

**This paper developed by FERC staff provides background information regarding the federal backstop transmission authority established by the Energy Policy Act of 2005 (EPAct 2005), discusses the possible delegation to FERC by the Department of Energy (DOE) of authority granted to DOE under EPAct 2005, and lays out a theoretical framework for FERC's implementation of delegated authority.**

**There is no current FERC proceeding on these matters, and any such proceeding would be opened only if DOE decides to make the above-noted delegation. It is understood that the theoretical framework would be subject to revision based on interagency discussion, input from states and other stakeholders, and rulemaking proceedings and other policy determinations.**

Delegation by the Department of Energy to the Federal Energy  
Regulatory Commission of Authority to Conduct Congestion Studies and  
Designate Corridors for Interstate Electric Transmission Projects

An efficient, reliable electric transmission grid is critical to the economy and security of the United States. The grid must be able to deliver power, particularly power produced from renewable energy resources, from where it is produced to where it is consumed. Historically, siting decisions regarding the construction of components of our national grid have, for the most part, been made at the state level.

### **Creation of Federal Transmission Siting Backstop Authority**

In the Energy Policy Act of 2005 (EPAct 2005), Congress recognized that the strong national interest in electric transmission required, in appropriate circumstances, that, as a backstop to state siting activity, federal agencies be able to consider and site certain interstate transmission projects. Accordingly, Congress established a process in which the Department of Energy (DOE) would conduct studies of electric transmission congestion, and then, in subsequent reports, designate as national interest electric transmission corridors (NIETCs) areas experiencing electric energy transmission constraints or congestion that adversely affected consumers.

The Federal Energy Regulatory Commission (FERC) was given authority to issue permits within NIETCs for the construction of electric transmission facilities, where a state lacked the authority to approve the facilities or consider their interstate benefits, or where a state had withheld approval of the facilities for more than one year or conditioned its approval in such a manner that the proposed project would not significantly reduce transmission congestion in interstate commerce or would be rendered economically infeasible. The Commission was also required to make certain findings, including that a proposed project was consistent with the public interest, would

significantly alleviate transmission congestion and protect or benefit consumers, and would be consistent with sound national energy policy and enhance energy independence.

In addition, the statute provided that DOE would be the lead agency for the purposes of coordinating all applicable federal authorizations and related environmental reviews for proposed projects (including the preparation of a single environmental document that would be used as the basis for all decisions under federal law). Further, DOE and the heads of all federal agencies with authority to issue federal authorizations regarding electric transmission projects were required to enter into a memorandum of understanding (MOU) to ensure timely and coordinated review and permitting.

### **Federal Agency Actions in Response to EPAct 2005**

In May 2006, the Secretary of Energy delegated to FERC the authority to coordinate federal authorizations, conduct related environmental reviews, and prepare a single environmental document, with respect to proposed transmission projects within NIETCs for which applicants were seeking construction permits from FERC.

DOE issued a transmission congestion study in August 2006. Also in August 2006, DOE; the Department of Commerce (National Oceanographic and Atmospheric Administration, National Marine Fisheries Service, and National Ocean Service); the Department of Defense (U.S. Army Corps of Engineers); the Environmental Protection Agency; the Department of the Interior; the Council on Environmental Quality; the Department of Agriculture (U.S. Forest Service); the Advisory Council on Historic Preservation; and FERC signed the statutorily-required MOU (a revised MOU was signed in October 2009).

FERC, in December 2006, published regulations governing applications for permits to site interstate electric facilities. FERC indicated that it would not consider siting applications until the relevant state procedures had been completed or the state failed to meet the deadline established by the statute. In October 2007, DOE designated two NIETCs, one in the Mid-Atlantic region, and the other in the Southern California-Phoenix/Tucson area.

Both DOE's congestion study and NIETC designations and FERC's siting regulations were challenged in the courts of appeals. In *Piedmont Environmental Council v. FERC*, a divided panel of the Court of Appeals for the Fourth Circuit vacated FERC's siting regulations, holding that FERC was incorrect in concluding in the preamble to the regulations that denial by a state of authority to construct an interstate transmission project in a NIETC constituted withholding approval such that an applicant could then seek a FERC construction permit.

In *California Wilderness Coalition v. DOE*, the Court of Appeals for the Ninth Circuit vacated DOE's congestion study and NIETC designations, concluding that DOE had not consulted with affected states as required by the statute, and had erred in not preparing a NEPA analysis in connection with the NIETC designations.

In July 2011, FERC issued Order No. 1000, a rule designed to provide consumers with greater access to efficient, low-cost electricity through the removal of barriers to development of transmission facilities, by requiring public utility transmission providers to improve transmission planning processes, to allocate costs for new transmission facilities to beneficiaries of those facilities, and to align transmission planning and cost allocation. The Order provided for both regional planning of interstate transmission projects and interregional coordination of transmission projects that spanned multiple regions.

To date, no construction permits for projects in NIETCs have been issued. Only one applicant proposing to site a project within a NIETC began the pre-filing process at FERC, and the applicant subsequently withdrew from the process. Clearly, the backstop transmission procedure established by Congress has not yet been effective.

### **Increasing Efficiency Through Additional Delegations**

To overcome some of the judicial and procedural hurdles to effective use of existing backstop siting authority, it has been suggested that DOE delegate additional authority allowing FERC, in conjunction with its existing permitting authority, to conduct the required congestion studies and to designate NIETCs. It has also been suggested that FERC issue narrower, project-specific NIETC designations where appropriate.

Unifying federal authority with respect to siting interstate transmission projects would allow a more efficient, directed process. The proposal envisions a three-step process: first, delegation by DOE to FERC authorizing FERC to conduct triennial congestion studies; second, delegation by DOE to FERC authorizing FERC to designate NIETCs; and, third, consideration by FERC of applications for both project-specific NIETC designations and permits for construction of interstate transmission projects within the project-specific NIETCs. Formal pre-issuance procedure is not required for DOE delegations (but a notice of the delegation must be issued).

Some stakeholders may feel that the delegation represents an attempt to expand federal agency authority and undercut state authority regarding the siting of transmission projects. However, the delegation will not expand federal authority, which was established and limited by EPCA 2005, but rather will simplify and consolidate in a single forum federal actions mandated by Congress.

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. Further, with respect to the Ninth Circuit ruling, FERC would invite state participation in proceedings on individual, project-specific corridor applications, thereby consulting with them in the performance of congestion studies and in NIETC designations (as well as with respect to more global studies and designations) and would perform a full NEPA analysis in each individual case, thus responding to the court's concerns.

#### A. Conducting Congestion Studies

Within 30 days of being delegated authority to conduct congestion studies, FERC staff would begin an open process whereby it would promptly make publicly available staff's general approach to identifying congestion, e.g., using historical congestion indicators (such as transmission loading relief, locational marginal pricing, and available transmission capacity (OASIS information) and others) and production cost studies to develop a forward-looking analysis. Concurrently, FERC staff would conduct regional meetings and workshops to collect input from affected stakeholders, such as states, environmental groups, renewable energy developers, utilities, and independent generators, regarding the study approach.

Within six months of being delegated study authority, FERC staff would post the proposed results and issue notice inviting formal public comment. After considering all comments, the Commission would issue an order to adopt, modify and adopt, or reject the final results of the congestion study. In that order, the Commission would also provide guidance on the criteria, derived from the congestion study, necessary to establish a NIETC for a specific proposed corridor/project. At this stage, no NEPA analysis would be needed for the congestion study, because detailed environmental analyses would be conducted for specific proposed corridors/projects. The final results of the congestion study would be an input into the regional planning process pursuant to Order Nos. 890 and 1000.

#### B. Establishing a Corridor Designation Process

In a separate proceeding, within 30 days of being delegated authority to designate NIETCs, FERC staff would issue a formal notice initiating a rulemaking to establish regulations for specific proposed corridor/ project NIETC designation requests. The notice would seek public comment. As with the congestion study process, FERC staff would again conduct regional outreach meetings.

Issues would include whether the Commission should make a preliminary NIETC suitability determination for a specific corridor/project application based on non-environmental factors. These factors would be designated and vetted by stakeholders in comments and outreach meetings in the corridor designation process rulemaking. Examples of the non-environmental factors that might be considered in this preliminary suitability determination order are:

1. Whether the proposed project line was included in a Regional Plan pursuant to Order Nos. 890 and 1000;
2. Impacts of present and projected congestion on reliability and how the corridor/project designation addresses them, including national and regional reliability criteria and standards, consideration of changing resource mixes such as renewable energy sources, and varying load profiles due to economic and technological changes;
3. The extent to which 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, or may be jeopardized by reliance on limited sources of energy; and whether a diversification of supply is warranted;
4. Whether the energy independence of the United States would be served by the designation;
5. Whether the designation would be in the interest of national energy policy; and
6. Whether the designation would enhance national defense and homeland security.

FERC would seek to make a preliminary determination on non-environmental issues during the pre-filing process, described in “D” below, and before the formal application process, described in “E” below. The purpose of the preliminary determination procedure would be to screen proposed specific corridor/project NIETC designation requests to ensure that FERC, federal land management agencies, applicants, and affected stakeholders do not unnecessarily expend resources on environmental review.

Again, no NEPA analysis would be required in connection with this general rulemaking process, because detailed environmental analyses would be conducted for specific proposed corridors/projects. The Commission would then issue an order adopting revised regulations for exercising the NIETC designation delegation. The Commission would seek to issue the order within 12 months after the notice of

rulemaking was issued. Stakeholders would have the opportunity to file for rehearing and, ultimately, seek appellate review.

### C. Requests for NIETC Designation

After the Commission issued an order on the congestion study and provided guidance on the criteria necessary for establishing a NIETC on a specific corridor/project basis, as well as an order on the rulemaking establishing a corridor designation process, applicants could file with FERC for specific corridor/project designations. The steps listed here are suggested procedures subject to the rulemaking initiated under “B” above. Thus, they would be subject to comment and potential modification.

1. Applicants would have to request a corridor designation for a specific project and begin the pre-filing process for that project concurrently. FERC would not contemplate allowing an applicant to enter the pre-filing process in the absence of a corridor designation request, given that the designation of a corridor is a prerequisite for FERC issuing a construction permit under our Section 1221 backstop siting authority.
2. Applicants could request a corridor designation and begin the pre-filing process concurrently with filing a state siting application.
3. A preliminary corridor suitability determination would be issued by the Commission.

### D. The Pre-Filing Process

During the pre-filing process, FERC would oversee the environmental pre-review process and (jointly with cooperating agencies) identify affected entities (such as state and federal agencies, landowners, Tribes, environmental organizations, local groups, and individuals), highlight issues, reach consensus as to study needs, arrange and attend site visits and meetings, issue scoping notices, and examine alternatives. The goal of the pre-filing process would be early identification and, where possible, resolution, of environmental issues, and direct interaction with stakeholders, with the goal of avoiding surprises when application are filed. The pre-filing process would take a minimum of six months, but actual duration would depend upon the circumstances of individual cases, and, in particular, on the quality of information provided by the applicant. During pre-filing, FERC would begin the process of establishing a schedule and coordinating federal agency reviews of the proposed project, consistent with the delegations and the inter-agency MOU.

In a separate but concurrent proceeding, the Commission would make a preliminary NIETC suitability determination for the proposed project during the pre-filing process.

### E. The Application Process

Once the pre-filing process was complete, project sponsors could file formal applications for FERC construction permits, once the statutory prerequisites were met. After a formal application was filed, FERC would oversee and coordinate the environmental assessment process and (jointly with cooperating agencies) develop and issue data requests, prepare and issue a draft environmental document, engage with the public and encourage them to file comments, and issue a final environmental document, selecting a recommended alternative and addressing comments. Under the existing mandates of EPCRA 2005, FERC has 12 months from the filing of a formal application to issue an order on an application for a construction permit.

Federal and state agencies would retain the right to issue permits within their statutory authority, such as special use authorizations and right-of-way grants, and construction could not begin until these authorizations had been issued. Thus, FERC's issuance of a construction permit would not override decisions by federal land managers.

However, in its role as lead NEPA agency and coordinator of federal authorizations, FERC would, in coordination with affected agencies, establish a schedule for the completion of actions under federal law related to the proposed project. To the extent that there is concern that granting FERC additional authority would undercut the ability of federal land managing agencies to protect the resources under their jurisdiction, experience in the gas pipeline sector demonstrates otherwise. As with gas pipelines, no transmission project construction on federal lands would begin until the project proponent obtained authorization from the relevant federal land managers and complied with all required terms specified by each federal agency.

States and other stakeholders may have concerns regarding a decision by FERC to allow federal proceedings to begin while state proceedings are ongoing. First, this decision would only be made after a new, complete rulemaking process provided all stakeholders with the full opportunity to express their views, as set forth in paragraph "B," above. There may be significant benefits to concurrent state and federal proceedings, including the exchange of information between federal and state agencies, the ability to jointly examine environmental issues, savings in time and money, and general efficiencies of process. In addition, to the extent that FERC considers project-specific congestion studies and NIETCs, states and stakeholders will be able to focus on the issues surrounding an individual project, rather than having to consider much broader issues outside of the context of an individual project.

Finally, deciding to wait until the conclusion of state proceedings prior to beginning the FERC backstop process was a FERC policy decision, which FERC could reverse at any time, independent of whether DOE delegates further authority to FERC.

#### F. The Standard for FERC Action

To issue a construction permit, FERC would have to find that a proposed project would be used for the transmission of electric energy in interstate commerce, would be consistent with the public interest, would significantly alleviate transmission congestion and protect or benefit consumers, would be consistent with sound national energy policy and enhance energy independence, and would maximize the use of existing infrastructure. In making a public interest finding, FERC would consider, among other things, appropriate alternatives, the extent to which environmental impacts could be eliminated or mitigated, and whether a proposed project was approved by a regional planning process.

It could be argued that developers of merchant transmission lines would seek construction authority without going through protections afforded by the planning process envisioned by Order No. 1000. It should be noted that even if a merchant does not seek cost allocation under Order No. 1000, it is required to coordinate with the Regional Plan for reliability purposes. Further, if a merchant comes forward with a project that is not awarded cost allocation in a regional plan, and proposes a project that is inferior to an alternative in that plan, the regional plan stakeholders would be able to challenge the merchant NIETC application at FERC. FERC then could consider both alternatives and make appropriate findings to protect the public interest after considering all comments in the proceeding.

#### **Conclusion**

The proposed delegation from DOE to FERC would allow a more rational, expedited federal process for the consideration of transmission projects, could overcome difficulties that have hitherto plagued that process, and would help satisfy the need for a modern and efficient transmission grid in the United States, with increased access to the most cost-effective renewable resources.