The Electricity Journal xxx (xxxx) xxx–xxx

Contents lists available at ScienceDirect

The Electricity Journal

journal homepage: www.elsevier.com/locate/tej

Energy Policy Institute's Seventh Annual Energy Policy Research Conference

Overlapping authorities in U.S. energy policy

Luke Fowler*, Autumn T. Johnson

Boise State University, United States

ARTICLE INFO

Keywords:
Intergovernmental relations
Policy governance
Subnational government

ABSTRACT

Overlapping intergovernmental authorities explain much of the complexities in U.S. energy policy, by accounting for limited powers, uncertain autonomy, cooperation and conflict, inter-state differences, and intersecting policies. Among the implications of overlapping authority are polycentric policymaking venues, direct and indirect policy effects, and energy system governance. Overlapping authority provides a framework for understanding the intersecting roles of national, state, and local governments in energy policy.

1. Introduction

Multi-layers of interdependent governments regulating U.S. energy systems create significant confusion in energy policy, where there is a lack of a comprehensive national policy, emerging state and local leadership, and dynamic markets. In response, energy policy scholarship diverges into focuses on national or subnational policies, with few attempts to integrate these into a comprehensive framework of intergovernmental regulation (Byrne et al., 2007; Osofksy and Wiseman, 2013). Consequently, there are several deficits in understanding U.S. energy governance complexities and subsequent implications for policymakers, regulators, and energy industry leaders. We argue contemporary energy policy in the U.S. is a function of overlapping authorities between national, state, and local governments, with a high degree of interdependence resulting from limitations in power, uncertain autonomy, and interstate policy variations (Wright, 1988; Agranoff and Radin, 2014). To analyze intergovernmental relations in U.S. energy policy, we proceed in three parts: (1) a discussion of the development of intergovernmental relations, and emergence of overlapping-authority; (2) an application of these concepts to energy policy, and (3) implications for policymakers, regulators, and industry leaders.

2. Evolution of intergovernmental relations

Intergovernmental relations in the U.S. tend to be described by one of three models, characterized by relationships between national and state governments (Wright, 1988). First, coordinate-authority (or dual or layer-cake federalism) relies on independent and autonomous national and state governments, with distinct spheres of influence surrounding policies reserved for each level of government. Accordingly, the U.S. Supreme Court, playing referee between the national and state governments, carefully upheld "distinct, insulated spheres of national and state powers" in order to reduce intergovernmental conflict (Wright, 1988, p. 41). Specific to energy policy, states had primary authority over electricity generation, transmission, and distribution, which at the time only occurred on an intrastate scale; and the federal government was largely unconcerned with domestic energy. However, by the 1930s, the predominant model of intergovernmental relations was shifting as the U.S. developed into an industrialized society, and energy markets expanded beyond a single state. In response, Court rulings fractured the independent spheres of governments. Most notably for energy policy with Public Utility Commission of Rhode Island v. Attleboro Steam & Electric Company (1927) and the "Attleboro Gap," in which the Supreme Court ruled that states could not regulate interstate electricity transactions. Consequently, the Attleboro ruling forced the national government to more aggressively regulate energy markets, starting with the of 1920.

Second, in response to growing policy complexity, inclusive-authority (or cooperative or marble cake federalism) relies on a system of interdependent layers of government coordinated by the national government (Wright, 1988). The Attleboro ruling was part of a wider trend in both Court ruling and national policy, where distinct national and state policy spheres were replaced with complimentary authorities (Wright, 1988; O'Toole and Christensen, 2012). Subsequently, national and state policymaking became an interdependent affair, where actions at each level are complementary and create a comprehensive policy regime led by the national government (Wright, 1988). For energy policy, Congress designed the Federal Energy Regulatory Commission (FERC) as a central coordinator of electricity markets, and later the Department of Energy created further national leadership. However, states were not wholly onboard with ceding control to the federal government, leading to numerous intergovernmental conflicts (Ardoin

* Corresponding author.
E-mail address: lukefowler@boisestate.edu (L. Fowler).

https://doi.org/10.1016/j.tej.2017.09.014

and Grady, 2006). While the inclusive-authority model was the predominant model for most of the twentieth century, New Federalism policies that strengthened state and local political institutions, and further development of poly-centric policymaking institutions in a globalized marketplace began to erode the national-centered model of intergovernmental management (Wright, 1988; Agranoff, 2001). These broader shifts in intergovernmental relations resulted in state and local governments emerging as energy policy leaders, and creating unique roles for themselves.

Third, following these changes, Wright (1988) identified a new model of intergovernmental relations, overlapping-authority, described as:

(1) substantial areas of governmental operations involve national, state, and local units (or officials) simultaneously; (2) the areas of autonomy or single-jurisdiction independence and full discretion are comparatively small, and (3) the power and influence available to any one jurisdiction (or official) is significantly limited. The limits produce an authority pattern best described as bargaining (p. 49).

With overlapping authority, governments retain autonomy to develop policies and management practices, but are reliant on other governments to achieve policy goals and have little power to force other institutions into complying with their leadership (Agranoff and McGuire, 1998, 2001). As such, subnational governments are more opportunistic and pursue strategic goals outside of national oversight (Conlan, 2006; McGuire, 2006). Additionally, state and local governments use their positions within the system to negotiate adjustments to federal programs that "request treatment that is not technically or apparently within standards or regulations…to redefine program goals from purely federal terms to local or at least intergovernmental terms that benefit all relevant levels of governments (Agranoff and McGuire, 2001, p. 675). Importantly, overlapping-authority is the intellectual basis for networks (Agranoff and Radin, 2014), where governance is predicated upon "various actors (individuals, coalitions, bureaus, and organizations) none of which possesses the power to determine the strategies of other actors" (Kickert, Klijn, and Koppenjan, 1997, p. 9). As a result, energy policy is a function of a complex interaction between federal, state, and local governments, where shared powers and mutual reliance creates a comprehensive regulatory regime for energy governance.

3. Overlapping authority in energy policy

Overlapping authority creates unique characteristics for energy governance that were non-existent in previous eras of intergovernmental relations. Most notably, there are limited and dispersed powers leading to uncertain areas of autonomy and a high degree of interdependence between governments. In response to the "Attleboro Gap," Congress institutionalized a new approach to energy federalism with the Federal Power Act, and later the Natural Gas Act, which provide regulatory authority over interstate and wholesale markets to the national government, and intrastate and retail markets to state governments (Devane, 1945; Federal Power Act, 2015). However, changes in energy markets over the following 90 years resulted in an "expanding business of transmitting and selling electric power in interstate commerce," creating ambiguities in defining separation of powers between FERC and the states (FERC v. Electric Power Supply Association (EPSA), 2016, p. 767). Recently in Oneok v. Learjet (2015), the Court indicated the difficulty in establishing a bright line between state and national authorities in energy markets and the need for a "careful balance between federal and state regulation" (p. 1601). One key example of this is case law surrounding supposedly distinct powers of wholesale and retail markets. Currently, Court rulings indicate that while FERC cannot directly regulate retail sales, FERC rules can affect "substantially the quantity or terms of retail sales," as it is impossible to isolate retail and wholesale trade in contemporary electricity markets (FERC v. EPSA, 2016, p. 767). Furthermore, "[s]tates may influence, through regulation, which generators participate in FERC's market, even though the end result may affect the wholesale market" and "FERC cannot take action that transgresses state's authority over generation, 'no matter how direct or dramatic,' the program's 'impact on wholesale rates'" (Village of Old Mill Creek Star, v. Star, 2017, p. 25-27). As such, there is little definition between practical capacities of FERC and the states to affect both wholesale and retail electricity markets.

Consequently, both bargaining and negotiations occur as governments compete and cooperate to achieve both individual and shared policy goals. Most scholars argue there is a generally cooperative nature to intergovernmental relations in energy with both formal and informal examples (Byrne et al., 2007; Carley, 2011; Carley and Browne, 2013; Osofsky and Wiseman, 2013). Horizontally, states form both regional and national organizations and interstate compacts to align policy goals, and there is significant evidence of interstate information sharing, coordination of state laws, and policy distribution at state and local levels (Freeman, 1985; Chandler, 2009; Hurlbut, 2010; Krause, 2011; Yi and Feiock, 2012; Osofsky and Wiseman, 2013; NCIC, 2017; WGA, 2017). However, there is little direct evidence of interstate or interlocal cooperation from the literature, partially as result of the interstate versus intrastate issues in energy markets where interstate cooperation falls into the realm of national authority, though some argue that multistate coordinated policies amount to interstate cooperation (Bowman, 2004; Hurlbut, 2010). Vertically, regional transmission organizations (RTOs) "[intermix] federal, regional, state, and local lines in its institutional construction" (Osofsky and Wiseman, 2013, p. 819). Additionally, one of the key areas of multi-level cooperation is research and development. While funding and coordination of energy research is an objective of the Department of Energy's Office of Energy Efficiency and Renewable Energy (EERE), they are largely reliant on state-operated public universities, with these projects bearing a direct impact on energy markets (Margolis and Kammen, 1999; Pew, 2015; DOE, 2017). Additionally, EERE funds state and local governments in developing energy plans, further cultivating a cooperative approach to energy governance (DOE, 2017).

However, emergence of state and local governments as energy policy leaders also creates vertical and horizontal competition in energy markets (Byrne et al., 2007; Rabe, 2011 Osofsky and Wiseman, 2013). Venue-shopping from both environmental interests and industry groups perpetuates vertical competition, where political interests seek out policymaking venues that are likely to acquiesce to policy demands (Shipan and Volden, 2005; Orr, 2006; Rabe, 2008, 2013; Krause, 2011; Davis and Hoffer, 2012; Warner and Shapiro, 2013). As a result, "often the allocation of [state and national] responsibility is based on credit claiming and blame avoidance, rather than efficiency grounds" (Volden, 2005, p. 328). Furthermore, although local governments have few unique areas of regulatory authority for energy, they adapt policy when state efforts are deficient (Shipan and Volden, 2005, 2008). While scholars heavily focus upon renewable portfolio standards and net metering as key state energy policies, some local governments adopt similar policies in absence of state policy, including the goal of Aspen, Colo., to produce 100% of its electricity needs from renewable sources (Byrne et al., 2007; DSIRE, 2017). On the other hand, horizontal competition is a new arena for inter-jurisdictional competition over citizens and economic development, where state and local governments use energy policy to attract jobs and capital investment, reduce energy costs, and meet citizen political preferences (Rabe, 2008, 2013; Lyon and Yin, 2010; Carley and Browne, 2013).

Due to complexities from interdependent authorities, national, state, and local governments have immense power to bargain, especially states with significant institutional capacity for energy policy implementation (Rabe, 2008). Siting is possibility the best example, where "laws and regulations for the development and siting of electric transmission projects often require reviews and/or approvals from multiple federal, tribal, state, and local entities… [and] coordination will reduc[e] redundancies and regulatory uncertainties" (Morton,