

**POWER PLANT SITING IN A DEREGULATED ELECTRIC ENERGY
INDUSTRY: DISCERNING THE CONSTITUTIONALITY OF SITING
STATUTES UNDER THE DORMANT COMMERCE CLAUSE**

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I. INTRODUCTION

Perhaps one of the most important conflicts between environmental regulation and energy policy today is that of electric generation capacity. Adequate generation capacity is vital to the United States electricity market, yet states are failing to site the number of power plants needed to meet the growing demand for generation of electric energy. For instance, in May of 2000, the Energy Policy Development Group issued a study in which they projected that the increased electric energy demand may require 393,000 megawatts of new capacity by 2020.¹ Large states such as California and New York are failing to certify the number of plants necessary to meet the increased demand for electric energy.² This problem is not unique to California or New York, but rather is a common theme seen throughout the country.

A significant source of the problem can be found in state siting statutes. When a generation expansion project (an effort to build a new power plant) is proposed, the state has the right to

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¹ Elise N. Zoli, *Power Plant Siting in a Restructured World: Is There a Light at the End of the Tunnel?*, 16 NAT. RESOURCES & ENV'T 252, 252 (Spring 2002).

² *Id.*

block the project.³ Moreover, in twenty-two states, local governments are also permitted to block such expansion projects.⁴ These statutes are often outdated, failing to take into account the vast changes the electric energy industry has undergone in the last decade or so.⁵ Unsurprisingly, parochialism plays a significant role in determining which power plants get sited.⁶ Only a handful of states allow siting boards to consider regional benefits during the siting process.⁷ To the extent that these statutes require siting boards to look solely to the in-state benefit of a project, these decision makers are bound to follow the letter of the law.⁸ Thus, in most states, power plants will not be sited unless they provide a significant in-state benefit, no matter how large a benefit the proposed plant may provide on a regional basis.

This type of decision-making is potentially problematic under the dormant Commerce Clause.⁹ Despite the potential for problems arising under this clause of the Constitution, there has been very little litigation over this issue. This likely stems from the fact that, until recently, the energy industry was heavily regulated. In recent years, however, the energy industry has been deregulated, leading to increased competition in the marketplace.¹⁰ This increase in competition will inevitably lead to more litigation involving the dormant Commerce Clause. This Comment seeks to address the relevant dormant Commerce Clause issues pertaining to power plant siting laws that are likely to arise in a deregulated electric energy industry.

³ Richard J. Pierce, Jr., *Environmental Regulation, Energy, and Market Entry*, 15 DUKE ENVTL. L. & POLY F. 167, 178 (Spring 2005). As Elise Zoli noted, “[b]y and large, Americans continue to respond negatively to the essential infrastructure required to power the American economy and our lives—power plants and transmission lines—when elements of that infrastructure are proposed in our communities and neighborhoods.” Zoli, *supra* note 1, at 253.

⁴ Pierce, *supra* note 3, at 178.

⁵ Ashley C. Brown & Damon Daniels, *Vision Without Site: Site Without Vision* at 2 (2003), <http://www.ksg.harvard.edu/hepg/siting.htm> (follow “Vision Without Site, Site Without Vision” hyperlink under “2003”).

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.*

⁹ See *infra* Part III for dormant Commerce Clause discussion. Electric energy indisputably constitutes interstate commerce, and thus is afforded protection under the Commerce Clause. *FERC v. Mississippi*, 456 U.S. 742, 757 (1982) (“[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy”). As Professors Bossleman, Rossi and Weaver have noted, “[t]he U.S. government’s authority to regulate energy resources is far reaching under the Commerce Clause. Since 1937, Congress has had the authority to regulate purely intrastate activities that affect interstate commerce, such as electricity and natural gas generation, transmission, [and] distribution.” FRED BOSSELMAN ET AL., *ENERGY, ECONOMICS, AND THE ENVIRONMENT* 15 (2000).

¹⁰ See *infra* Part II.

Part II will provide a general background on the electric energy industry discussing the move towards deregulation and the new players this deregulatory framework has created. Part III will introduce the dormant Commerce Clause. Part IV will apply to the dormant Commerce Clause to three hypothetical situations likely to occur under a standard power plant siting regime. Part V will offer concluding remarks.

II. THE DEREGULATED ELECTRIC ENERGY INDUSTRY

A. Basic Concepts of the Electric Energy Industry

The physical equipment that encompasses the modern electric power system can be divided into three basic categories: (1) generation¹¹, (2) transmission¹², and (3) distribution.¹³ In the past, the same entity—a vertically integrated firm—owned and operated all three features of the system.¹⁴ Vertical integration was the norm based on the belief that a vertically integrated firm was capable of providing electric energy in the most efficient manner.¹⁵

Traditionally, the electric utility was viewed as being “clothed with the public interest”,¹⁶ thus resulting in their regulation as a “public utility”—a firm granted a monopoly in a given geographic area in exchange for a duty to serve the public.¹⁷

¹¹ Generation is the process by which energy is produced. “Most electric power plants use either coal, oil, natural gas and uranium as fuel. . . . A bit more than half the electricity in the United States comes from coal-fired plants. About a fifth comes from nuclear power plants.” BOSSELMAN ET AL., *supra* note 9, at 654.

¹² Transmission is the process by which the electric energy is transferred from the generating facility. Because power plants are immovable, their output must be transferred from the generation facility to the consumer. *Id.* at 656. “The transmission system accomplishes much of this task with an interconnected system of lines, distribution centers, and control systems.” *Id.*

¹³ The system of distribution delivers the electricity to the consumer. “The distribution system consists of the substations, poles and wires common to many neighborhoods as well as underground lines found in many other areas.” *Id.* at 657.

¹⁴ *Id.* at 654.

¹⁵ Greg Goelzhauser, *Price Squeeze in a Deregulated Electric Power Industry*, 32 FLA. ST. U. L. REV. 225, 228 (2004).

¹⁶ See *Munn v. Illinois*, 94 U.S. 113 (1876). Since *Munn*, certain industries have been thought of as being “clothed with the public interest” and thus obligated to provide equal service to all. BOSSELMAN ET AL., *supra* note 9, at 150.

¹⁷ BOSSELMAN ET AL., *supra* note 9, at 150. See also Jim Rossi, *The Common Law “Duty to Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1236 (1998).

Proponents of regulation argue that regulation of a natural monopoly is critical to ensuring that consumers are not taken advantaged of. However, critics of regulation argue that it is not necessary. David Bryce aptly summarized the two sides of the debate:

The public utility is viewed as a “natural monopoly”—“a single firm that is able to provide a good or service to a market at a lower average cost than two or more firms because of economies of scale or other network economies.”¹⁸ Today, however, the electric energy industry is undergoing extensive changes and these natural monopolies are being encouraged¹⁹ to yield to a competitive market. Innovations in technology have led some economists to suggest that economies of scale no longer exist in the generation sector of the electric power industry.²⁰ This belief has led to efforts to open the generation sector to competition.²¹ However, the transmission and distribution sectors are still viewed as natural monopolies, and hence have not been deregulated.²²

Natural monopoly theory posits that economies of scale within certain industries enable a single firm to provide service at lower average cost than several competing firms. Where a natural monopoly exists, failure to regulate the monopolist firm may lead to pricing structures highly detrimental to consumers of the monopolist's services. Regulation becomes necessary to achieve a balance between the monopolist service provider and consumers that roughly mimics competitive market conditions.

Critics of basing regulatory policy on concerns of natural monopoly argue that perfectly competitive markets are not needed to prevent firms from achieving monopoly profits. Instead, the threat of competitors entering a market, coupled with their ability to exit if profits do not materialize, offsets the capacity of a single firm to attain monopoly profits. Moreover, natural monopolies do not exist in perpetuity. Technological developments in a given industry or modification of regulatory policy may reduce or eliminate natural monopoly conditions.

David V. Bryce, *Pipeline Gathering in an Unbundled World: How FERC's Response to "Spin Down" Threatens Competition in the Natural Gas Industry*, 89 MINN. L. REV. 537, 543 (Dec. 2004).

¹⁸ BOSSELMAN ET AL., *supra* note 9, at 150.

¹⁹ Order No. 888, discussed *infra*, recommended, rather than required, electric utilities to “unbundle” their services and provide open access. As the order stated, “the proposed rule would accommodate, but not require, corporate unbundling.” Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21,540, 21,551 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

Less than half of states have opted to pass laws regarding deregulation. States that have chosen to pass deregulation legislation include Arizona, Arkansas, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, and West Virginia. Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L. J. 507, 645, n.739 (2004).

²⁰ Goelzhauser, *supra* note 15, at 228.

²¹ *Id.*

²² *Id.*

B. Deregulation: Wholesale Competition in the Electric Energy Industry

Deregulation in the electric energy industry strips utilities of the monopoly franchises granted to them by the states and allows new power suppliers to enter the market and compete for their business. The theory behind deregulation is that it will produce downward cost pressures when inefficient electric energy suppliers lose market share.²³ New energy suppliers will then—through the use of market-based incentives to build generation facilities—be available to match demand and provide electricity to willing customers.²⁴

Based on principles of federalism, the process of deregulation has occurred in two separate arenas: at the state and federal level. The Federal Energy Regulatory Commission (FERC) was granted regulatory authority over the wholesale purchase of electric energy in interstate commerce²⁵ through the enactment of the Federal Power Act.²⁶ The Federal Power Act gives the states authority over most intrastate matters concerning retail sales of electric energy.²⁷ Thus, transactions regarding interstate wholesale purchases are governed by FERC, while intrastate retail sales transactions are governed by the relevant state public service commission.²⁸ Wholesale markets have made greater steps towards deregulation than their retail counterparts.²⁹ Therefore, this Part will discuss deregulation at the federal (wholesale) level.

With the passage of the Public Utilities Regulatory Policy Act³⁰ (PURPA) in 1978, wholesale markets began a transition towards competition.³¹ PURPA authorized FERC to command wheeling for wholesale customers and suppliers.³² Restrictive agency and judicial interpretations, however, resulted in PURPA having only a minimal impact on industry restructuring.³³ Despite PURPA's minimal impact on industry restructuring, it did

²³ David J. Hayes, *Energy, Again—But with a Kicker*, 16 NAT. RESOURCES & ENV'T 215, 219 (Spring 2002).

²⁴ *Id.*

²⁵ 16 U.S.C. § 824(b)(1) (2000).

²⁶ *Id.* at §§ 791-828.

²⁷ See Goelzhauser, *supra* note 15, at 229.

²⁸ *Id.*

²⁹ “Consumers do not currently have the option to select their retail providers.” *Id.* at 234.

³⁰ Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended at 16 U.S.C. §§ 824a-1 to a-3, 824i-k, 2601-2645 (1994)).

³¹ Goelzhauser, *supra* note 15, at 231.

³² *Id.* at 231-32.

³³ *Id.* at 232.

have the effect of allowing independent firms to enter the generation market and compete with the traditional integrated provider.³⁴

Congress's passage of the Energy Policy Act of 1992³⁵ (EPAct) saw the electric energy industry take its next big step towards competition. In passing the EPAct, Congress gave FERC more authority to order wholesale transmission access.³⁶ Under the EPAct, a firm participating in a wholesale market may "apply to FERC for issuance of an order requiring a 'transmitting utility' to provide wheeling services, including any enlargement of transmission capacity necessary to provide the service requested by the applicants."³⁷ FERC is then "authorized to grant the application and order a transmission facility owner to provide the applicant with the requested service on fair terms."³⁸ The EPAct also encouraged independent firms to enter the generation market by removing restrictions "on the type of generators that could sell deregulated wholesale power."³⁹ Essentially, the EPAct accelerated the shift to competitive wholesale markets initiated by PURPA.⁴⁰

The most significant development to date in electricity deregulation occurred in 1996 when FERC issued Order No. 888.⁴¹ Order No. 888 deregulated the electricity production industry by "unbundling" the wholesale transmission and generation sectors of the electric energy industry.⁴² Order No. 888 was based on the belief that, "[u]nless all public utilities are required to provide non-discriminatory open access transmission, the ability to achieve full wholesale power competition, and resulting consumer benefits, will be jeopardized."⁴³ Order No. 888, while not perfect, has led the energy industry in a significant way towards wholesale competition as "a wider range of generators and utilities have access to a networked wholesale power grid."⁴⁴

³⁴ *Id.*

³⁵ Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

³⁶ Goelzhauser, *supra* note 15, at 232.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 232-33.

⁴⁰ *Id.* at 233.

⁴¹ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

⁴² BOSSELMAN ET AL., *supra* note 9, at 757.

⁴³ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 60 Fed. Reg. 17,662 (proposed April 7, 1995) (codified at 18 C.F.R. pt. 35).

⁴⁴ Rossi, *supra* note 17, at 1280.

Deregulation has led to an increase in the number of groups competing for a market share in this newly competitive industry. The electric energy industry is currently comprised of six major groups:⁴⁵ (1) investor-owned utilities (IOUs);⁴⁶ (2) federal agencies that generate, transmit or market power;⁴⁷ (3) publicly owned systems, mostly operated by cities and known as ‘municipals’ or ‘public power;’⁴⁸ (4) rural electric cooperatives funded through the Department of Agriculture;⁴⁹ (5) independent power producers⁵⁰ and (6) power marketers.⁵¹

It is against the backdrop of competition and newly emerging players in the electric energy industry that we consider the effect of the dormant Commerce Clause on power plant siting laws.

III. THE DORMANT COMMERCE CLAUSE

The Constitution grants Congress the power to regulate interstate commerce.⁵² Additionally, the United States Supreme Court has given the Commerce Clause not only a pro-active interpretation in allowing Congress to regulate interstate commerce, but also a dormant aspect, which limits the states’ ability to act in a manner that creates an undue burden on interstate commerce.⁵³ Although the Constitution gives Congress the power to regulate interstate commerce, many subjects of this regulation escape congressional attention “because of their local

⁴⁵ BOSSELMAN ET AL., *supra* note 9, at 659.

⁴⁶ “Although referred to as *public* utilities, IOUs are private, shareholder-owned companies ranging in size from small local operations serving a customer base of a few thousand to giant multistate corporations serving millions of customers.” *Id.* (emphasis in original).

⁴⁷ “The Federal Government generates electric power at federally owned hydroelectric facilities. It is primarily a wholesaler, marketing its power through five Federal power marketing agencies: 1. Bonneville Power Administration, 2. Western Area Power Administration, 3. Southeastern Power Administration, 4. Southwestern Power Administration, and 5. Alaska Power Administration.” *Id.*

⁴⁸ “The more than 2,000 public power systems include local, municipal, State, and regional public power systems ranging in size from tiny municipal distribution companies to giant systems like the Los Angeles Department of Water and Power.” *Id.* at 660.

⁴⁹ “Electric cooperatives are electric systems owned by their members, each of whom has one vote in the election of a board of directors.” *Id.*

⁵⁰ “Most independent power producers began operation because of the Public Utility Regulatory Policies Act of 1978 (PURPA) and its requirement that utilities purchase power from certain defined qualifying facilities (QFs).” *Id.* at 661 (citation omitted).

⁵¹ “Since the passage of the Energy Policy Act of 1992, many new companies have been created to serve as marketers and brokers of electric power. These companies do not own or operate any electric facilities. They buy and sell electricity on the open market.” *Id.*

⁵² U.S. CONST. art. 1, § 8, cl. 3.

⁵³ See *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1852), *overruled on other grounds*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

character and their number and diversity.”⁵⁴ Absent federal regulation, states may control these subjects “so long as they act within the restraints imposed by the Commerce Clause itself.”⁵⁵ While the bounds of these restraints do not appear in the language of the Commerce Clause, the Court has given effect to such restraints based on the basic principle of the Commerce Clause. As Justice Jackson explained, that basic principle of the Commerce Clause is that the nation is one economic unit and “that one state in its dealings with another may not place itself in a position of economic isolation.”⁵⁶

Generally speaking, there are two categories of cases that fall under the dormant Commerce Clause.⁵⁷ First are cases in which the statute in question discriminates against out-of-state interests. These are statutes in which the state is engaging in economic protectionism.⁵⁸ These statutes fall into two categories: (1) statutes that discriminate on their face,⁵⁹ and (2) statutes that are facially neutral, but have the effect of discriminating against interstate commerce.⁶⁰ These statutes are subject to the strictest scrutiny; the state must show a compelling interest and show that they cannot accomplish this compelling interest in any manner that would be less restrictive on interstate commerce.⁶¹ Second

⁵⁴ South Carolina State Hwy. Dep’t v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938).

⁵⁵ Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978).

⁵⁶ H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949) (citations omitted).

⁵⁷ See generally MARK V. TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 228-29 n.98 (Princeton University Press 2000) (“[I]t is said that [the] doctrine [of the dormant Commerce Clause] has two branches, one barring states from enacting statutes that discriminate . . . and the other barring . . . unacceptably high burdens on interstate commerce.”).

⁵⁸ See, e.g., Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

⁵⁹ See, e.g., Philadelphia v. New Jersey, 437 U.S. 617 (1978).

⁶⁰ See, e.g., Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333 (1977). While the Court in *Hunt* clearly followed a discriminatory in effect analysis, the Court has not been completely consistent in this approach. See generally Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 S.C. L. REV. 381 (Spring 1995) (arguing that the Court has not consistently applied the approach they took in *Hunt* and that the Court should develop a clear cut approach to statutes that discriminate in effect). While Professor Twyman argues that the Court has not really undertaken discrimination in effect analysis, the Court itself has acknowledged that there are two levels of the discrimination analysis. See *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (stating that courts must inquire whether the state regulation “discriminates against interstate commerce either on its face or in practical effect”).

⁶¹ *Dean Milk Co.*, 340 U.S. at 344-46. Statutes that discriminate on their face, however, are virtually per se invalid. For instance, in *Philadelphia v. New Jersey*, the Court struck down a New Jersey statute that prohibited the treatment and disposal of waste which originated or was collected outside of the state. 437 U.S. at 628-29. In so doing, the Court noted that “where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.” *Id.* at 624. Moreover, the *Philadelphia* Court failed to even mention the *Dean Milk* test. Such an omission should not be seen as a mere oversight, but rather as a statement that the Court will not even consider upholding a statute that clearly discriminates against out-of-state interests on its face. See *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980) (holding a statute that discriminates on its face

are cases in which “the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental.”⁶² These statutes are subject to a lower standard of review, as described by the following statement from the Court in *Pike v. Bruce Church*:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of ‘direct’ and ‘indirect’ effects and burdens.⁶³

Thus, under the *Pike* test, the Court must balance the magnitude of the burden on interstate commerce against the state interest achieved by the statute. If the burden on interstate commerce is greater than the state interest achieved by the statute, then the regulation will be held as an unconstitutional violation of the dormant Commerce Clause.⁶⁴

With the relevant dormant Commerce Clause jurisprudence in mind, we now turn to its application in a deregulated electric energy industry.

displays a local favoritism or protectionism that significantly alters its Commerce Clause status).

⁶² *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

⁶³ *Id.* (citations omitted). See also Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (Nov. 1940). Professor Dowling’s now famous Virginia Law Review article is credited with crafting the balancing test adopted by the Court in *Pike*. Jeremy R. Jehangiri, *The Dowling Thesis Revisited: Professor Dowling and Justice Scalia*, 49 S.D. L. REV. 867, 867 n.1 (2004).

⁶⁴ See Jehangiri, *supra* note 63, at 876.

IV. APPLYING THE DORMANT COMMERCE CLAUSE TO THE DEREGULATED ELECTRIC ENERGY INDUSTRY

A. The Hypothetical

State X uses a power plant siting procedure that is similar to that of many other states. Under this procedure, the power plant siting board determines, pursuant to a statutory provision, whether the power plant should be sited in State X. The relevant statutory provision states the following:

Exclusive forum for determination of need-- On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the State X Electrical Power Plant Siting Act. The commission shall publish a notice of the proceeding in a newspaper of general circulation in each county in which the proposed electrical power plant will be located. The notice shall be at least one-quarter of a page and published at least 45 days prior to the scheduled date for the proceeding. The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its

members which might mitigate the need for the proposed plant and other matters within its jurisdiction such as, but not limited to, the environmental impact of the proposed plant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity and shall serve as the commission's report. An order entered pursuant to this section constitutes final agency action.⁶⁵

1. Case One

A merchant power company (“Merchant Plant”), an energy company that sells electricity on the interstate market, has applied for a permit to construct a power plant in State X. The plant will provide energy to State X as well as energy to States Y and Z. Merchant Plant, however, is not a State X utility. A prior decision of State X’s Supreme Court has interpreted their power plant siting statute in a manner that only allows State X utilities to apply for a permit within State X’s borders. Based on this State X Supreme Court decision, the siting board denies Merchant Plant’s request for a permit.⁶⁶

State X’s actions here present a constitutional problem. Under this regime, it is impossible for any out-of-state company to enter the wholesale electrical market in State X. Merchant Plant’s only hope of entering State X is to contract with a State X utility and have that utility apply for the permit on behalf of the out-of-state utility.⁶⁷ This, however, allows in-state utilities to bar out-of-state utilities from competing with them in State X simply by refusing to apply for a permit on their behalf.

Requiring Merchant Plant to contract with a State X utility before applying for a permit in State X overtly discriminates against interstate commerce. Statutes that discriminate on their face are virtually per se invalid. For instance, in *Philadelphia v. New Jersey*, the Court struck down a New Jersey statute that

⁶⁵ This statute is based on Florida’s power plant siting statute. See FLA. STAT. § 403.519 (2004). This statute is similar to other state power plant siting statutes.

⁶⁶ This hypothetical is based on a modified version of the facts from *Tampa Electric Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000).

⁶⁷ This point was made by the Utility Commission for the City of New Smyrna Beach, Florida in *Tampa Electric Co. v. Garcia*. See Br. for Appellee at 40, *Tampa Electric Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000), 1999 WL 33626599.

prohibited the treatment and disposal of waste that originated or was collected outside of the state.⁶⁸ In so doing, the Court noted that “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”⁶⁹ Moreover, the Court stated that no matter how important the state interest is, “it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, *apart from their origin*, to treat them differently.”⁷⁰ Here there is no reason, apart from the origin of Merchant Plant, to exclude them from applying for a permit in State X. As will be discussed below, State X can achieve their legitimate goals (as evidenced by the statute) without requiring the utility applying for a permit to be a State X utility.

Additionally, the Supreme Court has held unconstitutional many state statutes that attempted to give local businesses a competitive advantage by forcing anyone contemplating doing business in the state to first contract with an in-state company.⁷¹ As the Court has stated, “the cardinal principle [under the dormant Commerce Clause is] that a State may not ‘benefit in-state economic interests by burdening out-of-state competitors.’”⁷² State X is giving in-state utilities a distinct advantage by limiting the ability of out-of-state utilities to apply for a permit. Such a provision is not permitted under the dormant Commerce Clause.

The discriminatory nature of State X’s siting statute renders it virtually *per se* invalid. A state may not justify such a statute under any circumstances unless the state shows that its legitimate local interests could not be protected through a non-discriminatory alternative.⁷³ However, in cases in which the statute in question had discriminated on its face—as opposed to simply discriminating in effect—the Court has failed to employ this least restrictive alternative test. The *Philadelphia* Court failed to mention the least restrictive alternative test articulated

⁶⁸ 437 U.S. 617, 628-29 (1978).

⁶⁹ *Id.* at 624. *See also* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 42 (1980) (holding a statute that discriminates on its face displays a local favoritism or protectionism that significantly alters its Commerce Clause status).

⁷⁰ Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978) (emphasis added).

⁷¹ *See* C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994); Wyoming v. Oklahoma, 502 U.S. 437 (1992); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Toomer v. Witsell, 334 U.S. 385 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Buck v. Kuykendall, 267 U.S. 307 (1925).

⁷² West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994).

⁷³ Although, as I will note below, the Supreme Court has failed to employ the least restrictive alternative test in cases of facial discrimination. Rather, the Court has simply held such statutes unconstitutional without any mention of this test.

by the Court in *Dean Milk Co. v. City of Madison*⁷⁴. Such an omission should not be seen as a mere oversight, but rather as a statement that the Court will not consider upholding a statute that clearly discriminates against interstate commerce on its face.⁷⁵ Even assuming that the Court would employ the *Dean Milk* test in this situation, State X's statute could not possibly withstand such rigorous scrutiny.

In *Dean Milk*, the Court considered the constitutionality of a City of Madison ordinance that prohibited the sale of any milk unless it had been processed at an approved plant within a radius of five miles from the city.⁷⁶ The Court held that such a regulation plainly discriminated against interstate commerce.⁷⁷ In so doing, the Court stated, “[t]his [the City of Madison] cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interest, are available.”⁷⁸ The question here, therefore, is whether State X can achieve its legitimate local interests represented by the siting statute without banning out-of-state utilities from applying for permits absent contracting with in-state utilities.

The siting statute serves three legitimate local interests: (1) ensuring that the electric system is reliable; (2) ensuring that electricity will be provided at a reasonable cost; and (3) ensuring that the proposed power plant is the most cost-effective plant available.⁷⁹ All three of these interests can easily be achieved without requiring utilities applying for a permit within State X to be State X utilities. These interests have no relation whatsoever to whether the utility providing the electricity is an in-state utility or an out-of-state utility. The less restrictive alternative would be to site all plants—irrespective of their state of origin—and require the plants to meet the criteria listed in the statute. This would allow State X to achieve its valid state interests as enumerated in the statute, while at the same time not discriminating against interstate commerce.

⁷⁴ 340 U.S. 349 (1951).

⁷⁵ See *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980) (holding a statute that discriminates on its face “displays a local favoritism or protectionism that significantly alters its Commerce Clause status”).

⁷⁶ *Dean Milk*, 340 U.S. at 350.

⁷⁷ *Id.* at 354.

⁷⁸ *Id.*

⁷⁹ State X's siting statute provides, in relevant part, that the siting commission “shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available.” See *supra* note 65 and accompanying text.

Because State X's actions discriminate against interstate commerce, it is unnecessary to determine whether the requirement would unconstitutionally burden interstate commerce.⁸⁰ For the sake of thoroughness, however, the following discussion will explore whether State X's actions substantially burden interstate commerce.

In addition to discriminating against interstate commerce, State X has placed a substantial burden on interstate commerce. State X is restricting the ability of out-of-state utilities to apply for permits to build within State X. An out-of-state utility may not apply for a permit unless it first contracts with an in-state utility. Such a requirement substantially burdens interstate commerce by imposing additional transaction costs on utilities that seek to enter the State X electric energy market.

Statutes that do not discriminate against interstate commerce, but do burden interstate commerce, are analyzed under the Court's statement in *Pike v. Bruce Church*—the magnitude of the burden on interstate commerce balanced against the state interest achieved by the statute.⁸¹ Because the statute places a burden on interstate commerce, the question becomes, first, whether a legitimate local interest exists, and, if so, whether the interest could be promoted as well by a mechanism that has a lesser impact on interstate activities.⁸²

The above discussion illustrates that legitimate local interests do not support State X's in-state utility requirement. All three of the interests delineated in the statute can be achieved by other less burdensome means, and in fact, have no relation to whether the utility applying for a permit is an in-state utility or an out-of-state utility. Moreover, the statute in question does not operate evenhandedly in its treatment of utilities in the business of providing wholesale electrical power. The statute in question treats out-of-state utilities different from those of in-state utilities and imposes on out-of-state utilities an additional transaction cost that is not present for in-state utilities. State X's statute places a burden on interstate commerce that cannot be reconciled under the *Pike* test, and thus would likely be held unconstitutional.

As the foregoing discussion illustrates, State X's actions in Case One both discriminate against, and substantially burden, interstate commerce. By prohibiting an out-of-state utility from

⁸⁰ See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (holding that the Court would "not resort to" the burden analysis when the statute in question discriminates against out-of-state interests).

⁸¹ *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

⁸² *Id.*

applying for a permit within their state, State X has benefited in-state utilities at the expense of out-of-state utilities and has significantly restricted the flow of goods in interstate commerce. These actions violate the dormant Commerce Clause, and thus are not constitutionally permitted.

2. Case Two

Merchant Plant has applied for a permit to construct a power plant within State X. The plant will provide energy to State X as well as energy to States Y and Z. Unlike Case One, however, the State X Supreme Court has never held State X's power plant siting law to require the utility be a State X utility in order to receive a permit. The siting board considers Merchant Plant's request for a permit, but ultimately denies the permit based on the determination that State X has no current need for electricity.⁸³

While Case One was an easy case of facial discrimination, Case Two cannot be as easily decided. Case One is clearly different from Case Two in that in Case Two State X is not engaging in economic protectionism—they are not favoring their in-state companies over out-of-state companies. State X may, however, be discriminating against interstate commerce by prohibiting a power plant to be sited in their state unless the plant provides power to State X.

The argument for discrimination is much more difficult to make in Case Two, although there is an argument to be made. There are many dormant Commerce Clause cases dealing with the authority—or lack thereof—of a state to restrict the transportation of goods made in their state to other states. The following discussion will examine a sample of these cases.

In *New England Power Co. v. New Hampshire*, the Court examined the constitutionality of a New Hampshire statute that prohibited a utility engaged in water-powered generation of electrical energy from transporting such energy out-of-state unless the utility first obtained approval from the New Hampshire Public Utilities Commission.⁸⁴ The Court struck this statute down as both a case of discrimination and a burden on interstate commerce, holding that this statute permitted New Hampshire to gain an economic advantage for their citizens at the expense of citizens in neighboring states.⁸⁵ In doing so, the Court quoted its previous

⁸³ This hypothetical is based on a modified version of the facts from *Point of Pines Beach Ass'n. v. Energy Facilities Siting Bd.*, 644 N.E.2d 221 (Mass. 1995).

⁸⁴ 455 U.S. 331, 335 (1982).

⁸⁵ *Id.* at 338.

decision in *Philadelphia v. New Jersey* where it stated, “a [s]tate is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.”⁸⁶ This principle—that a state may not restrict goods made in their state from being shipped in interstate commerce—is a long recognized standard that has been repeated numerous times by the Court.⁸⁷

Under this principle, it would seem that State X’s actions in Case Two are a clear-cut case of discrimination. State X is preventing Merchant Plant from creating power in its state that will benefit customers in States Y and Z. This argument, however, is not as straightforward as it appears at first glance.

State X is not really prohibiting Merchant Plant from transmitting electrical energy created in their state to States Y and Z, but rather is refusing to site Merchant Plant within State X if the energy produced by the plant will not provide a needed energy supply to the residents of State X. If State X was in need of power and sited Merchant Plant within State X, Merchant Plant would be free to transport the energy created at its plant to whomever it chose; nothing in State X’s statute would prohibit this. The principle delineated above, therefore, can be distinguished from State X’s actions in Case Two. A court considering a challenge to State X’s siting statute in a scenario such as Case Two would likely hold as such. Additionally, State X’s statute does not have the effect of discriminating against interstate commerce; therefore, no “discriminatory in effect” analysis will be undertaken.

While Case Two can likely be taken out of the discrimination category by the distinctions noted above, State X’s actions in Case Two may still substantially burden interstate commerce. The fact that State X does not prohibit the transportation of electric energy created in their state as long as the plant sited provides needed energy to State X is enough to show that there is no discrimination—State X is not favoring their citizens over the citizens of other states. This distinction, however, does not help State X justify their actions under the burden analysis.

⁸⁶ 437 U.S. 617, 627 (1978) (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928)).

⁸⁷ See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

State X's actions clearly burden interstate commerce. As the Court in *New England Power Co.* noted, the Commerce Clause prohibits a state from providing its residents with "a preferred right of access, over out-of-state consumers," to products created within the state.⁸⁸ In so doing, the Court held that New Hampshire's exportation ban placed direct and substantial burdens on interstate commerce.⁸⁹ The same holds true in Case Two despite the fact that State X would allow exportation if electric energy was needed in the state. This distinction is only important under the discrimination analysis. Under the burden analysis such local favoritism and economic protectionism is not required. The burden analysis requires simply that the regulation in question place a substantial burden on interstate commerce.⁹⁰ Here, State X is preventing residents in States Y and Z from receiving needed power simply because State X has no current need for electric energy. Such a regulation clearly burdens interstate commerce.

After a burden on interstate commerce has been established the next question becomes whether the statute can be permitted to stand under the *Pike* balancing test—the magnitude of the burden on interstate commerce balanced against the state interest achieved by the statute.⁹¹ As noted above, State X has three legitimate local interests enumerated in the siting statute: (1) ensuring that the electric system is reliable; (2) ensuring that electricity will be provided at a reasonable cost; and (3) ensuring that the proposed power plant is the most cost effective plant available. These three interests all work under the assumption that there is a need for electricity in the state. Under *Pike* the question is whether this interest outweighs the burden on interstate commerce. Essentially, the question that must be addressed is whether State X has the authority under the dormant Commerce Clause to shut out a company from doing business in their state solely because the service provided by the company will not benefit the customers of State X.

The burden in this case is unquestionably significant. State X is denying residents in States Y and Z access to affordable power. Conversely, State X's interest underlying the statute is insignificant. State X does not have a justifiable reason to shut utilities out of their state solely because there is no present need for electrical energy. State X is essentially saying, "[w]e don't

⁸⁸ 455 U.S. at 338 (1982).

⁸⁹ *Id.* at 339.

⁹⁰ *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

⁹¹ *Id.* at 142.

want your plant in our state if it is not going to benefit us.” This justification simply does not meet dormant Commerce Clause scrutiny.

State X does, however, have a legitimate right to regulate the siting of power plants to protect the three interests listed above, but these interests can be protected without outright banning any utility that is not currently needed within the state. For instance, State X can still require all utilities applying for a permit within the state to meet the requirements laid out in the statute in the event that the utility would in the future supply electricity to State X consumers.

While State X’s actions in Case Two do not discriminate against interstate commerce, they do substantially burden interstate commerce. These actions do not survive constitutional scrutiny under the burden analysis of the dormant Commerce Clause. Thus, the regulation in Case Two is unconstitutional.

3. Case Three

Assume the same facts as Case Two, but in this scenario the permit is denied because the siting board determines that the plant will have an adverse effect on the environment. Specifically, the State X siting board maintains that the siting of Merchant Plant will negatively affect a nearby wetland.⁹²

State X’s actions in Case Three provide the best chance for State X to survive a dormant Commerce Clause challenge. Case Three is clearly not a case of discrimination—facial or in effect. Both out-of-state plants as well as in-state plants may be denied a siting permit based on environmental concerns. Thus, State X’s actions in Case Three will be upheld unless the regulation is found to substantially burden interstate commerce.

In decisions such as the one State X made here, state power is at its highest.⁹³ In considering the constitutionality of state regulations that touch upon public health and safety—as environmental concerns arguably do—“the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.”⁹⁴ However, as the *Philadelphia* Court noted, a state may not attempt “to isolate itself from a problem common to many by erecting a barrier against the

⁹² This hypothetical is based on a modified version of the facts from *Florida Power Corp. v. Dep’t. of Envtl. Reg.*, 638 So. 2d 545 (Fla. 1st DCA 1994).

⁹³ *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981) (holding that “State’s power to regulate commerce is never greater than in matters traditionally of local concern”).

⁹⁴ *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 449 (1978) (Blackmun, J. concurring).

movement of interstate trade.”⁹⁵ The question, then, is whether a court would yield to this high level of legislative deference, or whether a court would find that State X was attempting to isolate itself from a problem common to many by barring Merchant Plant’s request based on environmental concerns.

From the facts presented in Case Three it appears that a court would yield to the legislature’s decision. The environmental concerns used by State X to deny the permit are the type of public health and safety regulations that the Court has paid high deference to.⁹⁶ Moreover, there is no evidence that State X is attempting to isolate itself from a problem common to many by denying Merchant Plant’s permit. The statute is not an outright ban on power plants based on environmental concerns. Rather, the statute undertakes a case-by-case analysis of plant siting applications. This is clearly distinguishable from *Philadelphia* where New Jersey imposed an outright ban (except for a few statutory exceptions) on the dumping of out-of-state waste within the state of New Jersey.⁹⁷ Here, State X will allow power plants within their state so long as they do not pose a serious environmental concern.

Additionally, Case Three meets the requirements of the *Pike* test. State X has a legitimate local interest in the environment. In fact, this type of public health and safety regulation is the strongest interest a state possesses. State X’s interest, therefore, is very strong. By contrast, the effect on interstate commerce is only incidental. It is true that State X’s actions are denying customers in three states from receiving affordable power, but this is not an outright ban. Merchant Plant still has the option of amending their permit application to correct the environmental concerns. Moreover, other utilities are free to apply for a permit to erect a plant to serve the customers of States X, Y and Z. Under these circumstances it seems clear that State X’s actions in Case Three would withstand dormant Commerce Clause scrutiny.

The caveat to this is that a state wishing to constitutionally restrict a power plant from siting within their state based on environmental concerns will have to come forward with an

⁹⁵ *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978).

⁹⁶ See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (“[R]egulations that touch upon safety” are those that “the Court has been most reluctant to invalidate.”); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353 (1951) (noting that state regulations are to be upheld when “the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities.”) (citing *Parker v. Brown*, 317 U.S. 341, 362).

⁹⁷ See *Philadelphia*, 437 U.S. 617, 628 at 618-19.

accurate record indicating that the potential plant poses a real and serious problem.⁹⁸ Such a requirement would prevent states from rejecting valid applications based on sham reasons. Provided a state could come forward with an accurate record, environmental restrictions on power plant siting would likely withstand scrutiny under the dormant Commerce Clause.

B. Have states been given explicit power over power plant siting issues?

As the foregoing discussion illustrates, power plant siting laws can, in some instances, violate the dormant Commerce Clause. However, the argument has been advanced that Congress has explicitly left the issue of power plant siting to the states. The Court has recognized that Congress may specifically grant states the right to “restrict the flow of interstate commerce.”⁹⁹ As the Court opined, “[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.”¹⁰⁰ However, “Congress must manifest its unambiguous intent” to give the states the ability to regulate interstate commerce.¹⁰¹ If the Court finds that Congress did not manifest unambiguous intent, the state regulation will be subject to Commerce Clause scrutiny.

The only court to address a dormant Commerce Clause challenge to a power plant siting law held that Congress specifically left this issue to the states. If Congress has in fact explicitly left the issue of power plant siting to the states then State X’s actions would be immune from a dormant Commerce Clause challenge.

In *Tampa Electric Co. v. Garcia*, the Florida Supreme Court held that there was no merit in a dormant Commerce Clause challenge to Florida’s power plant siting statute because power plant siting is an area that Congress expressly left to the states.¹⁰² The court, however, gave scant attention to the dormant Commerce Clause challenge electing to place their minimal analysis of the issue in a footnote.¹⁰³ According to the court,

⁹⁸ *Kassel*, 450 U.S. at 670. (“[I]f safety justifications are *not illusionary*, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.”) (emphasis added).

⁹⁹ *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980).

¹⁰⁰ *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981).

¹⁰¹ *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).

¹⁰² 767 So. 2d 428, 436 (Fla. 2000).

¹⁰³ *See id.* n.18.

Congress explicitly gave the states power over the siting of electric facilities in the EPAct.¹⁰⁴ The relevant portion of that act provides, “[n]othing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.”¹⁰⁵ The question is whether this language is an express and unambiguous grant of authority by Congress. The following discussion of Supreme Court jurisprudence on this issue will show that the Florida Supreme Court erred in holding such language to be an express and unambiguous grant of authority by Congress.

In *W. & S. Life Ins. Co. v. State Bd. Of Equalization of Cal.*¹⁰⁶, the Court considered a dormant Commerce Clause challenge to a California retaliatory tax, imposed “on out-of-state insurers doing business in California, when the insurer’s State of incorporation impose[d] higher taxes on California insurers doing business in that State than California . . . otherwise impose[d] on that State’s insurers doing business in California.”¹⁰⁷ The Court held that the McCarran-Ferguson Act permitted California to impose this tax, free of any dormant Commerce Clause challenge.¹⁰⁸ In so doing, the Court relied on the following language from the act: “[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business.”¹⁰⁹ In reliance on this portion of the act the Court opined, “[t]he unequivocal language of the Act suggests no exceptions.”¹¹⁰

By contrast, in *Lewis v. BT Inv. Managers, Inc.*¹¹¹ and *Wyoming v. Oklahoma*¹¹² the Court did not find an express grant of authority in the relevant statutory language. In *Lewis*, the Court considered a Florida statute that prohibited out-of-state banks from owning or controlling businesses within the state that provided investment advisory services.¹¹³ In support of the statute the State argued that Congress had expressly left this issue to the states.¹¹⁴ This argument relied, in part,¹¹⁵ on the savings clause of

¹⁰⁴ *Id.*

¹⁰⁵ The Energy Policy Act of 1992, Pub. L. No. 102-486, Title VII, Subtitle C, State and Local Authorities, section 731.

¹⁰⁶ 451 U.S. 648 (1981).

¹⁰⁷ *Id.* at 650 (citing Cal. Ins. Code § 685 (1972)).

¹⁰⁸ *Id.* at 653.

¹⁰⁹ McCarran-Ferguson Act § 2(a), 15 U.S.C. § 1012(a) (2000).

¹¹⁰ *W. & S. Life Ins. Co.*, 451 U.S. at 653.

¹¹¹ 447 U.S. 27 (1980).

¹¹² 502 U.S. 437 (1992).

¹¹³ 447 U.S. at 29.

¹¹⁴ *Id.* at 44-45.

the Bank Holding Company Act of 1956, which provides: “[t]he enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof.”¹¹⁶ The Court held that “[t]his section was intended to preserve existing state regulations of bank holding companies.”¹¹⁷ The Court continued, “we find nothing in its language or legislative history to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation.”¹¹⁸ According to the Court, this section only applies to state laws that operate within the boundaries of the Commerce Clause.¹¹⁹

In *Wyoming*, the Court reviewed an Oklahoma statute that required electric power plants that generated power by burning coal to burn a mixture of coal that contained a minimum of 10% Oklahoma mined coal.¹²⁰ Oklahoma argued that the “savings clause” of the Federal Power Act, “which reserves to the States the regulation of local retail electric rates,” made the statutes discriminatory impact on the movement of Wyoming coal into interstate commerce permissible.¹²¹ The savings clause of the Federal Power Act provides:

The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of

¹¹⁵ The State also relied on another portion of the Bank Holding Company Act of 1956, however, this section of the act is not similar to the statute relied on by the Florida Supreme Court in *Garcia* and is thus irrelevant for purposes of this discussion. Therefore, this argument will not be discussed.

¹¹⁶ Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133, 138 (codified as amended at 12 U.S.C. § 1846 (2000)).

¹¹⁷ *Lewis*, 447 U.S. at 48-49.

¹¹⁸ *Id.* at 49.

¹¹⁹ *Id.*

¹²⁰ *Wyoming v. Oklahoma*, 502 U.S. 437, 440 n.1 (1992).

¹²¹ *Id.* at 457.

hydroelectric energy which is transmitted across a State line.¹²²

The Court held that this language did not alter the limits of state power otherwise imposed by the Commerce Clause.¹²³ Noting that Congress must manifest its unambiguous intent before a federal statute will be read as allowing a violation of the Commerce Clause, the Court opined, “Congress did no more than leave standing whatever valid state laws then existed . . . by its plain terms, [the savings clause] simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise lawful.”¹²⁴

Based on the three foregoing cases it seems abundantly clear that the Florida Supreme Court was incorrect in holding that the EPAct gave states express authority over power plant siting issues. The statute relied on by the Florida Supreme Court in *Garcia* is more analogous to the statutes examined in *Lewis* and *Wyoming* – where the Court found no express and unambiguous intent on the part of Congress to leave the respective issues to the states – than to the statute examined in *W. & S. Life Ins. Co.* – where the Court found express and unambiguous intent on the part of Congress to leave the issue of insurance to the states. Like the statutes in *Lewis* and *Wyoming*, the statute in *Garcia* was a savings clause that did nothing more than save from pre-emption state authority as was otherwise lawful. The statute in *Garcia* certainly did not have the kind of “unequivocal language [which] suggests no exceptions” that the Court relied on in *W. & S. Life Ins. Co.* to uphold California’s taxation statute.¹²⁵ Congress has not manifested unequivocal intent to leave the issue of power plant siting to the states, thus any state siting regime is subject to the constitutional requirements imposed by the dormant Commerce Clause.

V. CONCLUSION

This Comment has demonstrated—by the use of a hypothetical based on an actual power plant siting statute and a variation on the fact patterns of 3 reported cases—that various provisions of power plant siting statutes violate the dormant Commerce Clause. The need for expanded generation capacity has

¹²² Federal Power Act, 16 U.S.C. § 824(b)(1) (2000).

¹²³ *Wyoming*, 502 U.S. at 458 (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982)).

¹²⁴ *Id.* (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982)).

¹²⁵ *See W. & S. Life Ins. Co. v. State Bd. Of Equalization*, 451 U.S. 648 (1981).

never been greater. Unfortunately, the problem of inadequate capacity will not properly be addressed until a court, for the first time, seriously addresses the constitutionality of power plant siting laws under the dormant Commerce Clause. When a court finally does undertake a serious analysis of these state regulations, it is likely to find that many of the provisions in these regulations simply do not pass dormant Commerce Clause scrutiny.