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Proposing a Federal Wind Siting Policy

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EDITOR'S INTRODUCTION

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The two articles in this issue exemplify the diversity and breadth of issues embraced within the ABA Section of Environment, Energy, and Resources. In the first article, Professor Ostrow explores what a federal wind siting policy might be like if modeled after the Telecommunications Act of 1996. Such a policy would facilitate the development of wind energy projects while balancing the purpose of uniform federal regulation with the needs and concerns of state and local communities. In the second article, Ms. Lambert takes us on a journey across several states, tracking a legislative trend to barricade franchisors from conveying interests in franchise properties without first providing their franchisees with the chance to acquire that interest. Specifically, Ms. Lambert's article focuses on the interplay between the states' initiatives and the laws governing petroleum marketing premises, resulting in new questions that need to be answered.

BACK ISSUES

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PROPOSING A FEDERAL WIND SITING POLICY

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A National Interest in Wind Energy

Since taking office, President Barack Obama has made energy independence a national priority. To that end, Congress has allocated hundreds of millions of dollars for renewable energy projects, including wind energy development. Congress is also considering enacting a federal Renewable Portfolio Standard (RPS), which would require electric utilities to produce increasing percentages of their electricity from renewable sources, reaching approximately twenty-five percent by 2025. Recent polls have found that Americans overwhelmingly support wind energy and the enactment of a federal RPS.

While renewable energy, and wind energy in particular, are of national concern, the wind siting process remains largely uncoordinated and subject to state and/or local control. As a result, wind siting regulations vary, not only between states, but also within states, creating an inconsistent and often unpredictable regulatory

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process. Moreover, despite national support for wind energy, proposed projects often face strong opposition at the local level. Local residents, concerned about the impact of wind turbines on property values, noise, aesthetics, health and safety, and the environment and wildlife, use the local land use regulatory process to delay or entirely prevent wind projects from being sited.

Given the national interest in renewable energy, Congress should enact a federal wind siting policy to facilitate the development of wind energy projects. Specifically, this article proposes a national policy modeled on the cell tower siting policy of the Telecommunications Act of 1996 (TCA), which leaves primary siting authority in the hands of local governments, but places explicit federal constraints on the siting process. *See* 47 U.S.C. § 332(c)(7)(B)(iv)). A federal wind siting policy would increase regulatory uniformity and prevent localities from using the land use regulatory process to unreasonably delay wind siting. At the same time, such a regime would leave ample room for local communities to tailor wind policies to local conditions and experiment with regulatory approaches.

Overcoming Local Opposition to Wind Energy Siting

The TCA provides a good model for federal-local cooperation in land use siting because, in many ways, local opposition to cell phone towers parallels local opposition to wind turbines. Both engender local opposition because they impose direct costs on the communities in which they are located, but provide dispersed societal benefits. Prior to the passage of the TCA, local opposition to cell tower siting often prevented, or significantly delayed, approval of zoning applications for construction or modification of telecommunication towers. To address the obstacles posed by local opposition, Congress enacted a cell phone tower siting policy as part of its overall strategy to aid in the deployment of a national telecommunication network. The Siting Policy leaves primary siting responsibility with local authorities, but places a number of limitations on the siting process.

In particular, the siting policy prevents localities from "unreasonably discriminat[ing] among providers of functionally equivalent services" and from "prohibiting the provision of personal wireless services." The siting policy also prevents localities from regulating wireless facilities on the basis of the environmental effects of radio frequency emissions. In addition, the siting policy requires local governments to respond to any request for authorization to place or construct a cell phone tower "within a reasonable period of time . . . taking into account the nature and scope of such request." It further requires that the local government response "be in writing and supported by substantial evidence contained in a written record." Finally, the siting policy creates a judicial right of action, allowing persons aggrieved under the act to take their claims to federal court and requiring the court to hear and decide the claim on an expedited basis.

The TCA does not otherwise preempt state regulation of cell tower siting. Instead, within the contours of the siting policy, states remain free to experiment with cell tower siting and tailor policies to local preferences. North Carolina, for example, supplements the federal siting policy with its own statewide statutory scheme (S.B. 831, 2007 Sess. 526 (N.C. 2007) (codified at N.C. GEN. STAT. §§ 160A-400.50–.53 (2007)), which further limits the discretion of local zoning officials. For example, the North Carolina law requires permit fees to be reasonable and sets time limits within which local governments must respond to siting applications.

Since the passage of the TCA, courts have worked to balance the twin aims of the siting policy, weighing the national interest in deploying a national telecommunication network against the desire to preserve state and local control over land use matters. As the First Circuit observed, "The statute's balance of local autonomy subject to federal limitations does not offer a single 'cookie cutter' solution for diverse local situations. . . . Congress conceived that this course would produce . . . individual solutions best adapted to the needs and desires of particular communities" (*Town of Amherst v. Omnipoint Commc'ns Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999)).

Overall, the siting policy has proven effective in facilitating cell tower siting. Since the siting policy was enacted, the number of cell towers has increased dramatically, from 19,844 in 1995 to 245,912 in 2009. Moreover, the combination of local authority constrained by federal law has encouraged local governments and cellular providers to cooperate in choosing appropriate sites for telecommunication facilities.

Elements of a Federal Wind Siting Policy

Like the TCA's siting policy, a federal wind siting policy should (a) prohibit local governments from excluding wind energy facilities; (b) require local governments to make decisions on wind siting within a reasonable period of time; and (c) require such decisions to be made in writing and supported by substantial evidence.

The recommendations here are mainly procedural. Given the relative newness of wind energy technology and the vast geographic and demographic variations amongst wind-rich communities, Congress should avoid adopting a substantive ceiling on wind energy facilities siting at this time. Instead, subnational governments should be given some freedom to experiment with the substance of siting policies, in the hopes that the resulting variation in regulatory policy might ultimately produce a better result.

1. No Prohibition of Wind Facilities

The siting policy of the TCA forbids any regulation that would prohibit the provision of personal wireless services. Thus, localities can regulate the location of cell phone towers, but cannot exclude them entirely from the jurisdiction. A federal wind siting statute could, similarly, preempt local regulations that exclude wind energy facilities from a jurisdiction with wind energy potential. A similar requirement is in place in New Hampshire, where a state law prevents localities from unreasonably limiting wind installations. *See* N.H. REV. STAT. ANN. § 674:63. A federal wind siting policy that preempts local regulations that unreasonably exclude wind installations would aid in the deployment of wind energy technology by overcoming local efforts to keep wind turbines entirely out of wind-rich communities.

2. Decisions Within a Reasonable Time

The siting policy requires local governments to act on telecommunication siting requests within a reasonable time. In November 2009, after over a decade of experience with the siting policy, the FCC issued a declaratory ruling to provide guidance on the time frame that would be considered "reasonable" under the statute. Under the FCC ruling, zoning boards must respond to requests for collocation within 90 days and requests for new tower construction within 150 days. According to the FCC, the ruling "[A]chieves a balance by defining reasonable and achievable time frames for State and local governments to act on zoning applications while not dictating any substantive outcome on any particular case or otherwise limiting State and local governments' fundamental authority over local land use."

Wind developers would similarly benefit from a federal framework that requires local officials to make decisions on wind siting within a reasonable period of time. Such a requirement would prevent local communities from using the permitting process to perpetually delay siting, resulting in less fiscal waste and quicker access to renewable energy.

3. Decisions in Writing and Supported by Substantial Evidence

Courts traditionally review local zoning decisions under a highly deferential "arbitrary and capricious" standard. In contrast, the siting policy requires that all decisions "to deny a request to place, construct, or modify personal wireless service facilities shall be . . . supported by substantial evidence contained in a written record." Substantial evidence requires more than would be required under the traditional arbitrary and capricious standard, including, for example, scientific and engineering studies to support and/or refute identified concerns.

The siting policy, thus, creates a check on the local zoning process by requiring that decisions be made in writing and subjecting such decisions to a heightened standard of judicial review. A wind siting policy that requires zoning decisions to be made in writing would compel local officials to articulate the grounds for their decision. A written record would enable wind siting applicants to understand and respond to local concerns, and provide an official record for courts to review. In addition, the heightened "substantial evidence" standard of review would ensure that proposed projects are not denied solely on the basis of local concerns, without careful consideration of the overall project benefits.

Conclusion

Harnessing and using renewable energy is an important way that the United States can reduce its dependence on foreign oil and slow the pace of global warming. Despite the national importance of renewable energy, the wind siting process remains largely uncoordinated and subject to state and/or local control. This patchwork approach has created an inconsistent and unpredictable regulatory process that adds to the cost of renewable energy projects and enables local communities to prevent the siting of projects that would benefit the entire nation.

Though there are advantages to empowering local communities to regulate land use, in the context of wind energy more centralized regulation is desirable. Thus, this article has proposed a national wind siting regime, modeled the telecommunication siting policy, that leaves primary siting authority in the hands of local zoning officials but places explicit federal constraints on the local decision-making process. This hybrid federal-local approach would strike an appropriate balance between local concerns regarding wind turbine siting and the national interest in developing wind as a renewable domestic energy source.

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