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The Federal Government's Role in Electric Transmission Facility Siting

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Summary

The location and permitting of electricity transmission lines and facilities have traditionally been the exclusive province of the states, with only limited exceptions. However, the inability to get transmission lines built due to local interests, as well as competition in generation, has resulted in calls for an increased role for the federal government in transmission siting.

The Energy Policy Act of 2005 (EPAct; P.L. 109-58) established a role for the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC) in transmission siting. The act directed DOE to create "transmission corridors" in locations with adequate transmission capacity. The act also granted FERC secondary authority over transmission siting in the corridors. This new federal role in a decision-making process that had previously been the province of state governments was predictably met with resistance from those seeking to protect local and regional interests. Although the process of creating "transmission corridors" and increasing the federal role in transmission siting has moved forward, the Ninth Circuit recently vacated the congestion study that led to the designation of two such corridors. Nonetheless, there have been calls for further expansion of the federal role in transmission siting by some policymakers and commentators.

This report looks at the history of transmission siting and the reason for an increased federal role in siting decisions, explains the new federal role in transmission siting pursuant to EPAct, and discusses legal issues related to this and any potential future expansions of the federal role.

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Introduction

The location and permitting of facilities used to transmit electricity to residential and commercial customers have been the province of the states (with limited exceptions) for virtually the entire history of the electricity industry. State and local governments are well positioned to weigh the local factors that go into siting decisions, including environmental and scenery concerns, zoning issues, development plans, and safety concerns. Because the grid formerly consisted of many localized transmission and distribution networks, federal interest in siting of the transmission system was limited.

Although the federal government has increasingly exercised its authority over transmission reliability, it has, for the most part, left transmission siting decisions to states. However, as concerns over grid congestion and its impact on reliability have grown, the federal government has carved out a role in transmission siting as a "backstop" siting authority in designated transmission corridors. Although this new role has met some resistance from those who oppose expanding federal authority over siting, other policymakers and commentators have advocated an increased federal role in order to encourage development of renewable energy, which is often located in remote areas that are not easily connected with the interstate grid.

The courts have also thwarted the federal government's efforts to create transmission corridors. In 2011, the Ninth Circuit vacated the Department of Energy's congestion study underlying the designation of national interest electric transmission corridors,[1] and as a result, there are presently no such corridors in effect. Moreover, the Fourth Circuit reversed FERC's interpretation of its siting authority with respect to electric transmission facility applications that have been rejected by a state agency.[2]

The increased federal role in transmission siting decisions raises a number of legal and policy issues. Foremost among these are the concerns over loss of local and regional input and control that often accompany an expansion of federal power into a process traditionally reserved for the states. Indeed, the Federal Power Act specifically reserves certain aspects of governance over the electricity industry to the states, and efforts to expand the federal role in the past have met with resistance from state public utility commissions and advocates of federalism.

This report provides a review of the history of transmission siting; a summary and analysis federal authority to designate transmission corridors and provide backstop siting authority for transmission facilities in those corridors; a discussion of the legal issues associated with this expansion of federal authority and any future expansions of federal transmission siting authority; and a look at recent developments concerning transmission siting on federal lands.

Background

In order to understand the issues that arise from federal involvement in electricity transmission siting decisions, it is necessary to briefly review the history of the power industry and the development of the transmission grid.

[1] California Wilderness Coalition v. U.S. Dep't of Energy, 631 F.3d 1072 (9th Cir. 2011).

[2] Piedmont Environmental Council v. FERC, 558 F. 3d 304 (4th Cir. 2009).

Transmission lines connect power generation facilities to distribution systems that make final delivery of electricity to commercial and residential customers. For most of the 20th century, these lines were generally constructed and operated by "vertically integrated" electric utilities; that is, state-authorized and state-regulated monopolies that owned power generation plants, transmission facilities, and local distribution systems, and ultimately sold electricity to retail customers. While these transmission lines were almost exclusively intrastate in nature at first, the transmission system expanded rapidly to include interstate transmission lines. The Federal Power Act (FPA), first enacted in 1920 as the Federal Water Power Act and amended to include interstate electricity transmission in 1935, granted the Federal Power Commission jurisdiction over wholesale electric power transactions and the interstate transmission of electric power.[3] The states, for the most part, retained jurisdiction over the siting of generation and transmission facilities as well as the pricing of most retail electric power transactions.

Over the next several decades, this mostly local electric power system began to interconnect into larger regional grids. Interconnections were motivated by the reliability benefits of connecting a utility to its neighbors, opportunities for power sales, and joint ownership of increasingly large and expensive power plants. The development of higher voltage transmission lines—which made it possible to transmit electricity long distances with relatively small losses—also spurred interconnection.

Throughout this expansion, the states continued to be the sole authority for most decisions about where to site electric power transmission facilities. Federal transmission systems, such as the Tennessee Valley Authority and some municipal and cooperative utility systems, were able to site transmission lines independent of state authority. However, the vast majority of transmission facilities were constructed by investor-owned utilities under state jurisdiction.

Difficulty in constructing new transmission led Congress to include federal transmission siting authority as part of the Energy Policy Act of 2005 (EPAct).[4] One section of EPAct authorized the Department of Energy (DOE) to designate "National Interest Electric Transmission Corridors" based on DOE's findings after conducting a study of congestion as directed by EPAct.[5] EPAct authorized FERC to permit the construction and operation of electricity transmission facilities within the boundaries of the National Interest Electric Transmission Corridors. This authority may not be exercised by FERC unless the state where the facility would be sited lacks the authority to issue the permit, the applicant does not qualify for the permit in the state, or the state has "withheld approval" of the permit for more than one year.[6]

The federal transmission siting authority created in EPAct is a "backstop" authority that is exercised only if the state cannot authorize the facility or if it has "withheld approval." This authority, which is discussed in detail *infra*, was adopted after the blackouts in August of 2003 that interrupted service, in some cases for days, to many customers across the northeastern United States and in Canada. EPAct directed the Secretary of Energy to designate the corridors only in areas in which it finds "electric energy transmission capacity constraints or congestion that adversely affects consumers."[7] In addition, FERC was authorized to permit transmission facilities

[3] 16 U.S.C. 791-828c, Chapter 285, 41 Stat. 1063 (1920), *as amended by* Chapter 687, 49 Stat. 803 (1935).

[4] P.L. 109-58.

[5] *Id.* at §1221.

[6] *Id.*

[7] *Id.*

only upon a finding that the proposed construction or modifications would "significantly reduce transmission congestion in interstate commerce and protects or benefits consumers."[8]

Recent events, however, have led some legislators and commentators to push to expand the federal role in transmission siting. Some have advocated an expanded federal role as a means to encourage development of green energy technology. Others have suggested that a recent ruling[9] by the U.S. Court of Appeals for the Fourth Circuit interpreting the transmission siting section of EPAct has limited federal siting authority too severely, and that legislation is needed to expand FERC's siting authority to guard against future congestion problems. These concerns, and some of the proposals that address them, are explored further below.

Analysis

Transmission Siting and the Commerce Clause

Congressional Authority to Regulate Interstate Commerce

Congressional authority for legislation affecting the transmission of electric power, including the siting of transmission facilities, would likely be dependent upon Congress's constitutional authority to "regulate commerce ... among the several states."[10] This constitutional authority to legislate pursuant to the power to regulate interstate commerce has expanded significantly in the last 75 years. The plain meaning of this language might indicate a limited power to regulate commercial trade between persons in one state and persons outside of that state. During the early 1900s, the Supreme Court was confronted with statutes which went beyond regulation of trade and addressed other related economic activities. At that time, the Court struck down a series of federal statutes which attempted to extend commerce regulation to activities such as "production," "manufacturing,"[11] or "mining."[12]

Starting in 1937, however, with the decision in *NLRB v. Jones & Laughlin Steel Corporation*,[13] the Supreme Court held that Congress has the ability to protect interstate commerce from burdens and obstructions which "affect" commercial transactions. Subsequent Supreme Court decisions found that Congress had considerable discretion in regulating activities which "affect" interstate commerce, as long as the legislation was "reasonably" related to achieving its goals of regulating interstate commerce.[14] Thus the Court found that in some cases, events of purely local commerce (such as local working conditions) might, because of market forces, negatively affect interstate commerce, and thus would be susceptible to federal regulation.[15] The Court has also held that an

[8] *Id.*

[9] Piedmont Environmental Council v. FERC, 558 F. 3d 304 (4th Cir. 2009).

[10] U.S. CONST. Art. I, §8, cl. 3.

[11] United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

[12] Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936).

[13] 301 U.S. 1 (1937).

[14] United States v. Darby, 312 U.S. 100 (1941) (approving legislation relating to working conditions).

[15] 312 U.S. at 121.

activity which in itself does not affect interstate commerce could be regulated if all such activities taken together did affect interstate commerce.[16]

In the 1995 case of *United States v. Lopez*,[17] however, the Supreme Court identified three categories of laws which are authorized by the Commerce Clause: (1) laws which regulate channels of commerce; (2) laws which regulate instrumentalities of commerce; and (3) laws which regulate economic activities which affect commerce.[18] Within the third category of activities which affect commerce, the *Lopez* Court determined that the power to regulate commerce applies to intrastate activities only when they "substantially" affect commerce.[19]

Given the Court's broad application of these three acceptable categories of legislation, it seems likely that congressional action expanding the federal role in siting of electric transmission facilities would be found to fall into at least one of the categories. Although an argument can be made that the contemplated legislation could fall under any of the three categories, it seems particularly likely that legislation impacting the interstate electricity grid could be considered to be affecting an "instrumentality" of interstate commerce. The interstate electricity grid has characteristics similar to other interstate systems previously found to be instrumentalities of commerce, such as the railroads, the mail delivery, or the telephone network.

In order to rely upon this prong of the "interstate commerce" test, there likely would need to be a demonstration that the legislation in question is intended to provide for the safety, efficiency, and accessibility of the electricity grid. Such a demonstration seems plausible with respect to legislation that could enhance the reliability of electricity service by easing the regulatory path to obtaining a permit for construction of transmission facilities.

Also, the broadest of the three categories, legislation "affecting" interstate commerce, may be applicable to legislation. As noted *supra*, even local activity can be legislated under this category if the legislation "exerts a substantial economic effect on interstate commerce."[20] There is an argument that the ability to site electric power transmission facilities in accordance with national interest and with less pressure from local interests would exert such a substantial economic effect on interstate commerce. Such an argument would likely be bolstered by any information that may be available about the aggregate effect of transmission siting denials by state regulatory agencies on the reliability and efficiency of the interstate grid.

[16] Wickard v. Filburn, 317 U.S. 111 (1942).

[17] 514 U.S. 549 (1995).

[18] The Court failed to note that to some extent, the three categories are intertwined. For instance, the first category, the regulation of "streams" or "channels" of commerce, allows regulation of the creation, movement, sale and consumption of merchandise or services. But the initial extension of the "streams" of commerce analysis by the Court to intrastate trade was justified by the "effect" of these other activities on commerce. See NLRB v. Jones & Laughlin, 301 U.S. 1, 31 (1936). Similarly, the second category, which allows the regulation of such instrumentalities of commerce as planes, trains or trucks, is also based on the theory that a threat to these instrumentalities "affects" commerce, even if the effect is local in nature. Southern Railway Company v. United States, 222 U.S. 21, 26-27 (1911) (regulation of intrastate rail traffic has a substantial effect on interstate rail traffic). Thus, the final category identified by the Court appears to be a catchall for all other activities which "substantially affect" commerce.

[19] 514 U.S. at 559.

[20] 317 U.S. at 125.

Supreme Court Jurisprudence on the Interstate Nature of the Electricity Industry

In those instances in which the courts have evaluated legislation impacting the electricity industry in areas previously considered the province of state regulatory agencies, the courts have found such legislation to be within Congress's Commerce Clause authority. One relevant Supreme Court decision on this issue is *FERC v. Mississippi*.[21] In that case, the Court heard challenges to provisions in the Public Utility Regulatory Policies Act of 1978 (PURPA)[22] that directed state utility commissions to consider adoption of certain retail rate designs and regulatory standards affecting retail rates, and to implement rules designed to encourage development of certain kinds of generation facilities, known as "qualifying facilities." The State of Mississippi alleged that these PURPA requirements for state action exceeded congressional power under the Commerce Clause.

The Court rejected the state's challenge, deferring to the congressional findings that

> "the protection of the public health, safety and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require," ... a program for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electricity utilities, and equitable retail rates for electricity consumers ... [23]

The Court noted that in accordance with Commerce Clause precedent, it was tasked only with determining if the congressional findings had a rational basis.[24] Citing committee hearings and their findings, the Court found that the congressional findings were supported.[25] In fact, the Court went further, noting that it "agree[s] with appellants that it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product that is used in virtually every home and every commercial or manufacturing facility. No state relies solely on its own resources in this respect."[26]

The Court reached a similar conclusion with respect to the electricity transmission in *New York v. U.S.*[27] In that case, the Court reviewed FERC Order No. 888, in which FERC mandated that utilities offer access to their electricity transmission facilities to other companies generating electric power. This open access transmission mandate included a requirement for open access for retail electricity transmission. According to FERC, it was "irrelevant to the Commission's jurisdiction whether the customer receiving the unbundled transmission service in interstate commerce is a wholesale or retail customer."[28] This exercise of FERC's jurisdiction was challenged as beyond the scope of the FPA, which grants FERC jurisdiction over "the

[21] 456 U.S. 742 (1982).

[22] P.L. 95-617.

[23] 456 U.S. at 755, quoting 16 U.S.C. §2601.

[24] *Id.* at 756.

[25] *Id.*

[26] *Id.* at 757.

[27] 535 U.S. 1 (2002).

[28] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs., Regulations Preambles, January 1991-June 1996 ¶ 31,036 at 31,689 (1996).

transmission of electric energy in interstate commerce and the sale of such energy at wholesale."[29] The petitioners claimed that FERC's jurisdiction should be limited to wholesale transmissions pursuant to the FPA.

The Court rejected these challenges, finding that "[t]he unbundled retail transmissions targeted by FERC are indeed transmissions 'of electric energy in interstate commerce,' because of the nature of the interstate grid."[30] It is important to note that the Court's analysis focused on the meaning of "interstate commerce" as the term is used in the FPA, and not the Constitution. However, the Court's findings may be a useful predictive tool in determining how the Court might view a congressional exercise of the Commerce power in the electricity marketplace. Interpreting the impact of the decision, one observer said that "[i]n practical terms, this means the federal government could assert jurisdiction all the way to a consumer's toaster if it so chose, excepting such exclusively intrastate matters as the siting of power plants."[31]

This precedent seems to reflect a consistent determination by the Court that legislation that impacts electricity transmission, even if the direct impact of the legislation is local, necessarily affects interstate commerce. The Court has, on multiple occasions, acknowledged that the changing and evolving electricity grid has resulted in an interdependent interstate system. Any legislation that impacts that system or the commodity that it transmits would likely be considered legislation pursuant to Congress's authority to regulate interstate commerce.

The Energy Policy Act of 2005: National Interest Electric Transmission Corridors

As discussed *supra*, decisions about where to site electricity transmission facilities have historically been made almost exclusively by state regulatory agencies. In 2005, EPAct established for the first time a significant federal role in transmission siting decisions. Section 1221 of EPAct established what is commonly called a "backstop" siting authority for FERC. It authorized FERC to issue permits for the construction or modification of transmission facilities in certain circumstances in areas designated by the Secretary of Energy as "National Interest Electric Transmission Corridors."[32] EPAct directed the Secretary of Energy to "conduct a study of electric transmission and congestion" and subsequently "issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor."[33] In making this determination, EPAct provided that the Secretary might consider whether

> (A) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;

[29] 18 U.S.C. §824(b).

[30] 535 U.S. at 17.

[31] Eisen, Joel B., Regulatory Linearity, Commerce Clause Brinksmanship, and Retrenchment in Electric Utility Deregulation, 40 Wake Forest L. Rev. 545, 572 (2005).

[32] P.L. 109-58, at §1221.

[33] *Id.*

> (B)(i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and (ii) a diversification of supply is warranted;
>
> (C) the energy independence of the United States would be served by the designation;
>
> (D) the designation would be in the interest of national energy policy; and
>
> (E) the designation would enhance national defense and homeland security.[34]

The establishment of these National Interest Electric Transmission Corridors paves the way for the first significant federal role in electric transmission facility siting. EPAct gives FERC the authority to issue permits for the construction or modification of electric transmission facilities that are located in a National Interest Electric Transmission Corridor.[35] The permit application must also satisfy the following criteria to be eligible for FERC authorization:

> (1) (A) a State in which the transmission facilities are to be constructed or modified does not have authority to: (i) approve the siting of the facilities; or (ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State; (B) the applicant for a permit is a transmitting utility under this Act but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or (C) a State commission or other entity that has authority to approve the siting of the facilities has—(i) *withheld approval for more than 1 year after the filing of an application seeking approval* pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or (ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible;
>
> (2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;
>
> (3) the proposed construction or modification is consistent with the public interest;
>
> (4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers
>
> (5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and
>
> (6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.[36]

The American Recovery and Reinvestment Act of 2009 (ARRA)[37] later modified DOE's mission for NIETCs, directing DOE to include areas where renewable energy may be hampered by lack of access to the grid.[38]

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[34] *Id.*

[35] *Id.*

[36] *Id.* (emphasis added).

[37] P.L. 111-5.

FERC Authority to Site Transmission

In most instances, FERC's authority would arise only on those projects for which the state has "withheld approval for more than one year," because the other categories listed above in subsection (1) are rarely applicable. Thus, the FERC transmission siting authority under EPAct functions as a backstop authority, allowing FERC to permit transmission facilities only when there is no state authority to do so, or when the relevant state agency has "withheld approval for more than one year."[39]

An important step in creating a process to administer the national interest electric transmission corridors was a FERC rulemaking proceeding intended to outline the process for application for a federal transmission facility construction and operation permit in the corridors. FERC initiated the rulemaking on June 16, 2006, and issued a final rule on November 16, 2006, that established the applicable regulations.[40] For the most part, the rule was not controversial, simply establishing filing requirements and procedures for parties seeking to construct electric transmission facilities in the national interest electric transmission corridors that the Department of Energy would later establish. However, there was one controversial interpretation of Section 1221 of EPAct.

As mentioned *supra*, Section 1221 limited federal electric transmission facility permit applications to, among other criteria, projects for which the state has "withheld approval for more than one year."[41] There is no dispute that this criterion includes projects for which the state regulatory agency has failed to take any action on a properly submitted application. However, it is less clear if a project for which a permit is rejected or denied by the state regulatory agency would be considered a project for which the state has "withheld approval for more than one year." That is to say, does saying "no" to a project amount to withholding approval of a project?

In Order No. 689, FERC found that rejection was equivalent to "withholding approval," that therefore a project would be eligible for a federal permit if the state agency had rejected an application, so long as more than a year had passed since the permit request was submitted. FERC found that

> [t]he statute does not explicitly define the full range of State actions that are deemed to be withholding approval. Nonetheless, to promote regulatory certainty, we believe it is our responsibility to interpret the statutory language in this proceeding and to give all parties notice of such interpretation. To this end, we believe that a reasonable interpretation of the language in the context of the legislation supports a finding that withholding approval includes denial of an application.[42]

Because the statutory language was not clear on this point, and because FERC's decision resulted in an expansion of FERC permitting authority, the decision was a topic of considerable debate.

(...continued)

[38] Section 409 of ARRA directs DOE to analyze transmission needs and constraints related to renewable energy in the 2009 study of electric transmission congestion, and make recommendations to achieve "adequate transmission capacity."

[39] P.L. 109-58, at §1221.

[40] Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities (Order No. 689), 71 Fed. Reg. 69,440 (December 1, 2006).

[41] P.L. 109-58, at §1221.

[42] Order No. 689, at 69,444.

One of the FERC commissioners, Suedeen Kelly, felt so strongly that this interpretation of EPAct was incorrect that she dissented in part from the Order, stating that she "believe[s] the majority's interpretation flies in the face of the plain language of the statute, the purposes of the statute, well established principles of statutory interpretation and supporting case law, and inappropriately preempts the States in the process."[43] Commissioner Kelly argued that

> [t]he authority to lawfully deny a permit is critically important to the States for ensuring that the interests of local communities and their citizens are protected. What the Commission does today is a significant inroad into traditional state transmission siting authority. It gives states two options: either issue a permit, or we'll do it for them. Obviously this is no choice. This is preemption.
>
> Courts "have long presumed that Congress does not cavalierly pre-empt" state law. Indeed, courts should not find federal pre-emption "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." In short, courts must start with the "basic assumption that Congress did not intend to displace state law."
>
> There is no evidence to counter this "presumption against pre-emption." To the contrary, I find it inconceivable that Congress would have specifically listed ... a number of circumstances that will trigger Commission jurisdiction, yet fail to include on that list denial of a permit. If Congress had intended to take away the States' authority to lawfully deny a permit, surely it would have said so in unmistakable terms.[44]

FERC received a number of requests for rehearing of Order No. 689, many of which challenged FERC's interpretation of the "withholding approval" language from Section 1221 of EPAct. FERC, however, denied rehearing of the Order in Order No. 689-A, finding that the word "withheld," as used in this EPAct, is "inclusive, comprising 'denying' approval as well as 'refraining' or 'holding back' from granting approval."[45] FERC concluded that "the most common sense reading of 'withheld approval for more than one year' encompasses any action—whether it is a failure to act or an outright denial—that results in an applicant not having received state approval at the end of one year."[46] Commissioner Kelly continued to dissent from this finding, citing for the most part her reasoning from her previous dissent as reasoning for her continued rejection of the majority's interpretation of the statutory language.[47]

In *Piedmont Environmental Council v. FERC*, several organizations petitioned the U.S. Court of Appeals for the Fourth Circuit for review of Order No. 689 and Order No. 689-A. The petitioners challenged FERC's interpretation of the language in EPAct regarding FERC's transmission siting authority in circumstances where a state has "withheld approval for more than 1 year." The petitioners alleged that FERC had improperly classified a denial of an application as "withholding approval."

[43] *Id.*, Commissioner Kelly dissenting in part, at 69,476.

[44] *Id.*

[45] Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, order denying reh'g (Order No. 689-A), 119 FERC ¶ 61,154 (May 17, 2007)

[46] *Id.* at *3.

[47] *Id.* at *18-19.

The court agreed and reversed FERC's interpretation of the EPAct language, remanding the case back to the agency.[48] The court held that FERC's interpretation was contrary to the plain meaning of the statutory language.[49] The court found that the statutory phrase "without approval for more than one year," when read as a whole, "means that action has been held back *continuously* over a period of time (over one year)."[50] The court stated that "[t]he continuous act of withholding approval for more than a year cannot include the finite act of denying an application within the one-year deadline. The denial of an application is a final act that stops the running of time during which approval was withheld on a pending application."[51] The decision was appealed to the U.S. Supreme Court, and the Court denied certiorari in January of 2010.[52]

FERC has not taken any action to amend its interpretation of EPAct in the wake of the Fourth Circuit's decision in *Piedmont Environmental Council v. FERC*. That decision impacts the approval of permits only in states within the Fourth Circuit. Accordingly, FERC's interpretation of the phrase "withheld approval for more than 1 year" in Order No. 689 and Order No. 689-A is reversed in Maryland, Virginia, West Virginia, North Carolina, and South Carolina; in other states, FERC could theoretically approve a permit for an electric transmission facility when a state has denied a permit application. In any case, as discussed *infra*, FERC does not presently have the authority to issue any permits under EPAct, because there are currently no National Interest Electric Transmission Corridors in effect.

Challenges to Establishing National Interest Electric Transmission Corridors

Not surprisingly, the federal permitting authority in an area previously reserved for state regulatory agencies has been the source of further controversy. Another controversial action after the legislation was enacted was the Department of Energy's creation of the Mid-Atlantic Area and Southwest Area National Interest Electric Transmission Corridors. Some commentators began protesting the designation soon after the Department of Energy issued its draft proposal for the corridors in May 2007. One of the more common criticisms was that the corridors were drawn too broadly, resulting in too significant a role for the federal government in what had been local decisions.[53] The Mid-Atlantic Corridor, for example, covers the entire states of New Jersey and Delaware and large parts of New York, Pennsylvania, Maryland, Virginia, and West Virginia. It even reaches into parts of Ohio.[54] Despite these concerns, the Department of Energy approved these corridors in October 2007.[55]

However, in February 2011, the Ninth Circuit vacated the Congestion Study that led to the designation of the two National Interest Electric Transmission Corridors, and, as a result, there

[48] Piedmont Environmental Council v. FERC, 558 F. 3d 304, 309-10 (4th Cir. 2009).

[49] *Id.* at 313.

[50] *Id.* (emphasis in original).

[51] *Id.*

[52] Edison Electric Institute v. Piedmont Environmental Council, 130 S. Ct 1138 (2010).

[53] See, e.g., "States v. Feds: National Transmission Corridors Challenged," *EnergyBiz*, March/April 2008, p. 88; Letter from Edward G. Rendell, Governor of Pennsylvania, to Samuel W. Bodman, Secretary of Energy, June 8, 2007.

[54] For maps of the corridors, see http://energy.gov/oe/electricity-http://energy.gov/oe/electricity-policy-coordination-and-implementation/transmission-planning/national-interestpolicy-coordination-and-implementation/transmission-planning/national-interest.

[55] Department of Energy, "National Electric Transmission Congestion Report," 72 *Federal Register* 56992, October 5, 2007.

are no National Interest Electric Transmission Corridors presently in existence.[56] In *California Wilderness Coalition v. U.S. Department of Energy,* 13 petitions alleged that the Department of Energy failed to consult with affected states in undertaking its Congestion Study as required by EPAct.[57] The Ninth Circuit found that the Department's actions, which included giving an opportunity for comments on the ongoing study and the designation of the National Interest Electric Transmission Corridors, did not amount to consultation, because Congress intended for the Department to confer with the affected states.[58] Additionally, the court determined that the Department's failure to provide affected states with certain modeling data interfered with their own ability to consult with the government, and that these failures to consult did not constitute a harmless error.[59]

The Debate over an Increased Federal Role in Transmission Siting

While the scope of the federal government's ability to site electricity transmission facilities under Section 1221 of EPAct was being debated in the FERC rulemaking proceedings and before the U.S. Court of Appeals for the Fourth Circuit, a number of prominent policymakers have opined on expanding the federal role beyond the "backstop" authority contemplated in EPAct. Some of these policymakers advocated further expanding the federal role in order to ease grid congestion, address reliability concerns, and encourage development of "clean" energy resources.

One of the most prominent commentators on transmission siting policy has been former FERC Chair Joseph Kelliher. Kelliher served as a FERC commissioner for five years and as FERC chair for three years. In a letter written to Senator Bingaman dated January of 2009, Kelliher, in the midst of his departure as FERC chair, wrote that Congress should grant FERC "exclusive and preemptive federal siting for transmission facilities used in interstate commerce."[60] Kelliher stressed the importance of expanding transmission facilities in order to address reliability concerns, encourage competitive wholesale markets, and respond to climate change concerns (by allowing "green" energy sources increased access to the grid).[61] Kelliher was critical of the existing framework for electric transmission facility siting, including the EPAct transmission corridor scheme, saying that it "promises years of litigation, while diffusing responsibility for siting electric transmission facilities."[62]

FERC chair, Jon Wellinghoff, has also voiced his opinion that the federal government should have a more prominent and active role in electricity transmission facility siting. In March 2009 testimony before the Senate Committee on Energy and Natural Resources, Wellinghoff testified that in order to meet certain renewable goals outlined by the Obama administration, "there must be a mechanism to invoke federal authority to site the transmission facilities necessary to interconnect renewable power to the electric transmission grid and move that power to customer load."[63] Wellinghoff highlighted FERC's expertise in making siting decisions, pointing

[56] *See* California Wilderness Coalition v. U.S. Dep't of Energy, 631 F.3d 1072, 1085-1096 (9th Cir. 2011).

[57] *See id.* at 1075.

[58] *See id.* at 1085-1089.

[59] *See id.* at 1089-1095.

[60] Letter from Joseph Kelliher to Senator Jeff Bingaman, January 21, 2009.

[61] *Id.*

[62] *Id.*

[63] U.S. Congress, Senate Committee on Energy and Natural Resources, *Jon Wellinghoff, Acting Chair, FERC*, Hearing (continued...)

specifically to FERC's long-standing authority to authorize construction of natural gas pipelines. Wellinghoff noted that FERC "has developed comprehensive, efficient processes that provide for public notice and extensive public participation, including participation by affected states."[64] Wellinghoff suggested that Congress give FERC a similar role in electric transmission facility siting, concluding that "[w]ithout broader Federal siting authority to accommodate high levels of renewable electric energy—authority similar to that which exists for interstate natural gas pipelines ... it is unlikely that the Nation will be able to achieve energy security and economic stability."[65]

These commentators and others who share their views face opposition from representatives of state regulatory agencies. The National Association of Regulatory Utility Commissioners (NARUC) issued a resolution in March 2009 arguing that Congress should limit FERC's siting authority under any new legislation.[66] The resolution recommended that any legislation allow for primary siting jurisdiction by the states and that FERC not have any additional authority over intrastate transmission lines.[67] To the extent that Congress might grant FERC additional siting authority, NARUC recommended that such authorization of interstate transmission require an agreement concerning regulatory structure be in place to govern cost allocation among the states where the facilities are to be sited.[68]

Transmission Siting on Federal Lands

While the federal government's role in the transmission siting process on private land has been limited as discussed in this report, the federal government will likely have a more extensive role in siting transmission facilities on federal lands. Under Section 216(h) of the Federal Power Act, DOE is authorized to act as "lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of [electricity transmission facilities]."[69] This authority was granted as part of EPAct 2005's provisions addressing transmission siting.[70] DOE delegated this authority to FERC for transmission facilities on federal lands located in National Interest Electric Transmission Corridors. For other transmission facilities on federal lands, DOE retains the lead agency authority.

On October 23, 2009, nine agencies, including DOE, issued a Memorandum of Understanding Regarding Coordination in Federal Agency Review of Electric Transmission Facilities on Federal Land (MOU).[71] The goal of the MOU, according to its terms, is to improve "coordination among

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on Legislation Regarding Electric Transmission Lines, 111th Cong., 1st sess., March 12, 2009.

[64] *Id.*

[65] *Id.*

[66] National Association of Regulatory Utility Commissioners, "Resolution Regarding Possible Federal Legislation Amending the Federal Power Act Addressing Expansion of Transmission Facilities," March 10, 2009.

[67] *Id.*

[68] *Id.*

[69] 16 U.S.C. §824p (h)(2).

[70] P.L. 109-58, at §1221.

[71] The following agencies signed the MOU: the U.S. Department of Agriculture, Department of Commerce, Department of Defense, Department of Energy, Environmental Protection Agency, Council on Environmental Quality, Advisory Council on Historic Preservation, Department of the Interior, and Federal Energy Regulatory Commission. The MOU can be viewed at http://www.whitehouse.gov/files/documents/ceq/
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project applicants, federal agencies, and states and tribes involved in the permitting process." The MOU also notes that the agreement will provide "a single point of contact ... for coordinating all federal authorizations required to site electric transmission facilities on federal lands." That point of contact is DOE. According to the terms of the MOU, DOE will designate a lead agency for all proposed transmission projects for which all or part of the proposed transmission line crosses into areas administered by more than one agency. The lead agency's duties as set forth in the MOU include coordination of pre-application activities, consultation among relevant agencies, establishing a schedule for the project, conducting environmental review in accordance with the requirements of the National Environmental Policy Act,[72] maintaining an administrative record and making data available electronically, and establishing necessary procedures to implement responsibilities.

Conclusion

Traditionally, the federal government has had a limited role in electric facility transmission siting, as siting decisions have in large part been made by state agencies. However, in recent years there has been a push to expand the federal role in transmission siting. The Energy Policy Act of 2005 created a "backstop" siting authority for FERC in certain instances where grid congestion was a concern. Recently there have been suggestions and legislative proposals that would further expand the federal role in electric facility transmission siting. Legal precedent suggests that federal involvement with transmission siting would likely pass constitutional muster, assuming a connection to interstate commerce is shown. However, federal courts of appeals have impeded the government's attempts to create transmission corridors and issue electric transmission facility permits in the absence of state approval.

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Transmission%20Siting%20on%20Federal%20Lands%20MOU.pdf.

[72] 42 U.S.C. §4332.