed decision; remand the matter for further hearings; or reopen the matter and conduct its own hearings.<sup>91</sup>
- *Connecticut*: Within twelve months after receiving the application,<sup>92</sup> the Siting Council shall file a full written opinion on its decision and may not grant certification unless it finds that (1) there is a public need, (2) environmental impacts of the project are satisfactory, and (3) safety standards of the technology are satisfied.<sup>93</sup>
- *Florida*: In determining whether to approve an application, the Florida Department of Environmental Protection will consider the extent to which the location, construction, and operation of the electric power plant will protect public safety and comply with the procedural requirements of agencies; whether the application is consistent with applicable local government plans (those which have not been preempted in the hearing process); and the need for the facility by balancing environmental costs

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89. See *Public Participation in the Siting Process: Practice and Procedure Guide*, CAL. ENERGY COMM'N, 121 (2006), <http://www.energy.ca.gov/2006publications/CEC-700-2006-002/CEC-700-2006-002.PDF>; 20 CAL. CODE REGS. § 1745.5 (2016) (dictating decision be based exclusively on evidentiary record from hearing). After an initial Application for Certification hearing, the presiding member of the two-person committee prepares a proposed decision based upon the evidence presented at the hearing. The proposed decision follows a rigid format in which each proposal includes an outline of the evidence relevant to that issue, considers the Energy Commission and public comments, states the factual findings and conclusion of the committee, and lists the conditions of certification and verification. See *id.*

90. See *Public Participation in the Siting Process: Practice and Procedure Guide*, *supra* note 89, at 126.

91. 20 CAL. CODE REGS. § 1233.4 (2016). Once a proposal has been made, it is opened for public comment and the Presiding Member's Proposed Decision is revised according to these comments. Finally, the full Energy Commission holds a hearing to discuss and vote on the revised proposed decision. During this hearing, no new evidence is taken unless it is required by due process, and if so determined, the Commission must vote to reopen the record. If approved, construction on the plant can begin immediately. *Id.* §1747.

92. KEVIN E. MCCARTHY, OFFICE OF LEGIS. RESEARCH, 2009-R0246, PERMITTING PROCESS FOR POWER PLANTS (2009) <https://www.cga.ct.gov/2009/rpt/2009-R-0246.htm>. The Connecticut hearing process operates formally with opening statements, witnesses, experts, as well as an added public session held at night. The Council also conducts one or more public field reviews, which includes a visual assessment of the site and local land use. The Council creates a document with draft findings of fact, opinion, decisions and orders. This document will be open for public review and suggested changes from the parties, but no new evidence will be introduced. See *id.*

93. CONN. GEN. STAT. § 16-50P (2016).

and other factors.<sup>94</sup> The Florida Public Service Commission, a separate state agency, holds a separate hearing to determine need, and without a related determination of need, no certificate can be granted.<sup>95</sup>

- *Iowa*: When determining if a certificate should be issued, the state Board takes into account (1) whether project is consistent with legislative intent, (2) whether the project helps implement the state energy plan, and (3) whether the project meets reasonable state and local zoning regulations.<sup>96</sup>
- *Kentucky*: The Siting Board can accept or deny the project in whole or in part, considering: impact of facility on scenic surroundings, noise levels, economic impact of facility, whether the facility is being built on the site of an older facility, whether the facility will meet all local planning and zoning requirements, the facility's effects on service, whether the facility will comply with statutory land-use set-back regulations, "efficiency of any proposed measures to mitigate adverse impacts," and the applicant's environmental compliance history.<sup>97</sup>
- *Maine*: For a project to be approved for siting, the proposed facility must meet both the primary standard as well as additional criteria mandated by either the state Department of Environmental Protection (DEP) or the utility commission, depending on where the site is located.<sup>98</sup> The primary standard is that all projects must benefit the rate-payers, with priority given to renewable power generation resources. The DEP requirements focus on the effect of the proposed plant on the environment surrounding the plant.<sup>99</sup> The Commission focuses on impacts to the scenic character, tangible benefits to community, and public-safety related set-backs. In addition, the Department or the Commission must determine whether the facility is in the long-term public interest of the state. At a minimum, they must consider if it materially enhances transmission operations, and is reasonably likely to reduce rates.<sup>100</sup>

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94. See FLA. STAT. § 403.509(3)(a)–(g) (2016). All hearings are held before an administrative law judge recommends which applications are approved or rejected by the FDEP. The final step in certification is approval by the Governor and those sitting on the Siting Board. See *id.* §§ 403.5065, 403.508(b)–(d).

95. See *id.* § 403.519.

96. IOWA CODE §§ 476A.5, 476A.6 (2016).

97. See *id.* (a)–(i).

98. *An Introduction to Maine's Energy Siting Long-term Contracting Considerations*, SITING COMMISSION, (Dec. 19, 2012) [http://sitingcommission.vermont.gov/sites/cep/files/Siting\\_Commission/Publications/Meeting121912/ME\\_Bergeron\\_121912.pdf](http://sitingcommission.vermont.gov/sites/cep/files/Siting_Commission/Publications/Meeting121912/ME_Bergeron_121912.pdf) [hereinafter *Introduction to Maine's Energy Siting Long-term Contracting Considerations*]; see also Dep't of Envtl. Prot., *Site Location of Dev.*, STATE OF ME., 7, Form B, Form J (Sept. 9, 2013), [https://www1.maine.gov/dep/land/sitelaw/application\\_text.pdf](https://www1.maine.gov/dep/land/sitelaw/application_text.pdf) (describing process, including sample application and certification forms).

99. See *id.*

100. See *id.*

- *Maryland*: The State Commission will only act on an application after considering the recommendation of the governing body of each affected county or municipal corporation, as well as the ultimate effect of the proposed station on the electric system, economics, and aesthetics.<sup>101</sup>
- *Massachusetts*: Within 180 days of receiving a filed application, the Siting Board will commence public evidentiary hearings on the petition, and within one year the Board shall approve the petition if the Board finds that:<sup>102</sup> descriptions of the generating facility and potential impacts are substantially accurate and complete, the site selection process used is accurate, the plans for the construction of the proposed facility are consistent with health and environmental protection policies, and such plans minimize the environmental impacts. If a plant has petitioned the Board for a certificate because a local law is too restrictive, the factors determining acceptance of the application are slightly different.<sup>103</sup>
- *Minnesota*: The Commission's permits must be guided by the state's conservation goals, as well as the goal of minimizing environmental impacts and land-use conflicts.<sup>104</sup> The Commission is further guided, but not limited, by considerations including: research as to the effects on the land, environmental evaluations, evaluation of potential beneficial uses of waste energy, and direct and indirect economic impacts.<sup>105</sup>
- *Montana*: The Montana Department of Environmental Quality (DEQ) conducts the certification process, and within thirty days will issue a decision of approval if it finds that: the proposed facility conforms to non-preempted state and local laws, the facility will serve the public interest, convenience and necessity, the DEQ has issued all necessary decisions, opinions, orders, certifications and permits, and the use of public lands for location of the facility is evaluated and their use is as economically practicable as the use of private lands.<sup>106</sup>
- *Nebraska*: After a hearing, the Board has the authority to approve or deny an application so long as it is found that the facility is needed and benefits the public.<sup>107</sup>
- *Nevada*: An application in Nevada cannot be granted unless the commission determines the nature and effect on the environment, the extent to which a fossil fuel generating facility is needed, the need balances any adverse effects on the environment, the location of the

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101. See MD. CODE ANN., Pub. Util. § 7-207(e) (2016).

102. MASS. GEN. LAWS C § 69J 1/4 (2016). This finding does not require a determination of need. See *id.*

103. *Id.* § 69O 1/2 (2016).

104. See MINN. STAT. § 216E.03(7) (2016).

105. *Id.*

106. MONT. CODE ANN. § 75-20-301 (2015).

107. NEB. REV. STAT. § 70-1014(1) (2016).

facility conforms to state and local regulations issued, and the facility serves the public interest.<sup>108</sup>

- *New Hampshire*: To issue construction approval, the Site Evaluation Committee (SEC) uses a set of mandatory guidelines which dictate that (1) an applicant must have the financial, technical, and management capability to run the facility, (2) the views of local governments and agencies are taken into account, and (3) the facility must not exert any unreasonably adverse effects on the area.<sup>109</sup>
- *New York*: The Board cannot grant a siting certificate without making explicit findings regarding potential and probable environmental impacts from both the construction and operation of the facility,<sup>110</sup> that the facility is beneficial for the electric generation capacity of the state, serves the public interest, and works to minimize adverse environmental effects.<sup>111</sup> If the surrounding environment will be disproportionately impacted, the facility must offset or minimize those community impacts and be in compliance with all laws and regulations that have not been preempted.<sup>112</sup> The Board also considers other impacts to the electric grid and economic impacts.<sup>113</sup>
- *Ohio*: In granting a certificate, the Board must find and determine: that the facility is needed and serves the public interest, “the nature of the probable environmental impact” of the facility, that the facility plan represents the minimum impact possible, that the facility will be constructed in accordance with regional electric expansion plans, that the facility complies with state statutes, the amount of impact on land in agricultural districts where the facility is planned, and that the facility represents maximum feasible water conservation efforts.<sup>114</sup>
- *Oregon*: The Siting Council’s adopted standards consider whether: the applicant has the ability to build the proposed generation facility, the site is suitable, and the facility has a negative impact on the surrounding community or environment.<sup>115</sup>

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108. NEV. REV. STAT. § 704.890(1) (2015).

109. N.H. REV. STAT. ANN. § 162-H:16(IV) (2016). The SEC, in connection with the Counsel for the Public, may request any information or studies it needs to make an informed decision; the applicant must pay all reasonable costs. *Id.* § 162-H:10(V). All proceedings and deliberations on these matters are open to the public. *Id.* § 162-H:10(II).

110. N.Y. PUB. SERV. LAW § 168(2) (McKinney 2016).

111. *Id.* § 168(3)(a)–(c).

112. *Id.* § 168(3)(d)–(e).

113. *Id.* § 168(4).

114. OHIO REV. CODE ANN. § 4906.10(A) (West 2016).

115. *Id.*; see also *Energy Facility Siting Standards*, OREGON DEPT. OF ENERGY, <http://www.oregon.gov/energy/Siting/Pages/standards.aspx> (last visited July 31, 2016); OR. ADMIN. R. 345-022-0000 (2016), [http://arcweb.sos.state.or.us/pages/rules/oars\\_300/oar\\_345/345\\_022.html](http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_345/345_022.html) (offering a general standard of review).

- *Rhode Island*: To grant a siting certificate, the Siting Board must make a broad finding that the facility is needed, cost-justified, and is expected to produce energy at the lowest possible price for consumers.<sup>116</sup> The Board must also find that the facility will not cause “unacceptable harm to the environment,” and that the facility will enhance the “socioeconomic fabric” of the state.<sup>117</sup> The content of the final decision must specifically address each of the advisory opinions that the Board received from designated state agencies, and any other matters deemed appropriate by the Board.<sup>118</sup>
- *South Dakota*: A local review committee makes an assessment of the proposed project’s impact on the local community, including consideration of many community impacts, ranging from law enforcement needs, water use, and effects on schools.<sup>119</sup> The Public Utilities Commission has a duty to ensure that the location, manner of construction, and proposed facility produces the smallest adverse effects.<sup>120</sup> To obtain approval, the applicant must show that the facility will comply with laws, will not pose a threat to the environment or the economic vitality of inhabitants of the siting area, will not injure the health of people in the siting area, and will not hinder the development of the surrounding community.<sup>121</sup> The Commission is not involved in the easement acquisition or eminent domain process; these are handled privately with landowners and in the circuit courts, respectively.<sup>122</sup>
- *Vermont*: In order for a permit to be granted, the Board considers whether the project promotes “the general good of the state.”<sup>123</sup> The Board also considers whether the project promotes the orderly development of the region, meets present and future electricity needs, is a stable and reliable system, and is a net economic benefit for the state.<sup>124</sup> The Board also considers whether the proposal is consistent with the state resource plan, whether the facility complies with the state energy plan, the facility’s

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116. See 90-050 R.I. CODE R. § 1.13(c)(1) (LexisNexis 2016). The Public Utilities Commission holds separate hearings to determine need. *Id.* § 1.23. Final decisions from the Siting Board are released at least 120 days after the application is filed. *Id.* § 1.13(a).

117. See 90-050 R.I. CODE R. § 1.13(c)(iv)–(v) (LexisNexis 2016).

118. See *id.* § 1.13(c)(2).

119. S.D. CODIFIED LAWS § 49-41B-7 (2016). Within one year after the application is submitted, the Commission must render a decision. *Id.* § 49-41B-24.

120. See *South Dakota Utilities Commission Information Guide to Siting Energy Conversion & Electric Transmission Facilities*, S.D. PUB. UTILS. COMM’N. (2016) <https://puc.sd.gov/comm/ission/Publication/sitinghandout.pdf>.

121. See *id.*

122. See *id.*

123. VT. STAT. ANN. TIT. 30, § 248 (2016).

124. *Id.*

impact on water, the transmission lines associated with the new facility, and the aesthetic impacts of the facility.<sup>125</sup>

- *Washington*: If the state council finds that the construction and operation will produce minimal adverse effects on the environment, ecology of the land and wildlife, and ecology of the state waters and aquatic life, and the facility meets its construction and operation standards, then it will issue an Administrative Order with all findings of fact and recommendations.<sup>126</sup> If the council recommends acceptance of the proposal it will detail why the proposal should be accepted and any local regulations that may need to be preempted.<sup>127</sup> The council will also draft a Site Certification Agreement (SCA), which will be submitted to the governor and signed for final approval.<sup>128</sup> The SCA does not grant the right to eminent domain, and lists the conditions that must be met for the applicant to begin construction.<sup>129</sup>
- *Wisconsin*: The Public Service Commission holds public hearings and prepares an Environmental Impact Statement before it determines whether to approve, reject, or modify the proposed plant application.<sup>130</sup> The Commission will only approve a certificate if it determines that all of the factors listed in Wisconsin Statute Section 196.491(3)(d) are met, including need, if there will be undue adverse effects of the environment, and if the facility will not unduly interfere with the land-use and development plans of the local area.<sup>131</sup>

## II. PREEMPTION OF LOCAL LAND USE OF ZONING REGULATIONS

Even in states which require certification thresholds for similar size projects, the process and the authority of local government involved varies widely among the states. Some states consolidate the new facility siting process and provide a one-stop permit at the state level incorporating all state and local permits to be granted through one integrated certification process. Most of these consolidated permit states require that the facility meet local land-use or zoning regulations. However, within the state facility siting process there is an opportunity to preempt certain local regulations, depending on the state. Those states with some state preemptive authority of local regulation include twenty of the twenty-

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125. *Id.*; see also Public Serv. Bd., *Guide to Filing Section 248 Petitions*, STATE OF VERMONT <http://psb.vermont.gov/statutesrulesandguidelines/guidelines/GuidetoFiling248Petition> (last visited Aug. 2, 2016). There is no specific timeframe for state Commission decisions.

126. See *Certification Process*, WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL, <http://www.efsec.wa.gov/cert.shtml#6.%20Adjudicative> (last visited July 31, 2016).

127. *Id.*

128. *Id.*

129. *Id.*

130. See WIS. STAT. § 196.491 (2016) (noting that Commission shall hold a public hearing), amended by 2015 WISC. ACT 299 (2015 A.B. 804) (West).

131. See WIS. STAT. § 196.491(3)(d) (2016).

eight states that exercise siting jurisdiction: Arizona, California, Connecticut, Florida, Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, Kentucky, New Hampshire, New Mexico, New York, Oregon, Ohio, Rhode Island, South Dakota, Vermont, and Washington.<sup>132</sup>

Three other states require compliance with local regulations. However, even in these states, local laws can be preempted at the state level under limited special circumstances. These states are: New Jersey, Nevada, and Wisconsin.<sup>133</sup> Two other states are jurisdictionally unique: the District of Columbia has no state-level authority with its non-state political structure and status<sup>134</sup> and Nebraska, because its power plants are not investor-owned or regulated, does not have a PUC to regulate them.<sup>135</sup> A state-by-state examination of preemption of local law follows.

#### A. State Preemptive Consolidated Siting Authority

Twenty of the twenty-eight states which exercise facility siting authority have some absolute, qualified, or limited preemptive power at the state level to either subsume or preempt local land-use and environmental authority. In these cases, authority is consolidated into a single state proceeding. Governments may participate as parties in the proceeding. This gives local authorities the ability to raise issues, cross-examine witnesses, offer testimony, and take a position in the proceeding.<sup>136</sup> However, the local jurisdiction does not render the decision; it participates as a party. Twenty of the twenty-eight states with state facility siting statutes utilize this preemptive model, with some significant legal variations:

- *Arizona*: New facilities are certified through the Siting Committee,<sup>137</sup> with all certificates of environmental compatibility issued by the Siting Committee conditioned on compliance with applicable local ordinances and regulations.<sup>138</sup> The Arizona Corporation Commission also has the power to grant a certificate despite the Committee's refusal to do so.<sup>139</sup>
- *California*: The California Energy Commission (CEC) exercises exclusive jurisdiction over siting generation facilities that meet the regulatory criteria pursuant to the California Environmental Quality Act

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132. See *infra* Section II.A.

133. See *infra* Section II.B.

134. See *infra* Section II.C.

135. See *Nebraska Power Review Board Orientation Manual*, *supra* note 37.

136. See *infra* Section III.A.

137. ARIZ. REV. STAT. ANN. § 40-360.05(2) (West 2016) (allowing “[e]ach county and municipal government and state agency interested in the proposed site” to become a party to the certification proceedings at the state, rather than local, level).

138. *Id.* § 40-360.06(D) (unless such ordinances or regulations are found to be “unreasonably restrictive and compliance therewith is not feasible”). Note that statute is going to be updated with new legislation, but changes do not affect the section being referenced in this footnote.

139. See *Stanton*, *supra* note 31, at a-7.



(CEQA).<sup>140</sup> When exercising this authority, the Energy Commission places great weight on compliance with local or agency standards.<sup>141</sup> The Commission can override local regulations only if the affected local government agrees to amend the regulation in question, or the “Energy Commission finds that the proposed project is needed for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity.”<sup>142</sup>

- *Connecticut*: The Connecticut Siting Council has exclusive jurisdiction over the location and type of all energy generation facilities,<sup>143</sup> and jurisdiction over the “method of construction or reconstruction in whole or in part of each system used for the transmission or distribution of electricity.”<sup>144</sup> Nevertheless, “[a]ny town, city or borough zoning commission and inland wetland agency may regulate and restrict the proposed location of a facility” provided those regulations are written, published, and provided to the affected party.<sup>145</sup>
- *Florida*: The Electrical Power Plant Siting Act was created with the intention of creating a one-stop approval for power plant siting,<sup>146</sup> and the

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140. See Garofano, *supra* note 70, at 744; see also CAL. PUB. RES. CODE § 25500 (West 2016). In accordance with the provisions of this division, the Commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the Commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law. After the effective date of this division, no construction of any facility or modification of any existing facility shall be commenced without first obtaining certification for any such site and related facility by the commission, as prescribed in this division.

*Id.*

141. See *Public Participation in the Siting Process: Practice and Procedure Guide*, *supra* note 89, at 126. For an application to pass through the initial hearing phases of the Commission Siting Committee, a part of the California Energy Commission, the applicant must demonstrate conformity with all relevant local, regional, state and federal standards, ordinances, laws, and regulations. *Id.* at 36–37.

142. *Energy Facility Licensing Process: Developers Guide of Practices & Procedures*, CAL. ENERGY COMM’N, 13 (2000) (citing CAL. PUB. RES. CODE § 25525 (West 2016)) [hereinafter *California Energy Facility Licensing Process*].

143. See CONN. GEN. STAT. § 16-50X(a) (2016).

144. See *id.* § 16-243.

145. See *id.* § 16-50X(D). Furthermore, before filing an application with the Siting Council, a facility proponent must consult with the host municipality and work with it to hold a series of public meetings. See *id.* §1650(L). Any orders pursuant to these local regulations can be appealed to the Siting Council “which shall have jurisdiction, in the course of any proceeding on an application for a certificate or otherwise, to affirm, modify or revoke such order or make any order in substitution thereof by a vote of six members of the Council.” See *id.* § 16-50X(D).

146. FLA. STAT. § 403.502 (2016).

proposed facility's application must provide a statement of consistency with current local zoning ordinances and land use regulations.<sup>147</sup> If the Board determines that the facility factually meets the local zoning regulations it is approved; if the Board determines that it does not, it can "authorize a variance or other necessary approval to the adopted land use plan and zoning ordinances required to render the proposed site or associated facility consistent with local land use plans and zoning ordinances."<sup>148</sup>

- *Iowa*: The Utility Board has a contested case hearing process in which local agencies are permitted to enter the proceedings as a party.<sup>149</sup>
- *Kentucky*: A certificate from the Kentucky State Board on Electric Generation and Transmission Siting is required, the proposed facility is required to obtain all applicable permits,<sup>150</sup> and the state can preempt such local zoning regulations.<sup>151</sup>
- *Maine*: Towns have no specific role in the site law process; however, local governments are allowed to comment on applications.<sup>152</sup> In unincorporated towns, the state, through the state commission, establishes the locally applicable land use laws.<sup>153</sup>
- *Maryland*: The Public Service Commission procedures and rules dictate that if the facility does not meet any such applicable regulations, the facility must indicate why such approval is absent.<sup>154</sup>

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147. *Id.* § 403.50665(1). Within forty-five days of this statement, affected local governments must file a determination, unless the generation facility is on land that is already used for such purposes, which renders the proposed facility exempt from this process. *Id.* § 403.50665(2)(a). If the local government determines that the facility is not in compliance, the applicant may request local approval; if this request is denied the applicant can file a petition with the designated administrative law judge and a land use hearing will commence. *Id.* § 403.50665(4), (6).

148. *Id.* § 403.508(e)–(f).

149. IOWA CODE § 476A.5 (2016) ("City and county zoning authorities designated as parties to the proceeding may appear on record to contest whether the facility meets city, county and airport zoning requirements. The failure . . . to meet zoning requirements . . . shall not preclude the board from issuing the certificate and to that extent the provisions.").

150. *See* KY. REV. STAT. ANN. § 278.704(1) (West 2016). The Siting Board has specific set-back regulations dictating how close a turbine or exhaust stack can be built to specific buildings or adjacent property. *See id.* § 278.704(2). No exhaust stack or wind turbine may be built at least one thousand feet from the property boundary, and two thousand feet from any residential neighborhood, school, hospital, or nursing home. *Id.*

151. *See id.* § 278.704(3). If the proposed facility will be sited in an area with existing land-use or zoning regulations, those set-back requirements dominate over those listed in statute, and are not subject to modification by the board. *Id.*

152. *See Introduction to Maine's Energy Siting Long-term Contracting Considerations, supra* note 98.

153. *See* ME. STAT. tit. 12 § 685-G (2016).

154. MD. PUB. SERV. COMM. § 20.79.01.04 (West 2016). Any application to the commission must include a list of local, state, or federal agencies and entities having authority to issue permits regarding the proposed project. *Id.*

- *Massachusetts*: The Massachusetts Energy Facilities Siting Board (EFSB) certifies all electric generation projects of 100 MW or larger;<sup>155</sup> if local regulation prevents a state certified generation construction project, the EFSB has the authority to issue a certificate of environmental impact and public interest if the applicant is prevented or hindered from building the facility because of adverse state or local agency permitting decision or undue agency delay.<sup>156</sup> The certificate, if granted, has the legal effect of granting the permit in question and may grant additional project permits as well.<sup>157</sup>
- *Minnesota*: “A large electric generating plant may be constructed only on a site approved by the commission,” with a state-issued site permit,<sup>158</sup> which “shall supersede and preempt all zoning, building, or land use rules, regulations, or ordinances promulgated by regional, county, local and special purpose government.”<sup>159</sup> Facilities with a capacity over 80 MW can choose to seek local, as opposed to state commission, approval.<sup>160</sup> Still, “[i]f the applicant files an application with the commission, the applicant shall be deemed to have waived its right to seek local approval of the project.”<sup>161</sup>
- *Montana*: Pursuant to the Montana Major Facility Siting Act, the Board of Natural Resources and Conservation’s decisions on facility siting preempt any conflicting law in the state.<sup>162</sup> Once the Board issues a certificate, no local government or agency may “require any approval, consent, permit, certification, or other condition.”<sup>163</sup>
- *New Hampshire*: To avoid the undue local delay of construction projects, there is a state process through which the site evaluation committee reviews, approves, monitors, and enforces “compliance in the planning, siting, construction, and operation of energy facilities.”<sup>164</sup>
- *New Mexico*: “The judgment of the Commission [is] conclusive on all questions of siting, land use, aesthetics and any other state or local requirements affecting the siting.”<sup>165</sup> An application will not be approved

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155. See MASS. GEN. LAWS ch. 164 §§ 69G, 69K (2016).

156. See *id.* § 69K.

157. *Id.*

158. MINN. STAT. § 216E.03(1) (2016).

159. *Id.* § 216E.10. Local governments can request a Pre-Application Consultation Meeting for projects in their districts. *Id.* § 216E.03(b).

160. *Id.* § 216E.05(1). “If local approval is granted, a site or route permit is not required from the commission.” *Id.*

161. *Id.*

162. MONT. CODE ANN. § 75-20-103 (2016); *id.* § 75-20-104; *id.* § 75-20-101; *id.* § 2-15-3502.

163. *Id.* § 75-20-401(1). Of note, wind energy siting requirements in the state specify that if sited on private land, such siting is not regulated by the state. See Stanton, *supra* note 31, at a-54.

164. N.H. REV. STAT. ANN. § 162-H:1 (2016).

165. See N.M. STAT. ANN. § 62-9-3(G) (2016).

if it violates local rules, unless those rules are found to be “unreasonably restrictive” whereupon the “regulation shall be inapplicable and void as to the siting.”<sup>166</sup>

- *New York*: The New York State Board on Electric Generation Siting and the Environment grants a certificate for construction if the Board determines that the proposed facility is in compliance with applicable local laws and regulations, although the Board “may elect not to apply” a local law, ordinance, or regulation in whole or in part.<sup>167</sup>
- *Ohio*: “No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or initial operation of a major utility facility or economically significant wind farm authorized by a certificate issued” by the Ohio Power-Siting Board.<sup>168</sup>
- *Oregon*: Oregon has a consolidated state review process, allowing developers to receive all state and local permitting in a single process from the Oregon Energy Facility Siting Council, whereby compliance with local land use laws is a prerequisite for proposal approval.<sup>169</sup>
- *Rhode Island*: No later than forty-five days after receiving a siting application, the state will convene a preliminary hearing to determine the issues that should be considered by the Rhode Island Energy Facility Siting Board, and to designate which agencies will be required to render an advisory opinion to the Board as part of the state process.<sup>170</sup> Designated agencies, which include cities, towns, and municipalities eligible to issue permits absent the act, are given a level of involvement in the siting process.<sup>171</sup> These communities will render an advisory opinion, which the Board “shall consider as issues in every

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166. *Id.*

167. N.Y. PUB. SERV. LAW § 168(3)(e) (McKinney 2016). “The board shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation or other local action issued thereunder,” but if the municipality fails to file a notice of interest at the appropriate time in the proceeding, it is barred from all enforcement authority. *Id.*; *see id.* at § 166(j). Municipalities also nominate two ad hoc members of the Siting Board and have access to money provided by the applicant for public participation. *Id.* § 160(4), § 160(6)(b).

168. OHIO REV. CODE. ANN. § 4906.13(B) (West 2016); *see id.* § 4906.02; *see also* Garofano, *supra* note 70, at 748–49.

169. *The Siting Process for Energy Facilities*, OREGON DEPARTMENT OF ENERGY, <http://www.oregon.gov/energy/Siting/Pages/process.aspx> (last visited July 31, 2016) (describing state certification as a one-step process). “The Council’s decision is binding on all state and local agencies . . . [but] does not apply to federally-delegated permits.” *Id.*; *see* OR. REV. STAT. § 469.320(1) (2016) (“[N]o facility shall be constructed or expanded unless a site certificate has been issued for the site thereof.”); *see also id.* § 469.401(3) (noting certificate binds all state entities, counties, and cities to the approval of the site).

170. 42 R.I. GEN. LAWS § 42-98-9(a)–(b) (2016).

171. *Id.*

proceeding.”<sup>172</sup> However, the siting decision is left to the discretion of the state Board, and it consolidates and preempts all local permits.<sup>173</sup>

- *South Dakota*: The state commission assembles a Local Review Committee which “shall meet to assess the extent of the potential social and economic effect to be generated by the proposed facility, to assess the affected area’s capacity to absorb those effects at various stages of construction, and formulate mitigation measures,”<sup>174</sup> and submits a report to the commission with findings regarding impact and recommendations.<sup>175</sup> “A permit for construction of a transmission facility” at the state level may “preempt any county or municipal land use, zoning, or building rules, regulations or ordinances.”<sup>176</sup>
- *Vermont*: The Vermont Public Service Board conducts hearings in which local governments are permitted to offer guidance to the Commission, after which a Commission permit preempts any local zoning permissions.<sup>177</sup>
- *Washington*: The Energy Facility Site Evaluation Council (EFSEC) makes siting decisions, with city, local, and port representatives on the Council who can vote for projects in their local areas.<sup>178</sup> Public hearings include a Land Use Consistency Hearing, which performs a deeper critique of whether the project conflicts with local land use regulations.<sup>179</sup>

As highlighted in this comparative review of siting approval in those states that exercise such review, consistency with local land-use regulations is a significant consideration. However, state officials, not local officials, consider the question of consistency at the state level. Local input is obtained either by granting the local officials intervenor party status in the state proceeding (e.g. Iowa, Rhode Island), or more directly by either creating an advisory committee

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172. *Id.*

173. *See id.* § 42-98-2(4); *id.* § 42-98-7(a).

174. S.D. CODIFIED LAWS § 49-41B-7 (2016).

175. *Id.* § 49-41B-10. The Commission will also hear any testimony by local governments “relative to the environmental, social, or economic conditions” relevant to the proposed project. *Id.* § 49-41B-19.

176. *Id.* § 49-41B-28.

177. *City of South Burlington v. Vermont Elec. Power Co.*, 344 A.2d 19, 25 (Vt. 1975). The Court held that the Public Service Commission preempted the City’s orders, because municipalities should play a secondary role where there is a clash between state control and local control. *See id.*

178. *See* WASH. REV. CODE § 80.50.030 (2016) (determining persons to sit on committee). The Council asks potentially impacted cities, towns, and port districts to appoint representatives to the Council. *See id.* EFSEC is comprised of state agency representatives with the chairperson appointed by the Governor. *Id.*

179. *See Certification Process*, *supra* note 126 (stating the purpose of each meeting held during the review process). Anyone can speak at the hearing, and if the proposal is inconsistent with local land use policy, the council will determine whether to recommend that the Governor preempt these policies to allow the project move forward. WASH. ADMIN. CODE § 463-28-060 (2016).

with local representation, or by having local representation on the state agency considering the permit (e.g. Washington).<sup>180</sup>

The degree of involvement of the local representatives, ranging from full intervener status to an advisory committee or actual votes on the state decision-making siting agency, determines the proximity and influence of local perspective in the ultimate power-siting decision. The states have different laws determining point and degrees of access. In all states there is a starting presumption of required consistency with local land use requirements, which can be overruled pursuant to different standards ranging from automatic preemption (e.g. Minnesota, Montana, South Dakota, Vermont) to conditional preemption in certain legal circumstances (e.g. Massachusetts, New Mexico).<sup>181</sup> The legal standard in states range from considering local land-use law (e.g. California, Kentucky, New York) to complying with local land-use law (e.g. Arizona, Maryland, Oregon).<sup>182</sup> Some states issue state-level variances to local land-use requirement (e.g. Florida).<sup>183</sup>

Ultimately, state agencies may preempt local land-use requirements, but this preemption is subject to different legal standards ranging from absolute preemption to conditional preemption. Preemption of local siting authority minimizes the number of government permits required. It does so by preempting or removing local authority which otherwise would exist, whereby the role of local governments is reduced from the decision maker to a participant in a consolidated state proceeding.

#### *B. No Consolidated State Process and Greater Local Control of Siting*

Five of the twenty-eight states with state siting statutes require power facility applicants to obtain all local land-use and environmental permits as a condition of their state siting processes. They do this either affirmatively, by requiring all local permits to be obtained as a prerequisite for state siting approval, or negatively, by not preempting any local permits. This adds an additional state permit, without preempting or superseding the required local permits, must be obtained in these states:

- *New Jersey*: Siting a new power generation facility of any size involves approval from both local authorities and the New Jersey Department of Environmental Protection.<sup>184</sup> A utility aggrieved by a local action can appeal to the Board of Public Utilities.<sup>185</sup>

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180. See *supra* notes 149 (Iowa), 170–73 (R.I.), 178–79 (Wash.) and accompanying text.

181. See *supra* notes 155–74 (Mass.), 158–61 (Minn.), 162–63 (Mont.), 165–66 (N.M.), 174–76 (S.D.), 177 (Vt.) and accompanying text.

182. See *supra* notes 140–42 (Cal.), 150–51 (Ky.), 167 (N.Y.) and accompanying text.

183. See *supra* notes 146–48 (Fla.) and accompanying text.

184. See Garofano, *supra* note 70, at 747.

185. N.J. STAT. ANN. § 40:55D-19 (West 2016). If the Board finds that the land “described in the petition is necessary for the service, convenience or welfare of the public . . . the public utility

- *Nevada*: The state authority will not issue a certificate of need unless the facility meets all local zoning ordinances.<sup>186</sup> The state has the power to preempt local laws and regulations.<sup>187</sup>
- *North Carolina*: The process is primarily local; the state commission can revoke certificate if a facility fails to gain local approval.<sup>188</sup>
- *Wisconsin*: There is no one-stop to approve or deny projects.<sup>189</sup> Local agencies will review application following the issuance of a state certificate.<sup>190</sup>
- *Virginia*: Virginia employs a primarily local siting process; the state can preempt local zoning regulations.<sup>191</sup>

### C. Unique State Structures Regarding Preemption Standards

Two regulating entities have unique structural elements, which make them different. Both have unique legal factors, either being a city/territory or being the only state with no PUC and no investor-owned utilities to regulate:

- *District of Columbia*: When an application is submitted the applicant must serve notice to sixteen different District agencies including the District of Columbia Zoning Commission,<sup>192</sup> and instead of applying for each permit separately, the applicant can request the formation of a coordinating committee.<sup>193</sup> If the request is approved, a committee consisting of at least ten representatives will be appointed, including a representative

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or electric power generator may proceed in accordance with such decision of the Board of Public Utilities, any ordinance or regulation made under the authority of this act notwithstanding.” *Id.*

186. NEV. REV. STAT. § 704.890(2015).

187. See *State Generation & Transmission Siting Directory*, *supra* note 38, at 77.

188. 4 N.C. ADMIN. CODE 11.R8-63(e)(2) (2016).

189. See generally *Survey of Transmission Siting Practices in the Midwest*, *supra* note 34, at 3. Sixty days before submitting an application, an applicant must submit a description on their proposed project to the Wisconsin Department of Natural Resources (WDNR). WDNR will then provide a list of all set-specific permits required for construction and operation on that site. Within 20 days, applicants must apply for these permits, and within 120 days WDNR must decide then whether to issue these environmental permits. The Public Service Commission holds public hearings, and prepares an Environmental Impact Statement before it determines whether to approve, reject or modify the plant plans. Suzanne Bangert, *Electric Utility Pre-CPCN Approval and Application*, DEP’T OF NAT. RES. STATE OF WIS. (2004) <http://dnr.wi.gov/files/PDF/pubs/wa/WA606.pdf>.

190. See *State Generation & Transmission Siting Directory*, *supra* note 38 at 133–36 (describing the various agencies who review applications).

191. See *id.* at 125. Developers must obtain pre-construction approval from the State Corporation Commission, but the Commission focuses on overarching concerns of “public interest.” See also VA. CODE ANN. § 56-234.3 (2016) (stating requirements for utilities pre-construction).

192. See D.C. MUN. REGS tit. 15, § 2101.4 (2016). When determining whether the plant complies with applicable zoning laws the commission will rely, whenever possible, on the agencies charged with enforcement of those laws. See *id.* § 2109.3.

193. See D.C. MUN. REGS tit. 15, § 2106.1 (2016).

from each D.C. agency that has authority to issue a license or permit before construction can begin and agencies with a direct interest in the project.<sup>194</sup> The committee must approve construction, but uses compliance with applicable zoning or environmental laws as a measure.<sup>195</sup>

- *Nebraska*: There are no permits needed on the local level because consumer-owned public power companies exclusively serve Nebraska.<sup>196</sup> The state may preempt local zoning laws should an issue arise.<sup>197</sup>

So preemption varies legally as to whether states can supersede local land-use and permitting authority for power facilities.

#### *D. Entities Regulated: Utilities and Non-Utility ‘Merchant’ Projects*

The majority of new generation facilities are now constructed by merchant (unregulated) companies, rather than by regulated utilities.<sup>198</sup> In twelve of the twenty-eight states which exercise state level power facility siting, only public utilities are required to obtain a siting certificate before beginning construction on a generation facility.<sup>199</sup> Independent or “merchant” power generation facilities, which for several successive years have dominated new facility construction in the United States, are not covered.<sup>200</sup> These states that exempt from necessary permission independent non-utility facilities include:

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194. *See id.* This committee is advisory and does not have the ability to approve or deny an application, but it can coordinate the review of each application and provide the commission with information on how the project could comply with each agency’s applications. *Id.*

195. *See generally* D.C. MUN. REGS tit. 15, § 2100 (2016) (detailing the process for constructing electric generating facilities and transmission lines).

196. *See Stanton, supra* note 31, at a-56.

197. *See State Generation & Transmission Siting Directory, supra* note 38, at 73.

198. *See Report to Congress, supra* note 23, at 10.

199. For example, *compare* Indiana, IND. CODE § 8-1-8.5-7 (2016), which exempts the “construction of facilities” primarily for a person’s own use, *with* Missouri, MO. REV. STAT. § 386.020(15) (2016), which—among others—exempts electricity generated for railroads and private use on private land.

200. *See generally Report to Congress, supra* note 23, at 10–12.



Alabama,<sup>201</sup> Arkansas,<sup>202</sup> Colorado,<sup>203</sup> Delaware,<sup>204</sup> Indiana,<sup>205</sup> Idaho,<sup>206</sup> Kansas,<sup>207</sup> Michigan,<sup>208</sup> Mississippi,<sup>209</sup> Missouri,<sup>210</sup> Texas,<sup>211</sup> and Wyoming.<sup>212</sup>

A commission's decision on whether to allow construction must take specific factors and legislative policies into account.<sup>213</sup> The primary concern for these states is not the detailed land-use and environmental impact siting issues, but a determination of need for the generation facility.<sup>214</sup> Almost all of these states have not deregulated their retail supply of power to be delivered by power generation sources; instead, these states maintain regulation of retail investor-owned utilities, which must sustain enough power generation resources to

201. ALA. CODE. § 37-4-2 (2016) (limiting Commission jurisdiction to exclude nonutility generators). The Alabama Public Service Commission has no siting jurisdiction over “wind generation or generation facilities proposed by a non-regulated utility.” See Stanton, *supra* note 31, at a-3.

202. ARK. CODE ANN. § 23-3-201 (2016) (noting that utilities must obtain a certificate stating public convenience and necessity require construction). The Arkansas Commission will not regulate municipally owned utilities, public power agencies, or exempt wholesale generators (Independent Power Producers). See *Electric Section*, ARKANSAS PUBLIC SERVICE COMMISSION, <http://www.apscservices.info/electric.asp> (last visited July 31, 2016).

203. See COLO. REV. STAT. § 40-5-101 (2016) (certifying public utilities intending to construct a new facility).

204. See DEL. CODE ANN. tit. 26, § 201(a) (2016) (giving jurisdiction of energy facilities to the Delaware Public Service Commission); but see *id.* § 201(d)(1) (allowing the construction of a facility within a utilities' existing territory).

205. See IND. CODE §§ 8-1-8.5-2 (2016) (noting that the public utility may not begin construction without a certificate).

206. See IDAHO CODE § 61-526 (2016) (mandating that only regulated utilities seek certificates; merchant plants need environmental and local approval).

207. See *State Generation & Transmission Siting Directory*, *supra* note 38, at 47.

208. See MICH. COMP. LAWS § 460.502 (2016) (requiring that public utilities obtain a certification of public convenience and necessity).

209. MISS. CODE ANN. § 77-3-14(6) (2016) (clarifying that electric generation facilities built for a person's own use do not require certification).

210. Missouri laws requires all electric corporations to obtain a certificate; but exclude producers generating electricity for private use on private land from its electric corporation definition. See MO. REV. STAT. § 386.020(15) (2016); *id.* § 393.170.

211. TEX. UTIL. CODE ANN. § 37.051(a) (West 2016). The Texas PUC requires certificates for public utilities to serve areas outside their already allocated service area. Generally siting is a primarily local process. See also *State Generation & Transmission Siting Directory*, *supra* note 38, at 117.

212. WYO. STAT. ANN. § 37-2-205(a) (2016) (requiring a Commission certificate for construction of most new lines or plants).

213. See, e.g., IND. CODE § 8-1-8.5-4(1) (2016) (stating the factors the Commission should take into account when acting on a petition to construct a plant).

214. See Uma Outka, *The Renewable Energy Footprint*, 30 STAN. ENVTL. L.J. 241, 258–59 (2011). Mississippi Administrative Code Rule 7 states that Commission decisions will be based on, “(a) that the petitioner is fit, financially able and in good faith intends to provide such services; (b) that the public convenience or necessity requires the petitioner's operation; and (c) such other matters as the Commission deems relevant.” 39-1 MISS. CODE R. § 07 (LexisNexis 2016).

service all consumption in their service territories<sup>215</sup> (see Figure 1). In these states, need is not left to market forces and is a key component of state regulation. Though each of these states only regulates public utilities' siting decisions and not siting permission for independent power-projects, the manner and level of state oversight and permission legally varies:

- **BY DOLLAR EXPENDITURE:** Wyoming significantly deviates from this formula by price expended by the developer, rather than by type of power generation technology or by size of the facility. In Wyoming, the commission regulates all public utilities, but any newly constructed generating facility with an estimated construction cost of over \$96,900,000 is required to obtain a permit from the Industrial Siting Council.<sup>216</sup> The Industrial Siting Council is staffed by the Department of Environmental Quality, which also has regulatory authority over air and water quality, as well as other environmental concerns.<sup>217</sup>
- **BY TYPE OF TECHNOLOGY:** Kansas has the fewest restrictions of any state, only requiring certification from the Kansas Corporation Commission for generation of new nuclear power plants and no other technologies.<sup>218</sup> State law, administrative codes, and commission rules govern each state's process.

In these states, the state commission's approval does not exempt the utility from local zoning regulations.<sup>219</sup> Some state siting statutes specifically requiring conformity with local regulations include: Michigan,<sup>220</sup> Missouri,<sup>221</sup>

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215. See FERREY, THE NEW RULES, *supra* note 19, at 234–35.

216. See WYO. STAT. ANN. § 35-12-106(a) (2016).

217. *Id.* § 35-12-102(a)(vii) (defining facility as any industrial facility with an estimated construction cost of \$96,900,000).

218. See *State Generation & Transmission Siting Directory*, *supra* note 38, at 47.

219. See, e.g., *Stopaquila.Org v. Aquila, Inc.*, 180 S.W. 3d 24, 40 (Mo. Ct. App. 2005) (upholding injunction on power plant that violated local zoning rules even though the plant obtained a certificate from the commission).

220. MICH. COMP. LAWS § 460.503 (2016).

221. *Stopaquila.Org.*, 180 S.W. 3d at 30. The Missouri Court of Appeals finds that an electric utility could not begin construction in violation of local zoning regulations simply because it obtained a Certificate of Convenience from the Commission. *Id.* at 40.

Colorado,<sup>222</sup> Mississippi,<sup>223</sup> Arkansas,<sup>224</sup> and Wyoming.<sup>225</sup> Colorado requires utilities to meet local land use regulations, but also requires local governments to act quickly on such applications.<sup>226</sup>

### III. LEGAL DISTINCTION IN THE PROCESS OF SITING

Process and procedure matter. Process and procedure especially matter when agencies apply somewhat subjective and significantly discretionary criteria to a power-siting determination. Who makes the decision, who is allowed in to make the record on which the decision must be based, the type of interest or injury that the participant must demonstrate to participate, and the rights of appeal sculpt the ultimate outcome. States differ on each of these procedural and process issues. First, this Article contrasts who makes the decision in different states.

#### A. *Composition of the Siting Authority*

Who makes the public decision is critical. This is particularly so where the standards of the decision are amorphous, general, and attempt to balance so many subjective factors, as they do for power facility siting.<sup>227</sup> In each state the siting body, PUC, or committee is comprised of a distinct and varied statutory membership. It may contain some combination of agency representatives, political appointees, members of the general public, elected members, and/or public officials. Though there is not space to list a detailed comparison of each state commission, a few examples are noteworthy.

In New Hampshire, the commission has nine members representing eight state agencies, including the Department of Environmental Services Commission, the Director of the Water Division, the Commission of Cultural Resources, and more.<sup>228</sup> A majority of the members are officials serving the current executive branch governor.<sup>229</sup> In California, the Energy Commission is comprised of five people, not existing agency officials, appointed by the Governor, each of whom

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222. See COLO. REV. STAT. § 29-20-108(4)(a) (2016). A utility must notify a local jurisdiction that they wish to site their plant in the jurisdiction, and the local jurisdiction is required to render a decision based on their local standards within 120 days. See *id.* § 29-20-108(2).

223. See MISS. CODE ANN. § 77-3-19 (2016). While Mississippi does not appear to give municipalities the right to prevent construction, the Commission will not grant a certificate unless to a facility that plans to use public roads unless it can prove that it has entered into a franchise agreement with the applicable municipality. See *id.* Nevertheless, if the Commission finds that the franchise agreement was denied arbitrarily, then the Commission can grant a certificate despite the lack of a franchise agreement. *Id.*

224. See Stanton, *supra* note 31, at 13. The primary siting agency is in local municipalities. *Id.* at a-9.

225. See *State Generation & Transmission Siting Directory*, *supra* note 38, at 139.

226. See *supra* note 222 and accompanying text.

227. See *supra* Section II.C.

228. N.H. REV. STAT. ANN. § 162-H:3 (2016).

229. *Id.*

serves for a five-year term;<sup>230</sup> by law one member must be selected from the public at large.<sup>231</sup> In New York, there is a seven-member Siting Board comprised of five public officials, each from a different agency, and two *ad hoc* public members who are residents of the proposed project's locality.<sup>232</sup> In New York, the local proposed siting area is represented, but not necessarily, by local officials.

Washington's Energy Facility Site Evaluation Council is comprised of state agency representatives with a public member chair.<sup>233</sup> City, local, and port representatives also sit on the Council, but only vote for projects in their respective jurisdictions.<sup>234</sup> After the hearings, the Council prepares a recommendation that is presented to the governor who makes the final siting decision.<sup>235</sup>

In Arizona, the Public Service Corporation established a Siting Committee, which is made up of the state attorney general or her appointee, the directors of three state agencies, and the chairman of the Corporation Commission.<sup>236</sup> These all reflect executive branch appointments. Vermont's Public Service Board is made up of only three members, all of whom are nominated by the Vermont Judicial Nominating Board, appointed by the Governor, and confirmed by the Vermont Senate.<sup>237</sup> The Vermont committee thus is less partisan, proceeds through a less partisan screening process, and requires legislative branch confirmation.

The South Dakota Public Utilities Commission is composed of three commissioners elected in a general election.<sup>238</sup> This does not reflect executive branch appointment; this group designates a local review committee for each application. The Kentucky Siting Board has five permanent members and two *ad hoc* members appointed by the governor to review specific applications.<sup>239</sup>

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230. See *Public Participation in the Siting Process: Practice and Procedure Guide*, *supra* note 89, at 7–8.

231. See *id.*

232. See Bd. on Elec. Generation Siting & the Env't, *Siting Board Members*, DEPARTMENT OF PUBLIC SERVICE, <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/12B735036AC1324A85257E200054A993?> (last visited July 31, 2016).

233. See *Certification Process*, *supra* note 126.

234. See WASH. REV. CODE § 80.50.030(2)(a) (2016). The Council asks potentially impacted cities, towns, and port districts to appoint representatives to the Council. See *id.*

235. See *Certification Process*, *supra* note 126 (illustrating how the certification process concludes). When the Site Certification Agreement is recommended to the Governor, it includes all “environmental, social, economic, and engineering condition the applicant must meet for construction and operation throughout the life of the project.” See *id.*; see also WASH. REV. CODE § 80.50.100 (2015).

236. ARIZ. REV. STAT. ANN. § 40-360.01(B) (2016).

237. VT. STAT. ANN. tit. 30, § 1 (2016).

238. See S.D. CODIFIED LAWS § 49-1-2 (2016).

239. *Kentucky's Electric Generation & transmission Siting Process: A guide to public Participation*, KY. STATE BRD. ON ELECTRIC GENERATION & TRANSMISSION SITING, [https://psc.ky.gov/agencies/psc/siting\\_board/guide.pdf](https://psc.ky.gov/agencies/psc/siting_board/guide.pdf).

The three permanent members are the Kentucky Public Service Commission chairperson, secretary of the Kentucky Environmental and Public Protection Cabinet, and the secretary of the Kentucky Cabinet for Economic Development.<sup>240</sup> This three-member Board of state executive branch agencies is similar to the composition of the Rhode Island Siting Board.<sup>241</sup>

These examples illustrate the variation in who renders siting decisions. Heads of existing state environmental and other agencies, including the PUC, or their designees, are often included in the Board making the final decision. In some cases, such as in Rhode Island, only such state-level public officials are members of the deciding body.<sup>242</sup> In other states, either elected or other appointed public members at large or of the affected community are included in the deciding body, but do not dominate its membership. In Washington, the governor makes the final decision.<sup>243</sup> In other states, the Board is elected.

These distinctions make a difference: existing state officials are appointed by the governor, and act in the interest of that administration. Energy and energy siting decisions can be political, and appointed officials typically reflect and act in a manner consistent with the sitting governor.<sup>244</sup> While public members appointed by the governor may also reflect the governor's position, they are not permanent agency administrative officials. Elected members are not appointed and not necessarily as partisan.

Structure also matters in how decisions are made. In some states, the board is an independent agency, while in others it sits as a panel advising an agency. In some states, local representatives of the affected communities are included, while in others, they are not. In some, there is a public review committee as part of the process.

#### *B. Public Access to the Process and Party Intervention Status*

The rules of participation matter. If one party is not allowed at the table, a decision may proceed without that stakeholder's active participation in the process. States vary on their siting board legal standing requirements, which dictate and determine who can participate in formal siting board determinations either as-of-right or by permission of the board.<sup>245</sup> Public access is determined by legal standing. Standing determines stakeholder representation and rights in the formal decision-making process.

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240. *See id.*

241. *See* R.I. GEN. LAWS § 42-98-5(a) (2016).

242. *Id.*

243. *See* WASH. REV. CODE § 80.50.030 (2)(a) (2016).

244. *See supra* Section III.A.

245. *See, e.g.,* ARIZ. REV. STAT. ANN § 40-360.04 (2016) (describing Arizona's hearing procedures); *see also infra* notes 250–309 and accompanying text.

Not all states require public hearings, but all allow public hearings at the request of the state or members of the local community.<sup>246</sup> Members of the public who choose to make a limited appearance are not considered a party to the case; states with siting authorities vary in how they allocate rights of standing to participate. Most states allow members of the public to make general statements, which is not the same as having active “party” status.<sup>247</sup> General public comments become part of the official record of the proceeding.<sup>248</sup>

Maryland is the only state that does not require a person to intervene in order to present evidence and cross-examine witnesses.<sup>249</sup> Montana has no formal hearing process and, therefore, no specific process for intervention is required. Interveners have the rights of an official “party,”<sup>250</sup> which include the right to present evidence, call witnesses, and appeal a committee’s decision. In each state, the legal procedure for intervention is legally different:

- *Arizona*: After an application is submitted to the Arizona Corporations Commission, the Commission refers the matter to the separate Arizona Power Plant and Transmission Siting Committee (Siting Committee) for hearing.<sup>251</sup> In hearings before the Siting Committee, the hearing officer shall allow all “material, nonrepetitive evidence and comments of the parties to the proceeding and any rebuttal evidence of the applicant.”<sup>252</sup> These parties shall include: (1) the applicant, (2) every county of municipal government or state agency that filed with the chairmen no less than ten days before the hearing date, (3) non-profit organizations with a conservation, environmental, health, or historic purpose who filed no later than ten days before hearing, and (4) other persons who the hearing officer may deem appropriate.<sup>253</sup> The committee will also consider testimony of any person who wishes to make a limited appearance by filing a request with the committee no less than five days before the hearing.<sup>254</sup>

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246. See generally *infra* notes 250–309 and accompanying text.

247. See generally *infra* notes 250–309 and accompanying text.

248. In most states’ siting processes there is an opportunity for the public to speak or intervene in the proceeding. Once part of the official record, those with party status can refer to it in briefs, as can the commission in its final decision. However, those making general comments without “party” status do not generally have the right to cross-examine witnesses, submit formal evidence, make motions or brief the case to urge a particular outcome. And those without “party” status may or may not have any rights on appeal of the commission’s ultimate decision. See generally *infra* notes 250–309 and accompanying text.

249. See *infra* notes 277–79 and accompanying text.

250. See *Intervening in Siting Cases*, CAL. ENERGY COMM’N [http://www.energy.ca.gov/public\\_adviser/intervening\\_siting\\_cases.html](http://www.energy.ca.gov/public_adviser/intervening_siting_cases.html) (last visited Aug. 2, 2016) (detailing the difference between informal and formal participation); see also *Public Participation in the Siting Process: Practice and Procedure Guide*, *supra* note 89 at 8–10 (explaining the siting process for non-agency interested parties).

251. See ARIZ. REV. STAT. ANN. § 40-360.03 (2016).

252. See *id.* § 40-360.04.

253. See *id.* § 40-360.05(A).

254. See *id.* § 40-360.05(B).

- *California*: The Committee holds a formal evidentiary hearing to review the findings and conclusions of the applicant, staff, interveners, and other agencies through written, oral, and documentary testimony.<sup>255</sup> To obtain the status of intervener, a non-agency party must submit an application to intervene, and a committee of two commissioners will consider this application.<sup>256</sup> If the application to intervene is not granted, the petitioner has a right to appeal to the full Energy Commission within fifteen days.<sup>257</sup>
- *Connecticut*: The Siting Council must hold a hearing on an application if at least twenty-five people petition the Council to appear.<sup>258</sup> Regardless of whether the Council holds a hearing or uses a Declaratory Ruling proceeding, public comment and some level of intervention is allowed.<sup>259</sup> Interveners can include any person whose participation “is in the interest of justice and will not impair the orderly conduct of the proceeding.”<sup>260</sup> Automatically deemed parties are: “any person whose legal rights, duties or privileges will be affected” by the council’s decision, as well as any non-profit group whose purpose is “to promote conservation or natural beauty, to protect the environment, personal health or biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups, or to promote the orderly development of the areas in which the facility is to be located.”<sup>261</sup>
- *District of Columbia*: Any person may intervene if he or she petitions the court and shows that he or she has a “substantial interest” in the proceedings.<sup>262</sup> Any party may submit an answer to this petition, and the

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255. See *Six Phases of the Power Plant Siting Process*, CAL. ENERGY COMM’N, [http://www.energy.ca.gov/public\\_adviser/six\\_phases.html](http://www.energy.ca.gov/public_adviser/six_phases.html) (last visited Aug. 2, 2016) (listing the six phases as: (1) prefilling review phase, (2) data adequacy phase, (3) discovery phase, (4) analysis phase, (5) hearing phase, and (6) decision phase). During the Analysis Phase, the Committee publishes a Preliminary Staff Assessment (PSA), which after public comment, is amended and published in the Final Staff Assessment (FSA), thereafter the Committee conducts a prehearing conference. *Id.*

256. *Intervening in Siting Cases*, *supra* note 250.

257. See *id.* If a person is permitted to intervene, his or her testimony is given under oath, and can be used to support a Commission decision. *Id.* Interveners are also permitted to receive all filings in the case, receive all notices, testify before the Commission Siting Committee, request and obtain data from other parties, file documents relevant to the siting process including motions and objections, and present witnesses. See CAL. CODE REGS., tit. 20 § 1201(K) (2016).

258. See MCCARTHY, *supra* note 92.

259. See *id.*

260. See *id.*

261. CONN. GEN. STAT. § 16-50n (2016); see also, *Connecticut Siting Council Information Guide to Party & Intervenor Status*, CONN. SITING GOV’T, [http://www.ct.gov/csc/lib/csc/guides/guidesonwebsite042010/information\\_guide\\_to\\_party\\_or\\_intervenor\\_status\\_%283%29.doc](http://www.ct.gov/csc/lib/csc/guides/guidesonwebsite042010/information_guide_to_party_or_intervenor_status_%283%29.doc) (last visited Aug. 2, 2016).

262. See D.C. MUN. REGS tit. 15, § 106.1 (2016). When an application is submitted the applicant must serve notice to sixteen different District agencies. See *id.* § 2101.4. The applicant

commission may grant or deny any petition so long as it does not broaden the scope of the issue being addressed or slow the process.<sup>263</sup>

- *Florida*: The Florida Department of Environmental Protection can hold a hearing regarding local land use and a second hearing focusing on environmental issues and matters not related to zoning.<sup>264</sup> Automatic parties to the proceeding include: (1) the applicant, (2) the Public Service Commission, (3) the Department of Economic Opportunity, (4) the Fish and Wildlife Conservation Commission, (5) the affected water management district, (6) the Department of Environmental Protection, (7) the regional planning council, (8) the local government, and (9) the Department of Transportation.<sup>265</sup> Any agency not listed as an automatic party, as well as specified non-profit corporations, can join the proceeding after demonstrating a substantial interest affected by the proceedings.<sup>266</sup> Florida also allows some members of the general public to present oral or written information to the judge without being an intervener.<sup>267</sup>
- *Iowa*: Agencies appear on record to state if a project meets their permitting requirements, and if not, how the application regarding the property can be amended to come into compliance.<sup>268</sup> City and county zoning authorities are designated as parties, but failure to meet local zoning code will not preclude the Board from issuing a certificate.<sup>269</sup> A person may petition to intervene at the presiding officer's discretion after weighing: (1) the intervener's interest, (2) how the intervener's interest will be impacted by the hearings outcome, (3) whether the intervener's interest is already represented by other parties, and (4) if the intervener will help develop a sounder record on which to make a decision.<sup>270</sup> If granted, the certificate gives the applicant the power of eminent domain to the extent the Board has approved such eminent domain in the particular situation.<sup>271</sup>
- *Kentucky*: At the request of local entities, or at least three residents, the Siting Board will hold a public hearing that gives non-parties an opportunity to address aspects of the proposal.<sup>272</sup> Interveners will be

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is also responsible for notifying the public about the proposed plans and creating a community advisory group. *See id.* § 2107.

263. *See id.* § 106.4, 106.5.

264. *See* FLA. STAT. § 403.508(1)(f) (2016).

265. *See id.* § 403.508(3)(a).

266. *Id.* § 403.508(3)(e).

267. *See id.* § 403.508(4)(b).

268. IOWA CODE § 476A.5 (2016).

269. *Id.* § 476A.5(3).

270. *See* IOWA ADMIN. CODE r. 199-7.13 (2016).

271. IOWA CODE § 476A.7 (2016).

272. *Kentucky's Electric Generation & Transmission Siting Process: A Guide to Public Participation*, KY. STATE BRD. ON ELECTRIC GENERATION & TRANSMISSION SITING, [https://psc.ky.gov/agencies/psc/siting\\_board/guide.pdf](https://psc.ky.gov/agencies/psc/siting_board/guide.pdf).



allowed as parties in a particular matter if they demonstrate an interest not already represented by another party.<sup>273</sup>

- *Maine*: Applicants must hold two public information meetings to give interested parties time to comment before the application is submitted.<sup>274</sup> Hearings will only be held if requested.<sup>275</sup> Any interested person can be granted party status any time before the DEP permit is issued.<sup>276</sup>
- *Maryland*: The commission will hold public hearings on each application in each county and municipal corporation in which the facility is proposed to be constructed.<sup>277</sup> The commission may hold hearings jointly with local agencies to consolidate the planning process.<sup>278</sup> The commission will grant leave to intervene unless the commission concludes that the party's interests are already represented or the issues this party seeks to raise are irrelevant.<sup>279</sup>
- *Massachusetts*: All Massachusetts adjudicatory proceedings are headed by a presiding officer who is assigned by the Director of the Siting Board for a siting proceeding.<sup>280</sup> If a party petitions and is admitted, this intervening party does not have all the rights of a primary party.<sup>281</sup>
- *Minnesota*: Once an application has been submitted, the commission may appoint a public advisory task force comprised of local representatives, among others, to help carry out the review process.<sup>282</sup> Any person can appear at the hearing and offer testimony, question witnesses, and present exhibits without becoming an official intervenor.<sup>283</sup>

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273. 807 KY. ADMIN. REGS. 5:001 (2016) (Interveners must submit a request within thirty days of the filing of a completed application).

274. See *Introduction to Maine's Energy Siting Long-term Contracting Considerations*, *supra* note 98.

275. See *id.* (explaining that hearings are infrequent, especially in the context of wind siting).

276. See *id.*

277. See MD. CODE ANN., PUB. UTIL., § 7-207(d) (LexisNexis 2016) (amended 2016 Md. Laws 464 (S.B. 1069)).

278. See MD. CODE REGS. 20.79.02.03 (2016).

279. See MD. CODE ANN., PUB. UTIL., § 3-106 (LexisNexis 2016). According to the Commission's rules and procedures concerning hearings, all parties shall be represented by an attorney. See MD. CODE REGS. 20.79.02.04 (2016).

280. See 980 MASS. CODE REGS. § 1.04(2)(a) (2016). When required by statute or deemed appropriate, public hearings will take place in all or some of the affected towns. See *id.* § 1.04(5).

281. See *id.* § 1.05(2). If a person wishes to participate as a limited participant, he or she must also make a written request, typically; participation in this limited capacity is limited to filing briefs or commenting. *Id.*

282. See MINN. STAT. § 216E.08 (2016). The commission shall designate one staff person whose sole job is to assist and advise those interested in the site or route proceedings. *Id.* The commission will also hold public contested case hearings in front of an administrative law judge. *Id.* § 216E.03(6).

283. See *id.*

- *Montana*: The Department will make a preliminary decision on whether to grant or deny the permit, and thereafter will hold hearings to receive public comment.<sup>284</sup> The hearing is not subject to the contested case procedure under the Montana Administrative Procedure Act; no cross-examination is allowed and no formal intervener status is required.<sup>285</sup>
- *Nebraska*: At a hearing, any interested person can appear, file objections, and offer evidence.<sup>286</sup> The parties before the Board will be classified as applicant, protestant, respondent, complainants, or interveners.<sup>287</sup>
- *Nevada*: In Nevada, parties automatically admitted to the permitting process are: (1) the applicant, (2) the Division of Environmental Protection of the State Department of Conservation and Natural Resources, (3) each local government served with a copy of the application and filed a notice of intervention as a party, (4) any natural person living in a the jurisdiction of a local government who was entitled to notice and who filed a petition to intervene that was subsequently accepted, and (5) relevant domestic non-profit corporations.<sup>288</sup> Any non-party can make a limited appearance by filing a statement of position at the appropriate time.<sup>289</sup>
- *New Hampshire*: All hearings are adjudicative and must give consideration to concerns of municipal and regional planning commissions and municipal governments, with at least one public hearing required in the county affected by the proposed facility.<sup>290</sup> The hearing officer decides undisputed petitions for intervention; the committee's presiding member decides disputed petitions.<sup>291</sup>
- *New York*: Public outreach and the cost of intervention is at least partially funded by the applicant by a fee equal to \$350 per MW of proposed facility generation capacity. Any person may make a limited appearance, but an intervener has party status and access to intervener funds.<sup>292</sup>

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284. MONT. ADMIN. R. 17.4.501 (2016).

285. *See id.*

286. NEB. POWER REVIEW BD., REV. RULES OF PRACTICE AND PROCEDURE 16–17 (1989), <http://www.powerreviewboard.nebraska.gov/nprbregs.pdf>. Nebraska state law provides that a hearing shall be held within sixty days of submission of an application. NEB. REV. STAT. § 70-1013 (2016). This has been deemed advisory and not mandatory. *See generally* Omaha Pub. Power Dist. v. Nebraska Pub. Power Project, 243 N.W. 2d 770, 722 (Neb. 1976).

287. *See id.*

288. NEV. REV. STAT. § 704.885 (2016).

289. *Id.*

290. *N.H. Site Evaluation Comm.*, Site 300, [http://www.gencourt.state.nh.us/rules/state\\_agencies/site100-300.html](http://www.gencourt.state.nh.us/rules/state_agencies/site100-300.html).

291. N.H. REV. STAT. § 162-H:4 (2016).

292. Bd. on Elec. Generation Siting & the Env't, *Siting Board - Frequently Asked Questions*, DEPARTMENT OF PUBLIC SERVICE, <http://www3.dps.ny.gov/W/PSCWeb.nsf/ArticlesByTitle/BCE89BD8C61D9D4B85257E200054A99A?OpenDocument> (last visited Aug. 3, 2016). Within the Department of Public Service, the Public Information Coordinator helps members of the public

- *Ohio*: Parties to the more formal proceeding include: (1) the applicant, (2) those entitled to receive notice of the petition, and (3) a person living in a municipal corporation that is entitled to receive service and petitions the Board for leave to intervene in a timely way.<sup>293</sup> Any person may offer written or oral testimony but the right to call, examine, and cross-examine witnesses is confined to parties.<sup>294</sup>
- *Oregon*: The review process is administered by Oregon’s Energy Facility Siting Council, which is comprised of citizen volunteer appointees.<sup>295</sup> After the Department conducts a review and issues a Draft Proposed Order, including an initial recommendation on site certification,<sup>296</sup> the public then has an opportunity to respond to this proposal in open hearings.<sup>297</sup> An independent hearing officer presides over the mandatory contested hearing, while the applicant, the Department of Energy, and anyone with permission from the hearing officer may have party status.<sup>298</sup>
- *Rhode Island*: One public hearing will be held in every political subdivision impacted by the proposed project, including areas that will be affected by construction or alteration of transmission lines.<sup>299</sup> The Siting Board is empowered by statute to create regulations that determine the

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participate in the siting and certification process. *Id.* One hundred and fifty days before the scoping phase of the application process, a public involvement plan must be presented and implemented. *Id.*

293. OHIO REV. CODE ANN. § 4906.08(B) (West 2016).

294. *Id.* § 4906.08(C).

295. *See Oregon Comparison of Siting Requirements, supra* note 59 (comparing the consolidated review process in Montana, California, and Oregon). The process includes two main phases. *See* OR. REV. STAT. § 469.330(1)–(3) (2016). In the first phase, the applicant submits a notice of intent to the Department of Energy. *Id.* This notice allows the Department to hold an initial period of public comment, and allows state agencies time to gather information regarding applicable laws and regulations. *Id.* The second phase does not begin until the Department issues a Project Order; once this is complete, an official application can be submitted. *Id.*; *see also The Siting Process for Energy Facilities*, OREGON DEPARTMENT OF ENERGY, <http://www.oregon.gov/energy/Siting/Pages/process.aspx> (last visited July 31, 2016) (detailing two phases of siting process). An order is not necessary in an expedited review; however, typically an order will identify all applicable rules and regulations and information needed in the official application. *See id.*

296. *See* OR. REV. STAT. § 460.370(2) (2016) (listing the steps of review for a draft proposed order).

297. *See id.* § 469.370(3) (establishing process for public comment). “Any issue that may be the basis for a contested case shall be raised not later than the close of the record at or following the final public hearing prior to issuance of the department’s proposed order.” *Id.* If a party wishes to contest the final proposed order, he or she must offer some specific objection and support at one of these hearings. *See id.*

298. *See Energy Facility Siting Standards, supra* note 115 (warning that only those previously on record with specific issue can become a party). After the contested hearing the hearing officer will issue a Contested Case Order and the case will move into the final stage of review. *See id.*

299. *See* R.I. GEN. LAWS § 42-98-9.1 (2016). All Siting Board hearings are open to the public and include an opportunity for oral public comment before and after each hearing. *Id.*

standards for intervention<sup>300</sup> for those who live in an affected city or town, others with a right conferred by statute or an interest that is affected by the project, or represents the public interest.<sup>301</sup>

- *South Dakota*: Individuals can become formal parties and are legally obligated to respond to discovery requests and subject to cross-examination at the formal hearing.<sup>302</sup>
- *Vermont*: With the exception of some smaller projects, all proceedings will include at least one public hearing in the affected county.<sup>303</sup> The Vermont Department of Public Service is an automatic party to represent the public interest including ratepayers. However, local governments and state agencies are not automatically afforded party status.<sup>304</sup> Typically, municipalities seek and are granted intervener status.<sup>305</sup>
- *Washington*: All state agencies and local government with members on the energy facility siting council are considered automatically as parties in the proceeding.<sup>306</sup> The state also appoints a Counsel for the Environment to represent the public interest.<sup>307</sup> Any other person wishing to become a party must petition the EFSEC, which will decide based on the project's impact on the proposed interveners' interests.<sup>308</sup> After the hearings, the Council prepares a recommendation that is presented to the governor who makes the final siting decision.<sup>309</sup>

There are significant procedural differences for general public participation in state power facility siting processes to create the record on which the decision must be based. Standing rights range in different states from entitlements to automatic intervener status granted to "any person" (e.g. Maine, Montana,

300. See *id.* § 42-98-7. Decisions regarding intervention are decided within forty-five days of filing an application to intervene. See *id.* § 42-98-9.

301. See 90-050-001 R.I. CODE R. § 1.10(b)(1)-(3) (LexisNexis 2016).

302. See *South Dakota Utilities Commission Information Guide to Siting Energy Conversion & Electric Transmission Facilities*, S.D. PUB. UTILS. COMM'N. (2016) <https://puc.sd.gov/commission/Publication/sitinghandout.pdf>. South Dakota encourages the public to send informal comments regarding the project to the Commission. *Id.* With 30 days' notice, the Commission will hold requested public hearings as close as possible to the proposed site of the new generation facility. S.D. CODIFIED LAWS § 49-41B-16 (2016).

303. VT. STAT. ANN. tit. 30, § 248(a)(4)(A) (2016).

304. *Id.* at § 217.

305. *Multi-State Energy Facility Siting Review*, N.H. SENATE 25 (2013), [https://www.nh.gov/oep/energy/programs/documents/sb99other\\_states\\_process.pdf](https://www.nh.gov/oep/energy/programs/documents/sb99other_states_process.pdf).

306. See WASH. ADMIN. CODE. § 463-30-050 (3026); see also § 463-90-020 (noting that hearings may be run by the Council or an Administrative Law Judge).

307. See WASH. REV. CODE ANN. §§ 80.50.020, 80.50.080 (West 2016).

308. See *Certification Process*, *supra* note 126.

309. See WASH. REV. CODE § 80.50.100 (2016) (describing the conclusion of the certification process). When the Site Certification Agreement goes to the Governor, it includes all "environmental, social, economic, and engineering condition that applicant must meet for construction and operation throughout the life of the project." See *Certification Process*, *supra* note 126.

Minnesota, Nebraska, Nevada), to any member of the city or town where the facility is proposed to be sited (e.g. Nevada, Ohio), to intervention only upon demonstrating that one's interests are not otherwise represented (e.g. Iowa, Maryland, Massachusetts, Kentucky), to very limited rights of intervention to parties without a potential injury (e.g. Vermont). In some states, interveners are admitted to actively make the initial record (e.g. Minnesota), while in other states, parties are admitted only after agency has made a preliminary decision (e.g. Montana, Oregon). Some states make potential intervener funding available (e.g. New York).

Regarding the inclusion of other agencies of government, some states such as Arizona, automatically allow "party" status to any state agency and/or any local government, and Washington has a variant of this.<sup>310</sup> Other states, like Vermont, do not provide automatic local government intervener status; local governments can petition to intervene.<sup>311</sup> Other states, such as Nevada, automatically grant "party" status to any environmental or conservation-oriented non-governmental organization.<sup>312</sup>

The EFSB process in Massachusetts provides for a public hearing where parties are "substantially and specifically affected."<sup>313</sup> To intervene in an EFSB hearing, a party must show that there are specific, proximate, and direct impacts or injuries to its interests. Economic or speculative environmental impacts are not enough for a party to be granted standing.<sup>314</sup> In *Tofias v. Energy Facilities Siting Bd.*,<sup>315</sup> the court found a lack of evidence presented by the intervening party to show any impact of proposed adjacent power line installation.<sup>316</sup>

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310. See *supra* note 253 and accompanying text.

311. See *supra* note 304 and accompanying text.

312. See *supra* note 288 and accompanying text.

313. *Tofias v. Energy Facilities Siting Bd.*, 757 N.E.2d 1104, 1109 (Mass. 2001); see also MASS. GEN. LAWS ch. 30A, § 10(4) (2014) (allowing a person—after showing a substantial and specific affectedness—"to intervene as a party in the whole or any portion of the proceeding, and allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose, as the agency may order").

314. See *Tofias*, 757 N.E. 2d at 1111; cf. *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 693 N.E.2d 153 (Mass. 1998). In *Ginther*, the Court outlined the standing process in Massachusetts:

Alleging "[i]njury alone is not enough; a plaintiff must allege a breach of duty owed to it by the public defendant." Injuries that are speculative, remote, and indirect are insufficient to confer standing. "Not every person whose interests might conceivably be adversely affected is entitled to [judicial] review." Moreover, the complained of injury must be a direct consequence of the complained of action.

*Ginther*, 693 N.E.2d at 157 (citations omitted).

315. 757 N.E.2d 1104 (Mass. 2001).

316. See *id.* at 1110. In *Tofias*, the plaintiff intervener claimed the EFSB abused its authority in not granting intervener status because of the economic and environmental impact of the electromagnetic field. *Id.* The intervener's claim failed because no evidence was presented to show any actual or potential damage from the power lines. *Id.* The court reasoned that it is not necessary to prove the harm, but merely to offer proof that harm could exist. *Id.* The court went on to note the EFSB's ruling was not biased because it followed a pattern of "reasoned consistency." *Id.* at 1111.

In some states, such as Iowa, Maryland, and Kentucky, intervener status is granted to a particular petitioning intervener if other interveners do not already represent the interest of the petitioner.<sup>317</sup> Other states, such as California and Washington, leave discretion to the presiding officer to discretionarily grant petitions for intervener party status.<sup>318</sup> Denial of such applications can also be an issue for appeal.<sup>319</sup> Therefore, presiding officers have a tendency to liberally grant petitions for intervener status, so as not to be reversed on appeal on this procedural issue.

Just because a party has attained intervener status, does not require the siting board or commission to allocate any weight to the position of a particular intervener. In some states, like Maryland, all interveners must be represented by an attorney.<sup>320</sup> In certain states, such as Iowa, city and county zoning authorities are designated automatically and in advance as parties, but ultimately their local zoning and land-use codes do not control the outcome; failure to meet local zoning codes will not preclude the board from issuing a siting certificate if it so decides.<sup>321</sup>

Some states, such as Maine, have different regulatory authorities governing the siting process for different kinds of power generation assets—such as for wind and other types of generating facilities.<sup>322</sup> In some states, like Maryland, the commission has discretion to consolidate state and local siting hearings.<sup>323</sup> However, consolidation of the hearing process is not the same as consolidation of two required board decisions into a single preemptive decision made by the superior agency. Instead, it merely consolidates the hearing process and admitted evidence and briefs which become the basis of two independent decisions. It consolidates time expended, but not the independent decision authority, to the extent that such exists under applicable law.

### C. The Record

Most of these states also require utilities to notify the local jurisdiction before applying for a state certificate.<sup>324</sup> Some commissions even require a utility to gain required local approvals before applying for a state certificate of convenience.<sup>325</sup> Finally, in some states where facilities are required to seek local

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317. See *supra* notes 270, 273, 279 and accompanying text.

318. See *supra* notes 256, 308 and accompanying text.

319. See *infra* Section III.D.

320. See MD. CODE REGS. 20.79.02.04 (2016).

321. IOWA CODE § 476A.5(3) (2016).

322. See *supra* note 98 and accompanying text.

323. See *supra* note 277 and accompanying text.

324. See, e.g., COLO. REV. STAT. § 29-20-108(4)(a) (2016) (requiring utilities to notify local jurisdiction before submitting an application).

325. See, e.g., ARK. CODE ANN. § 23-18-513 (2016) (requiring newspaper notice to jurisdiction prior to application); MICH. COMP. LAWS § 460.503 (2016) (requiring the applicant to obtain consent from the local municipality).

approval, if denied, the facility can appeal to the state siting commission or the state to preempt the local rule. Colorado allows utilities to appeal to the state commission if a local government denied the facility's application.<sup>326</sup> The state, not the commission, can preempt local land use laws on a limited basis in Wyoming.<sup>327</sup>

Each state requires facilities to provide the state commission with a base level of information, typically including the cost of a project, maps of affected areas, names of those involved with the company, and more information in some states.<sup>328</sup> Some states have different application requirements depending on the size of the plant, or the cost of its operation.<sup>329</sup> For example, Indiana requires higher standards and more information for plants that are designed to generate 80 MW or more.<sup>330</sup>

Most of these states require public hearings,<sup>331</sup> though Mississippi requires such hearings only if the plant application is contested.<sup>332</sup> All states allow at least written comments on the project and the possibility of intervention by interested parties.<sup>333</sup> Typically the potential intervenor must show a "substantial interest in the subject matter;" some states require a "specific prayer[ ] for affirmative relief," or deny intervenor status if the proposed intervenor's interest is already represented.<sup>334</sup> Though states have different criteria for determining

326. See COLO. REV. STAT. § 40-6-109.5 (2016). Utilities are also permitted to appeal to the Commission if the local government accepted the utilities application but places too many cumbersome restrictions on that acceptance. See *id.*

327. See *State Generation & Transmission Siting Directory*, *supra* note 38, at 139.

328. See, e.g., COLO. CODE REGS. § 723-3:3102 (2016) (listing all elements that must be included in application).

329. See, e.g., IND. CODE § 8-1-8.5(e) (2016) (noting higher standards in certification process for plants producing over 80 MW); see also 39-1 MISS. CODE R. § 07 (LexisNexis 2016) (nothing that any plant beginning construction of a facility that could cost in excess of "\$10 million or ten percent of the utility's existing jurisdictional net plant investment" must apply for a certificate).

330. IND. CODE ANN. § 8-1-8.5(e) (2016).

331. See, e.g., *id.* § 8-1-8.5-5 (requiring a public hearing on applications).

332. 39-1 MISS. CODE R. § 07 (LexisNexis 2016) (allowing the Commission to forego a hearing if certificate application is uncontested); see also *State ex rel. Utilities Com'n v. Empire Power Co.*, 435 S.E.2d 553, 561 (N.C. Ct. App. 1993) (holding that if no material issues of fact required a hearing the Commission could choose not to conduct one).

333. See, e.g., 170 IND. ADMIN. CODE 1-1.1-11 (2016) (detailing petitions to intervene); *Public Utilities Rules of Practice and Procedure*, Miss. Serv. Comm'n and Pub. Util. Staff, (2012), <http://www.psc.state.ms.us/executive/pdfs/2012/Procedural%20Rules.pdf>; *Electric Section*, ARK. PUB. SERV. COMM'N, <http://www.apscservices.info/electric.asp> (last visited July 31, 2016); N.C. UTILS. COMM'N, COMM'N RULES AND REGULATIONS ch. 1, Rule R. 1-19, <http://www.ncuc.commerce.state.nc.us/ncrules/Chapter01.pdf> (allowing intervention as a matter of course if petition is timely and demonstrates a "real interest in the subject matter of the proceeding"); COLO. CODE REGS. 723-2 § 3002 (2015) (requiring utilities to notify interested parties that they can intervene); 26-1000-1001 DEL. ADMIN. CODE § 2.0-2.9 (2015) (delegating authority to grant intervention to hearing examiner but allowing interlocutory appeal).

334. See, e.g., 170 IND. ADMIN. CODE 1-1.1-11(a) (2016); *Public Utilities Rules of Practice and Procedure*, Miss. Serv. Comm'n and Pub. Util. Staff, (2012),

when an intervener will be permitted status, in all states the denial of intervention is strictly within the discretion of the commission.<sup>335</sup>

#### D. Appeal Rights

In all of the twenty-eight states with state siting agencies, a final decision of the siting board, council, or commission can be appealed to state courts. The consistency ends there. In all but two states, only formal parties, including interveners, can appeal a final decision. The two jurisdictions in which any aggrieved person with an interest in the proceedings can appeal are District of Columbia and Minnesota.<sup>336</sup> Some states require that before a party can petition for judicial review, it must first petition the siting board for administrative rehearing. All states differently establish which state court will have jurisdiction over these types of appeals and which appeals are not ripe or not permitted:

- *Arizona*: No court in Arizona can hear a case that could have been decided by the Siting Committee of the Commission.<sup>337</sup> Yet, if the Committee issues an Environmental Compatibility Certificate, any party to the case may request that the Commission review this certification before they confirm the Committee's decision.<sup>338</sup> After the Commission grants or denies a certificate, a party can ask the Commission to reconsider within thirty days; this request must illustrate how the Commission failed to or unlawfully applied the statutory criteria.<sup>339</sup> If the party is again denied, it may, within thirty days of a rehearing or denial of a rehearing, appeal to the superior court in the county in which the Commission has its office.<sup>340</sup> If the Commission rescinds the order that is subject to the appeal, the

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<http://www.psc.state.ms.us/executive/pdfs/2012/Procedural%20Rules.pdf> (allowing intervention if movant has "substantial interest" and will not impede process); *Rules of Practice and Procedure*, Ark. Pub. Serv. Comm'n (2014), [http://www.apscservices.info/Rules/rules\\_of\\_practice\\_procedure2014.pdf](http://www.apscservices.info/Rules/rules_of_practice_procedure2014.pdf) (requiring potential intervener's interest not be otherwise "adequately represented").

335. 170 IND. ADMIN. CODE 1-1.1-11 (2016)

If a petition to intervene satisfies this section and shows the proposed intervenor has a substantial interest in the subject matter of the proceeding or any part thereof, and the proposed intervener's participation will not unduly broaden the issues or result in unreasonable delay of the proceeding, the presiding officer may grant the prayer for leave to intervene, in whole or in part and, thereupon, the intervenor becomes a party to the proceeding with respect to the matters set out in the intervention petition.

*Id.*; see *Public Utilities Rules of Practice and Procedure*, Miss. Serv. Comm'n and Pub. Util. Staff, (2012), <http://www.psc.state.ms.us/executive/pdfs/2012/Procedural%20Rules.pdf> (specifying when Commission may allow intervention.).

336. See *infra* notes 348, 363 and accompanying text.

337. ARIZ. REV. STAT. ANN. § 40-360.11 (2016).

338. *Id.* § 40-360.07(A). The Commission will request the record from the Committee, and may take oral argument. *Id.*

339. *Id.* § 40-360.07(c).

340. *Id.* § 40-254(A).



action is moot.<sup>341</sup> After trial in the superior court, either party in the action may appeal to the Supreme Court.<sup>342</sup>

- *California*: After the Energy Commission’s final decision, any “party” may petition the Commission for reconsideration. Within thirty days, the Commission will accept or deny the motion by a majority vote of three members.<sup>343</sup> The Public Resources Code provides that the Energy Commission’s final decisions are subject to review only by the Supreme Court of California, bypassing lower state courts.<sup>344</sup> If the Supreme Court agrees to review the case, no new evidence will be permitted; the court will consider only the Commission’s administrative record.<sup>345</sup>
- *Connecticut*: Once the Siting Council has issued an order, any party can seek judicial review in Superior Court.<sup>346</sup> The appeal does not stay the agency decision without a successful motion for a stay, which will stop construction.<sup>347</sup>
- *District of Columbia*: Once the commission has rendered a decision, any public utility or person affected by the final order, upon petition for reconsideration, can appeal to the Court of Appeals.<sup>348</sup> This is unique in its breadth of right for anyone to appeal, as most state statutes stipulate that only a formal “party” in the adjudicatory proceeding has standing to appeal.<sup>349</sup>

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341. *Id.* § 40-254(B).

342. *Id.* § 40-254(D).

343. *See California Energy Facility Licensing Process*, *supra* note 142, at 13. A party must file and serve all parties with a “Petition for Reconsideration of Energy Commission Decision” which must offer specific reasons for reconsideration and address an error in law. *Id.*

344. *Public Participation in the Siting Process: Practice and Procedure Guide*, *supra* note 89, at 127. A petitioner seeking judicial review must file a petition for a Writ of Mandate. *Id.*; *see also* Santa Teresa Citizen Action Grp. v. State Energy Conservation & Dev. Comm’n, 130 Cal. Rptr. 2d 394, 395–96 (2003) (holding that the California Supreme Court has exclusive jurisdiction over power plant certification appeals).

345. *Public Participation in the Siting Process: Practice and Procedure Guide*, *supra* note 89, at 127–28. “The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution.” CAL. PUB. RES. CODE § 25531(b) (West 2016).

346. *See* CONN. GEN. STAT. § 16-50q (West 2016); *id.* § 4-183(a) (2016). Appeal must be submitted within forty-five days after notice of the decision or denial of reconsideration from the Council, and the appeal must be served to the Council and all the parties involved in the proceedings. *See id.* § 4-183(c). A petition for reconsideration with the Council is not a prerequisite, but all administrative remedies must be exhausted before a judicial appeal can be made. *See id.* § 4-183(a).

347. *Id.* § 4-183(f).

348. D.C. CODE § 34-605(a) (2016).

349. *Pollak v. Public Utilities Commission*, 191 F.2d 450, 453–54 (D.C. Cir. 1951), vacated, 343 U.S. 451 (1952) (clarifying the rather low bar for who was affected by the transportation decision and therefore eligible to appeal).

- *Florida*: A party who is adversely affected by a final agency decision can appeal to the appellate court district where the agency maintains its headquarters, or where the party resides.<sup>350</sup> Filing the petition for appeal does not stay the agency enforcement of the agency decision.<sup>351</sup> The court shall set aside the final order of the administrative law judge or remand the case to the administrative law judge, if it finds that the final order depends on any finding of fact that is not supported by competent substantial evidence in the record of the proceeding.<sup>352</sup> This standard is favorable to the party appealing, compared to an arbitrary and capricious standard on appeal.<sup>353</sup>
- *Iowa*: Any decision made by the Board is considered a “single agency action,” despite the participation of many agencies.<sup>354</sup> After exhausting their administrative remedies, petitioners may appeal the issuance or denial of a certificate to the Polk County District Court, or the district court for the county in which the petitioner resides.<sup>355</sup>
- *Kentucky*: Any party to the Siting Board’s hearing can bring an action against the Board in circuit court within thirty days after the filing of a final determination.<sup>356</sup>
- *Maine*: Any person aggrieved may appeal within thirty days of the decision.<sup>357</sup> If there was no hearing held during the decision-making process, then a person can request such a hearing within thirty days.<sup>358</sup> Appeals go directly to the Supreme Judicial Court.
- *Maryland*: A party aggrieved by a final judgment may petition the Commission for rehearing,<sup>359</sup> or appeal the judgment to the Court of Special Appeals.<sup>360</sup>
- *Massachusetts*: Any party with full party status—not a limited participant—may appeal directly to the Supreme Judicial Court for review.<sup>361</sup> The scope of this review is narrow and will only determine if

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350. FLA. STAT. § 120.68(1)(2), 2(a) (2016).

351. *Id.* § 120.68(3).

352. *Id.* § 120.68(10). The Court will pay great deference to the agency decision, and the court “shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on any disputed finding of fact.” *Id.*

353. See FERREY, ENVIRONMENTAL LAW, *supra* note 3, at 66–67.

354. IOWA CODE § 476A.11 (West 2015).

355. *Id.* § 17A.19 (2015).

356. KY. REV. STAT. ANN. § 278.712 (West 2015).

357. ME. STAT. tit. 35-a, § 3121 (2016); see also *Casco Bay Island Transit Dist. v. Pub. Utilities Comm’n*, 528 A.2d 448, 450 (Me. 1987) (discussing the thirty-day period for filing a notice of appeal).

358. ME. STAT. tit. 38, § 485-A(2) (2016).

359. MD. CODE ANN., PUB. UTIL. § 3-114(c)(1) (LexisNexis 2016).

360. *Id.* § 3-209 (2015).

361. MASS. GEN. LAWS ANN. ch. 164, § 69P (West 2016).

the decision was made in conformity with the state and federal constitutions, the factors set out in applicable statute, and the rules and regulations of the Board.<sup>362</sup>

- *Minnesota*: Minnesota broadly allows any applicant, party, or person aggrieved by the issuance of a siting permit to appeal to the Court of Appeals.<sup>363</sup>
- *Montana*: Decisions of the DEQ can be appealed to the Board of Environmental Review. The subsequent decisions of the Board may be appealed to state district courts.<sup>364</sup>
- *Nebraska*: Any party or person aggrieved by a contested case hearing before the Board can petition for judicial review.<sup>365</sup> Final decisions by the Nebraska Power Review Board can be appealed to the Court of Appeals, while any party before the Commission can appeal to the district court.<sup>366</sup>
- *Nevada*: Any aggrieved party may apply for rehearing within fifteen days after issuance of the order; if denied, the party can appeal to the district court within thirty days. The grounds and scope of review are limited and include (1) conformity with constitutions, (2) supported by substantial evidence, (3) made in accordance with factors set forth in statute, or (4) holdings that are arbitrary, capricious, or an abuse of discretion.<sup>367</sup>
- *New Hampshire*: Aggrieved parties may appeal directly to the New Hampshire Supreme Court.<sup>368</sup>
- *New York*: Upon grant or denial of a certificate, any party can petition the Siting Board for a rehearing within thirty days.<sup>369</sup> Not until after this rehearing or denial of rehearing may a party obtain judicial review in the Appellate Division of the Supreme Court of the State of New York in the county where the facility is located, or in the petitioner's county if the request for rehearing was denied.<sup>370</sup> Following any rehearing and any judicial review, the Board's jurisdiction shall end and the Public Service Commission shall monitor, enforce, and administer compliance with the terms of the certificate.<sup>371</sup>

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362. *Id.*

363. MINN. STAT. § 216E.15 (2016). This appeal must be filed within thirty days after the publication in the State Registrar of the issuance of the permit. *Id.*

364. MONT. CODE ANN. § 75-20-223 (1)(a) (2016).

365. NEB. REV. STAT. § 70-1016 (2016).

366. *Id.* § 75-136 (2015).

367. NEV. REV. STAT. § 704.895(1) (2015).

368. N.H. REV. STAT. ANN. § 162H:10 (2016).

369. N.Y. PUB. SERV. LAW § 170(1) (McKinney 2016).

370. *Id.*

371. *See id.*

- *Ohio*: Any party dissatisfied with a ruling by the administrative law judge during the hearings may make an immediate interlocutory appeal to the Board.<sup>372</sup> A party may also appeal the Board's decisions by filing a petition with the Ohio Supreme Court.<sup>373</sup>
- *Oregon*: Any party to a contested case has thirty days to request a rehearing, or petition the Oregon Supreme Court for direct judicial review within sixty days.<sup>374</sup>
- *Rhode Island*: Final decisions may be appealed directly to the state supreme court within ten days after ratification.<sup>375</sup>
- *South Dakota*: Any party to the permitting proceeding may appeal the decision of the Commission to a circuit court.<sup>376</sup>
- *Vermont*: Parties may appeal directly to the Vermont Supreme Court, or submit a motion for reconsideration to the Board.<sup>377</sup>
- *Washington*: If a party disagrees with the Governor's final decision, it may petition for review in the Thurston County Superior Court,<sup>378</sup> which shall then certify the petition for review to the supreme court if the petition can be reviewed on the administrative record, the interests at stake are fundamental and urgent, supreme court review is likely, and the record is complete.<sup>379</sup>
- *Wisconsin*: Commission decisions are subject to judicial review.<sup>380</sup>

There are significant differences in rights to appeal. Some states have direct appeal to the supreme court of the state.<sup>381</sup> This avoids multiple layers of appeal and consolidates all rights into a single appeal. In some of these states, the supreme court has discretion to determine whether or not there is a sufficiently alleged reversible error of law or fact to decide whether to take the appeal.<sup>382</sup> Appeal to the state's lowest court, provided in several states, is a longer process.

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372. OHIO REV. CODE ANN. § 4906-2-29(A) (West 2016).

373. OHIO ADMIN. CODE § 4906-7-18 (2015). Unless the review process was accelerated, the Board shall render its decision within ninety days after receiving the application. OHIO REV. CODE ANN. § 4906.03 (West 2015).

374. See OR. REV. STAT. § 469.403 (2016) (stating that the Oregon Supreme Court has exclusive jurisdiction in siting cases).

375. See 42 R.I. GEN. LAWS § 42-98-12(b) (2016).

376. S.D. CODIFIED LAWS § 49-41B-30 (2016).

377. See VT. STAT. ANN. Tit. 30 § 12 (2016).

378. See WASH. REV. CODE § 80.50.140(1)(a)-(d) (2016) (detailing the method of appealing administrative decisions).

379. See *id.*

380. See WIS. STAT. §§ 196.39, .49, .491, 227.52 (2016); State *ex rel.* Madison Airport v. Wrabetz, 285 N.W. 504, 506 (Wis. 1939).

381. See, e.g., MASS. GEN. LAWS ch. 25, § 5 (2016); OR. REV. STAT. § 469.403 (2016); 42 R.I. GEN. LAWS § 42-98-12(b) (2016); VT. STAT. ANN. tit. 30 § 12 (2016).

382. See OR. REV. STAT. § 469.403 (2016); VT. STAT. ANN. tit. 30 § 12 (2016).

Yet, this may work to the advantage of opponents of siting a new power generation facility who want to delay construction.

There are also significant differences in the determination of who has standing to appeal. Some states allow any interested person the right to appeal.<sup>383</sup> Other states only allow formal parties and formally aggrieved parties the right to appeal.<sup>384</sup> This has an impact on the possibilities of added time until a determination is final. Because under the U.S. system each party pays its own legal fees, ease of access to multiple layers of judicial appeal by any person, regardless of formal party status in the proceeding, can add to the uncertainty and cost associated with power-project siting.<sup>385</sup>

#### IV. THE MOSAIC

There are critical legal distinctions of both legal substance and legal process when one examines power-siting authority across the state mosaic. Even small legal distinctions and variances matter in something as important as electric power, the second most important invention in history, after the wheel.<sup>386</sup> Nothing is more indispensable than electricity in the foundation of the modern economy.<sup>387</sup> With the divergence of siting policies among states, there is no adherence to consistent “best practices” across the nation.

If power siting were a matter of a single federal law, there would be no divergence and no conflict across the country with energy facility siting. However, energy facility siting is jurisdictionally vested in the fifty states and four U.S. territories rather than the federal government. In many of the jurisdictions, states cede this authority to localities that have even more variant land-use restrictions.<sup>388</sup> State and local split authority over facility siting creates a legal “check-mate” in putting in place basic infrastructure for this critical technology.

Land-use regulation is traditionally exercised at the local level through local police power. Traditional local land-use authority exercised through the police power can block or frustrate power facility siting. Approximately half the states

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383. See, e.g., D.C. CODE § 34-605(a) (2016); MINN. STAT. § 216E.15 (2016).

384. See, e.g., MD. CODE ANN., PUB. UTIL. § 3-209 (LexisNexis 2016); MASS. GEN. LAWS ch. 25, § 5 (2016); N.H. REV. STAT. ANN. § 162H:10 (2016); N.Y. PUB. SERV. LAW § 170(1) (McKinney 2016); OHIO REV. CODE ANN. § 4906-2-29(A) (West 2016).

385. See *Aleaska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 245–47 (1975) (explaining that what is known as the “American Rule” to attorney’s fees means each party bears its own attorney expenses in bringing an action, unless a fee-shifting statute is applicable); see also RESTATEMENT (SECOND) OF TORTS § 914(1) (AM. LAW. INST. 1979).

386. See Fallows, *supra* note 2. Electricity finished behind only the movable type printing press. *Id.* Electricity is essential to operate seven other “top 50” inventions of all time *Id.* The Internet, computers, air-conditioning, radio, television, the telephone, and semiconductors. *Id.*

387. See FERREY, ENVIRONMENTAL LAW, *supra* note 3, at 562–67.

388. See *supra* Section I.B.

exercise overarching state authority over energy facility siting.<sup>389</sup> Some states preempt local land-use and zoning authority.<sup>390</sup> Of this group of states that exercise overarching state authority, five states do not preempt local authority as a matter of course when exercising state authority.<sup>391</sup>

There are different state legal structures for state preemption of traditional local authority ranging from automatic preemption to conditional preemption in certain circumstances. The state legal standard in different states ranges from considering local land-use law to requiring compliance with local land-use law. For comparison, in approximately one-half the states, there is no state siting authority at all.<sup>392</sup> States vary over whether size of facility matters and what standards are applied by the states that do exercise separate state legal authority.

Judicial recourse regarding state decisions is a key variable. All states establish differently which state court will exercise appellate jurisdiction and when.<sup>393</sup> There also are significant differences in the determination of who has standing to appeal.<sup>394</sup> Some states allow any interested person the right to appeal; other states only allow formal parties and formally aggrieved parties the right to appeal.<sup>395</sup> In all but two states, only formal parties in the state proceeding can appeal a final decision; in the other two, anyone aggrieved can appeal.<sup>396</sup> Some states require that before a party can petition for judicial review, it must first petition the energy siting board for administrative rehearing in order to exhaust administrative remedies.<sup>397</sup>

There are state differences in composition of state decision-making boards which render these decisions and whether the agency is independent of an appointed agency, public access to the process and legal standing to intervene, creation of the record, and appeal. In some states, the board is an independent agency, while in others it sits as a panel advising an agency.<sup>398</sup> In some states, local representatives of the affected communities regarding a proposed power facility are included in the decision-making body, while in others, they are not.<sup>399</sup> Boards are differentially composed of appointed heads of existing state agencies, other gubernatorial appointees, members of the public, or those

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389. *See supra* Section I.C.

390. *See supra* Section III.C.

391. *See supra* Section II.B.

392. *See supra* Section I.C.

393. *See supra* Section III D

394. *Id.*

395. *See id.*

396. *See id.* (discussing how anyone aggrieved by the state proceeding in Minnesota or DC may appeal a final decision).

397. *See id.*

398. *See supra* Section III.A.

399. *See id.*

independently elected.<sup>400</sup> In one state, the governor makes the decision.<sup>401</sup> These distinctions make a difference.

Who comes to the party? States vary on their legal standing requirements, which dictate and determine who can participate either as-of-right or by permission of the power-siting board.<sup>402</sup> Among states, there is great variation in standing rights, from entitlements to automatic intervenor status granted to “any person,”<sup>403</sup> to standing for any member of the city or town where the facility is proposed to be sited,<sup>404</sup> to intervention only upon demonstrating that one’s interests are not otherwise represented,<sup>405</sup> to very limited rights of intervention to parties without a potential injury.<sup>406</sup>

In some states, like Maryland, the commission has discretion to consolidate state and local siting hearings.<sup>407</sup> Some states make potential intervenor funding available.<sup>408</sup> In some states, intervenors are admitted to actively make the initial record,<sup>409</sup> while in other cases, parties are admitted only after the agency has made a preliminary decision.<sup>410</sup> Not all states require public hearings.<sup>411</sup> Who actively creates the record on which the decision is required by law to be based is a critical variable in the process. The requirements for creation of the administrative record diverge and differ in each of the states with siting agencies.<sup>412</sup> Process and procedure make a difference in what power infrastructure is sited, especially when the state standards of review for making power facility siting decisions are subjective and extremely discretionary.<sup>413</sup> There are critical legal distinctions of both legal substance and legal process when one compares siting authority across the state mosaic. Each has legal significance. Even small legal distinctions and variances matter in something as important as electric power, the second most important invention in history, after the wheel. “We take for granted electricity, water, even concerts. Count your blessings.”<sup>414</sup>

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400. *See id.*

401. *See supra* Section III B (discussing state of Washington).

402. *See supra* Section III.B.

403. *See id.* (discussing of Minnesota and Nebraska).

404. *See id.* (discussing of Nevada and Ohio).

405. *See id.* (discussing Iowa, Maryland, and Kentucky).

406. *See id.* (discussing of Vermont).

407. *See id.* (discussing of Maryland).

408. *See id.* (discussing of New York).

409. *See id.* (discussing of Montana).

410. *See id.* (discussing of Montana and Oregon).

411. *See id.*

412. *See supra* Section III.C.

413. *See id.*

414. *See* Mitnick, *supra* note 1 (quoting Damian Marley).

