Cross-Sound Blues

Legal challenges continue for the undersea transmission line.

By Linda Randell and Bruce McDermott

When the Connecticut Siting Council granted a certificate of environmental compatibility and public need approving the Cross-Sound cable in January 2002, it determined that the project would provide a public benefit and would not have an environmental impact constituting "sufficient reason to deny the application." The 330-MW transmission cable was installed beneath the seabed of Long Island Sound between Connecticut and New York in the spring of 2002, months after the state siting and environmental permits, and a federal dredging permit were granted for this electric transmission line project.

The pre-installation permitting process was non-linear (see "Chronicle of a Transmission Line Siting," *Public Utilities Fortnightly*, Jan. 1, 2003), but the post-installation political, legislative, and administrative agency process has demonstrated a chilling new reality: The permitting process may not have an endpoint, and political/legislative obstacles to transmission line siting may be more effective than opponents' direct challenges to the granting of permits based on an agency's application of statutory permitting criteria.

The Cross-Sound cable, at the time of this writing, is in operation pursuant to federal order, while opponents continue to try to shut down the cable. What happened in 2003 to delay the project, and how might the ongoing struggle affect similar projects proposed or under way?

A Tough Year

The Cross-Sound cable project faced setbacks in 2003, but it began operating in the summer. The state legislature enacted and extended a moratorium on the construction of certain types of new transmission lines. In addition, the Connecticut attorney general appealed the Siting Council's approval in both the Connecticut Superior Court and Supreme Court. (The superior court rejected the appeal. The attorney general further appealed to the Connecticut Supreme Court, but eventually withdrew his appeal.)

Until the summer of 2002, most of Cross-Sound's battles were fought in Connecticut. In August 2002, however, the U.S. Department of Energy stepped into the fray, issuing an emergency order directing Cross-Sound to operate the cable if certain energy supply and demand conditions were met. Those conditions were not met before the emergency order expired on Oct. 1, 2002, and the cable was never operated pursuant to the order.

In the wake of the Aug. 14, 2003, blackout, however, the DOE ordered the facility to begin transmitting power. The facility is now operating under that order, but legal and political challenges continue to mean an uncertain future.

Shortly after the transmission line was installed, Cross-Sound determined that in several places the cable was not buried to the final depths specified in permits provided by the U.S. Army Corps of Engineers and the Connecticut Department of Environmental Protection (CDEP). Subsequently, Cross-Sound submitted information to the Army Corps of Engineers and the CDEP demonstrating that operation of the cable as installed would have no adverse effect on navigation or the environment. After consulting with the National Marine Fisheries Service and reviewing the information provided by Cross-Sound, CDEP agreed with Cross-Sound and specifically stated that the electromagnetic field (EMF) and temperature variations associated with operation at the as-buried depths would not be expected to have an impact on fisheries' resources. The Army Corps of Engineers stated that operation would pose neither navigational nor environmental harm, and it acknowledged that it had no objection to operation of the cable while Cross-Sound obtained the necessary authorizations to reach the final burial depths set forth in the permits.

The CDEP, however, took a different approach from that of the Army Corps. In a letter to Cross-Sound dated Jan. 6, 2003, the CDEP objected to the cable's operation on "procedural" grounds. CDEP effectively said that until the cable was installed to the permitted depth requirements, operation would violate the permit, notwithstanding the absence of environmental harm.

Cross-Sound requested in January 2003 that CDEP modify the burial-depth requirement through a certificate of permission (COP). The COP effectively would have harmonized CDEP's position with that of the Army Corps.

The CDEP, however, refused to consider Cross-Sound's request. The CDEP cited a 2002 legislative moratorium on permits or applications related to certain infrastructure crossings of the sound.

A Study in States' Rights

The Cross-Sound cable saga depicts a project embroiled in several disputes— environmental, economic, political, and technical. At the heart of the matter, however, is the age-old question of states' rights versus regional and national interests.

What Ashley Brown of the Harvard Electricity Policy Group calls state and local "parochialism" has stood in the way of more than one electric power facility. In a presentation on transmission siting, Brown cited three other cases in which the courts rejected interstate electricity needs in favor of in-state interests (*see Tampa Electric v. Joe Garcia, et. al., Fla. Sup. Ct., 2000; Point of Pines Beach Association v. Energy Facilities Siting Board, et. al., Sup. Judicial Ct.-Mass., 1995; and Mississippi Power & Light v. Louis A. Connerly, et. al., Sup. Ct.-Miss., 1984*).

In this legal context, the Cross-Sound dispute has raised a chorus of outrage from the utility industry and from pro-business interests in general.

"Across the country, the zoning and permit process for new construction has stretched to an expensive, years-long ordeal," said Fred L. Smith, president of the Competitive Enterprise Institute in Washington, D.C. "A nation that permits officials like [Connecticut Attorney General Richard] Blumenthal to continually delay vital new energy projects is not a nation that is going to respond well to future electrical crises."

With rising grid-reliability concerns and slow progress to create liquid regional power markets, transmission-siting issues have gained political traction on Capitol Hill. The omnibus energy bill that failed in late 2003 included a section granting eminent-domain authority to the Federal Energy Regulatory Commission (FERC). The section did not pose a major arguing point in the 2003 legislation, and it is expected to remain in a revived energy bill in 2004.

If enacted, the legislation would streamline transmission siting, especially for merchant transmission projects. But it won't be a silver-bullet solution. First, the legislation itself sets a significant threshold for granting a permit. The project must be located in one of the "congestion areas" to be identified in a commission study, and it must be facing onerous regulatory treatment at the state level. Second, a FERC permit won't represent immunity from other types of challenges.

"Before a utility can make an investment, they will have to face the question of how it will be treated by regulators," says Peter Rigby, a director with Standard & Poor's. "Are they at risk for cost-recovery? Eminent domain authority will reduce one barrier, but few utilities will get a blanket go-ahead to make transmission investments."—*Michael T. Burr*

Cross-Sound responded by filing a lawsuit in Connecticut Superior Court, seeking an order of *mandamus* against the commissioner of the CDEP. In the lawsuit, Cross-Sound argued that its permits (and the facility itself) pre-dated the 2002 moratorium, and therefore the agency had a statutory duty to consider and rule upon Cross-Sound's request for permit modification. On April 9, 2003, the court denied Cross-Sound's request for a temporary order of *mandamus* pending the lawsuit's resolution.

Several weeks before the 2002 moratorium was set to expire in June 2003, Cross-Sound requested that CDEP modify its installation permit to allow the cable to operate while Cross-Sound worked with CDEP and the ACOE to address the permanent burial depth requirements. Cross-Sound argued that because the 2002 moratorium was about to expire, the CDEP could render its final decision on this COP application within the time frames required under Connecticut statutes. Specifically, Cross-Sound asked CDEP to modify its permit to provide that Cross-Sound could operate the cable as installed in its current location for a period up to, and including, the expiration of the permit, by which time the cable would be installed to a depth that the CDEP determined would not cause any substantial adverse environmental impacts.

On June 2, 2003, one day before the 2002 moratorium was to expire, the CDEP denied the request to modify the permit, stating again that the 2002 moratorium precluded the CDEP from considering the COP, and citing the Connecticut legislature's recent passage of legislation that would extend the moratorium for an additional year. Even though the state's governor had not yet signed the bill, the CDEP said "the clear will of the legislature" was to "extend the moratorium to allow additional study and review of utility and infrastructure crossings of Long Island Sound."

The 2002 moratorium expired on June 3, 2003. Upon expiration, the CDEP reopened and denied both of Cross-Sound's previously filed COP applications. The CDEP found that the requested change in the initial COP filed in January was not a minor alteration or amendment to the original permit and was not eligible for the COP process. Similarly, the CDEP found that the more permanent modifications of the burial depth requested in the May COP application were not appropriate for authorization through the COP process.

The CDEP suggested that Cross-Sound file a new permit application if it wished to seek the changes in burial depth requirements requested in the COP applications. Cross-Sound therefore filed a new permit application with the CDEP on June 12, 2003. In the

new application, Cross-Sound requested that the CDEP issue a permit to allow operation of the cable as installed until the expiration of the permit.

However, on June 26, 2003, Connecticut Gov. John Rowland signed into law a bill extending the moratorium until June 3, 2004. Because of the new 2003 moratorium, the CDEP has not considered the new permit application.

Moreover, this is not the only remaining legal hurdle facing the Cross-Sound project.

Clams and Courts

Connecticut leases shellfish beds in Long Island Sound to fishermen for a nominal annual fee, allowing the lessees to use the beds for cultivating and harvesting shellfish. Before Cross-Sound installed its cable, it reached a settlement with the shellfish companies that leased the shellfish beds the cable would cross. In mid-2002, however, a company whose shellfish bed was not traversed by the cable, claimed to the CDEP that the project's installation damaged its shellfish bed in New Haven Harbor. The CDEP undertook an extensive investigation of the shellfish company's claim, including consultation with federal and state agencies, and found "no evidence that the process of laying and burying the cable was causally related to the damage alleged." (According to the CDEP, the data suggest a naturally occurring sand wave caused the damage to the company's shellfish bed.)

Notwithstanding the CDEP's determination, the shellfish company sued Cross-Sound in Connecticut Superior Court in July 2003, claiming that cable installation adversely affected its leased beds. The lawsuit remains pending.

Meanwhile, the Connecticut attorney general's appeal before the Connecticut Supreme Court of the Siting Council approval, reached its conclusion in 2003. Oral argument was set for September 2003, but the attorney general withdrew his appeal before the hearing could proceed. However, on the same day the attorney general withdrew his appeal, he filed a new petition in the U.S. Court of Appeals for the Second Circuit, challenging the DOE's post-blackout emergency order. Hours after the grid failure occurred on Aug. 14, the DOE issued an emergency order directing the New York ISO and ISO New England to require Cross-Sound to operate its cable. The DOE stated that, "within hours, it was delivering 300 MW of energy from Connecticut to Long Island and also providing valuable voltage support and stabilization services for the electric transmission systems in both New England and New York."

On Aug. 28, 2003, the DOE issued another emergency order directing Cross-Sound to continue operating the cable "until such time as the emergency identified in [the] order ceases to exist." Since August, the cable has transmitted electricity with no apparent harm to navigation or the environment. Nonetheless, on Aug. 29, 2003, the CDEP and Gov. Rowland asked the DOE for a "rehearing or stay" of its current emergency order.

The DOE agreed in early September to rehear the matter "for the limited purpose of further consideration." Despite the DOE's offer to reconsider, on Sept. 22 the Connecticut attorney general and the CDEP filed a petition in the U.S. Court of Appeals for the Second Circuit for review of the emergency order, arguing that no emergency exists and that the DOE therefore abused its discretion in issuing the Aug. 28 emergency order. The petition also asserts that the DOE deprived the state of its rights, violating the 10th Amendment of the U.S. Constitution. The Connecticut attorney general and the CDEP have requested that the DOE stay enforcement of its order pending court resolution of the Second Circuit appeal. The DOE has not acted upon that request, and the appeal remains pending.

Legislative Limbo

In late fall 2003, Congress tried to reach agreement on a comprehensive energy bill. The entire discussion of the Cross-Sound cable was contained in one sentence: "Department of Energy Order No. 202-03-2, issued by the Secretary of Energy on Aug. 28, 2003, shall remain in effect unless rescinded by Federal statute." Just before the Thanksgiving recess, efforts to reach agreement stalled for reasons unrelated to the Cross-Sound project, and the bill was tabled until 2004.

At press time, prospects for enactment of energy legislation in 2004, and its possible effect on the project, remained unclear. Meanwhile, the Cross-Sound cable continues transmitting power under the DOE's emergency order, and the legal and political battles continue raging as proponents and opponents wrangle over the facility's ultimate fate.

The circuitous post-installation path to operation of the Cross-Sound cable has included political, legislative, and executive agency consideration on both the federal and state level. The challenges to transmission line infrastructure no longer follow a relatively predictable, linear path of participation in permitting proceedings and appeals from the granting of permits. Instead, the current reality is that political and legislative actions can be more effective in stopping specific projects than challenging the projects' permits on their merits. To counter these actions, the likely responses may aim for legislative or executive results.

The courts could become arbiters of whether legislative or executive agency actions have *(Continued on p. 57)*

predefined period of time.

Within these options are still further refinements. Tickets, for instance, may be structured for use during specific periods. They may expire at different times. And in all cases, when such tickets are used, the exact nature of the use and the accompanying separate energy and demand charges are spelled out in the bill.

Such programs are expanding. Greg Galluzzi of TMG Consulting says, "We have seen intelligent meter interfaces to CIS systems grow from mere pilots of 100 to 500 meters to full-scale implementations. The need for CIS systems to encompass this technology is imperative to providing customers with exceptional levels of service."

New metering dramatically expands utilities' data-handling requirements. Stepping up internal facilities for analyzing this data lets utilities experiment with different price signals and incentives. By gauging the effect on overall load and on grid constraints, utilities can maximize the return on existing transmission assets and reduce the need for new investment.

Just as important, utilities can use the new data to develop regulated and competitive products for specific customer niches. This is more than a profit opportunity. It is also part of a utility's public obligation. Utilities that fail to satisfy the complex and growing needs of larger customers, encourage them to seek alternatives like self-generation. The result may be both lower utility returns and increased system-maintenance costs for remaining customers.

The answer is not to chain customers to the grid with exit penalties, but to develop the ability to respond to their needs. F

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Endnotes:

1. Jim Spiers, "Energy Management + Price-Responsive Demand = Effective Customer Choice," META Group, July 2001, *http://www.metagroup.com/cgi-bin/inetcgi/jsp/displayArticle.do?oid=32200.*
2. "EEI Member and Non-Member Residential/Commercial/Industrial Efficiency and Demand Response Programs for 2003," Edison Electric Institute, June 2003, *http://www.eei.org/industry_issues/retail_services_and_delivery/wise_energy_use/programs_and_incentives/progs.pdf.*
3. Eric Hirst "Barriers To Price-Responsive Demand In Wholesale Electricity Markets," Edison Electric Institute, 2002, *http://www.eei.org/industry_issues/retail_services_and_delivery/wise_energy_use/demand_response/barriershirst.pdf.*
4. Demand response programs are, for instance, included as a general rule in the U.S. Federal Energy Regulatory Commission's current Standard Market Design (SMD) proposal. See also the congressional testimony of FERC Chairman Pat Wood at *http://www.ferc.gov/news/congressionaltestimony/WoodTestimony07-24-02.pdf.*
5. Jill Feblowitz, "AES NewEnergy Brings Economic Demand Response to Life," *AMR Alert*, Tuesday, Aug. 14, 2001.

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exceeded their authority, rather than whether an agency has properly applied existing statutory siting and environmental standards. The battle may have changed from substantive issues—does the project provide a public benefit, and is there an environmental effect?—to constitutional issues. If judges allow legislative and executive actions to override siting decisions, the courts could become an attractive forum to stall or block unpopular projects, even if those projects meet the applicable siting criteria.

This strategy may achieve short-term results, but it undercuts the elements of predictability and consistency that promote the development of infrastructure. If permitting agencies diligently review the facts and apply their long-standing criteria in adjudicating a permit application, their findings should not be superseded by actions outside the permitting process. F

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