

Feds May Need Power To Take State Lands For New Grid

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Ambitions to decarbonize the power sector by 2035 face a number of significant hurdles — the most intractable of which may be the extent of corresponding high-voltage transmission infrastructure necessary to accommodate the forecasted growth of renewable generation.

The authority to site new transmission infrastructure rests with the states, and every state has historically had the power to prevent construction of transmission infrastructure it opposes.

The Energy Policy Act gave the Federal Energy Regulatory Commission new backstop siting authority, in an attempt to overcome state opposition to construction of transmission infrastructure. But this authority was fatally flawed from the outset, and has never been used.

Although the Infrastructure Investment and Jobs Act, which passed the U.S. Senate on Aug. 10, seeks to bolster FERC's backstop authority in response to adverse court decisions, it fails to address another key flaw: the lack of eminent domain authority over state-owned lands.

Given the extent of state landholdings, it is practically impossible to build a major transmission line without crossing state lands, such as river bottoms. As a result, even if FERC grants a permit for a transmission project under its backstop authority, a state opposing the project can still prevent its construction, by simply denying the necessary real estate instruments.

Enacting a new legislative grant of federal eminent domain authority over state lands is no doubt politically daunting. But unless the current state-land eminent domain carveout is addressed, states will continue to have the power to stymie the energy transition and renewable generation goals, by blocking construction of transmission infrastructure.

Background

The Biden administration has announced a goal to completely decarbonize the U.S. power grid by



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2035.[1] Likewise, a number of states have announced their own ambitious goals — New York seeks 100% zero-emission electricity by 2040;[2] California by 2045;[3] and Virginia and New Jersey by 2050.[4]

These decarbonization objectives can only succeed, however, if the nation's transmission network is tailored to move power from newly sited solar, wind and other renewable power sources to markets where the power is needed. This will require significant upgrades to existing transmission infrastructure, as well as extensive new construction.[5]

Siting transmission infrastructure has historically been governed by states, and some states continue to object to large transmission projects crossing their lands. This is especially true when a state may perceive, for example, that its residents do not derive adequate benefit from the project, or that its ratepayers are allocated an unfair share of the project's costs.[6]

The Energy Policy Act of 2005 and FERC Backstop Authority

The Energy Policy Act[7] sought to address some of the impediments to the construction of additional transmission capacity, including measures to overcome state opposition by providing FERC with backstop authority.[8] This authority was designed to overcome one form of state objection — the failure of a state to grant timely authorization for construction or modification of new transmission lines.

Under Section 216 of the Federal Power Act, FERC has jurisdiction to issue permits, in certain circumstances, for the construction or modification of transmission facilities in areas designated as "national interest electric transmission corridors." [9]

This includes instances where a state entity with siting authority has withheld approval for more than one year after the filing of an application for a permit.[10] This attempt to provide FERC with backstop siting authority had at least two fatal flaws.

State Failure to Act

First, as interpreted by the courts, FERC's Section 216 siting authority is triggered only when a state fails to act on an application, not when a state denies an application.

In *Piedmont v. FERC*, decided by the U.S. Court of Appeals for the Fourth Circuit in 2009,[11] two state utilities commissions and two community interest organizations challenged FERC's 2006 final regulations implementing its new Section 216 backstop authority.

The final regulations broadly interpreted the phrase "withheld approval for more than one year" to include situations where a state affirmatively denies an application. The Fourth Circuit rejected FERC's interpretation as contrary to law, and concluded that the phrase did not include "the outright denial of a permit application within the one-year deadline." [12]

In the context of the entire statutory provision in which the phrase appears, the Fourth Circuit noted:

A reading of the entire provision reveals that Congress intended to act in a measured way and conferred authority on FERC only when a state commission is unable to act on a permit application in a national

interest corridor, fails to act in a timely manner, or acts inappropriately by granting a permit with project-killing conditions.[13]

As a result, FERC currently does not have backstop siting authority when a state takes "the final administrative act of denying a permit." [14]

Eminent Domain Carveout for State Lands

In addition to the problems created when a state affirmatively denies an application for a needed authorization, the backstop authority also contains a separate fatal flaw. The eminent domain authority granted to holders of FERC backstop permits cannot be exercised over state lands.[15]

As a result, a state opposed to a project authorized under FERC's backstop authority can still prevent construction of the transmission project simply by refusing to grant real estate instruments. It is practically impossible to construct a high-voltage transmission line of any significant length without crossing state-owned lands.

Under the equal footing doctrine,[16] each state owns the bottoms of all navigable waters within its territory, such as riverbeds that form the boundaries of most states. All but four of the lower 48 states, including every state east of the Mississippi River, have at least part of their boundaries defined by rivers.[17]

Many states also have extensive terrestrial landholdings in the form of state parks and forests, as well as most of the land used for the interstate highway system. Finally, states can obtain interests in various lands through state conservation easements and preservation programs.[18]

As a result, a transmission project that completely avoids crossing any state lands is infeasible. A state that opposes a transmission project can easily kill it by denying the necessary real estate grants, notwithstanding the project's receipt of FERC backstop authorization.[19]

The Infrastructure Bill's Partial Remedy

The Infrastructure Investment and Jobs Act,[20] which passed the Senate in August, includes several provisions that focus on decarbonization of the energy sector. The bill attempts to remedy the first fatal flaw in FERC's backstop authority noted above, addressing instances where a state commission has denied approval for a project.

Section 40105 of the bill provides that FERC could use its backstop siting authority not only when a state fails to act in a timely manner, but also when a state "has denied an application seeking approval pursuant to applicable law." That would solve the first issue explained above.

But the bill entirely ignores a state's ability to veto projects by denying real estate grants across state-owned lands. Congress could attempt to remedy this flaw, by eliminating the eminent domain carveout for state lands, if it could overcome certain political opposition. Congress has a model for doing so, as it enacted Section 7(h) of the Natural Gas Act[21] without any explicit carveout for state-owned lands.

Earlier this year, in *PennEast Pipeline Co. v. New Jersey*,[22] the U.S. Supreme Court upheld the use of the NGA's eminent domain authority for a natural gas pipeline crossing lands New Jersey claimed it owned. The pipeline in that case crossed 42 parcels of land in which New Jersey claimed an interest —

two parcels owned by the state, and 40 parcels in which the state claimed various nonpossessory interests, like conservation easements.[23]

New Jersey opposed the project, refused to grant the necessary real estate rights and challenged the exercise of eminent domain authority by the FERC certificate holder. During oral argument, Justice Stephen Breyer discussed the history of the NGA, and noted Section 7(h) was enacted specifically to overcome state objections to pipelines.

Justice Breyer cited examples of planned natural gas pipelines, from the Permian Basin to California, Pennsylvania, Illinois and Massachusetts, which were halted by states "objecting in a whole variety of complex ways." [24] So, Justice Breyer reasoned, Congress enacted the relevant provision in the NGA because the pipelines could not have been built without "the power to proceed against the state" in eminent domain. [25]

The same problem is evident here: Without any power to proceed against the state in eminent domain, transmission infrastructure projects necessary for the renewable energy transition will still be subject to a functional veto by nonconsenting states.

Conclusion

There is growing recognition that FERC backstop authority may be necessary to achieve the aggressive goals set by the administration and some states to decarbonize electric power generation in the U.S. [26] But the backstop authority provided in Section 216 of the Energy Policy Act simply doesn't work, and has never been successfully used.

Although the Senate infrastructure bill attempts to address one flaw in FERC's backstop authority, so that FERC can act when a state affirmatively denies approval for a transmission project, it fails to address the lack of eminent domain authority over state lands. As a result, in situations where a state opposes a transmission line and denies approval, the state will still be able to prevent construction, notwithstanding issuance of a FERC backstop permit.

Without eminent domain authority over state lands, FERC's backstop authority remains as powerless against state opposition as it has been for the past two decades. [27] The states retain multiple authorities to stymie infrastructure projects they oppose, whether by denying real estate access, denying state water quality certifications or denying necessary permits under state-delegated programs that are not preempted.

The states and interest groups that oppose new transmission projects necessary for the renewable transition may be very different than those who have historically opposed gas pipelines. But notwithstanding the attempted fix in the Senate infrastructure bill, FERC's backstop siting authority for transmission infrastructure will likely never be successfully invoked over the opposition of a state, unless Congress grants eminent domain authority over state lands.

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[1] Press Release, Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (April 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

[2] Climate Act, N.Y. State, <https://climate.ny.gov/> (last visited Oct. 7, 2021).

[3] Press Release, California Releases Report Charting Path to 100 Percent Clean Electricity (March 15, 2021), <https://www.energy.ca.gov/news/2021-03/california-releases-report-charting-path-100-percent-clean-electricity>.

[4] 2020 Session: HB 1526 Electricity Utility Regulation; Environmental Goals Summary as Passed, Va. Legis. Info. Sys., <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB1526> (last visited Oct. 7, 2021); About the Energy Master Plan, State N.J. Energy Master Plan, <https://nj.gov/emp/energy/> (last visited Oct. 7, 2021).

[5] See Patrick R. Brown and Audun Botterud, The Value of Inter-Regional Coordination and Transmission in Decarbonizing the US Electricity System, 5 Joule 115-34 (2021); Hearing to Review Administration of Laws Within FERC's Jurisdiction Before the S. Comm. on Energy and Natural Resources, 117th Cong. (2021) (prepared statement of Richard Glick, Chairman, Federal Energy Regulatory Commission) ("The rapid shift in the resource mix and the growing threat to grid resilience due to the changing climate require significant investments in new and existing transmission"); Hearing to Review Administration of Laws Within FERC's Jurisdiction Before the S. Comm. on Energy and Natural Resources, 117th Cong. (2021) (prepared statement Allison Clements, Comm'r, Federal Energy Regulatory Commission) ("It is clear that a significant buildout of transmission is the optimal approach to capturing the benefits that low-cost clean energy resources present").

[6] How to allocate the costs for new transmission infrastructure needed to accommodate the transition to renewable generation is a very complex problem involving not only states, but FERC and regional transmission planning organizations as well, and much has been written about this topic. See Cong. Research Serv., R41193, Electricity Transmission Cost Allocation 1, 3-4 (2012), https://www.everycrsreport.com/files/20121218_R41193_d98832ecc6dbab276ddd71eef21ffcc782421cb7.pdf; Catherine Morehouse, Cost Allocation Remains Key Challenge for FERC Ahead of Transmission Reform, Glick Says (July 20, 2021), Utility Dive, <https://www.utilitydive.com/news/cost-allocation-remains-key-challenge-for-ferc-ahead-of-transmission-reform/603597/>.

[7] Energy Policy Act, Pub. L. No. 109-58 (Aug. 8, 2005).

[8] Section 1221 of the EAct of 2005, codified as Section 216 of the Federal Power Act, 16 U.S.C. § 824p.

[9] 16 U.S.C. § 824p(b). To determine a "national interest electric transmission corridor," the secretary of energy considers whether:

(A) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity; (B)(i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and (ii) a diversification of supply is warranted; (C) the energy independence of the United States would be served by the designation; (D) the designation would be in the interest of national energy policy; and (E) the designation would enhance national defense and homeland security.

Id. (a)(4).

[10] 16 U.S.C. § 824p(b)(1)(C)(i).

[11] *Piedmont v. FERC*, 558 F.3d 304 (4th Cir. 2009).

[12] 558 F.3d at 315.

[13] Id.

[14] Id.

[15] 16 U.S.C. § 824p(e)(1).

[16] See *PPL Montana LLC v. Montana*, 565 U.S. 576 (2012); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845).

[17] Although a permit from the U.S. Army Corps of Engineers under Section 10 of the Rivers and Harbors Act of 1899 is also required to cross navigable waters, that permit does not grant any real estate rights. 33 U.S.C. § 403; 33 C.F.R. § 320.4(g).

[18] See, e.g., *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244, 2253 (2021).

[19] Also, there is no indication the Energy Policy Act intended to remove other state authorities that are almost certainly required for construction of a major transmission project, such as a state's Clean Water Act Section 401 water quality certification authority (which all states possess) and Section 402 permitting authority (which most states possess through the implementation of federally delegated permitting programs). In the context of the recent gas pipeline wars, where FERC certificate holders are granted eminent domain authority over state-owned lands, numerous states have demonstrated the ability to block pipelines by refusing to grant necessary environmental authorizations.

[20] H.R. 3684, 117th Cong. (2021-2022).

[21] 15 U.S.C. § 717f.

[22] *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244 (2021).

[23] Id. at 2253.

[24] Oral Arg. Tr. at 65-66, *PennEast Pipeline Co. v. New Jersey*, 121 S.Ct. 2244 (2021) (No. 19-1039), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-1039_o7jq.pdf.

[25] PennEast Pipeline Co. may not be the last word on federal eminent domain authority over state lands. *Columbia Gas Transmission, LLC v. 12 Acres of Land*, No. 19-02040 (4th Cir. filed Sept. 25, 2019), currently pending before the Fourth Circuit, raises an 11th Amendment textual issue highlighted in Justice Neil Gorsuch's dissent in *PennEast*.

[26] See Hearing to Review Administration of Laws Within FERC's Jurisdiction Before the S. Comm. on Energy and Nat. Res., 117th Cong. (2021) (statements of Richard Glick, Chairman, Federal Energy Regulatory Commission and Allison Clements, Comm'r, Federal Energy Regulatory Commission).

[27] A separate provision of the Energy Policy Act, Section 1222 (codified at 42 U.S.C. § 16421), grants the U.S. Department of Energy federal siting authority for transmission lines, subject to certain conditions, within states in which the Western Area Power Administration and Southwestern Power Administration operate (essentially all of the lower 48 states west of the Mississippi River, excluding the Pacific Northwest). Although this section does not expressly grant eminent domain authority, the DOE has interpreted the statute as allowing it to condemn lands for Section 1222 projects pursuant to WAPA's and SWPA's eminent domain authority. But this authority has likewise never been successfully used. Opponents of the Plains & Eastern Clean Line Transmission Project, a 700-mile HVDC transmission line proposed in 2010 and designed to transport wind energy from the Oklahoma Panhandle to Western Tennessee, challenged the DOE's asserted authority to condemn private lands for the project. In examining the DOE's authority under Section 1222, the court in that case noted, "Whether the Energy Policy Act authorizes the United States to acquire needed easements by condemnation is a vexed question." *Downwind LLC v. Dep't of Energy*, No. 3:16-CV-00207 (D. Ark. Dec. 21, 2017) (slip op. at 8). Ultimately the court found the issue unripe, however, because the DOE had not yet acted to condemn any such lands. *Id.* at 9-10. The district court's decision was thereafter vacated by the U.S. Court of Appeals for the Eighth Circuit when the DOE terminated the Section 1222 agreement for the proposed project in 2018. *Downwind LLC v. Dep't of Energy*, No. 18-1399 (8th Cir. April 18, 2018). Even assuming the DOE has eminent domain authority for Section 1222 projects, and that authority extends to state lands, Section 1222 cannot be used to site proposed transmission projects east of the Mississippi River or in the Pacific Northwest. Moreover, states objecting to any such projects would still be able to withhold other necessary environmental authorizations.