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January 23, 2023

### FERC Proposes To Update Its Backstop Siting Authority for Electric Transmission Facilities



The Federal Energy Regulatory Commission (FERC) on December 15, 2022, issued a notice of proposed rulemaking (NOPR) to update its regulations governing backstop siting authority for electric transmission projects.

The proposed rule is intended to account for recent changes to section 216 of the Federal Power Act (FPA), which changes stem from the 2021 Infrastructure Investment and Jobs Act (IIJA). The NOPR was published in the *Federal Register* on Tuesday, January 17, 2023.

In the NOPR, FERC seeks to accomplish the following:

- Implement the new electric transmission siting authority it was granted in the IIJA.
- Establish processes that allow concurrent state and federal review of construction permits for new transmission lines, with certain limitations.
- Implement a new landowner engagement process and require developers to meet certain conditions to protect landowners.
- Evaluate environmental justice issues in the siting process.
- Update and revise FERC's NEPA regulations.

Overall, the NOPR is designed to effectuate FERC's authority to supersede a state regulatory body's rejection of a proposed transmission project located in a national interest electric transmission corridor, allow simultaneous processing of state applications for siting authority and FERC pre-filing proceedings, and update FERC's NEPA regulations. The changes proposed in the NOPR could encourage the development of needed electric transmission infrastructure and support the build-out of electric transmission envisioned in the IIJA. This could support further development of multistate transmission lines needed to deliver significant wind and solar resources to market. Comments on the NOPR are due April 17, 2023, and reply comments are due May 17, 2023.

## Background

The FPA gives FERC broad jurisdiction over wholesale sales of electricity and the transmission of electricity in interstate commerce. FERC approves rates for such wholesale sales and interstate transmission services, including the authority to charge market-based rates. On the other hand, state regulatory commissions regulate retail electric service and—prior to the Energy Policy Act of 2005 (EPAct 2005)—had sole authority over electric transmission siting. As described below, EPAct 2005 granted FERC "backstop" siting authority over the constructing or modifying electric transmission facilities in certain limited circumstances.

### Energy Policy Act of 2005 and Section 216 of the FPA

In EPAct 2005, Congress created section 216 of the FPA with the goal of increasing the build-out of important electric transmission infrastructure. This statutory provision gives the U.S. Department of Energy (DOE) power to coordinate all applicable federal authorizations, tribal consultations, and state agency reviews required to designate "national interest electric transmission corridors" and construct needed transmission lines in those corridors. Once DOE has established one or more national interest electric transmission corridors, FPA Section 216(b) allows FERC to "issue one or more permits for the construction or modification of electric transmission facilities" within such corridors if it makes the following findings:

1. The state where the transmission facility is to be built lacks authority to approve the facility siting or consider interstate benefits to be achieved by the facilities;
2. The permit applicant does not serve end-use customers in the state; or
3. A state commission with siting authority has withheld approval of the facilities for more than one year after the application was filed or after designation of the relevant national interest corridor, whichever is later;
4. The facilities to be authorized by the permit:
  1. Will be used for the transmission of electric energy in interstate commerce.
  2. Are consistent with the public interest.
  3. Will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers.
  4. Are consistent with sound national energy policy and will enhance energy independence; and
  5. Will maximize, to the extent reasonable and economical, transmission capabilities of existing towers or structures.

In a prior rulemaking intended to implement section 216, FERC interpreted the phrase "withheld approval" in item C above to include any action that resulted in an applicant not receiving state approval within one year, including express denial by the relevant state of an application to site transmission facilities. In 2009, the U.S. Court of Appeals for the Fourth Circuit issued a decision in *Piedmont Environmental Council v. FERC*,<sup>[1]</sup> holding that FERC's interpretation was contrary to the plain meaning of the statute and its permitting authority does not apply when a state has denied a permit application within the one-year deadline. The Fourth Circuit also vacated amendments FERC had proposed to its NEPA regulations, finding that FERC had failed to consult with the Council on Environmental Quality (CEQ) before adopting the revised regulations.

In 2011, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *California Wilderness Coalition v. DOE*,<sup>[2]</sup> vacating a DOE congestion study and certain national interest corridor designations and finding that DOE failed to consult with affected states, as required by Section 216, and failed to consider environmental effects of the corridor designations under NEPA. Since issuance of the decision by the Ninth Circuit in 2011, DOE has not designated any national interest corridors and FERC has received no applications for permits to site electric transmission facilities.

## **Infrastructure Investments and Jobs Act**

The IJA, which became law in November 2021, revised FERC's FPA section 216 authority. In light of the court decisions described above, the IJA provides that FERC can use its backstop permit authority where a state (1) has not made a determination on an application by the one-year date, (2) has conditioned its approval such that the proposed project will not significantly reduce transmission constraints or congestion or is not economically feasible, or (3) has denied an application. In addition, as a precondition to granting a developer eminent domain authority, FERC must determine the developer made good faith efforts to engage with landowners and other stakeholders early in the permitting process. The IJA also expanded DOE's authority to designate national interest electric transmission corridors in areas currently experiencing or that are expected to experience transmission capacity constraints or congestion.

## **Notice of Proposed Rulemaking**

In the NOPR, FERC seeks to implement the changes to FPA section 216 established in the IJA. Consistent with the requirements of the IJA, FERC seeks comments with respect to implementing the following:

- Its newly revised FPA section 216 backstop authority.
- A concurrent state and federal pre-filing siting and permitting process.
- New provisions under which an applicant may show it has made good faith efforts to engage with landowners by (1) complying with FERC's proposed "Applicant Code of Conduct," or (2) specifying an alternative method that is equal or superior to compliance with the Applicant Code of Conduct.
- Its proposal to require an applicant to file (as part of its Project Participation Plan) an Environmental Justice Public Engagement Plan describing its completed and planned outreach activities that are targeted to identified environmental justice communities.

FERC is also seeking comment on its earlier NEPA regulations that were vacated by the Fourth Circuit in *Piedmont* but are still included in 18 CFR Part 380, as well as certain revisions to those existing regulations. Specifically, FERC seeks comments on the following proposed changes to its NEPA regulations:

- Relocating the tribal resource-related information requirements to a new, standalone resource report (Resource Report 6—*Tribal resources*) and including additional information related to potentially affected tribes.
- Adding a new resource report (Resource Report 7—*Environmental justice*) that would require the applicant to identify environmental justice communities within the project's area of potential impacts, potential impacts to those communities, and proposed mitigation measures.
- Adding a new resource report (Resource Report 11—*Air quality and environmental noise*) that would require the applicant to estimate emissions from the proposed project and impacts on air quality, the

environment, and the noise environment, and describe proposed mitigation measures.

- Whether and which visual aid tools are appropriate to include in FERC's analysis of an applicant's *Land use, recreation, and aesthetics* resource report (renumbered as Resource Report 10).

## Endnotes

[\[1\]](#) 558 F.3d 304 (4th Cir. 2009), *cert. denied*, 558 U.S. 1147 (2010) (*Piedmont*).

[\[2\]](#) 631 F.3d 1072 (9th Cir. 2011).

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