



Recent U.S. Court of Appeals Case Highlights the Need to Clarify Federal Energy Regulatory Commission's Backstop Authority For Siting Transmission Lines In National Interest Corridors

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A recent U.S. Court of Appeals case highlights the need for a cooperative state/federal solution to siting transmission lines that are in the national interest. Under Section 216(b)(1)(c)(i) of the Federal Power Act (the "Act"), added to the Act pursuant to the Energy Policy Act of 2005, Federal Energy Regulatory Commission ("FERC") backstop permitting authority is triggered in five specific situations: (1) a state does not have authority to permit the proposed lines; (2) a state does not have the authority to consider interstate benefits to be achieved by a transmission facility in the state; (3) the applicant for the construction of the transmission line does not serve end-use customers in the state where the line is to be constructed; (4) the state has "withheld approval" of an application for more than one year; or (5) a state conditions the approval in such a way to essentially kill the project.

On November 16, 2006, FERC issued its final rule interpreting Section 216(b) of the Act. *Order No. 689*, 71 Fed. Reg. 69,440 (Dec. 1, 2006). Specifically, FERC interpreted Section 216(b) to allow backstop permitting authority even where a state commission denied a project permit outright. In *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. Feb. 18, 2009), however, the Fourth Circuit reviewed FERC's interpretation. The court followed Commissioner Kelly's dissent to FERC Order 689 and held that the meaning of the phrase "withheld approval for more than one year" does not include "the outright denial of a permit application within the one-year deadline." *Id.* at 315. Ultimately, under its current grant of authority, the FERC cannot preempt state denial of an application.

Electrical power transmission, however, is both a state and federal issue and if the *Piedmont* decision is any indication, the solution to regional transmission siting will likely have to provide for state participation. States have the knowledge of how to best ensure protection of local communities and their citizens and as such, permitting for the siting and construction of transmission facilities is a power that has been traditionally reserved by the states. The

result, however, is a transmission grid comprised of an interconnected patchwork of state authorized facilities. This patchwork grid is not designed to carry large power loads over great distances. What is needed is a national system to carry the power from where it is generated, typically in remote areas, to where it is needed in the high population density load centers. Thus, there appears to be a need for some federal oversight to ensure that the necessary transmission is built to facilitate design and construction of a national transmission grid.

Two energy bills recently introduced by Senator Reid and Senator Bingaman, provide FERC with siting authority over new transmission lines. Although the bills differ in their approach to interconnection wide transmission planning, both bills provide for a level of state and regional participation in the process and provide FERC backstop authority if a state or regional planning entity fails to participate in a timely manner. Clearly, delineation of siting jurisdiction as a federal or state power will continue to be debated. However, due to the national emphasis on energy security and given FERC's exercise of preemptive siting authority for gas pipelines, liquefied natural gas facilities, and hydroelectric facilities for example, it appears that some expansion of FERC's authority over transmission siting may be forthcoming.



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