"Cooperative Federalism"

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In the absence of "Cooperative Federalism" the development of so-called "Green Infrastructure," as contemplated both by the Stimulus Package and by the forthcoming initiatives from the President and Congress in the areas of energy, security, and climate change regulation, will be thwarted.

We are heading toward an impasse in practical legislation unless this fact is addressed directly in the formation of the new laws--and indeed, in the implementation of the Stimulus Package in an effective way as well.

The absence of Cooperative Federalism is the insistent legal theme embedded in the swirling policy and economic debate of how national policy objectives should be achieved. Issues of Federalism are often dismissed by proponents of policy change as vestigial legacies of constitutional tradeoffs made long ago, or as a smokescreen of arguments designed to conserve the political or economic status quo. Conversely, sometimes they are ennobled as the protectors of the intended liberty and rights of the individual and private enterprise. In the energy/environment area, though, I would suggest that there is one underlying pragmatic issue with which we all are wrestling: how can the profile and technical operations of the electrical utility industry be adapted to the energy challenges of the 21st Century within our Federal legal framework of governance?

The legislative flashpoints are the debates over Renewable Portfolio Standards, carbon cap and trade legislation, and transmission reform. In each case, the question is framed as Federal vs. state governance. The issue ultimately is evolutionary: one of adaptation of the rules of governance so that our national engine of private enterprise (in this case utilities) can operate in a manner aligned with national needs.

Since the days of Thomas Edison and Samuel Insull, utilities have been regulated, and they've operated on the principle of minimized system cost (whether termed "locational," "marginal pricing," "economic dispatch," or simply "free market economics"). Much of this regulation has been done at the state level and, while transmission and some activities of some utilities have been Federalized over time, the basic governing principle of minimized system cost has been embodied there as well, save for a few special incentive-rate-type programs.

Come now certain interrelated developments which challenge the adaptability of the first principle or regulation:

Concern with greenhouse gases can only be dealt with at significant cost, which euphemistically we now call upon to be "internalized." Similarly, "energy security" intrinsically has a cost, which will surely be increased if grid-based electricity becomes a significant basis for automobile power.

At the present time (putting aside the nuclear debate, which itself has Federal-state ramifications), the means to reduce GHG and increase security appear to be (and the Stimulus Plan has thrust them forward through incentives and raw cash): (a) renewables, and (b) associated transmission requirements--energy-efficient "smart grids," notably though not exclusively, in their distributed generation form.

Unfortunately for utilities, these solutions have a drawback more or less in common and, unless something is changed, their marginal costs and state oversight impacts on utilities are both negative. Neither electrons nor carbon molecules respect borders. Consequently, if external costs are to be internalized principally through targeted energy and emission legislation--as opposed to blanket taxation--electric utilities will likely bear a significant burden of these costs.

The matter is further complicated when new Federal rules are proposed to overlay state regulation, because of the rise of regionalism. As with most energy matters, effort to address cost internalization has taken on a regional character; the fuels, uses, and topography which utilities confront obviously vary. Moreover, as a result of the last wave of reform, this regional character is overlaid by the fact that, while some utilities operate on a fully-integrated basis, other have been subject to

more-or-less deregulation. Since there has been an approximate vacuum in Federal regulation focused on the proposed energy/environmental fixes, we have seen the emergence of various types of regional responses, notably in the environmental field, but in the transmission field as well.

In the absence of Federal regulation in some areas, states have taken action individually, e.g., Resource Portfolio Standards. In some cases, through, regional organizations have propounded their own solutions, e.g., carbon regulation and, in some cases, in a partial relationship with Federal regulators, e.g., transmission. In still other cases, through, what has emerged are strategies for Federal delegation, e.g., energy efficiency, with advisory Federal guidelines.

Consequently, the Federalism issue is not one of writing on a blank slate, either in practice or in legal theory. Consequently, the need for "Cooperative Federalism" is even greater than would naturally be assumed to be the case.

That said, for the 21st Century utility and its state regulators, what will this "Cooperative Federalism" look like?

I would suggest that reference to the emerging "Smart Grid" case might be one starting point to illustrate creative new approaches. The potential of the Smart Grid is clear: It ranges from traditional possibilities such as monitor and control of intermittently-generated renewable resources, like wind and solar, to those notably associated with efficiency, e.g., scheduling the charging and discharging of distributed storage. The theoretical means by which the Smart Grid could operate is clear, too: some kind of integration of one or more "platforms" through which signals or integration can allow the information received from individual control applications to run, charge, or discharge utility response.

However, there are not only technical but political constraints to be overcome. Above all, the utility must receive, from regulators, market signals which definitely reward it for its appropriate behavior.

As the Stimulus Package implicitly recognizes, investments must be made. Regulated utilities cannot themselves, within the parameters of their framework of operation and regulations, afford to make these investments.

The NARUC/FERC Smart Grid Collaborative Proposed Funding for the "Stimulus Package" Smart Grid Matching Grant and Demonstration Program general criteria, addresses the issues of how cooperative Federalism and utility contribution to national energy goals can be reconciled, including:

(a) Funding--how has the project minimized the possibility of stranded investment by designing for the ability to be upgraded?

(b) Overarching criteria--including regional diversity and representation of urban, rural, and suburban settings

(c) Technology criteria--including an open architecture that can become the basis for interoperability with multiple applications

(d) Rate design--compatibility of existing or proposed rate designs with the purposes for which a project is designed

(e) Regulatory--coordination of the project with the RTO and/or system operator

(f) Information/data requirements designed to measure performance and also to measure receptivity of customer response

This type of guideline points the way to two basic conclusions:

(1) The 21st Century utility must be one which delivers new "smart" technologies, which is to say, it is adaptive to Federal policies and regional requirements.

(2) The Cooperative Federalism necessary to develop green infrastructure suitable to our changing society not only must be oriented toward ongoing receptivity to new technology, but also adaptive to regional differences without adopting a one size fits all model.

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In sum, the answer to modern national energy infrastructure needs will not be found in the Supremacy or the Commerce Clause, or preservation of state regulators' cost allocation and siting powers. The keys will be:

- Flexible technology criteria;
- Regional adaptivity; and
- Focus on on-going financial sustainability.

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