

Will the Infrastructure Investment and Jobs Act Accelerate Transmission Development?

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On November 15, 2021, President Biden signed into law the \$1.2 trillion Infrastructure Investment and Jobs Act (IIJA).¹ Among the changes and funding set out in the IIJA, a provision granted FERC authority to supersede state siting decisions for electric transmission projects. The Energy Policy Act of 2005 (EPAct of 2005) first authorized the Federal Energy Regulatory Commission (FERC) to approve, if a state withheld its approval, interstate transmission projects in “national interest electric transmission corridors” identified by the Department of Energy. The new statute clarifies and expands FERC’s authority.

In this alert, we first examine whether such superseding approval by FERC would be subject to the National Environmental Policy Act (NEPA) and require an environmental impact statement (EIS). Second, we explore how such backstop siting authority is likely to affect state Public Utility Commissions (PUCs) permitting decisions. Overall, it is unlikely that the new IIJA will lead to a sudden acceleration of the siting of transmission lines.

Existing Siting Authority under Section 216 of the Federal Power Act

The sufficiency and capabilities of the interstate transmission grid have presented obstacles to wholesale power market competition ever since FERC mandated open access transmission in the mid-1990s. The reason is simple: the power grid was built by local utilities to move power from generators to customers in nearby load centers. The grid was not designed to facilitate wholesale competition among generators widely scattered across the country. Shifting from local to regional usage patterns exposed deficiencies in the capability of the transmission grid to meet the new demands reliably and economically. Billions of dollars have been invested in new transmission projects to alleviate these conditions. But the recent explosion of investment in remotely located renewable energy projects has added new strains to the grid. These projects need to move energy across ever-greater distances.

A major impediment to building new transmission projects has often been the need to obtain certificates of public convenience and necessity from state regulatory agencies. These “CPCNs” can take up to ten years of contentious proceedings. They commonly involve litigation before the state agencies and in the courts. Projects to move electricity across states can fare even worse. The benefits flow to remote consumers in other markets. Proposals

for major interstate tie lines like the Palo Verde-Devers No. 2 line to serve California (opposed in Arizona) and the Trans-Allegheny Line to serve the Mid-Atlantic region (opposed in Pennsylvania, Virginia, and West Virginia) failed in significant part because of local opposition.

To address these problems, FERC and Congress have made numerous attempts to spur new transmission investment. FERC, for example, has issued several major rulemaking orders. These change the way public utilities plan for future transmission needs, including the obligation to plan for “public policy” projects (i.e., those needed to accommodate state renewable energy mandates). Congress passed landmark legislation in the EPAct of 2005. This incentivizes new transmission investment through more favorable rate treatment. Section 1241 of the EPAct of 2005 (Section 216 of the Federal Power Act) also gave FERC “backstop” siting authority for the construction or modification of electric transmission facilities located within “National Interest Electric Transmission Corridors” (NIETCs). NIETCs are geographic areas experiencing electric energy transmission capacity constraints or congestion adversely impacting consumers. NIETCs are identified through the issuance of Congestion Studies conducted by the Department of Energy (DOE). Criteria that DOE was to consider in designating NIETCs included economic factors in the corridor, and whether designation would be in the interest of national energy policy and enhancing national defense and homeland security.²⁴ At the time of the issuance of Section 216, using DOE to identify NIETCs was a way to limit federal intrusion into the siting authority typically reserved to states.

FERC’s State “Backstop” Authority

FERC summarized the legislative changes from the EPAct of 2005 and the means to administer them in a 2006 rulemaking. This explained that after DOE makes a NIETC determination:

[FERC] has the authority to issue permits to construct or modify electric transmission facilities if it finds that: (1) a State in which such facilities are located does not have the authority to approve the siting of the facilities or to consider the interstate benefits expected to be achieved by the construction or modification of the facilities; (2) the applicant is a transmitting utility but does not qualify to apply for siting approval in the State because the applicant does not serve end-use customers in the State; or (3) the State commission or entity with siting authority withholds approval of the facilities for more than one year after an application is filed or one year after the designation of the relevant national interest electric transmission corridor, whichever is later, or the State conditions the construction or modification of the facilities in such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.²⁵

Section 216 ran into trouble in the courts. In 2009, in the *Piedmont Environmental Council* case, the Fourth Circuit held (1) Section 216 does not give FERC jurisdiction when a state timely denies a transmission project’s siting application, (2) FERC’s procedural regulations on the content of permit applications under Section 216 did not require preparation of an EIS under NEPA, and (3) FERC violated the White House Council on Environmental Quality’s (CEQ) regulations when it failed to consult with the CEQ before amending the NEPA implementing regulations to cover Section 216 permit applications.²⁶ Following *Piedmont Environmental Council*, FERC’s backstop siting authority was reduced to scenarios where a state agency failed to act on a permitting application for more than one year after the filing of a Section 216 permit application. FERC could no longer approve a siting application where a state agency had already denied it.

Two years later, Section 216 suffered another blow in the Ninth Circuit. In *California Wilderness Coalition*, the Ninth Circuit vacated DOE’s designation of the Mid-Atlantic and Southwest National Interest Electric Transmission Corridors NIETCs.²⁷ The Ninth Circuit held that DOE failed to consult with the affected states when it prepared its Congestion Study and designated the NIETCs. Moreover, the court found that DOE failed to undertake an environmental study of its NIETC designations. As a result, the Ninth Circuit remanded to DOE for a new Congestion Study.

As a result of the *Piedmont Environmental Council* and *California Wilderness Coalition* cases, FERC has not issued a single permit under Section 216.

The IIJA's Revival of FERC Siting Authority

Section 40105 of the new IIJA addresses siting of interstate electric transmission facilities. It amends Section 216 of the Federal Power Act to clarify DOE's role in designating NIETCs. It also reforms FERC's backstop siting authority. First, the IIJA directs DOE to issue a Congestion Study at least once every three years, which may designate the following geographic areas as a NIETC:

- an area that is experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers; or
- an area that is expected to experience such energy transmission capacity constraints of congestion.^[9]

The IIJA also adjusts the factors DOE can consider in the designation of NIETCs. In particular, it added the following new criteria at Section 216(a)(4):

- The designation would enhance the ability of facilities that generate or transmit firm or intermittent energy to connect to the electric grid;
- The designation maximizes existing rights-of-way; and avoids and minimizes, to the maximum extent practicable, and offsets to the extent appropriate and practicable, sensitive environmental areas and cultural heritage sites; and
- The designation would result in a reduction in the cost to purchase electric energy for consumers.^[10]

Then, the IIJA grants FERC authority to supersede a state PUC transmission siting permitting decision in three scenarios:

- When the state authority has not made a determination on a transmission permit application for more than one year after the later of when the application was filed and the date on which DOE designated the relevant NIETC; or
- When the state authority has conditioned its approval of a permitting application in such a manner that the proposed construction or modification will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible; or
- When the state authority denied the siting permit.^[11]

Will NIETIC Designation and FERC's Exercise of Backstop Siting Authority Trigger NEPA?

Section 216 and the amendments to it from the IIJA are intended to expand FERC backstop siting authority.

However, they do not exempt the application of that authority from environmental reviews. As described above in the *Piedmont* and *California Wilderness Coalition* cases, FERC's failure to undertake environmental review has caused issues in the past. It is likely to do so again.

NEPA requires federal agencies to incorporate environmental considerations into their planning and decision-making. Subject to certain exclusions and exceptions, federal agencies like FERC must assess the environmental impact of, and alternatives to, major federal actions significantly affecting the environment.^[12] This may require developing an EIS. CEQ regulations implementing NEPA define "major federal action" to include "actions with effects that may be major and which are potentially subject to [f]ederal control and responsibility."^[13] According to the regulations, federal actions are generally: (1) adoption of official policy (rules, regulations, and interpretations), (2) adoption of formal plans, (3) adoption of programs, and (4) *approval of specific projects, including actions approved by permit or other regulatory decision.*^[14]

A FERC decision to supersede a state decision to withhold or deny siting approval is almost certainly a federal action triggering NEPA review. A NIETC designation by DOE is likely triggering, too. The *Piedmont* and *California Wilderness Coalition* cases support this. In *Piedmont*, FERC emphasized that it would undertake full environmental analysis of every proposed transmission project. The Fourth Circuit also stated, “Once FERC receives a permit application, it will be required under NEPA to assess the environmental effects of the project. The assessment will likely prompt the preparation of an EIS or an [environmental assessment]. Any deficiencies in project-specific environmental assessments may be challenged at the appropriate time.”^[12] While *Piedmont* found that FERC’s promulgation of procedural regulations specifying the content of Section 216 permit application did not require a full NEPA review, actual use of the backstop siting authority would.

Likewise, in *California Wilderness Coalition*, the court held that designation of NIETCs was NEPA triggering. The court said, “We cannot accept DOE’s unsupported conclusion that its final agency action that covers ten States and over a 100 million acres does not, as a matter of law, have some environmental impact.”^[13] Thus, designation of new NIETCs by DOE and FERC’s exercise of backstop siting authority will likely continue to require environmental review.

How Will This Impact the Political Dynamic with State PUCs?

FERC’s newly clarified siting authority from the IJA is also likely to impact the political dynamics with state PUCs.

Some posit that state PUCs and other regulatory authorities may now be less likely to make regionally tough siting decisions knowing that FERC is there to back them up. However, FERC may not be so quick to use its clarified authority. Stepping in to approve a project that will support a transmission developer but condemn private property, cause a NIMBY problem for constituents, or result in costs to local consumers (who may not receive the benefits of the new transmission line) will not be easy, even for FERC.

The IJA sought to clarify DOE’s role in designating NIETCs and FERC’s backstop siting authority. Still, there are areas of possible confusion that could spur litigation. For instance, subsection (a)(2) about areas “experiencing electric energy transmission capacity constraints or congestion *that adversely affects consumers*,” or that are “expected to experience such energy transmission capacity constraints or congestion,” leave a great deal of room for interpretation.^[14]

Moreover, cost allocation has been a source of numerous court disputes. Under the Federal Power Act’s “just and reasonable” ratemaking standard, the rule has long been that customers can be charged only for the cost of facilities that are “used and useful” in public utility service and from which the customers derive measurable benefits.^[15] Meanwhile, the IJA provides no standard to determine what “adversely affects consumers” means or how one determines when congestion is “expected” to have such effects. Thus, subsection (a)(2)’s reference to “congestion that adversely affects consumers” or “any geographic area that . . . is expected to experience such energy transmission capacity constraints or congestion” opens the door to a replay of past cost allocation litigation.

The IJA also does not deal with the problem of changing models. A number of transmission projects have been canceled when regional transmission organizations have run new studies. The new studies found that previously approved projects were no longer needed to relieve transmission congestion or to address reliability needs. As a result, the Regional Transmission Authorities have taken the projects out of their regional cost allocations, and then the states have revoked siting and construction permits. This results in stranded costs that get allocated to consumers for projects that will never serve them.

Moreover, in the context of the new statute, the pertinent studies are performed by DOE. What if DOE finds a project is no longer needed in a NIETC? What if DOE reverses a prior NIETC determination? Presumably, the predicate finding of consumer impacts from congestion (actual or expected) would no longer hold. Therefore, the need and cost allocation justification would no longer seem valid. This remains to be seen.

Key Takeaways

- The IJA attempts to clarify DOE designation of NIETCs and FERC’s authority to supersede state objections to interstate transmission projects. In theory, FERC’s clarified authority is expected to help the country deploy new

transmission lines to serve renewable energy projects.

- The IJA is, however, unlikely to lead to a rush of new transmission lines for several reasons, including:
 - There are currently no DOE-designated NIETCs, and DOE has until 2023 to issue a new Congestion Study, so FERC is unable to issue permits under Section 216 today.^[6]
 - Exercise of the backstop siting authority is almost certain to invoke NEPA and require an EIS that may take years.
- There are sensitive political dynamics at play where FERC chooses to exercise its authority in a space typically reserved for states.
- Even when approval for construction is issued, there are still obstacles to constructing a new transmission line, including funding and connecting them to the grid.

For further information or questions about FERC's backstop transmission siting authority and its impact on your business, please contact Jonathan D. Brightbill (Partner, White Collar, Regulatory Defense, and Investigations/Environmental Litigation), Ray Wuslich (Of Counsel, Energy), Madalyn Brown (Associate, Environmental), or your Winston relationship attorney.

Please note that government orders on the federal, state, and local level are changing every day, and the information contained herein is accurate only as of the date above.

This blog was also published in Law360.

^[1] <https://www.congress.gov/bills/117/congress/house-bill/3684/text>.

^[2] 16 U.S.C. § 824p(a).

^[3] Order No. 689, 71 Fed. Reg. 69,440 (2006).

^[4] *Piedmont Env't Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

^[5] *Cal. Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072 (9th Cir. 2011).

^[6] H.R. 3684, 117th Cong. § 40105(a)(2) (2021).

^[7] *Id.* § 40105(a)(3).

^[8] *Id.* § 40105(b)(1)(C).

^[9] 42 U.S.C. § 4332(2)(C).

^[10] 40 C.F.R. § 1508.18.

^[11] *Id.* § 1508.18(b).

^[12] *Piedmont Env't Council*, 558 F.3d at 317.

^[13] *Cal. Wilderness Coalition*, 631 F.3d at 1105.

^[14] H.R. 3684, 117th Cong. § 40105(a)(2)(B) (emphasis added).

^[15] See, e.g., *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009).

^[16] <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/transmission-planning/national-2>.

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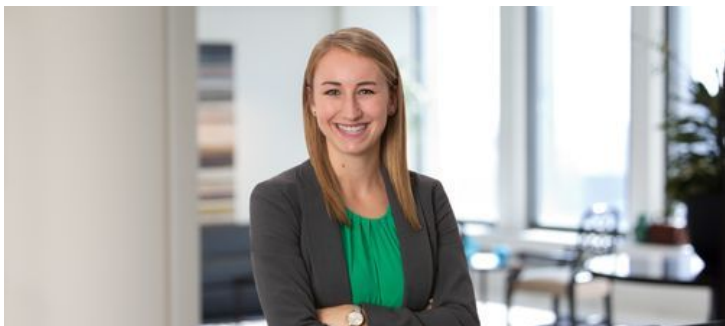
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