

The following article was published in January 2010 in Volume 1, Number 1 of the Carbon Trading and Energy Finance Committee Newsletter of the ABA's Section on Environment, Energy and Resources. Copyright © 2010. American Bar Association. *This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in any electronic database or retrieval system without the express written consent of the American Bar Association.*

**FERC'S UNIQUE ABILITY TO OVERSEE  
THE URGENTLY-NEEDED EXPANSION OF  
THE ELECTRIC TRANSMISSION GRID**

**James H. McGrew**  
***Bruder, Gentile & Marcoux, L.L.P.***

Our nation's electric transmission grid will require significant expansion and upgrading to accommodate twenty-first century economic demand and current environmental policy. All proposed expansion of the electric transmission grid will in turn require permitting of the construction and siting of the transmission lines by a regulatory authority. The current regulatory system, in which each state makes permitting and siting decisions for electric transmission facilities within its boundaries, does not lend itself to meeting the urgent need for a high quality interstate grid. As this article discusses, the Federal Energy Regulatory Commission (FERC) is ideally suited to provide the regulatory oversight and permitting decisions needed for the required development of the interstate grid.

**The Current State of the Electric Transmission Grid**

Some commenters describe the electric grid in the U.S. as the world's most complex machine. There are more than 3,000 electric utilities in the country, including investor-owned and government-owned utilities as well as cooperatives. The bulk power system itself consists of three independent networks: the Eastern Interconnection, the Western Interconnection, and the Texas Interconnection. Overall

reliability planning and coordination is provided by the North American Reliability Council (NERC) under the regulatory umbrella of FERC.

The grid in the U.S. evolved on mostly an *ad hoc* basis over the last century, primarily to serve the needs of individual utilities as opposed to serving national needs. Most of the grid was developed before the digital age. There are approximately 157,000 miles of high-voltage (greater than 230 kV) electric transmission lines. (U.S. Department of Energy, Office of Electricity Delivery & Energy Reliability, <http://www.energetics.com/gridworks/grid.html>.) The North American grid represents approximately \$1 trillion in assets. (Renewable Energy World.com, <http://www.renewableenergyworld.com/rea/news/article/2009/04/green-superhighway-overhauling-the-grid-to-accommodate-renewables>.)

### **Needs of the Twenty-First Century**

Electricity demand will increase by as much as 36 percent in 2030 as compared to 2007 levels. (Energy Information Administration, Annual Energy Outlook 2009 with Projections to 2030, <http://www.eia.doe.gov/oiaf/aeo/electricity.html>.) Moreover, some members of Congress are now discussing the imposition of a nation-wide requirement that as much as 25 percent of electric generation must come from renewable sources by 2025. Also, there is ongoing discussion of constructing a “smart grid,” *i.e.*, a power system from generation to end-user that integrates two-way flows of communications and energy as new technologies enable new forms of supply, delivery and consumption.

All these societal demands will require both additions to and enhancement of the electric grid. The renewable energy sources most likely to meet the “25 percent by 2025” target would be predominantly wind and solar generation. Wind and solar

generation resources are typically located long distances away from load centers. For this reason, the nation will need many thousands of miles of new transmission facilities that traverse several states. The American Society of Civil Engineers has projected that electric utility investment needs, particularly for transmission facilities, could be as much as \$1.5 trillion by 2030. (American Society of Civil Engineers, Report Card for America's Infrastructure, <http://www.infrastructurereportcard.org/fact-sheet/energy>.)

### **The Current Regulatory Structure**

FERC only has the limited jurisdiction over the energy industry that Congress grants to it. At present, FERC has very little jurisdiction over the permitting (certification) and siting of electric transmission facilities. Such permitting authority belongs mostly to individual states to the extent a utility proposes to build transmission facilities within or through a particular state. On the other hand, FERC does have jurisdiction to regulate the rates, terms and conditions of electric transmission in interstate commerce. This patchwork quilt of jurisdictional authority over electric transmission does not lend itself to the development of the national grid that is required by the twenty-first century economy and environmental goals.

The Energy Policy Act of 2005 (EPACT 2005) added Section 216 to the Federal Power Act (FPA), originally enacted in 1935, 16 U.S.C. §§ 791a *et seq.*, to provide FERC with backstop siting authority if (a) DOE has designated a certain geographic area as a national interest electric transmission corridor and (b) a state does not have authority to approve siting or has withheld approval of siting for more than one year. A recent judicial opinion effectively gutted the limited usefulness of Section 216 by holding that Section 216 does not apply to cases in which a state actively denies an application

for siting authority. (*Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4<sup>th</sup> Cir. 2009)).

Applications for permits to site and construct long-distance high-voltage transmission facilities almost always raise sensitive environmental and NIMBY issues. Even when a proposed transmission line is entirely within one state, the utility's permitting application creates a battlefield of opposing viewpoints and interests. (See, e.g., CPUC Decision 08-12-058 issued on December 24, 2008 in the matter of San Diego Gas & Electric Company's application to construct its Sunrise Powerlink Transmission Project.) Any applicant seeking to construct a transmission line crossing several states faces substantial litigation in each state and has to prevail in litigation in each state to obtain authorization for the proposed project.

### **FERC Can Play an Important Role**

The question of who (the states or the federal government) should have siting authority for interstate transmission facilities is clearly a political question. The answer to that question will be worked out through the political processes of this country. This article does not take a position on this controversial political issue. However, there are two proposals presently under discussion that implicate FERC, and this article explains why FERC is institutionally well suited to assume more jurisdiction over the siting of transmission facilities.

One idea under consideration is simply to preempt state permitting authority by replacing it with federal authority to be exercised by FERC. In other words, Congress could amend the FPA to provide that public utilities, *i.e.*, investor-owned utilities regulated by FERC, must apply to FERC for a certificate of public convenience and

necessity, *i.e.*, a permit, to construct and operate transmission facilities in interstate commerce. FERC's permitting authority would then replace that of the states. Such a concept has ample precedent at FERC itself.

Since 1920, FERC and its predecessor, the Federal Power Commission, have reviewed applications and issued licenses for hydroelectric projects that are not owned and operated by the federal government. These non-federal hydroelectric projects require transmission facilities to enable the electricity generated by the project to reach the electric grid. FERC is responsible for authorizing the construction and operation of those facilities, including authorization for the siting of those facilities.

Since 1938, FERC and its predecessor have also reviewed applications and issued certificates of public convenience and necessity for the construction and operation of natural gas pipelines in interstate commerce, including siting authorization. Thus FERC already has the experience, the institutional structure, and the expertise to take on the added responsibility of authorizing the siting of non-hydroelectric transmission facilities.

Members of Congress are keenly aware that states jealously guard their jurisdiction over transmission siting and are often loath to surrender that jurisdictional authority to the federal government. Thus, Option One (giving FERC plenary jurisdiction over the siting of interstate transmission facilities) may be politically unworkable. In that event, Congress may turn to a less problematic alternative. Under Option Two, FERC would have significant "backstop" jurisdiction (rather than primary jurisdiction) over the siting of transmission facilities. Such backstop authority would be more extensive than the current "backstop" authority under EPACT 2005, which, as

explained above, the Fourth Circuit has effectively gutted. Option Two would give FERC siting jurisdiction if the states, either working individually or cooperatively (perhaps through an Independent System Operator (ISO) or a Regional Transmission Organization (RTO)), are unwilling or unable to authorize siting of proposed transmission facilities after a specified time period, for example, one year. No designation of “national interest corridors” by the DOE would be required, and FERC’s authority would apply even if one state expressly denied an application for transmission siting.

If Congress does amend the FPA to provide for either Option One or Option Two, we must consider how such expanded FERC authority would work in practice and how specifically such expanded jurisdiction would allow for complete and detailed consideration of the environmental issues related to electric transmission.

### **How Would FERC’s Expanded Jurisdiction Actually Work?**

First, for reasons of practicality and efficiency, FERC should be the lead agency in conducting all reviews, including the rate, engineering and environmental aspects implicated by the utility’s application to construct and operate interstate electric transmission facilities. As the lead agency, FERC would cooperate with and be informed by all other agencies having expertise and relevant jurisdiction, including federal agencies, such as the EPA, and state environmental agencies, such as fish and wildlife agencies. FERC currently acts as the lead agency for reviewing applications to construct hydroelectric facilities, interstate natural gas pipelines, and Liquefied Natural Gas (LNG) import facilities.

Second, FERC should allow a “prefiling” process. The prefiling process would allow for environmental and logistical review of a proposed application before the formal filing of the application itself. The formal filing of an application at FERC often triggers rules, procedures and deadlines that make it difficult for FERC to offer an open and transparent forum for the consideration of all the issues related to a proposed project. In the prefiling process, by contrast, FERC can issue notices to affected landowners, public interest groups, and federal and state agencies with appropriate jurisdiction. During the prefiling period, FERC staff members can sponsor, or require the applicant to sponsor, “open houses” or “town hall meetings” in which representatives of the applicant can meet with citizens, members of the press, government officials, members of the business community and anyone else affected by the application for construction of transmission lines. This prefiling process allows for a full and frank exchange of views and allows both FERC staff members and the applicant to become aware of significant or unique problems raised by the proposed application. Often, the applicant will have a chance to amend its draft application during the prefiling process to cure any problems created by the initial proposal. The prefiling process usually produces a better product when the formal application is actually filed at FERC, and the prefiling process usually reduces the time needed to review the application.

Third, the FERC procedures should allow for the due process the application requires. FERC would provide formal notice of the application with an opportunity to intervene in the proceeding and to comment on the application. FERC will sponsor public “scoping meetings” to allow the public to discuss the environmental and engineering aspects of the application. FERC would issue a Draft Environmental

Impact Statement (DEIS) with full opportunity to comment, and FERC would issue a Final Environmental Impact Statement (FEIS), again with full opportunity to comment for affected parties and agencies.

Fourth, FERC would assemble a unified record regarding the application because FERC is the lead agency reviewing the application, including its environmental aspects. FERC would then issue an order on the application, together with any conditions requiring mitigation of significant environmental impacts. Because the FPA requires a party to request rehearing of a FERC order as a condition of appealing any FERC order, there would likely be requests for rehearing of FERC orders and subsequent orders on rehearing issued by FERC.

Fifth, the FPA provides for appeals of FERC orders to the United States Court of Appeals. Thus, allowing FERC to have siting authority, or more correctly, certificate authority for transmission facilities, will provide for orderly appeals. A unified appeal based on a unified record seems to be preferable to piecemeal appeals from each state siting decision that may pertain to a proposed transmission project. Any amendment of the FPA could and should allow for an expedited hearing on transmission projects that significantly affect the public interest.

Sixth, FERC would have to be given authority to award eminent domain powers to successful applicants. FERC grants eminent domain powers to successful applicants for interstate natural gas pipelines as provided by the Natural Gas Act, originally enacted in 1938, 15 U.S.C. §§ 717 *et seq.*

## **Conclusion**

To meet this nation's increased demand for electricity and modern environmental goals, we will need to make significant improvements to the interstate electric transmission grid. That expansion in turn will require permitting and siting authorization. FERC is ideally suited to exercise increased jurisdictional authority over such permitting and siting decisions. Expanded FERC jurisdiction would permit "one-stop shopping" in which one agency decides the rate, public need, siting, and environmental issues raised by a new application. FERC already has the institutional structure and expertise to handle the challenge if Congress chooses to expand FERC's authority in this vital area.

[James H. McGrew is a partner at Bruder, Gentile & Marcoux, L.L.P. in Washington, D.C. and has specialized in practice before FERC for over 29 years. Mr. McGrew is the author of *Basic Practice: FERC*, second edition, published by the ABA in 2009.]

m:\wdox\clients\144non\00036893.docx