

Transmission Development: Will Federal Initiatives Soon Trump State Authority?

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After passage of the Public Utility Holding Company Act and the breakup of the large utility holding companies in the 1930s, the electric utility industry largely evolved into numerous vertically-integrated, local monopolies serving designated franchise territories. Each utility developed transmission facilities to support service within its own territory and there were limited ties between companies and regions.¹ As wheeling was limited, independent power producers usually sold their energy to the utilities with which they interconnected.

Today, the Federal Energy Regulatory Commission (FERC) has reshaped the electric marketplace and the world is a very different place. Following implementation of open access in 1996 and the rapid evolution of competitive markets for wholesale (and in some cases retail) sales soon thereafter, the transmission system is now being used in ways that planners had never anticipated. In addition, the existing infrastructure is aging. At the same time, legislators and regulators across the country have decided not only to promote, but in many cases require, development of renewable resources.² Many renewable resources are far from major load centers, necessitating many miles of new transmission. For all these reasons, the transmission system needs to be upgraded and expanded. Some have even called for the development of a transmission "Superhighway" of new extra-high voltage lines across the entire United States.³

But transmission is not being planned and built quickly enough to meet new and increasing demands. Some believe that one of the biggest impediments to development is state siting authority. The Federal Power Act (FPA) gives FERC authority over interstate transmission

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service and, to some extent, the facilities over which such service is provided. The FPA limits federal siting authority to a "backstop" role only.⁴

Is more federal oversight needed to spur development of transmission? A simple solution would be to give FERC oversight and siting authority over all transmission planning and development, perhaps using Section 7 of the Natural Gas Act as a model. But that, or any other solution based on increasing federal authority, would be controversial. The states do not want to cede their siting power. They are reluctant to allow transmission projects to be built within their borders if the environmental, financial and/or aesthetic detriments outweigh the benefits to their residents. Legislation is pending in Congress that would increase federal power to site transmission, but it is not certain to become law. Nor is it clear that the legislation will serve the intended purpose. Meanwhile, at FERC, a rulemaking proceeding is underway to address regional planning requirements and cost allocation issues, but whatever rules FERC adopts, absent legislative action, the states will continue to be the ultimate siting authority.

Siting Transmission: A Traditional State Power

Before the enactment of the Federal Power Act, the states attempted to regulate all aspects of the electric utility industry.⁵ The federal government can supplant the states, but only to the extent Congress chooses to do so.⁶ Since the enactment of the FPA, electric utility regulation has been split between the states and the Federal government, with the states retaining full authority to site transmission until the Energy Policy Act of 2005 (EPAAct of 2005) gave FERC "backstop" siting authority.⁷ Notwithstanding the backstop authority, the states continue to regulate siting in the first instance.⁸ Some states have statutes that address transmission siting specifically, while others rely on general land use laws and eminent domain power.⁹ Such divergent approaches, which reflect varied transmission siting policies, combined with an understandable focus by each state on the particular interests of its own residents, have produced a balkanized grid, "an interconnected patchwork of state-authorized facilities" that is not always the best overall solution for the region or the country.¹⁰

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Expanding federal authority is highly controversial. Maybe expanded federal authority will get more lines built, but at what cost to residents of any particular state? States will often be more familiar with the needs and wants of their residents, and may be more adept at identifying reasonable alternatives to mitigate any opposition. For example:

- Transmission lines can be expensive.¹¹ Any state that will bear a portion of a transmission project's costs will want to make sure that the project is not "gold-plated." Moreover, each state will want to be certain that the benefits its residents receive are commensurate with the costs that they bear.
- High voltage lines are generally considered ugly. Routing a line over pristine hillside is likely to be opposed by the people who will have to look at it every day. There have also been health concerns over the years with the electromagnetic fields (rightly or wrongly). The result is a Catch-22. Keep lines away from population centers, because people do not want to be near them, but keep lines away from more remote areas, where nature would be spoiled. Alternatively, lines can be built underground, but that increases costs significantly.
- The environmental impacts of a transmission project may also be of particular importance. The Cross-Sound Cable project between New York and Connecticut fostered vehement opposition in some quarters due, in part, to the potential disturbance of the shellfish beds in the Long Island Sound.¹² The issue was eventually settled with an agreement that included a six million dollar fund for the preservation of Long Island Sound to be administered jointly by the state governments of New York and Connecticut.¹³

Even though individual states may have different views on these issues for a particular project, it is not clear that state siting authority, in and of itself, is a significant impediment to transmission line development. Experience shows that while some projects do not get built, others do. For example, the proposed Devers-Palo Verde line would have connected generation in Arizona to major load centers in California. Arizona regulators were concerned about the impacts of the line on "Arizona air quality, Arizona land, Arizona water and Arizona wildlife."¹⁴ They were also troubled because the benefits associated with the line

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would largely accrue to California. As Commissioner Mundell of the Arizona Corporation Commission stated: "[I]t's going to cost Arizona ratepayers millions and benefit California by the billions....I don't want Arizona to become an energy farm for California."¹⁵ On the other hand, the Trans-Allegheny Interstate Line (TrAIL) project, which will run through Pennsylvania, West Virginia and Virginia, was approved by each of the state commissions and is now undergoing construction, with a projected completion date of June 2011.¹⁶

There are examples of states that have tackled the need for transmission development, which may indirectly benefit an entire region. For example, California and Texas have implemented plans to facilitate the development of transmission facilities in order to access renewable resources located far from load centers. In California, the Tehachapi Renewable Transmission Project is designed to transmit wind-generated electricity from California's Tehachapi Wind Resource Area to Los Angeles. Texas's Competitive Renewable Energy Zone (CREZ) Project is designed to transmit wind-generated energy from the Texas panhandle to major load centers.

Whether the California or Texas models will ultimately be successful is yet to be determined. Even if they are, it would not be easy to replicate them in most areas of the country. In both Texas and California, renewable resources, the needed transmission lines and the loads to be served are largely, if not exclusively, within state borders. The primary costs and benefits associated with any particular project, therefore, are realized by the residents in that state. In many other parts of the country, transmission lines often need to cross two or more states to move power from source to load. The costs incurred and the benefits realized by the residents of any particular state are not always proportional. Another solution is likely needed.

Backstop Siting Authority: The Feds Exercise Some Muscle

Since Congress enacted the Federal Power Act in 1935, federal oversight of the electric transmission system has been ever-increasing.¹⁷ The latest step in that direction occurred when Congress established federal "backstop" siting authority under EPAct of 2005. The use of backstop authority is determined initially by the Secretary of Energy, who may designate

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geographical areas as "National Interest Electric Transmission Corridors" (NIETCs).¹⁸ Factors that may be considered in support of such a designation include: (1) constraints on the economic vitality of a region due to inadequate supplies of reasonably priced energy; (2) limited sources of energy in the region that may jeopardize economic growth; (3) diversification of the energy supply; (4) the energy independence of the United States; (5) national energy policy; and (6) national defense and homeland security concerns.¹⁹

Once an NIETC is designated, FERC may issue permits authorizing construction or modification of electric transmission facilities within the NIETC.²⁰ Among the various requirements that must be satisfied before FERC can issue the permit, the most controversial has been that a state commission charged with siting authority (assuming there is one) must have "withheld approval for more than 1 year."²¹ Some have argued that withholding approval means the state has failed to act on a request to site transmission, while others have taken a broader view, arguing that denial of a project is also withholding approval. In February 2009, the United States Court of Appeals for the Fourth Circuit concluded that Congress intended to give FERC limited authority to exercise its backstop function – it could not permit a project when a state commission had already denied it.²² No other circuit has yet agreed with or contradicted that decision.

The Secretary of Energy, to date, has not used NIETC authority to take over the siting function on a large scale. There are only two designated NIETCs: (1) the "Mid-Atlantic Area Transmission Corridor" which runs from central West Virginia to the New York-Canadian border; and (2) the "Southwest Area National Corridor" which covers much of Southern California and Southwestern Arizona.²³ Within those corridors, no permits have been issued. The threat of federal action may cause states authorities to be more accepting of projects that in the past would have been rejected or approved with conditions. But backstop authority, at least in its current form, is having no obvious effect.

The Next Step Toward Federalization?

The need for new transmission is the "elephant in the room" any time policies designed to promote renewable resources are being discussed. To that end, energy legislation currently

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pending before Congress would expand federal authority to promote transmission development. It is not certain, however, that these bills will be passed any time in the foreseeable future.

The U.S. House of Representatives passed the American Clean Energy and Security Act of 2009 (commonly referred to as "ACES" or the Waxman-Markey bill), but it is now stalled in the Senate.²⁴ Also pending before the Senate is the American Clean Energy Leadership Act of 2009 (ACELA).²⁵ Each bill would obligate FERC to adopt national planning principles that include developing regional plans, but FERC is already moving in that direction (as discussed below) so these requirements would add nothing meaningfully new. Each bill would also empower FERC to issue a certificate of public convenience and necessity under certain conditions, thereby permitting a transmission line to be built, if state authorities deny a request to do so (not just when they withhold authority). In other words, these bills would nullify the Fourth Circuit's interpretation of the current federal backstop authority. As noted above, however, current backstop authority has not had much effect on promoting transmission. It is unclear that new backstop authority would have significantly more success.

On June 17, 2010, FERC issued a Notice of Proposed Rulemaking (NOPR) to solicit comments on various issues related to planning transmission facilities and allocation of the associated costs.²⁶ Among the various requirements that FERC proposes to establish under the NOPR, each public utility transmission provider would be required to participate in a regional transmission planning process that produces a regional transmission plan and meets established planning principles regarding coordination, openness, transparency, information exchange, comparability, dispute resolution, and economic planning studies.²⁷ Each transmission provider would also coordinate with its neighboring transmission planning regions, as reflected in an "interregional transmission planning agreement."²⁸

In addition, FERC is proposing to more closely align the transmission planning and cost allocation processes. Under the new requirements, FERC would direct transmission providers to develop methods for allocating costs of interregional facilities with neighboring regions, in consultation with customers and stakeholders. If an agreement could not be reached, the

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Commission itself would develop and impose a cost allocation method. Without a legislative solution, however, FERC cannot mandate that a particular transmission project get built; it is the states that would continue to play the critical role.

Conclusion

Many miles of new and upgraded transmission lines will be necessary in the coming years to ensure reliable service, increase the efficiency of competitive markets and access remote renewable resources. The initiatives currently under consideration in Congress and at FERC to get that transmission built appear to be premised on the assumption that state siting authority is the problem, and expanded federal power is the solution. But a good case has not been made to show that taking siting authority away from the states will improve the situation. Nor is it certain that the incremental steps in the pending legislation, or FERC's NOPR, will actually facilitate completion of more transmission projects. For that reason, the controversy is certain to continue.

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¹ For example, New York has about 40,000 MW of generating capacity and 30,000 MW of peak load, while New England has roughly 30,000 MW of generating capacity and 30,000 MW of peak load. Yet, even today, the capacity of the tie lines between these two regions is only about 2,000 MW.

² By 2010, 33 states had adopted renewable portfolio standards (RPS), mandating that a

certain percentage of load be served by "green" power. See U.S. Department of Energy: States with Renewable Portfolio Standards, *available at* http://apps1.eere.energy.gov/states/maps/renewable_portfolio_states.cfm#chart.

- ³ http://www.awea.org/newsroom/releases/Transmission_Superhighway_WhitePaper_18Feb09.html
- ⁴ 16 U.S.C. § 824p(b) (2006).
- ⁵ What the states did not regulate was unregulated. See *Public Utilities Comm'n of Rhode Island v. Attleboro Steam*, 273 US 83 (1927).
- ⁶ *Id.* at 91. See also *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515, 65 S.Ct. 749, 89 L.Ed. 1150 (1945).
- ⁷ 119 Stat. 600 § 1221(b) (2005), codified as 16 U.S.C. § 824p(b) (2006).
- ⁸ See Edison Electric Institute *State Generation & Transmission Siting*, 2004, *available at* http://www.eei.org/ourissues/ElectricityTransmission/Documents/State_Generation_Transmission_Siting_Directory.pdf.
- ⁹ Rossi, Jim, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 *Envtl. L.* 1015 (2009).
- ¹⁰ *Piedmont Env'l Council v. FERC*, 558 F.3d 304 (2009).
- ¹¹ Projects announced in recent years have projected costs at \$2–4 million per mile.
- ¹² Connecticut Attorney General's Statement on LIPA/Cross Sound Cable's Offer to "Help" Connecticut, May 8, 2003, *available at* <http://www.ct.gov/ag/cwp/view.asp?A=1778&Q=284024&agNav=|42277|>.
- ¹³ *Transmission & Distribution World, NY Governor Hails Agreement on Cross Sound Cable*, Jun. 28, 2004 *available at* <http://tdworld.com/news/Cross-Sound-Cable/>.
- ¹⁴ *Ariz. Corp. Comm'n, Press Release, Regulators Reject "Extension Cord for California": Commissioners Reject Palo Verde to Devers II Power Line* (May 30, 2007), *available at* http://www.energylegalblog.com/files/ACC_Press_Release_Devers_II_Vote.pdf.
- ¹⁵ *Id.*
- ¹⁶ *Swanstrom & Jolivert, DOE Transmission Corridor Designations & FERC Backstop Siting Authority: Has the Energy Policy Act of 2005 Succeeded in Stimulating the Development of New Transmission Facilities?*, 30 *Energy Law J.* 415 at 457 (2009).
- ¹⁷ *Compare, e.g., New York v. FERC* 535 U.S. 1 (2002); *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453 (1972); *Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205 (1964); *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515 (1945); *Public Utilities Comm'n of Rhode Island v. Attleboro Steam*, 273 US 83 (1927).
- ¹⁸ 16 USC 824p(a).

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- ¹⁹ 16 USC 824p(a)(4).
- ²⁰ 16 USC 824p(b). This is similar to, though less comprehensive than FERC's certificate authority under the Natural Gas Act for proposed natural gas pipelines.
- ²¹ The year runs from the date on which a filing requesting approval was submitted to the state commission, except in cases where the NIETC is designated after such a filing has already been made, in which case the year runs from the date the NIETC is designated. 16 USC 824p(c)(1).
- ²² *Piedmont Environmental Council v. FERC*, 558 F.3d 304, 315 (2009). The Supreme Court denied certiorari on January 19, 2010. See ___ U.S. ___, 130 S. Ct. 1138 (2010).
- ²³ See <http://nietc.anl.gov/nationalcorridor/index.cfm>.
- ²⁴ H.R. 2454, 111th Cong. (2009).
- ²⁵ S. 1462, 111th Cong. (2009).
- ²⁶ See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 131 FERC ¶ 61,253 (2010).
- ²⁷ *Id.* at PP 50–54.
- ²⁸ *Id.* at PP 114–120.

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