Electric Transmission Siting—An Expanding Federal Role

By Daniel P. Venora

The recent designation by the Department of Energy (DOE) of two expansive regions across the northeast and southwest United States as critical electric transmission corridors illustrates the federal government's broad reach over the siting of electric transmission lines. Under provisions of the Energy Policy Act of 2005 (EPAct),[1] the DOE is charged with conducting studies of the nation's electric transmission grid, ultimately leading to the designation of National Interest Electric Transmission Corridors (NIETCs). The NIETC designation is a prerequisite to triggering federal siting jurisdiction, which under the legislation is designed to enable a transmission project developer to forgo or override state action by applying to the Federal Energy Regulatory Commission (FERC) for a federal construction permit. The heated debate over the scope of federal siting authority that preceded the enactment of EPAct continues today as a result of DOE orders designating NIETCs across two of the most populous regions of the country. This article considers the implications of NIETC designations on future electric transmission expansion.

Energy Policy Act of 2005

Prior to EPAct, the FERC had exclusive and preemptive jurisdiction over the construction of interstate natural gas pipelines,[2] but no siting authority with respect to electric transmission lines. Although the operation of the electric grid and planning for necessary transmission expansion was often driven by regional needs in addition to state and local needs, electric transmission siting was left exclusively to state and local authorities.

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The massive blackout in August 2003 that affected millions of people across the Midwest and northeastern United States and eastern Canada bolstered a concern that electric transmission development to meet increasing regional demands was being hampered, because the state process was not necessarily addressing the need for facilities from an interstate perspective, and ultimately provided impetus for many of the reliability measures and other provisions in EPAct. These provisions expanded the DOE's authority to assess transmission congestion and FERC's jurisdiction to authorize transmission construction in critical regions. FERC stated that the new law signified a conclusion by Congress that "the status quo was failing to develop the strong transmission grid that our country needs," and that it was necessary to provide for federal transmission siting authority.[3]

EPAct amended section 216(b) of the Federal Power Act (FPA)[4] to direct the DOE to conduct periodic nationwide studies of electric transmission congestion,

and to empower FERC to authorize under certain conditions "the construction or modification of electric transmission facilities" within critical congestion areas identified by DOE.[5] FERC's jurisdiction over projects within a NIETC is triggered if (a) the state does not have authority to site the project or to consider the interstate benefits of the project; (b) the applicant does not qualify for a state permit because it does not serve end-use customers in the state; or (c) the state has withheld approval for more than one year, or imposes conditions that will impair the project's ability to reduce congestion significantly or render it economically infeasible.[6]

FERC characterized its jurisdiction as "limited in scope," drawing a contrast between its exclusive and preemptive jurisdiction over the siting of interstate natural gas pipelines, and its so-called "backstop" role with respect to electric transmission where its jurisdiction "supplements state siting, but does not supplant state siting."[7] EPAct allows a project developer to seek FERC approval if the state denies a permit, fails to approve a permit after one year, or issues a permit with unacceptable conditions. In essence, EPAct enables the FERC to look over the shoulder of state officials. Although FERC's jurisdiction is not exclusive, it provides a new avenue for project development, and could facilitate the development of some projects that encounter opposition on the state and local level.

Among the more controversial aspects of EPAct is the provision to allow the holder of a FERC-issued construction permit to acquire transmission line rights-of-way through the exercise of eminent domain authority.[8] The goals of EPAct could be stymied if the developer of a FERC-approved project were subsequently unable to obtain necessary rights-of-way. Federal eminent domain authority was viewed by supporters of EPAct as critical to enabling necessary projects to go forward, while opponents asserted in essence that the measure was a further erosion of state control over transmission line development.

Implementation of EPAct at FERC

Shortly after the enactment of EPAct in August, 2005, FERC acted promptly to adopt regulations for the filing of applications for transmission construction permits. As FERC characterized it, this action was taken "so that when the [DOE] was in a position to designate [NIETCs], our rules would be in place."[9] The FERC regulations require an extensive prefiling consultation process, derived from a similar approach it follows in natural gas pipeline proceedings and hydropower licensing proceedings. Importantly, it has also ruled that the prefiling process for electric transmission projects cannot be initiated during the first year of any state proceeding. This gives the states "one clear year"[10] before FERC can step in. Once FERC steps in, the prefiling process must be concluded before the application is submitted, and all federal permits must be issued within one year of the application, or as soon as practicable thereafter.[11]

Implementation of EPAct at DOE

EPAct requires the DOE, acting through its Office of Electricity Delivery and Energy Reliability, to conduct periodic nationwide studies of electric transmission congestion.[12] Codified as FPA § 216, the law required the first congestion study to be completed within one year of the enactment of EPAct, and subsequently every three years. The law also required the DOE to issue a report on the study, "which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national electric transmission corridor."[13]

The DOE issued its initial congestion study in August 2006, using historical data and future modeling to identify and categorize congestion areas throughout the country. The study identified two "critical congestion areas,"[14] one in the northeast United States (from metropolitan New York through northern Virginia) and the other in southern California; four "congestion areas of concern"[15] (New England, the Phoenix-Tucson area, the San Francisco Bay area, and the Seattle Portland area); and "conditional congestion areas."[16] The study was followed by a May 7, 2007, notice in which the DOE issued draft NIETC designations for the two critical congestion areas identified in the study, the Mid-Atlantic Area National Corridor and the Southwest Area National Corridor. On October 5, 2007, the DOE issued orders designating the two NIETCs. The designations remain in effect for 12 years, unless rescinded or renewed by the DOE.

The "corridors" envisioned by DOE bear little resemblance to what one might typically envision by this term. The Mid-Atlantic NIETC covers all of New Jersey, Delaware, and the District of Columbia, most of New York, Pennsylvania, Maryland, and West Virginia, and substantial portions of northern Virginia and eastern Ohio. The Southwest NIETC covers seven counties in southern California and three counties in western Arizona. Since the reach of FERC's jurisdiction is contingent upon the NIETC designations, the DOE's implementation was a significant step toward giving broad effect to federal siting authority.

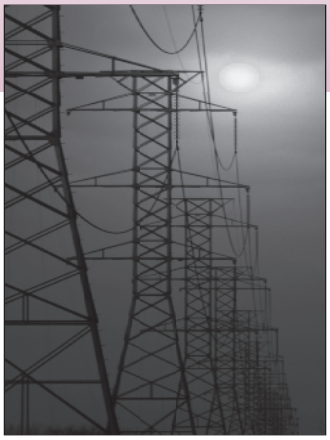
The DOE's actions prompted strong opposition from landowners, public officials, state agencies, environmental and other interest groups in the areas covered by the designations. The DOE received dozens of rehearing requests in response to the October 2007 orders, many of which asserted that the designations are overly broad in geographic scope and extend beyond critical congestion areas. The Pennsylvania Public Utility Commission characterized the

Mid-Atlantic NIETC designation as an "overly burdensome 'Transmission Park.'" The New Jersey Board of Public Utilities argued that the DOE failed to consider alternatives to alleviate transmission congestion, such as energy efficiency, demand response, and clean local generation. The New York attorney general challenged DOE's consultation with the states as inadequate, said that it failed properly to consider the effects on consumers, and on natural, cultural, and historic resources, and that it failed properly to assess environmental impacts under the National Environmental Policy Act[17] and other federal environmental laws. The California Public Utilities Commission asserted that the DOE usurped the state's energy procurement policy by making factually unsupported findings of congestion and on the diversification of supply and access to renewable and alternative energy sources. Rehearing requests were also filed by the governor of Maryland and the Arizona Corporation Commission, among many others.

The Virginia governor and attorney general also filed a rehearing request, in which they characterized electric transmission line siting as "an issue largely of local concern," and portrayed state utility commissions as "familiar with the important conditions and concerns both within and without their jurisdiction."[18] In contrast, the Edison Electric Institute (EEI) filed a rehearing request in strong support of the DOE's congestion study and designation orders, explaining the need for a "sufficient network of transmission facilities to ensure that electricity generated or purchased at wholesale can be delivered reliably and economically to customers who need it." EEI noted that although customers and communities need reliable facilities, they often oppose transmission projects due to visual or other impacts. Further, "states may not always agree on the need for particular facilities or the locations of the facilities, especially if the facilities are intended in whole or in part to ensure regional reliability rather than solely to provide direct service from generation to load centers within a single state." EEI also said that the difficulty in siting transmission is often exacerbated by the increasing demand for electric power.[19]

On December 7, 2007, the DOE issued orders granting rehearing, "[i]n order to afford additional time for consideration of the matters raised in the rehearing requests."[20] The orders were accompanied by DOE's statement that it "based its designations on sound data and analysis showing that there is persistent electricity transmission congestion within the corridors. . . . These designations followed two months of public review and comment in which time over 2,000 comments were received and evaluated in addition to over 60 hours of public meetings held across the country." Acknowledging the numerous rehearing requests, DOE stated that the requests would be given "full consideration," and that "DOE will take additional time to thoroughly evaluate the basis of their requests. . . . Ensuring adequate infrastructure to supply affordable, reliable, and secure electricity to Americans is a national priority and through these designations, the Department is focusing attention on the need for action to keep pace with America's growing energy appetite." [21] The DOE denied the rehearing requests in an order issued March 6, 2008.

The NIETC designation does not prejudge need.



Other legal challenges

Aside from the unsuccessful rehearing requests at DOE, there have been rumblings of other potential legal challenges, as well as some legislative proposals that in the past year have not gotten much traction. There has been at least one proposal to repeal FPA § 216 altogether,[22] a proposal entitled "Protecting Communities from Power Line Abuse Act" that would amend FPA § 216(e) to eliminate federal eminent domain for the holder of a FERC-issued construction permit,[23] and a proposal to require the DOE to consider the impact that a NIETC designation would have on "natural values and special places considered to be in the national interest."[24] All three of these bills were referred to the Subcommittee on Energy and Air Quality on February 6, 2007, with no significant action since.

Implications for future projects

In regions of the country that are designated as a NIETC, the states will continue to have a meaningful role with respect to electric transmission line projects, and projects in those regions can and likely will be permitted and constructed without ever invoking federal authority. The law states that nothing "precludes any person from constructing or modifying any transmission facility in accordance with State law."[25] Project developers must still establish that a proposed transmission line project is the right solution and that the proposed route is acceptable. The NIETC designation does not dictate specific routes, engineering, or design solutions to transmission congestion, nor is it supposed

to prejudge the question of need for specific transmission projects.[26] Further, FERC's regulations and statements thus far show a clear inclination to allow the state process to run its course. In a case that could become the first use of federal siting authority, FERC held a preliminary consultation on February 25, 2008, with Southern California Edison regarding its proposal to build a 500-kV line from Arizona to California, and simultaneously notified the Arizona Corporation Commission and the California Public Utilities Commission "to ask for their input as to whether EPAct 2005 requirements giving FERC backstop siting authority have been met."

In cases where federal authority is triggered, the FERC will make the substantive decisions on whether to grant or deny a construction permit, where necessary facilities should be located, and what conditions to impose. In many respects, the FERC option will impose an additional process and longer time frames that would likely cause developers to view the FERC option as a last resort for critical projects. At the same time, the specter of FERC involvement may temper the response of state siting authorities to important projects that provoke local opposition.

DOE will not reduce federal siting authority.

Subject to the outcome of potential future legal challenges, the DOE made clear in responding to the rehearing requests that it would not limit its initial NIETC designations or reduce the "safety net" of federal siting authority. It is also important to keep in mind that DOE's initial study that led to the designation of the Mid-Atlantic and Southwest NIETC's also identified four other regions of the country as congestion areas of concern. Since the DOE is obligated under EPAct to study transmission congestion every three years, the safety net of federal siting could grow.

Endnotes

1. Pub. L. No. 109-58, 119 Stat. 594.
2. Natural Gas Act, § 7(a) and (h), 15 U.S.C. § 717f(a) and (h).
3. Statement of FERC Chairman Kelliher regarding Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities (Docket No. RM06-12-000; Order No. 689), Nov. 16, 2006, *available at* http://www.ferc.gov/news/statements-speeches/kelliher/2006/11-16-06-kelliher-C-2.pdf.
4. Codified as amended at 16 U.S.C. § 824p.
5. FPA § 216(b), 16 U.S.C. § 824p(b).
6. FPA § 216(b)(1), 16 U.S.C. § 824p(b)(1).
7. Statement of FERC Chairman Kelliher, *supra* note 3.
8. FPA § 216(e)(1), 16 U.S.C. § 824p(e)(1).
9. Statement of FERC Chairman Kelliher, *supra* note 3.
10. *Id.*
11. FPA § 216(h)(4)(B), 16 U.S.C. § 824p(h)(4)(B); Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,442 (Dec. 1, 2007).
12. The DOE has explained that electric transmission "congestion" is a condition that occurs when the capacity of the system is "constrained," such that it is insufficient "to enable safe delivery of all scheduled or desired wholesale electricity transfers simultaneously." National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992, 56,992 n.2 (Oct. 5, 2007).
13. FPA § 216(a), 16 U.S.C. 824p(a).
14. A "critical congestion area" is one "where the current and/or projected effects of congestion are especially broad and severe...." Office of Electricity Delivery and Energy Reliability; Draft National Interest Electric Transmission Corridor Designations, 72 Fed. Reg. 25,838, 25,839 (May 7, 2007).
15. A "congestion area of concern" is one "where a large-scale congestion problem exists or may be emerging, but more information and analysis appears to be needed to determine the magnitude of the problem...." *Id.*
16. A "conditional congestion area" is one "where future congestion would result if large amounts of new generation were to be developed without simultaneous development of associated transmission capacity...." *Id.*
17. 42 U.S.C. §§ 4321–4375.
18. Commonwealth of Virginia, Application for Rehearing of DOE Designation Order, Docket Nos. 2007-OE-01, 2007-OE-02 (Nov. 5, 2007), p. 2 (emphasis added).
19. EEI, Request for Rehearing and Clarification of DOE Designation Order, Docket Nos. 2007-OE-01, 2007-OE-02 (Nov. 5, 2007).
20. National Interest Electric Transmission Corridor Designation Orders, 72 Fed. Reg. 69,202 (Dec. 7, 2007).
21. Statement of DOE Spokesperson J. Ruggiero, *available at* http://nietc.anl.gov/rehearing/index.cfm.
22. H.R. 809, 110th Cong. (2007).
23. H.R. 810, 110th Cong. (2007). A similar proposal to amend H.R. 3321 to repeal federal eminent domain authority for a FERC permit-holder (H. Amdt. 751, 110th Cong. (2007)) failed by a recorded vote of 169-245.
24. H.R. 829, 110th Cong. (2007).
25. FPA § 216(g), 16 U.S.C. § 824p(g).
26. National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992, 56,995 (October 5, 2007).