
COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY
CONSUMER ADVOCATES REGARDING THE PROPOSED
DELEGATION OF AUTHORITY FROM THE DEPARTMENT
OF ENERGY TO THE FEDERAL ENERGY REGULATORY
COMMISSION TO CONDUCT CONGESTION STUDIES AND
TO DESIGNATE ELECTRIC TRANSMISSION CORRIDORS

I. INTRODUCTION

On September 1, 2011, members of the National Association of State Utility Consumer Advocates (NASUCA)¹ received a briefing from the Chairman of the Federal Energy Regulatory Commission (FERC), Jon Wellinghoff and Department of Energy (DOE) Assistant Secretary Patricia Hoffman. The purpose of the briefing was to explain and discuss the proposed delegation of authority (Proposal) from the DOE to the FERC to conduct congestion studies and to designate corridors for interstate electric transmission projects pursuant to Section 1221 of the Energy Policy Act of 2005. NASUCA also was invited to submit comments on the Proposal to Senior DOE Advisor, Lauren Azar. NASUCA is extremely grateful to FERC and DOE for providing the briefing directly to NASUCA members and also for the opportunity to submit these preliminary comments on the Proposal. NASUCA looks forward to participating in the detailed rulemaking that is anticipated to occur if the implementation of the Proposal goes forward.²

¹ NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

² NASUCA provides these comments based on the information and explanations of the Proposal contained within documents (Proposal Outline) supplied to NASUCA by Chairman Wellinghoff.

II. COMMENTS

It is NASUCA's understanding under the Proposal that DOE would transfer to the FERC its existing authority under the Energy Policy Act of 2005 (EPA05) to conduct congestion studies and to establish National Interest Electric Transmission Corridors (NIETC). Although issues as to what FERC would do with the delegation may at this point be somewhat preliminary, NASUCA does wish to express its concerns as to certain elements contained within FERC's Proposal Outline – specifically, 1) the proposed application of FERC's backstop siting authority even where transmission siting has been denied by a state commission, 2) concurrent processes by both FERC and state commissions, and 3) the proposed designation of individual NIETCs for specific transmission projects.

The EPA05 authorized the FERC to assume jurisdiction over the permit process for certain transmission line projects when a state commission had “withheld” approval for more than one year. EPA05, § 1221(b)(C)(i). The FERC initially interpreted the term “withheld” to include when a state commission denied the application. Numerous parties appealed to the Federal courts over this interpretation.

On February 18, 2009, the United States Court of Appeals for the Fourth Circuit held that FERC's interpretation of this provision was incorrect. Piedmont Environmental Council v. FERC, 558 F.3d 304 (4th Cir. 2009). The Court held that if a state commission denies an application to build an interstate transmission line within the required one-year timeframe, the FERC does not have backstop authority to approve construction of such a line in that instance. Id. at 309-10, 312-15. A grant of *Certiorari* was sought from the Supreme Court of the United States to review the Fourth Circuit's Decision, but the Supreme Court declined to hear the case. Edison Elec. Institute v. Piedmont Environmental Council, 130 S.Ct. 1138, (U.S. Jan 19, 2010)

(Piedmont).

In June 2010, NASUCA approved a Resolution on transmission planning and development. The Resolution provides that NASUCA supports transmission expansion activities where such expansion benefits consumers by addressing reliability issues and/or providing greater access to lower cost generation. The Resolution further provides, however, that the siting of such transmission should remain primarily with the states. Specifically, the Resolution provides:

That primary authority and control over the siting of transmission facilities should remain at the state level and that state control over siting of transmission lines in national transmission corridors and elsewhere can and should include an assessment of the costs and benefits of the proposed transmission project to ratepayers of that state within the parameters of 16 U.S.C.S. § 824(b)(1)(C)(i) and *Piedmont v. FERC*.³

Accordingly, NASUCA has serious concerns over the following statement provided in the Proposal Outline:

To the extent that there may be a concern that DOE, FERC, and other involved agencies are ignoring, or seeking to circumvent, the mandates of the courts of appeals in the *Piedmont* and *California Wilderness Coalition* cases, it can be correctly noted that the effect of the *Piedmont* case is limited to the Fourth Circuit, and that other courts might reach a different result.

Proposal Outline at p. 4. NASUCA submits that a course of action that applies the Piedmont decision only in the Fourth Circuit would raise serious legal and practical issues.

For example, an interstate transmission line project that touches any part of the Fourth Circuit, such as the recently completed Trans-Allegheny Interstate Line (TrAIL) line, would be subject to different processes and procedures than a similar project that did not go through the Fourth Circuit. The TrAIL Project started in the Third Circuit (Pennsylvania) then

³ NASUCA Resolution 2010-01, approved June 15, 2010.

proceeded to the Fourth Circuit through West Virginia en route to its terminus in Virginia. Under the Proposal, FERC would be free to assert its backstop authority in Pennsylvania (not a part of the Fourth Circuit) even if the state siting authority had said no to TrAIL, but in West Virginia and Virginia FERC would have to adhere to the decision in the Piedmont case.

NASUCA is also concerned with the suggestion that state and federal siting proceedings could be held on a concurrent basis,⁴ rather than using FERC's authority only as a "backstop" if and when a state siting authority failed to act within the 12-month period as specified in EAct05. While NASUCA always appreciates the value of efficiency, its experience with state approval for transmission siting has been that such projects are not normally held up by delays in state approvals. Under such circumstances, it would seem unreasonable to impose the costs of potentially duplicative proceedings on interested parties in order to cover concurrent tracks.

NASUCA also has concerns as to the proposed designation of individual NIETCs for specific transmission projects. The Proposal Outline describes a process wherein an applicant can seek to have a NIETC corridor designated for a specific transmission project.⁵ NASUCA submits that the purpose of conducting the congestion studies and then to designate NIETCs was to provide market participants with the information needed to accurately identify those areas of the country where constraints or congestion on the interstate transmission system could be adversely affecting consumers. Once armed with this information, market participants could come forward with potential solutions – some of which may involve building new transmission infrastructure projects and some of which may not.

⁴ See Proposal Outline at pgs. 6-7.

⁵ See Proposal Outline at pgs. 5-6.

In its National Electric Transmission Congestion Report (DOE Order),⁶ the DOE provided that a “National Interest Corridor designation is not a determination that transmission must, or even should be, built.”⁷ The DOE Order anticipated that non-transmission solutions may adequately address congestion issues, as follows:

Not only would a National Corridor designation not prejudice State or Federal siting processes against non-transmission solutions, it should also not discourage market participants from pursuing such solutions. Implementation of one solution to a congestion or constraint problem can reduce, and in some cases, eliminate, the need for, and thus the viability of, competing solutions.⁸

The DOE Order thus specifically provided that the NIETC designations are not intended to authorize the siting of a particular transmission line project and should not discourage other non-transmission solutions to congestion problems.

III. CONCLUSION

NASUCA wishes to thank the DOE and FERC for this opportunity to supply comments on these important issues. NASUCA looks forward to working with all stakeholders as these important issues are decided.

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⁶ National Electric Transmission Congestion Report, 72 Fed. Reg. 56992, 56993-56994 (October 5, 2007).

⁷ DOE Order at 56993-56994.

⁸ Id. at 56994.