

FERC Proposes Reforms to Backstop Transmission Siting Authority, Implementing Changes Required by 2021 Bipartisan Infrastructure Bill

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On Thursday, December 15, 2022, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a Notice of Proposed Rulemaking (“NOPR”) proposing changes to FERC’s authority under section 216 of the Federal Power Act (“FPA”). Section 216 provides FERC with jurisdiction over the siting of interstate transmission projects in National Corridors designated by the Department of Energy (“DOE”)—commonly referred to as FERC’s “backstop” transmission siting authority. Comments on the NOPR will be due in Spring 2023.

The NOPR carries forward Congress’s intent in the 2021 Infrastructure Investment and Jobs Act (“IIJA”) to revive FERC’s backstop transmission siting authority. The ultimate impact of the NOPR must be assessed in light of DOE’s efforts—currently still in the Notice of Intent stage—to revitalize its responsibility to designate National Corridors after a period of dormancy. Pursuant to DOE’s Notice of Intent, DOE envisions reviewing and designating National Corridors on a route-specific, applicant-driven basis, which could result in less discretion for FERC in fulfilling its responsibilities under FPA section 216. Coupled with the DOE’s efforts on National Corridors, FERC’s NOPR, if finalized, could—at least on paper—provide an expedited pathway to get steel in the ground for the types of major transmission projects that are widely viewed as required to realize the long-heralded “grid of the future.”

That said, FERC has in recent months through the Joint Federal-State Task Force on Electric Transmission linked arms with state authorities to press toward transmission solutions. There is an inherent tension between FERC’s focus on cooperation with state partners, on the one hand, and any future FERC action to exercise its federal backstop authority to override state decisions, on the other hand. With two FERC commissioners concurring on the NOPR to voice concerns about potential overreach, it remains to be seen whether and how quickly FERC will be able to move forward with a final rule

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following the NOPR and whether and how FERC ultimately will wield its backstop authority.

Background on FPA Section 216

Congress established section 216 in the Energy Policy Act of 2005 (“EPAct 2005”), but subsequent federal court opinions sharply limited its applicability, including the 2009 *Piedmont* decision, in which the U.S. Court of Appeals for the Fourth Circuit found that FERC did not have backstop siting authority where a state affirmatively denied the project’s permit application.¹ The IIJA explicitly “undoes” the statutory interpretation on which the *Piedmont* court relied and empowers FERC to exercise federal jurisdiction over the siting of certain power transmission projects even when such siting authority has been expressly rejected by a state agency.

The basic framework of section 216 begins with the DOE, which is required to complete studies every three years to identify geographic regions of the country where there is an acute need for the development of additional transmission facilities, known as National Corridors. Provided DOE establishes one or more National Corridors (currently none are designated), FERC may exercise jurisdiction over proposed interstate transmission projects located in those corridors, provided that the project applicant meets certain requirements and that their state-level siting application has been pending for more than one year. Permits issued by FERC under section 216 confer eminent domain authority onto the project developer.

After the enactment of EPAct 2005, FERC promulgated regulations to implement section 216, which largely have lain dormant. In the NOPR, FERC proposes to keep many of those regulations in place. FERC proposes to amend its regulations by: (1) allowing applicants to proceed on a parallel state and federal siting track (no longer requiring applicants to spend one year proceeding only at the state level); (2) make explicit that a state’s denial of a transmission siting application can form the basis of FERC jurisdiction over a proposed transmission facility (consistent with Congress’s directive in the IIJA to “undo” *Piedmont*); and (3) *requiring the submission of additional landowner engagement information to FERC, including submission of evidence of engagement with environmental justice communities.*

Summary of Changes to Existing FERC Regulations Implementing Section 216

Pursuant to the directive of the IIJA, FERC proposes to amend its regulations to reflect its jurisdiction over projects located in a National Corridor that have been denied state siting authority.

Further, reflecting a FERC policy change not expressly directed by the IIJA, FERC proposes to amend its regulations to allow project applicants to apply for permitting authority on parallel state and federal tracks, thereby potentially saving applicants time. Under its previous regulations, FERC required applicants to wait one year after the filing of a state application before applying to FERC. Now, FERC proposes to allow applicants to file state and federal applications simultaneously.

In terms of application procedures, at a high level, the NOPR's proposed federal power transmission siting process reflects some of the same rules and application requirements that FERC applies to interstate natural gas certificate projects under section 7 of the Natural Gas Act ("NGA"). For example, FERC proposes that transmission siting applicants include in their applications:

- Evidence of stakeholder engagement, in the form of a Project Participation Plan.
- An Environmental Justice Public Engagement Plan, which must describe the applicant's engagement with "environmental justice communities."
- Notice of the project to affected landowners within a specified time period after submission of an application to FERC.
- Eleven resource reports, consistent with FERC's National Environmental Policy Act regulations, that will require information related to, *inter alia*:
 - Estimated emissions from the proposed project, as well as associated impact on air quality as well as on the surrounding noise environment (Resource Report 11);
 - Impacts on the visual characteristics of the surrounding lands and waters affected by the project (Resource Report 10); and
 - Impacts of the proposed project on Indian Tribes (Resource Report 6).

Further, consistent with a recently promulgated rule in the natural gas certificate context (Order No. 871 and its progeny), FERC proposes to limit the ability of applicants to proceed with construction of an approved project if a request for rehearing of the authorization order is pending before the Commission. However, as with Order No. 871, a qualifying request for rehearing must reflect opposition to project construction, operation or need, so not all requests for rehearing will prevent the applicant from proceeding with construction.

DOE

Whether efforts by FERC will ultimately result in change depend in part on how much progress DOE makes. DOE is not required to issue a new transmission siting study until 2023. Because there are currently no DOE-designated

National Corridors, FERC is unable to issue permits under section 216 today. As mentioned above, while DOE has begun the process of revitalizing its FPA section 216 responsibilities, it does not appear that DOE has taken any further steps since the issuance of a Notice of Intent in January 2022.

Concurrences

Commissioners James Danly and Mark Christie issued separate concurrences to the NOPR, both of which expressed significant concerns with the NOPR as proposed. Commissioner Danly expressed concerns regarding FERC's legal authority to condition the issuance of section 216 permits on considerations not expressly referenced in either the IIJA or the EPCA 2005: "I disagree that the limited 'backstop' siting authority that the Commission has been granted also confers extensive powers as an environmental and social regulator."

Commissioner Christie's concurrence focuses on FERC's proposal to allow applicants to proceed on parallel state and federal permitting tracks. Commissioner Christie questions whether this use of discretion is wise policy, and whether it improperly expands federal authority over matters properly reserved to states.

Commissioner Christie's points about state jurisdiction are important to keep in mind. The nature and strength of states' opposition states to this type of federal preemption is unknown and could be fiercer in certain regions as compared to others; for instance, some observers have raised the specter of potentially strong opposition in Western states. Also, seeking a FERC permit to preempt a state siting process may not be a preferred path for all entities. For example, many transmission developers are state-regulated transmission and distribution utilities, or affiliates of state-regulated transmission and distribution utilities, such that the state commissions that would be preempted also set the utilities' rates for their existing distribution rate base. In this respect, the electric transmission industry is different than the interstate natural gas pipeline industry—the interstate natural gas pipeline companies do not also own natural gas local distribution companies.

Comment Date

Comments on the NOPR are due within 90 days of its publication in the *Federal Register*, which publication we expect to occur within the next 1-2 weeks. As a result, comments on the NOPR will be due by the end of March or early April.

1. *Piedmont Env't Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) (holding that FERC did not have jurisdiction over transmission siting in the event of a denial by a state agency and vacating FERC's NEPA regulations for section 216

applications for failing to consult with the Council on Environmental Quality in promulgating them); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072 (9th Cir. 2011) (vacating certain DOE National Corridor designations).