

**DOE TRANSMISSION CORRIDOR DESIGNATIONS & FERC
BACKSTOP SITING AUTHORITY: HAS THE ENERGY POLICY
ACT OF 2005
SUCCEEDED IN STIMULATING THE DEVELOPMENT OF NEW
TRANSMISSION FACILITIES?**

*Debbie Swanstrom
Meredith M. Joliver**

Synopsis: Historically, the Federal Energy Regulatory Commission (FERC) lacked authority over the siting of electric transmission lines. The FERC's siting role was limited to issuing certificates of public convenience and necessity for the construction of interstate natural gas transportation facilities. State agencies, in contrast, authorized the construction of electric transmission facilities. This regulatory landscape shifted, however, when the Energy Policy Act of 2005 (EPAc 2005) was enacted.

Recognizing the need for new transmission infrastructure in many areas of the country, the U.S. Congress established a four-part approach to the siting of new transmission facilities in congested areas. First, Congress directed the Secretary of the U.S. Department of Energy (DOE) to study transmission congestion. Second, based on the results of such study, Congress vested the Secretary of the DOE with authority to designate National Interest Electric Transmission Corridors (NIETCs). NIETCs are geographic areas experiencing transmission congestion that adversely affects consumers and wherein the relief of congestion would promote this country's energy independence, national security, and economic growth. Third, Congress allowed the states the opportunity to act first on applications for authority to site new transmission facilities within NIETCs. Fourth, Congress empowered the FERC with new backstop authority to site transmission lines within NIETCs under certain circumstances where, for example, a state fails to act quickly enough or imposes onerous conditions which effectively destroy the economic viability or benefits of a project.

Exercising its new authority, the DOE designated two, large NIETCs spanning several Southwestern and Mid-Atlantic States, which are now being challenged in Federal Court. The FERC's backstop siting regulations also were challenged, resulting in a Federal Court decision vacating those regulations in significant part. Moreover, the only utility to commence the process of seeking FERC backstop siting approval for a new transmission project has since announced that it no longer intends to pursue a FERC permit.

While the mere threat of potential federal preemption may have some influence on the siting behavior of states, by inducing them to approve more certificate applications at a faster pace or engage in greater regional cooperation,

* Ms. Swanstrom is a partner in the law firm of Patton Boggs, L.L.P., who advises companies on transmission projects and regulations affecting the development and operation of transmission facilities. Ms. Joliver is an associate in the same firm who supports Ms. Swanstrom in her practice. The views expressed in this article are those of the authors, and are not attributable to any particular client or clients.

the provisions granting FERC siting authority in NIETCs do not appear to be a driving force for new transmission investments. Instead, other factors such as transmission rate incentives, authorized under Section 1241 of EAct 2005, appear to have a much greater impact on the development of new transmission facilities. Since the adoption of the FERC's Final Rule on transmission rate incentives, the FERC has approved some form of rate incentives for over thirty transmission projects.

This article addresses recent legislative, regulatory, and litigation developments affecting the siting of transmission projects across the country, including remaining barriers to infrastructure development and actions being taken to overcome those barriers. We examine factors affecting the development of new transmission projects post-EAct 2005, including the downturn in the U.S. economy, access to and the cost of capital, transmission rate incentives, the availability of federal grants or loans, the siting process, cost allocation disputes, renewable energy standards, reliability standards, and regional transmission planning.

Our research found that, despite the recent downturn in the U.S. economy, the number of applications filed with state commissions and the amount of investments made in transmission projects appear to have increased post-EAct 2005. We also found that: (1) more applications appear to have been filed with state commissions for projects outside of NIETCs than for projects inside NIETCs; and (2) many state commissions acted on applications in approximately one year, both pre-and post-EAct 2005. There has not been a flood of applications filed at the FERC for backstop siting authority; to the contrary, only one company even started the pre-filing process and that company ultimately withdrew its request. Some companies have, however, purposefully sited their new projects on federal lands in the West, enabling them to take advantage of a new, streamlined federal agency review procedure mandated by EAct 2005.

Currently, we believe the FERC's transmission rate incentive policy as well as the states' renewable portfolio standards are most effectively stimulating new transmission investments, not the backstop siting provisions in EAct 2005. Going forward, we expect regional transmission planning initiatives (including any actions taken on the allocation of costs on a regional or interconnection-wide basis), smart grid policies, and federal funds flowing from the American Recovery and Reinvestment Act of 2009 to have an increased affect on transmission project investments. Reliability, of course, always has been, and will continue to be, a core driving force for new transmission investments.

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I. INTRODUCTION

Trading of electricity in wholesale markets is now primarily regional in nature, often requiring access to transmission facilities crossing multiple states. Demands for renewable energy also are increasingly causing a need for long transmission lines to access those coveted resources in remote areas. As a result, lawmakers and regulators, at both the state and federal levels, are changing their approaches to transmission planning and infrastructure development.

This article provides an overview of the historical evolution of the transmission siting process and examines the impact of EPCRA 2005 on the development of new transmission infrastructure. It analyzes barriers to transmission infrastructure development and finds, contrary to a popular misperception, that many state commissions act promptly on applications for certificates to construct new transmission facilities. It also analyzes what types of actions have promoted transmission infrastructure development successfully, and finds that transmission rate incentives most effectively stimulate investments in transmission infrastructure. Finally, this article describes steps being taken at the federal and state levels to foster transmission infrastructure development.

II. HISTORICAL OVERVIEW OF THE SITING AND OPERATION OF ELECTRIC TRANSMISSION FACILITIES

Prior to the enactment of EPCRA 2005, the FERC lacked authority over the siting of electric transmission facilities. The FERC's siting authority was limited to issuing certificates of public convenience and necessity for the construction of interstate natural gas pipeline facilities. State agencies, in contrast, authorized the construction of electric transmission facilities. While some view this state authority to site electric transmission facilities as a vital component of state responsibilities to protect the health, safety and welfare of their citizens or to address inherently local land use issues, others view it as an outdated legacy from the past when transmission line construction and operation were more local in nature. Increasingly, the transmission of electricity has become regionalized.

The U.S. Court of Appeals for the District of Columbia Circuit, in a landmark transmission policy case, summed up this trend toward greater regionalization as follows:

Historically, vertically integrated utilities owned generation, transmission, and distribution facilities. They sold generation, transmission, and distribution services as part of a "bundled" package. Due to technological limitations on the distance over which electricity could be transmitted, each utility served only customers in a limited geographic area. . . . Since enactment of the Federal Power Act in 1935, the electricity industry has undergone significant change, both economically and

technologically. Economies of scale have justified the construction of large (greater than 500 MW) generation facilities, such as nuclear power plants. Technological advances in the 1970s and 1980s have permitted small plants to operate efficiently as well. . . Technological improvements also made feasible the transmission of electric power over long distances at high voltages. Alternative power suppliers, such as cogenerators, small power producers, and independent power producers emerged in response to these developments, [which] created a wholesale market for low-cost power.

A prominent group of state and federal government officials, from the National Council on Electricity Policy, reached a similar conclusion about the “regionalization of the electric grid” in a 2008 policy paper funded by the DOE and U.S. Environmental Protection Agency (EPA).² The paper found “changes in technology and markets have created new needs for power to be moved over greater distances, often crossing State boundaries or entire regions.”³ Referencing a presentation made on behalf of the National Conference of State Legislatures, the paper identified several factors illustrating why coordinated planning and siting of transmission facilities is important in today’s electric industry. For example, “[s]tates depend upon each other to export or import power” across state lines; the distance between power plants and loads is frequently large (and may grow even larger as more renewable resources located in remote geographic areas are brought on line); many mergers and acquisitions have occurred in the electric industry and multi-state companies, operating across state lines, are now common; the reliability of the Nation’s bulk power system is controlled and monitored on a regional level (with the exception of Hawaii, Alaska, and Texas); and air quality policies and regulations affect regions, not just individual states.⁴ These factors necessitate regional cooperation and planning.

Just as the technological nature of electric transmission has changed over time, so too has the regulatory landscape. For example, in 1993, the FERC began to order utilities, on an individual case-by-case basis, to transmit the electricity of competing wholesale sellers over the utilities’ transmission lines.⁵

In 1996, the FERC promulgated industry-wide rules mandating that all public utilities adopt tariffs offering non-discriminatory, open access transmission service.⁶ Although sales to retail customers traditionally were

1. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000), *aff’d*, *New York v. FERC*, 535 U.S. 1 (2002) [hereinafter, *New York*].

2. National Council on Electricity Policy, *Coordinating Interstate Electric Transmission Siting: An Introduction to the Debate*, at 2 (July 2008), http://www.oe.energy.gov/state_assist.htm. (Established in 1994, a goal of the National Council on Electricity Policy (Council) is to enable better coordination between federal and state entities responsible for electricity policy and programs. The Council is a venture between the National Association of Regulatory Utility Commissioners, National Association of State Energy Officials, National Conference of State Legislatures, National Association of Clean Air Agencies, and National Governors Association. The Council also includes participation by the FERC, DOE, and EPA.)

3. *Id.* at 2.

4. *Id.* at 3 (citing Matthew Brown, *Regional Reliance: Why Transmission Coordination is Key*, National Conference of State Legislatures (Oct. 2006)).

5. *Florida Municipal Power Agency v. Flower Power & Light Company*, 65 F.E.R.C. ¶ 61,125 (1993).

6. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,539 (May 10, 1996); F.E.R.C. Stat. & Regs. ¶ 31,036 (1996); *clarified*, 76 F.E.R.C. ¶ 61,009 (1996) [hereinafter, *Order No. 888*]; *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997); *order on reh’g*, 62 Fed. Reg. 64,688 (Dec. 9, 1997); 81 F.E.R.C. ¶ 61,248 (1997); *order on reh’g*, 82 F.E.R.C. ¶ 61,046 (1998);

viewed as falling exclusively within the regulatory province of the states, the FERC took the then-unprecedented step, in its rulemaking orders, of asserting jurisdiction over the transmission component of any unbundled sale to retail customers in states which opened their retail electric markets to competition.⁷

In 2000, the FERC promulgated industry-wide regulations establishing criteria for the formation of Regional Transmission Organizations (RTOs) and encouraging utilities to voluntarily turn control of their transmission facilities over to these RTOs to operate independently on a non-discriminatory basis.⁸ Several RTOs now exist, including RTOs spanning multiple states.⁹ These multi-state RTOs engage in transmission planning on a regional basis. Individual utilities also have, for decades, participated in regional transmission planning processes spearheaded by the North American Electric Reliability Corporation (NERC)¹⁰ and other voluntary regional organizations. For example, in the West, utilities submit their transmission plans to a regional reliability organization now known as the Western Electricity Coordinating Council (WECC)¹¹ and coordinate their planning activities through the WECC.

In 2007, the FERC updated its open access transmission rules and added a formal requirement that all public utility transmission providers participate in transmission planning processes at both the local and the regional level.¹² Each of these transmission providers was required to add an attachment to its open access transmission tariff describing its planning process and how that process addresses nine mandatory planning principles: (1) coordination; (2) openness; (3) transparency; (4) information exchange; (5) comparability; (6) dispute resolution; (7) regional participation; (8) congestion studies; and (9) cost allocation.¹³

Another shift in this regulatory landscape occurred when Congress passed EPAct 2005, substantially changing the legal authority of the FERC and other federal agencies with respect to the siting, permitting, development, and

aff'd in part and remanded in part sub nom., *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000); *aff'd sub nom.*, *New York*, *supra* note 1.

7. *Order No. 888*, *supra* note 6, at 31,980; *New York*, *supra* note 1, at 11.

8. *Regional Transmission Organizations*, 89 F.E.R.C. ¶ 61,285 (1999) [hereinafter, *Order No. 2000*]; *order on reh'g*, *Order No. 2000-A*, F.E.R.C. Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

9. RTOs and similar entities, known as Independent System Operators (ISOs), currently include the Midwest ISO (MISO), ISO New England (ISO-NE), the California ISO (CAISO), Electric Reliability Council of Texas (ERCOT), New York (NYISO), PJM Interconnection (PJM), and Southwest Power Pool (SPP).

10. Established in 1968, the North American Electric Reliability Corporation (NERC) was formerly known as the North American Electric Reliability Council. NERC was created, as a self-regulatory organization, to maintain the reliability of the North American electric system. More information about NERC is available at <http://www.nerc.com>.

11. WECC was formerly known as the Western Systems Coordinating Council (WSCC). The WSCC originally was established in 1967 by agreement of 40 electric power systems operating in 14 Western States and British Columbia, Canada. In 2002, the WSCC merged with the Southwest Regional Transmission Association (SWRTA) and the Western Regional Transmission Association (WRTA), to collectively become the WECC. More information about the WECC is available at <http://www.wecc.biz>.

12. *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. 12,266 (Mar. 15, 2007); *Order No. 890, order on reh'g and clarification*, 73 Fed. Reg. 2984 (Jan. 16, 2008); *order on reh'g*, 73 Fed. Reg. 39,092 (July 8, 2008), 123 F.E.R.C. ¶ 61,299 (2008); *order on reh'g and clarification*, 74 Fed. Reg. 12,540 (Mar. 25, 2009).

13. *Id.* at 444.

operation of electric transmission facilities. As discussed in Section III below, among other significant changes, for the first time in U.S. history, this new law shifted some of the regulatory jurisdiction over the siting and permitting of electric transmission facilities from the states to the FERC. The new law also directed the FERC to adopt federal rules providing rate incentives, which some refer to as economic “candy,” for purposes of inducing investments in transmission facilities.¹⁴

III. SIGNIFICANT REFORMS MADE BY EFACT 2005 TO FEDERAL LAWS RELATED TO THE DEVELOPMENT AND OPERATION OF ELECTRIC TRANSMISSION FACILITIES

A. *Legislative History and Underlying Goals of New Electric Transmission Provisions in EFACT 2005*

Following the enactment of the Federal Energy Administration Act of 1974, the U.S. Energy Information Administration (EIA) was established to provide policy-neutral, unbiased energy data, analysis, and forecasting.¹⁵ Each year, the EIA gathers energy data, publishes statistics, and provides Congress with annual reports, such as an *Annual Energy Review* and *Annual Energy Outlook*, summarizing its activities and research results. The EIA’s reports to Congress showed a trend of increases in demand for electricity, necessitating increases in supply. For example, according to the EIA’s 2000 *Annual Energy Review*, per capita average consumption of electricity in 1999 was seven times higher than in 1949.¹⁶ As of 2001, the EIA projected that approximately 1,310 new power plants with a total of 393 GW of capacity would be needed to meet growing demand and offset retirements by 2020.¹⁷ While demand was continuing to rise, transmission investments began to trend downward, in real dollars, starting as early as 1970¹⁸ and hit a low point in 1994, according to some sources.¹⁹ As a result, some Congressional members feared our country’s energy security was at risk.

For several years in the late 1990s and early 2000s, Congressional members introduced comprehensive energy legislation addressing this concern. These legislative efforts did not succeed, however, until 2005. EFACT 2005

14. Energy Policy Act of 2005, Pub. L. No. 105-98, 42 U.S.C. § 19 (2005) [hereinafter, *EFACT 2005*].

15. Federal Energy Administration (FEA) Act of 1974, Pub. L. No. 93-275, 15 U.S.C. § 761 (1974); Department of Energy (DOE) Organization Act, Pub. L. No. 95-91, 42 U.S.C. § 7135 (1977) (establishing EIA as independent from the rest of the DOE with respect to data collection, and from the whole Government with respect to the content of EIA reports).

16. U.S. Department of Energy, Energy Information Administration, *Annual Energy Review 1999*, at xxxix (July 15, 2000), <http://www.eia.doe.gov/aer>.

17. U.S. Department of Energy, Energy Information Administration, *Annual Energy Outlook 2001*, at 73 (Dec. 22, 2000), <http://www.eia.doe.gov/oiaf/aeo/>.

18. Eric Hirst, *Transmission Crisis Looming? Separating Hype From Fact; Hard Numbers and Hopeful Projections on the Adequacy of the Electric Grid*, PUBLIC UTILITIES FORTNIGHTLY, Sept. 15, 2000 (citing National Governors Association, *Moving Power: Flexibility for the Future*, Report of the Committee on Energy and the Environment Task Force on Electricity Transmission (1987)).

19. ELECTRICITY ADVISORY COMMITTEE, KEEPING THE LIGHTS ON IN A NEW WORLD 16 (U.S. Department of Energy 2009) (reporting that annual investment in transmission infrastructure “hit a low of \$2.5 billion” in 1994). See also N. Am. Elec. Reliability Corp., *2003 Long-Term Reliability Assessment* (Dec. 2003) (reporting that, as compared to investment in 1972, there was reduced transmission investment during 2001 through 2003).

comprehensively reformed federal energy laws to enhance our nation's energy security and reduce dependence on foreign fuel sources.²⁰ It reflected Congress' concern that demands for energy were outpacing domestic supply, and that the reliability of energy infrastructure in many parts of the country was in jeopardy.²¹ Congress designed EAct 2005 to promote energy efficiency and a diversity of fuel sources, as well as strengthen the interstate delivery system for energy supplies.²²

B. Summary of Significant New Electric Transmission Provisions

With respect to the transmission of electricity in interstate commerce, EAct 2005 modernized the decades-old Federal Power Act (FPA)²³ in at least four significant ways:

First, it required the formal creation of Electric Reliability Organizations (EROs) responsible for developing and implementing mandatory reliability standards (applicable to all users, owners, and operators of the bulk power system²⁴), subject to the FERC's oversight and approval.²⁵ To give these mandatory reliability standards teeth, the FERC also received substantial new authority to impose penalties for violations.²⁶

Second, it granted the FERC authority to issue permits to site interstate electric transmission facilities in certain geographic areas of national importance determined by the Secretary of DOE to be experiencing transmission capacity constraints or congestion that adversely affect consumers.²⁷ These areas, designated by the DOE, are known as National Interest Electric Transmission Corridors, or NIETCs.²⁸ The FERC's authority to site transmission facilities in NIETCs commonly is referred to as a "backstop" permitting or siting authority because Congress gave states the chance to act first. Much like the fence behind a catcher in baseball, which serves as a backstop, the FERC's new authority typically comes into play only if the ball is not first fielded effectively by the states.

Third, it directed the Secretary of the DOE, in consultation with other federal agencies responsible for granting authorizations necessary to construct electric transmission facilities on federal lands, to engage in greater coordination and implement procedures designed to streamline and expedite the processing of requests to locate facilities on federal lands.²⁹ Among other things, these provisions require the DOE to serve as the lead agency for purposes of a

20. S. Rep. No. 109-78, at 11 (2005); H.R. Rep. No. 109-215, at 169 (2005).

21. S. Rep. No. 109-78, at 6, 8 (2005); H. R. Rep. No. 109-215, at 171 (2005).

22. S. Rep. No. 109-78, at 2-6, 9 (2005); H. R. Rep. No. 109-215, at 169 (2005).

23. 16 U.S.C. § 824, *et al.* (2008).

24. 16 U.S.C. § 824o (2008) (The FPA defines "bulk-power system" as: "(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (B) electric energy from generation facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.").

25. 16 U.S.C. § 824n (2008).

26. 16 U.S.C. § 825o (e) (authorizing the ERO to impose penalties, subject to review by the FERC, as well as the FERC to impose penalties directly, for violations of reliability standards).

27. 16 U.S.C. § 824p(a)-(d) (2008).

28. 16 U.S.C. § 824p(a) (2008).

29. 16 U.S.C. § 824p(h) (2008).

coordinated environmental review and provide an applicant the right to submit an appeal directly to the President of the United States if a federal authorization is denied or a federal agency fails to act within a proscribed time frame of approximately one year.³⁰

Fourth, it required the FERC to adopt rules giving electric transmission providers the opportunity to collect incentive-based transmission rates.³¹ Among other things, the rules must provide a return on equity that attracts new investment in transmission facilities, including the deployment of new transmission technologies. The rules also must allow recovery of all “prudently-incurred costs” related to transmission infrastructure development in NIETCs.³²

In addition to these changes to the FPA, EAct 2005 amended other parts of the U.S. Code, including provisions addressing the management of federal lands upon which new energy facilities might be sited. Most notably, EAct 2005 directed multiple federal land-managing agencies to designate energy corridors on federal lands in which not only electric transmission facilities, but also natural gas, oil, or hydrogen pipelines could be sited.³³

At bottom, the electric transmission provisions in EAct 2005 were born out of the 2003 blackout in the Northeast and Midwest.³⁴ This blackout, which the now-Chair of the Senate Energy and Natural Resource Committee characterized as “worst blackout in North American history,” left approximately 50 million people without electricity in the States of Michigan, Ohio, New York, New Jersey, Massachusetts, and Connecticut.³⁵ The House Energy and Commerce Committee Report on the legislation, which ultimately led to the enactment of EAct 2005, specifically pointed to this blackout as one of the reasons why transmission reforms were necessary.³⁶ Both this House Committee Report, as well as a companion report by the Senate Committee on Energy and Natural Resources, also expressed concern about perceived delays in state regulatory approvals for the siting of new transmission lines and a lack of coordination among the states with respect to this siting.³⁷ Through enactment of the electric transmission provisions in EAct 2005, Congress sought to strengthen the reliability of the national transmission grid and promote greater regulatory certainty, with the hope that “[b]illions of dollars” in new transmission investments would occur.³⁸

By the time EAct 2005 was finally passed by the 109th Congress, the FERC, states, industry organizations, and individual utilities already began to

30. 16 U.S.C. § 824p(h) (2008).

31. 16 U.S.C. § 824s (2008).

32. 16 U.S.C. § 824s (b)(4) (2008).

33. 42 U.S.C. § 15926 (2008). The agencies, subject to this provision, include the Departments of Agriculture, Commerce, Defense, Interior, and Energy. The Secretaries of these Departments were directed to designate the corridors in consultation with the FERC, among others. *See also* 42 U.S.C. § 15926(a) (2008).

34. H.R. Rep. No. 109-215, at 171 (2005) (stating that blackout demonstrates “transmission system reliability is suspect” and “[l]egislation is needed to address the issues of transmission capacity, operation, and reliability”). *See also* 151 Cong. Rec. H2195 (daily ed. Apr. 20, 2005) (statement of Rep. Shimkus) (stating the legislation “helps expand the transmission grid and block the backlogs that helped cause the major blackout that we had 2 years ago”).

35. 150 CONG. REC. S3732 (daily ed. Apr. 5, 2004) (statement of Sen. Domenici).

36. H.R. Rep. No. 109-215, at 171 (2005).

37. S. Rep. No. 109-78, at 8 (2005); H.R. Rep. No. 109-215, at 171 (2005).

38. S. Rep. No. 109-78, at 8 (2005).

remedy deficiencies in transmission infrastructure and reliability. Indeed, a 2005 survey published by the Edison Electric Institute (EEI), the Nation's largest trade association of public utilities, showed that a trend of declining transmission investments occurring from approximately 1999 to 2003, already had been reversed by 2005.³⁹ An Electric Advisory Committee to the DOE similarly reported that transmission investments were rising before the enactment of EAct 2005.⁴⁰ Thus, it may be argued that EAct 2005 helped spur additional investments, but not necessarily that EAct 2005 started this trend.

IV. COMPARISON OF TWO CORRIDOR PROVISIONS IN EACT 2005

There are two separate sections related to corridors for the siting of electric transmission facilities in EAct 2005: (i) Section 368; and (2) Section 1221.⁴¹ Section 368 amends Title 42 of the U.S. Code to provide for the designation of energy right-of-way (ROW) corridors on federal lands.⁴² These corridors are intended to be used for a variety of energy projects, including natural gas, oil, and hydrogen pipelines as well as electric transmission and distribution facilities.⁴³ Section 368 does not direct, license, or otherwise permit any actual siting activity. Applications to site facilities within federal energy ROW corridors must be submitted to an interagency panel comprised of representatives of participating agencies controlling the federal lands on which a facility is proposed to be sited.⁴⁴

Section 1221 on the other hand, amends Title 16 of the U.S. Code to add provisions to the FPA enabling the Secretary of the DOE to designate NIETCs and the FERC to issue permits for the siting of interstate electric transmission facilities in those NIETCs under certain circumstances described below. As the name National Interest Electric Transmission Corridor implies, this section of EAct 2005 focuses solely on electric transmission facilities. It does not provide for the siting of other types of facilities in NIETCs, such as natural gas, oil or hydrogen pipelines, or electric distribution facilities.

NIETCs potentially can be designated on any type of land – including not just federal land, but also private property and state land. But, the DOE Secretary can only designate a “geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a [NIETC].”⁴⁵ Also, as explained in Section IX, an eminent domain power available to a backstop permit holder to condemn land in a NIETC is limited to private property. A backstop permit holder is not empowered to condemn land owned by the federal government or states in a NIETC.

39. Edison Electric Institute, *Survey of Transmission Investment, Historical and Planned Capital Expenditures (1999-2008)*, at 1 (May 2005), available at <http://www.eei.org>.

40. The Electric Advisory Committee to the DOE reported that annual investment in transmission infrastructure “hit a low of \$2.5 billion” in 1994. But, then began to climb, “reaching \$5.8 billion annually in 2005, with projections to exceed \$8 billion in 2009.” ELECTRIC ADVISORY COMMITTEE, *KEEPING THE LIGHTS ON IN A NEW WORLD* 26 (U.S. Dep’t of Energy 2009).

41. 42 U.S.C. § 15926 (2008).

42. *Id.*

43. 42 U.S.C. § 15926(a)(1), (b)(1) (2008).

44. West-Wide Energy Corridor (WECC), Final PEIS, *Designation of Energy Corridors on Federal Land in the 11 Western States (DOE/EIS-0386)*, at S-7, S-12 (Nov. 2008) (hereinafter, *Final PEIS*).

45. 16 U.S.C. § 824p(a)(2) (2008).

The DOE took a markedly different approach when designating energy ROW corridors than it did when designating NIETCs. The NIETCs are broad and span entire counties in the Mid-Atlantic and Southwestern United States. The energy ROW corridors, in contrast, are narrow, linear areas, consistent with historic usage of the technical term “corridor” in the energy industry. While the energy ROW corridors largely incorporate land areas in which utility or transportation ROWs already have been developed and simply expand those areas where needed, the NIETCs bear no relation to existing ROWs. Also, a programmatic environmental impact statement was prepared prior to designating the energy ROW corridors. But, no environmental impact statement was prepared prior to designating the NIETCs.

A. *Energy ROW Corridors on Federal Lands*

Congress created the energy ROW corridor provisions, in Section 368, to streamline federal agency procedures and overcome institutional barriers to energy infrastructure development on federal lands. Congress was particularly concerned about impediments to energy infrastructure development in the West, where vast amounts of federal land exist.

Prior to the enactment of EPAct 2005, barriers to infrastructure development in the West included: inconsistent federal agency procedures for granting ROWs; inconsistent federal agency views on whether proposed energy infrastructure projects would address near- or long-term energy needs; a lack of coordination among federal agencies that administer contiguous tracts of land when responding to applications for a ROW across their respective jurisdictions; and a lack of coordination within federal agency offices regarding the appropriate geographic locations of corridors or ROWs.⁴⁶

The design of energy ROW corridors under Section 368 is intended to expedite the process of siting facilities on federal lands, as well as assist in minimizing adverse environmental impacts associated with the proliferation of separate ROWs.⁴⁷

Section 368 specifically directs the Secretaries of numerous federal land-managing agencies, namely the Secretaries of the Departments of Agriculture, Commerce, Defense, Energy, and the Interior, to consult with each other and designate the energy ROW corridors on federal lands.⁴⁸ These land-managing agencies also must consult with the FERC, states, tribal or local units of governments as appropriate, affected utility industries, and other interested persons on the corridor designations.⁴⁹

Starting with eleven contiguous Western States, in which there are large areas of federally-owned land, Section 368 requires that “[n]ot later than [two] years after August 8, 2005” (i.e., by August 8, 2007), the federal land-managing agencies must:

- (1) designate, under their respective authorities, corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal land [in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico,

46. *Final PEIS, supra* note 43, at S-4.

47. *Final PEIS, supra* note 43, at S-25.

48. 42 U.S.C. § 15926 (2008).

49. 42 U.S.C. § 15926(a), (b) (2008).

Oregon, Utah, Washington and Wyoming]; (2) perform any environmental reviews that may be required to complete the designation of such corridors; and (3) incorporate the designated corridors into relevant agency land use and resources management plans or equivalent plans.⁵⁰

When designating each corridor, the federal land-managing agencies are directed, at a minimum, to “specify the centerline, width, and compatible uses of the corridor.”⁵¹

While Congress prioritized the designation of energy ROW corridors in the eleven Western States, Section 368 also requires that “[n]ot later than [four] years after [August 8, 2005]” (i.e., by August 8, 2009), the Secretaries of the land-managing agencies similarly develop energy ROW corridors in other states and “schedule prompt action to identify, designate, and incorporate the corridors into” the relevant agency land use and resource management plans or equivalent plans.⁵²

After these corridors are designated, Section 368 further imposes ongoing responsibilities on the agencies to establish procedures that:

- (1) ensure that additional corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal land are promptly identified and designated as necessary; and
- (2) expedite applications to construct or modify oil, gas, and hydrogen pipelines and electricity transmission and distributions facilities within such corridors, taking into account prior analyses and environmental reviews undertaken during the designation of such corridors.⁵³

In carrying out their responsibilities under Section 368, the Secretaries are specifically directed to “take into account the need for upgraded and new electricity transmission and distribution facilities to – (1) improve reliability; (2) relieve congestion; and (3) enhance the capability of the national grid to deliver electricity.”⁵⁴

Like Section 368, a companion provision in Section 372 of EPAct 2005,⁵⁵ also is expected to help streamline and expedite the process of siting facilities on federal lands. This Section requires the Secretary of the DOE, in consultation with the Secretaries of the Interior, Agriculture, and Defense, to enter into a memorandum of understanding (MOU) to coordinate all applicable federal authorizations and environmental reviews relating to a proposed or existing utility facility.⁵⁶ To the maximum extent practicable under applicable law, the Secretary of the DOE must “ensure timely review and permit decisions, coordinate such authorizations and reviews with any Indian tribes, multi-State

50. 42 U.S.C. § 15926(a)(1)-(3) (2005).

51. 42 U.S.C. § 15926(e) (2005).

52. 42 U.S.C. § 15926(b) (2005).

53. 42 U.S.C. § 15926(c) (2005).

54. 42 U.S.C. § 15926(d) (2005).

55. 42 U.S.C. § 15928 (2005).

56. 42 U.S.C. § 15928(c) (2005). A “utility facility” is defined as: any privately, publicly, or cooperatively owned line, facility, or system – (1) for the transportation of – (A) oil, natural gas, synthetic liquid fuel, or gaseous fuel; (B) any refined product produced from oil, natural gas, synthetic liquid fuel, or gaseous fuel; or (C) products in support of the production of the material referred to in subparagraph (A) or (B); (2) for storage and terminal facilities in connection with the production of material referred to in paragraph (1); or (3) for the generation, transmission, and distribution of electric energy.

entities, and State agencies that are responsible for conducting any separate permitting and environmental reviews of the affected utility facility.”⁵⁷

To accomplish this purpose, Congress specifically directed that the MOU include provisions establishing: (1) “a unified right-of-way application form;” and (2) “an administrative procedure for processing right-of-way applications, including lines of authority, steps in application processing, and timeframes for application processing.”⁵⁸

The MOU also must provide for: (1) “coordination of planning relating to the granting of the rights-of-way;” (2) “an agreement among the affected federal agencies to prepare a single environmental review document to be used as the basis for all federal authorization decisions;” and (3) “coordination of use of right-of-way stipulations to achieve consistency.”⁵⁹

In 2006, this MOU was entered into by the DOE, Department of Agriculture, Department of the Interior, and Department of Defense.⁶⁰

1. Energy ROW Corridors in Western States

In 2007, the federal land-managing agencies released maps of preliminary energy ROW corridor routes and alternatives in the Western States. Public comments were solicited, and the agencies conducted meetings with Western Governors and/or their staff, as well as sought input from western tribes.

In accordance with Congress’ directive to perform any environmental reviews required to complete the corridor designations, and to integrate the National Environmental Policy Act (NEPA) planning process into the proposed corridor designations at the earliest possible time,⁶¹ the agencies prepared a programmatic environmental impact statement (PEIS) analyzing potential environmental impacts from the proposed corridor designations. The draft PEIS was published for public comments, and public hearings were held on the draft PEIS.

The agencies defined an energy corridor as federal lands where the construction, operation, or upgrade of one or more energy transport projects is preferred.⁶² Many corridors were proposed to be designated as “multimodal,” meaning that the corridor can be used for any one or more purposes, including oil, gas and hydrogen pipelines, and electricity transmission and distribution facilities. The corridors generally have a width of 3,500 feet unless specified otherwise because of environmental sensitivities or other land management constraints. The agencies selected a width of 3,500 feet to provide sufficient room for siting multiple transport systems. The draft PEIS provided the following examples of what could fit into such a corridor: nine individual 500-kV transmission lines; thirty-five liquid petroleum pipelines with 32-inch

57. 42 U.S.C. § 15928(a)(1) (2008).

58. 42 U.S.C. § 15928(a)(2) (2008).

59. *Id.*

60. Memorandum of Understanding between the Departments of Energy, Defense, Agriculture, and Interior regarding Energy Right-of-Way Corridors on Federal Lands (Feb. 2006). Under the MOU, DOE was designated as the lead agency responsible for providing the project manager to direct and facilitate all activities. The Bureau of Land Management (within the Department of the Interior) was designated to serve as co-lead and required to furnish an assistant project manager. The U.S. Forest Service (within the Department of Agriculture) and Department of Defense were designated as cooperating agencies.

61. *Final PEIS, supra* note 43.

62. *Final PEIS, supra* note 43, S-2, S-3, S-5.

diameter and 100-foot ROW; twenty-nine natural gas pipelines with a 42-inch diameter and 120-foot ROW.⁶³

Approximately sixty-one percent of the corridors proposed in the PEIS follow or include existing utility and/or transportation ROWs. As an example, in California, seventy-seven percent of corridors follow existing utility and transportation rights-of-way.⁶⁴

The agencies used a four-step process to develop the energy ROW corridors:

Step 1 - Develop “an ‘unrestricted’ conceptual West-wide network” of long-distance “energy transport paths that . . . connect energy supply areas . . . with demand centers . . . regardless of land ownership or environmental” constraints;

Step 2 - Revise the conceptual network developed in “Step 1 to avoid non-Federal lands [and] major known environmental, land use, and regulatory constraints” such as wilderness areas, cultural resources, and military test and training areas. This step resulted in a preliminary West-wide energy corridor that “avoided private, state, and Tribal lands” and other environmental and regulatory constrained areas.

Step 3 - Subject the preliminary corridors from Step 2 to further review and adjustment by local federal land managers to avoid important or sensitive areas and to ensure consistency with resource management objectives.

Step 4 – The corridor locations presented in the draft PEIS were further evaluated and revised, as appropriate, “in response to concerns expressed by the public, states, Tribes, local governments, nongovernmental organizations, and other stakeholders during the public comment period for the draft PEIS and during ongoing government to government consultations.”⁶⁵

The Final PEIS was published in 2008. Ultimately, 121 energy ROW corridors were designated, totaling approximately 6,112 miles in length, as shown in the table below:

63. West-Wide Energy Corridor (WECC), Draft PEIS, Designation of Energy Corridors on Federal Land in the 11 Western States (DOE/EIS-0386), at ES-13 (Dec. 2007) (hereinafter, *Draft PEIS*).

64. According to the Department of Interior, the corridor designations will allow utilities to apply for siting authority for projects adjacent to existing ROWs and utilities which control existing ROWs will not have to reapply or provide any additional information to the siting agency in order to use their existing ROW. See Bureau of Land Mgmt., Approved Resource Management Plan Amendments/Record of Decision (ROD) for Designation of Energy Corridors on Bureau of Land Management-Administered Lands in the 11 Western States, at 14 (Jan. 2009).

65. *Final PEIS*, *supra* note 44, at S-19-S-20.

TABLE S-1
 Number, Total Linear Miles, and Acres of Federal Energy Corridors
 Designated under Section 368 as the Proposed Action⁶⁶

State	Number of Corridors	Miles of Corridors	Corridor Area (acres)	Miles Incorporating Existing Developed Utility ROWs ^a	Miles Incorporating Existing Developed Transportation ROWs ^a	Percentage of Length Incorporating Existing Developed Utility and Transportation ROWs ^b
Arizona	16	650	386,567	505	74	81
California	20	823	672,503	684	304	86
Colorado	19	426	260,954	354	59	86
Idaho	14	314	123,108	173	39	60
Montana	8	236	49,308	51	36	33
Nevada	34	1,622	904,771	973	276	69
New Mexico	4	293	121,064	225	31	79
Oregon	12	565	230,593	240	72	54
Utah	14	692	370,382	371	155	68
Washington	2	51	6,198	51	9	100
Wyoming	18	438	185,592	286	82	72
Wyoming	131 ^c	6,112 ^d	3,311,041 ^c	3,914	1,138	71
Total						

^a Miles of corridors that would be designated under the Proposed Action that follow or incorporate authorized ROWs with existing utility or transportation infrastructure.

^b Because some proposed corridor locations may incorporate both “developed utility” and “developed transportation” ROWs, the stated percentages cannot be obtained by simply summing the mileages of the existing utility and transportation ROWs, since summing these mileage estimates would overestimate the actual mileages of developed ROWs within the proposed corridors.

^c The total is then the sum of the state numbers because some corridors cross state boundaries, and these are included in each appropriate state total.

^d Slight difference between indicated total and the sum of the stated entries is due to rounding.

Following the publication of the Final PEIS, the agencies each issued a Record of Decision amending their respective land management plans and adopting uniform interagency operating procedures for reviewing applications to site facilities within energy ROW corridors.⁶⁷

2. Energy ROW Corridors in Other States

In contrast to the high priority accorded to the designation of energy ROW corridors on federal lands in the eleven Western States, little agency activity has

66. *Id.* at S-25.

67. *E.g.*, Bureau of Land Mgmt., Approved Resource Management Plan Amendments/Record of Decision (ROD) for Designation of Energy Corridors on Bureau of Land Management-Administered Lands in the 11 Western States (Jan. 2009); Record of Decision: USDA Forest Service Designation of Section 368 Energy Corridors on National Forest System Land in 11 Western States (Jan. 14, 2009).

occurred with respect to the designation of such corridors in the other thirty-nine States. Relatively speaking, these other States contain far less federally-owned lands than the Western States.

In 2008, the DOE issued a notice of the agencies' intent to prepare a PEIS for the designation of energy corridors on federal lands in the other thirty-nine States and to amend land use plans to incorporate the corridors.⁶⁸ This notice requested comments from the general public, tribes, states, and industry not only to identify environmental issues, but also to obtain specific suggestions on where the corridors should be located to serve the goal of improving energy delivery to population centers. The notice generated relatively little interest and few suggestions. Although the notice stated that the agencies plan to issue a Draft PEIS in 2009,⁶⁹ thus far, no Draft PEIS has been issued despite the passage of the statutory deadline of August 8, 2009.

3. Process for Filing Applications to Site Electric Transmission Facilities in Energy ROW Corridors

Notably, an applicant can apply to site an electric transmission facility on federal lands either inside or outside of the designated energy ROW corridors. However, if the applicant seeks to site a facility outside the already-designated corridors, the applicant will not receive the benefit of coordinated interagency application procedures (which the agencies refer to as a "virtual 'one-stop shop'" process for applications because only one application need be submitted, not multiple applications to multiple agencies).⁷⁰ Also, the applicant likely will face a more difficult process to amend land use plans and perform new environmental analyses.

There are several new electric transmission projects proposed on federal lands in the Western States. For example, more than seventy-five percent of the routes for new two projects, by Chinook Power Transmission, L.L.C. and Zephyr Power Transmission, L.L.C., are on federal lands.⁷¹ These projects are under development in the States of Montana, Wyoming, and Nevada.⁷²

V. THE DOE'S AUTHORITY UNDER SECTION 1221 TO DESIGNATE NIETCS AND HOW THAT AUTHORITY HAS BEEN IMPLEMENTED IN PRACTICE

A. *National Interest Electric Transmission Corridors in Congested Geographic Areas*

In addition to the new process for the siting of transmission facilities on federal lands established in Section 368, Section 1221 of EPAct 2005 established a new process for the siting of transmission facilities in other geographic areas experiencing electric transmission congestion.⁷³ Section 1221 embodies a four-part approach to the siting of transmission facilities in these congested areas.⁷⁴

68. 73 Fed. Reg. 57,613 (Oct. 3, 2008).

69. *Id.* at 57,616.

70. *Final PEIS*, *supra* note 44, at S-5, S-6.

71. *Chinook Power Transmission*, L.L.C., 126 F.E.R.C. ¶ 61,134, at note 6 (2009).

72. *Id.* at 2.

73. 16 U.S.C. § 824p(a)(1) (2005).

74. 16 U.S.C. § 824p(a)(2) (2005).

First, Congress directed the Secretary of the DOE to study electric transmission congestion.⁷⁵ Second, based on the results of such study, Congress vested the Secretary of the DOE with authority to designate NIETCs (at the Secretary's option).⁷⁶ NIETCs are geographic areas experiencing transmission congestion that adversely affects consumers and wherein the relief of congestion would promote this country's energy independence, national security, and economic growth. Third, Congress allowed the states the opportunity to act first on applications to site new transmission facilities within NIETCs.⁷⁷ Fourth, Congress empowered the FERC with new backstop authority to site transmission lines within NIETCs under certain circumstances where, for example, a state fails to act quickly enough or imposes onerous conditions which effectively destroy the economic viability or benefits of a project.⁷⁸

Although Section 1221 designated the DOE as the lead agency for purposes of coordinating all such federal authorizations, the DOE Secretary delegated to the FERC authority to act as the lead agency once an application for backstop siting approval is filed at the FERC.⁷⁹ The FERC is therefore expected to coordinate federal authorizations whenever an application is filed for backstop siting authority, including potentially requests to site transmission projects in ROWs on federal land.

B. Legal Requirement to Conduct Congestion Study Every Three Years, in Consultation with States and Appropriate Regional Entities

Before the DOE Secretary can designate a NIETC, a study of congestion must be performed. As Congress implicitly recognized in EPAct 2005, congestion patterns can change over time.⁸⁰ Congestion, which is here today, may be gone in the future if, for example, energy demands are reduced, transmission capacity is increased, or generation is located closer to loads. Similarly, transmission lines, which are not currently congested, may become congested in the future if, for example, increases in demand occur or more remote generation must be transmitted long distances. Consequently, EPAct 2005 contains a recurring congestion study provision.⁸¹

Specifically, EPAct mandates that “not later than [one] year after August 8, and every [three] years thereafter,”⁸² the Secretary of the DOE, in consultation with affected states and appropriate regional entities,⁸³ conduct a study of electric transmission congestion. After considering alternatives and recommendations from interested parties (including affected states), the Secretary is required to “issue a report, based on that study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest

75. *Id.*

76. *Id.*

77. *Id.*

78. 16 U.S.C. § 824p(b) (2005).

79. Dep't of Energy Delegation Order, No. 00-004.00A (May 16, 2006).

80. EPAct 2005, *supra* note 14, at § 1221(a)(1).

81. 16 U.S.C. § 824p(a)(1) (2005).

82. 16 U.S.C. § 824p(a)(1)-(a)(3) (2005) (emphasis added).

83. The phrase “appropriate regional entities” refers to Electric Reliability Organizations established pursuant to 16 U.S.C. § 824o (2005).

electric transmission corridor.”⁸⁴ The DOE released its first Congestion Study in 2006, and designated two NIETCs in 2007.

C. The DOE's 2006 Congestion Study

The DOE started its study process by issuing a Notice of Inquiry seeking public comments on how to proceed with its first study. The DOE asked for comments on what kind of data the DOE should examine and what criteria the DOE should use to determine whether transmission constraints or congestion exist in certain geographic areas.⁸⁵ After receiving public comments, the DOE held a technical conference.⁸⁶ At the technical conference, a DOE official stated that the DOE's 2006 Congestion Study will include a review of other existing studies and transmission trends.⁸⁷ This DOE official also stated that “[t]he purpose of the review is to identify congested areas based on historical analyses and understand metrics and methodologies used to assess congestion.”⁸⁸ “With regards to the modeling,” the DOE official reported: “the east and west reviews are being separately done but coordinated and the model years we're looking at 2008 as the first model year and then in the east we're looking at 2011 and then 2015 in the west.”⁸⁹

Ultimately, the DOE relied on information and data from private consultants, as well as regional transmission and reliability organizations (including utility members of those organizations). For the Eastern Interconnection, the DOE's 2006 Congestion Study relied primarily on an analysis provided by the consulting firm CRA International.⁹⁰ For the Western Interconnection, the DOE relied primarily on an analysis provided by the regional reliability group, within the WECC, called the Western Congestion Assessment Task Force (WCATF).⁹¹

The DOE's 2006 Congestion Study classified three types of areas that “merit further Federal attention:” 1) Critical Congestion Areas; 2) Congestion Areas of Concern and 3) Conditional Congestion Areas.⁹² The DOE concluded that the Atlantic coastal area from New York to Virginia, as well as parts of Southern California, fell within the category of Critical Congestion Areas. The DOE also concluded that the New England area, the Phoenix-Tucson, Arizona area, the Seattle-Portland area, and the San Francisco Bay area fell within the category of Congestion Areas of Concern. Finally, the DOE concluded that the Montana-Wyoming area, the Dakotas, Kansas, Oklahoma, Illinois, Indiana,

84. 16 U.S.C. § 824p(a)(2) (2005).

85. 71 Fed. Reg. 5,660 (Feb. 2, 2006).

86. Transcript of Public Technical Conference on U.S. Dep't of Energy Congestion Study and Criteria for Designation of Nat'l Interest Electric Transmission Corridors (March 29, 2006), available at http://nietc.anl.gov/documents/docs/Transcript_Public_41206.pdf.

87. *Id.* at 3.

88. *Id.*

89. *Id.*

90. DOE, NAT'L ENERGY TRANSMISSION CONGESTION STUDY 97-99 (2006), available at http://www.oe.energy.gov/DocumentsandMedia/Congestion_Study_2006-9MB.pdf

91. *Id.* at 101-103.

92. *Id.* at 2.

Upper Appalachia, and the Southeastern United States fell within the category of Conditional Congestion Areas.⁹³

In reaching these conclusions, the DOE examined not just actual, historic congestion patterns, but also simulated models of possible future congestion. The DOE used 2008 as the first model year for both Interconnections, and then 2011 for the Eastern Interconnection and 2015 for the Western Interconnection.⁹⁴

The DOE took the position that Congress did not require any form of environmental impact analysis prior to designating a NIETC. Therefore, it did not perform any environmental impact analysis.

D. Legal Authority to Designate a NIETC Based on Study Results and the DOE's Designation of Two NIETCs in the Mid-Atlantic and Southwest Regions of the Country

After conducting the 2006 Congestion Study, the DOE sought public comments on a proposal to designate two large NIETCs – one in the Mid-Atlantic region and one in the Southwest region of the United States. The DOE asserted that these geographic areas were experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers.⁹⁵

The DOE relied upon the following factors, set forth in Section 1221 of EPCAct 2005, when it proposed to designate these areas as NIETCs:

- (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.⁹⁶

Essentially, the DOE drew the boundaries of these NIETCs by:

- (1) starting with areas it concluded to be congested;
- (2) adding in other “source” and “sink” areas; and
- (3) expanding all of these areas out to county boundaries for easy identification.

The DOE described sink areas as urban areas downstream of constraints, where consumers may be adversely affected by “persistent congestion.”⁹⁷ It described source areas as locations with “substantial amounts of existing, under-used generation capacity” and “potential for substantial development of wind, geothermal, or solar generation capacity.”⁹⁸

93. *Id.* at 2-3.

94. The National Council on Electric Policy, *supra* note 2.

95. Press Release, DOE, DOE Designates SW Area and Mid-Atlantic Area Nat'l Interest Elec. Transmission Corridors (Oct. 2, 2007), *available at* http://nietc.anl.gov/documents/docs/NIETC_Designation_News_Release.pdf.

96. 16 U.S.C. § 824p(a)(2) (2005).

97. Notice of Draft Nat'l Interest Elec. Transmission Corridor Designations and Opportunity for Comment, 72 Fed. Reg. 25,838, 25,918 (May 7, 2007).

98. *Id.* at 25,838, 25,918.

Ultimately, the DOE designated a Mid-Atlantic NIETC covering each of the Counties listed in the chart below:

Mid-Atlantic Area National Interest Electric Transmission Corridor In Docket No. 2007-OE-01		
DELAWARE (3 of 3 counties)		
Kent County	New Castle County	Sussex County
WASHINGTON DC		
MARYLAND (22 of 24 counties and Baltimore City)		
Allegany County	Dorchester County	Queen Anne's County
Anne Arundel County	Frederick County	St. Mary's County
Baltimore County	Garrett County	Talbot County
Calvert County	Harford County	Washington County
Caroline County	Howard County	Wicomico County
Carroll County	Kent County	Worcester County
Cecil County	Montgomery County	City of Baltimore
Charles County	Prince George's County	
NEW JERSEY (21 of 21 counties)		
Atlantic County	Gloucester County	Ocean County
Bergen County	Hudson County	Passaic County
Burlington County	Hunterdon County	Salem County
Camden County	Mercer County	Somerset County
Cape May County	Middlesex County	Sussex County
Cumberland County	Monmouth County	Union County
Essex County	Morris County	Warren County
NEW YORK (47 of 62 counties)		
Albany County	Kings County	Queens County
Bronx County	Lewis County	Rensselaer County
Broome County	Livingston County	Richmond County
Cayuga County	Madison County	Rockland County
Chenango County	Monroe County	St. Lawrence County
Clinton County	Montgomery County	Saratoga County
Columbia County	Nassau County	Schenectady County
Delaware County	New York County	Schoharie County
Dutchess County	Niagara County	Seneca County
Erie County	Oneida County	Suffolk County
Franklin County	Onondaga County	Sullivan County

Fulton County	Ontario County	Ulster County
Genesee County	Orange County	Wayne County
Greene County	Orleans County	Westchester County
Herkimer County	Otsego County	Wyoming County
Jefferson County	Putnam County	
OHIO (7 of 88 counties)		
Belmont County	Harrison County	Stark County
Carroll County	Jefferson County	
Columbiana County	Monroe County	
PENNSYLVANIA (52 of 67 counties)		
Adams County	Dauphin County	Montour County
Allegheny County	Delaware County	Northampton County
Armstrong County	Fayette County	Northumberland County
Beaver County	Franklin County	Perry County
Bedford County	Fulton County	Philadelphia County
Berks County	Greene County	Pike County
Blair County	Huntingdon County	Schuylkill County
Bradford County	Indiana County	Snyder County
Bucks County	Jefferson County	Somerset County
Butler County	Juniata County	Susquehanna County
Cambria County	Lackawanna County	Union County
Carbon County	Lancaster County	Wayne County
Centre County	Lebanon County	Washington County
Chester County	Lehigh County	Westmoreland County
Clearfield County	Luzerne County	Wyoming County
Clinton County	Mifflin County	York County
Columbia County	Monroe County	
Cumberland County	Montgomery County	
VIRGINIA (15 of 95 counties and 7 of 39 independent cities)		
Arlington County	Page County	City of Harrisonburg
Clarke County	Prince William County	City of Fairfax
Culpeper County	Rappahannock County	City of Falls Church
Fairfax County	Rockingham County	City of Manassas
Fauquier County	Shenandoah County	City of Manassas Park
Frederick County	Stafford County	City of Winchester
Loudon County	Warren County	
Madison County	City of Alexandria	
WEST VIRGINIA (42 of 55 counties)		
Barbour County	Jackson County	Pocahontas County
Berkeley County	Jefferson County	Preston County
Boone County	Kanawha County	Putnam County
Braxton County	Lewis County	Randolph County
Brooke County	Marion County	Ritchie County

Calhoun County	Marshall County	Roane County
Clay County	Mason County	Taylor County
Doddridge County	Mineral County	Tucker County
Gilmer County	Monongalia County	Tyler County
Grant County	Morgan County	Upshur County
Hampshire County	Nicholas County	Webster County
Hancock County	Ohio County	Wetzel County
Hardy County	Pendleton County	Wirt County
Harrison County	Pleasants County	Wood County

Source: National Interest Electric Transmission Corridor Report Designating the Mid-Atlantic Area National Interest Electric Transmission Corridor and the Southwest Area National Interest Electric Transmission Corridor, 72 Fed. Reg. 56,992 (Oct. 5, 2007).

The DOE also designated a Southwest NIETC covering each of the Counties listed in the chart below:

Southwest Area National Interest Electric Transmission Corridor In Docket No. 2007-OE-02		
CALIFORNIA (7 of 58 counties)		
Imperial County	Orange County	San Diego County
Kern County	Riverside County	
Los Angeles County	San Bernardino County	
ARIZONA (3 of 15 counties)		
La Paz County	Maricopa County	Yuma County

Source: National Interest Electric Transmission Corridor Report Designating the Mid-Atlantic Area National Interest Electric Transmission Corridor and the Southwest Area National Interest Electric Transmission Corridor, 72 Fed. Reg. 56,992 (Oct. 5, 2007).

The unusually large size of these corridors, encompassing some areas where the DOE's Congestion Study did not find congestion to exist, led to a flurry of court appeals.

E. Judicial Challenges to the DOE's NIETC Designations: Appeals in Ninth Circuit by States and Other Parties

Thirteen petitions for review of the DOE's orders were filed in multiple Circuits of the U.S. Court of Appeals. Ultimately, these petitions were consolidated in the Ninth Circuit. Petitioners include states, public utility or service commissions, a governmental utility, a home builder, environmental

groups, and community organizations.⁹⁹ Each petition questioned the legality of the DOE's NIETC designations on a variety of grounds. The states and commissions were particularly concerned about the large breadth of the NIETCs, in which state authority potentially might be pre-empted through the FERC backstop siting provisions in EAct 2005. A common legal argument raised by the petitioners is that the DOE exceeded its statutory authority by designating overly broad corridors in areas where the DOE's 2006 Congestion Study did not find any congestion to exist.

For example, a group of State Petitioners¹⁰⁰ argued that the DOE's inclusion of source and sink areas within the NIETCs was contrary to the plain language of the statute because those areas were not shown to be experiencing congestion.¹⁰¹ They also challenged the procedural process employed by the DOE, arguing, for example, that the DOE failed to comply with rulemaking requirements of the Administrative Procedure Act.¹⁰²

A subgroup of Eastern State Petitioners¹⁰³ further argued that the DOE's designation of the Mid-Atlantic NIETC, in particular, violated the law because the DOE failed to consult properly with the affected Eastern States of New York, Pennsylvania, New Jersey, and Virginia when conducting its 2006 Congestion Study.¹⁰⁴ They asserted that the DOE's Designation Order was deficient because the Order failed to: 1) adequately document and explain why consumers are "adversely affect[ed]" (and instead just assumed consumers were always adversely affected without engaging in any quantifications), and 2) adequately explain how the purported existence of some "persistent" congestion justified the DOE's designation of a geographically massive Mid-Atlantic region.¹⁰⁵

A subgroup of Western Petitioners¹⁰⁶ asserted that the DOE violated the plain language of the law and exceeded the limited authority granted to it by Congress when the DOE designated an overly broad Southwest NIETC.¹⁰⁷ They contended that the DOE's designation of the Southwest NIETC was not based on

99. These Petitioners are: Pennsylvania Public Utility Commission, State of New York, Commonwealth of Virginia, Arizona Corporation Commission, Commonwealth of Pennsylvania, New Jersey Board of Public Utilities, Public Service Commission of the State of New York, Public Utilities Commission of the State of California, Imperial Irrigation District, The Wilderness Society, Piedmont Environmental Council, Toll Brothers, Governor Edward G. Rendell and the Pennsylvania Department of Environmental Protection, and Communities Against Regional Interconnection. Their petitions for review were consolidated under the lead case, *The Wilderness Society, et al. v. U.S. Dep't of Energy*, Case No. 08-71074 (9th Cir. 2009).

100. State Petitioners include the Pennsylvania Public Utility Commission, Governor Edward G. Rendell and the Pennsylvania Department of Environmental Protection, New Jersey Board of Public Utilities, State of New York, Public Service Commission of the State Of New York, Commonwealth of Virginia, Public Utilities Commission of the State of California, and Arizona Corporation Commission.

101. State Petitioners' Brief at 28, *The Wilderness Society v. U.S. Dept. of Energy*, No. 08-71074 (9th Cir. May 14, 2009).

102. *Id.* at 28-35.

103. Eastern State Petitioners include the Pennsylvania Public Utility Commission, Governor Edward G. Rendell and the Pennsylvania Department of Environmental Protection, New Jersey Board of Public Utilities, State of New York, Public Service Commission of the State of New York, and Commonwealth of Virginia.

104. Eastern State Petitioners' Brief at 11-19, *The Wilderness Society v. U.S. Dept of Energy*, No. 08-71074 (9th Cir. May 14, 2009) (citing 16 U.S.C. § 824p(a) (2005)).

105. *Id.* at 20-30.

106. Western Petitioners include the Arizona Corporation Commission, Imperial Irrigation District, and Public Utilities Commission of the State of California.

107. Western Petitioners' Brief at 1-5, *The Wilderness Society v. U.S. Dept. of Energy*, No. 08-71074 (9th Cir. May 14, 2009).

substantial evidence of transmission congestion and that the DOE acted arbitrarily by including areas not shown to be congested in the DOE's Study, while omitting other geographic areas in the West that the Study actually showed to be heavily congested.¹⁰⁸ They also contended that the DOE unlawfully relied on mere simulations of possible future congestion, contrary to statutory language requiring that a geographic area be "experiencing" congestion currently and the three-year restudy provision in EPAct 2005 which is designed to address future congestion.¹⁰⁹ The Western Petitioners further asserted that the DOE's designation of ten entire counties in the Southwest, comprising 65,000 square miles, cannot reasonably be interpreted as a "corridor" as that term is commonly understood in the electric industry.¹¹⁰ In addition, they argued that the DOE acted contrary to law when it failed to consider alternatives to the Southwest NIETC, including local generation, increased demand response, and more reasonably tailored corridor boundaries in the limited areas where congestion was actually found to exist.¹¹¹

One of these Western Petitioners, the Arizona Corporation Commission, also argued that the DOE violated the law by failing to consult with it properly and that the DOE failed to adequately support its conclusion that source areas in Arizona have substantial amounts of excess generation capacity that could increase the diversification of power supplied to Southern California.¹¹²

A group of Environmental Petitioners argued that the DOE's designation of the NIETCs violated the NEPA, Endangered Species Act (ESA), and National Historic Preservation Act (NHPA) because the DOE failed to: (1) perform an Environmental Assessment (EA) under NEPA; (2) consult with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) as required by ESA; and (3) consult with the Advisory Council on Historic Preservation as required by NHPA.¹¹³ The Environmental Petitioners asserted that the designation of NIETCs is a major federal action, comparable to the designation of a wilderness area or resource management plan, and requires NEPA review.¹¹⁴ Since the DOE did not prepare an EA, environmental impact statement (EIS), or identify an applicable categorical exclusion that would relieve it of the duty to prepare one, they contended the DOE violated NEPA.¹¹⁵ To illustrate the necessity of NEPA review, the Environmental Petitioners identified some of what they claimed to be the foreseeable environmental effects of designation of NIETCs including habitat fragmentation, wildlife disturbance, habitat loss, air pollution, and climate change impacts.¹¹⁶

The DOE answered that its NIETC designations were consistent with Congress' authorization and entitled to deference from the Court. With respect to its "source-and-sink" approach, the DOE argued that it was not contrary to the

108. *Id.* at 9-10.

109. *Id.* at 46.

110. *Id.* at 10. .

111. *Id.* at 65-67.

112. *Id.* at 26-32, 61-63.

113. Environmental Petitioners Brief at 1-25, *The Wilderness Society v. U.S. Dept. of Energy*, No. 08-71074 (9th Cir. Apr. 4, 2009).

114. *Id.* at 15.

115. *Id.* at 3-4.

116. *Id.* at 8.

language limiting designations to areas “experiencing” congestion. The DOE also asserted that its designations were not contrary to the term “corridor,” stating that Congress used “corridor” not as a term of restriction, but to describe “any geographic area” where congestion might be experienced. The DOE also asserted that its decision to include some source areas, and not others, was appropriate given the circumstances of the areas included and the DOE’s decision not to extend the NIETCs more than necessary to provide a reasonable range of potential transmission solutions.¹¹⁷ In the DOE’s view, its corridor designations were supported by the record. It alleged that “Petitioners’ complaint that [the] DOE did not quantify ‘persistent’ misses the point.”¹¹⁸ The DOE argued that it “used ‘persistent’ not to establish a numerical threshold, but to make the common-sense observation that congestion must be ‘recurrent’ to warrant consideration of new transmission facilities.”¹¹⁹

With respect to the relevant procedural requirements, the DOE stated that it:

solicited comments from States and interested parties at every stage of the administrative proceedings . . . [and that] [w]hile the State Petitioners contend that DOE’s duty to prepare the Congestion Study ‘in consultation with affected States’ required more than notice-and-comment proceedings, their argument finds no support in the statutory language.¹²⁰

In response to environmental concerns, the DOE argued that it acted in accordance with environmental statutes when designating the NIETCs and, because the Designation Order itself has no environmental effects or impacts, it is not subject to review under the statutes cited by Environmental Petitioners.¹²¹ Any necessary environmental review will occur, instead, when a permit for a specific project is requested from the FERC.

A group of intervenors supporting the DOE argued that Congress afforded the DOE discretion and that the DOE’s actions in designating NIETCs were within the scope of the expert discretion that Congress entrusted to DOE.¹²² These intervenors claimed:

it is impossible to review the voluminous record that DOE compiled in this case, the numerous technical studies DOE relied upon, and the multiple instances of public outreach and request for comments, without concluding that DOE gave thorough consideration to large amounts of complex information, and applied its expertise and judgment in accordance with Congressional intent.¹²³

In response to challenges to the DOE’s decision based on alleged environmental consequences, the intervenors stated that the DOE’s actions do not have such consequences because the DOE’s Orders neither authorize any facilities to be constructed nor commit any government or other resources to any particular course of action regarding any existing or proposed new transmission infrastructure.¹²⁴ They further argued that any environmental impacts caused by

117. Answering Brief for Respondents U.S. Dept. of Energy at 20, *The Wilderness Society v. U.S. Dept. of Energy*, No. 08-71074 (9th Cir. Mar. 30, 2009).

118. *Id.* at 25.

119. *Id.*

120. *Id.* at 26.

121. *Id.* at 49-50.

122. Brief of Intervenors in Support of Respondent at 10, *The Wilderness Society v. U.S. Dept. of Energy*, No. 09-71074 (9th Cir. Apr. 16, 2009).

123. *Id.*

124. *Id.* at 11.

transmission siting that occurs as a result of NIETC designation, would occur after the FERC has taken action; thus, there is no causal connection between the DOE's designation and the harmful impacts that NEPA, ESA, and NHPA are designed to prevent.¹²⁵

The Ninth Circuit has not yet ruled on any of these arguments.

F. The DOE's 2009 Congestion Study

While this litigation was ongoing, the DOE commenced its second Congestion Study under the three-year restudy provision in EAct 2005. In February of 2009, the DOE held a technical workshop to discuss how the 2009 DOE Congestion Study would be conducted.¹²⁶ With respect to the Western Interconnection, a DOE official stated that the DOE will not perform its own study, but will instead rely on projections from TEPPC. This official indicated that the 2009 Congestion Study will likely cover the many positive actions, including energy efficiency, demand response, and additional local generation, which have occurred in the critical congestion areas. He also stated that the DOE will look closely at the areas previously identified as containing any kind of congestion or constraints in the 2006 Congestion Study. He continued that all of these areas will be reviewed and the DOE cannot rule out that new areas may be considered congested in 2009.¹²⁷

Although this second Congestion Study was expected to be released in August of 2009, at the time of publication of this article, the DOE still had not noticed the Study for comments. Therefore, it is not known publicly what the results of that Study will show and how those results will impact the designation of the existing NIETCs or potential new NIETCs.

VI. THE FERC'S AUTHORITY UNDER SECTION 1221 TO SITE TRANSMISSION FACILITIES IN NIETCS AND HOW THAT AUTHORITY HAS BEEN IMPLEMENTED IN PRACTICE

After the DOE lawfully designates a NIETC based on the results of its Congestion Study, the FERC's backstop authority to site transmission facilities in that NIETC is generally triggered, subject to some notable exceptions or pre-conditions described below.

A. Legal Findings Required Before the FERC Can Issue Permit

Before the FERC can issue a permit to construct or modify transmission facilities in a NIETC, it must make the following findings:

- (1)(A) a State in which the transmission facilities are to be constructed or modified does not have authority to—
 - (i) approve the siting of the facilities; or
 - (ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

125. *Id.* at 12.

126. Technical Workshop in Support of DOE 2009 Congestion Study, 74 Fed. Reg. 7679 (Feb. 19, 2009); Transcript of Spring 2009 Technical Workshop in Support of U.S. Department of Energy 2009 Congestion Study (March 25-26, 2009).

127. *Id.*

(B) the applicant for a permit is a transmitting utility under this chapter but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or

(C) a State commission or other entity that has authority to approve the siting of the facilities has—

(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or

(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible;

(2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;

(3) the proposed construction or modification is consistent with the public interest;

(4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;

(5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and

(6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.¹²⁸

In some instances—including where interstate compacts are entered into by states—the FERC may lack authority to issue any permit at all.¹²⁹

1. Exceptions to the FERC’s Backstop Siting Authority

Significantly, if a state is concerned about federal preemption of its siting authority by the FERC, Congress provided an avenue to avoid this risk by entering into a compact with other neighboring states to form a regional transmission siting agency. Section 1221 of EAct 2005 authorizes three or more contiguous states to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to—“(A) facilitate siting of future electric energy transmission facilities within those States; and (B) carry out the electric energy transmission siting responsibilities of those States.”¹³⁰

Congress envisioned that, in lieu of the FERC, these “regional transmission siting agencies [would] have. . . authority to permit siting of transmission facilities, including facilities in [NIETCs] (other than facilities on property owned by the United States).”¹³¹

Carving out a major exception to the FERC’s authority, Section 1221 specifically states that:

The Commission shall have no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary [of the DOE] makes, after notice and an opportunity for a hearing, the finding described in subsection (b)(1)(C) of this section.¹³²

128. 16 U.S.C. § 824p(b) (2005).

129. 16 U.S.C. § 824p(i)(4) (2005).

130. 16 U.S.C. § 824p(i)(1) (2005).

131. 16 U.S.C. § 824p(i)(3) (2005).

132. 16 U.S.C. § 824p(i)(4) (2005).

Congress also carved out the Electric Reliability Council of Texas (ERCOT) entirely from the FERC's siting authority, most likely due to the exclusively intrastate (rather than interstate) nature of transmission operations in ERCOT.¹³³

According to a survey published by the National Council on Electric Policy,¹³⁴ many states have statutes with language encouraging interstate cooperation, joint hearings and investigations, or compacts.¹³⁵ The following chart, produced by the Council, identifies such states:

Table 2: State Coordination Language¹³⁶

Cooperation/Coordination	Joint Investigations, Hearing, Orders	Compacts
Alabama	Delaware	California
Illinois	Idaho	Connecticut
Kansas	Illinois	Delaware
Minnesota	Kansas	Illinois
Mississippi	Minnesota	Kansas
North Carolina	Missouri	Maryland
North Dakota	New Mexico	New Jersey
New Hampshire	Ohio	New Mexico
Ohio	Vermont	Ohio
Oregon	Washington	South Carolina
Rhode Island		Vermont
Wyoming		Washington
		Wisconsin

In practice, many states have coordinated or worked cooperatively together on power supply and transmission planning issues. For example, states falling within the operating region of the MISO formed an "Organization of MISO States."¹³⁷ As also discussed in Section XI of this article, the Western Governors' Association launched a major initiative to coordinate the development of renewable energy zones and transmission planning for the delivery of renewable energy West-wide. Relatively few states, however, go so far as to establish formal "interstate compacts."¹³⁸ Since the enactment of EAct

133. 16 U.S.C. § 824p(k) (2005).

134. The National Council on Electricity Policy, *supra* note 2.

135. *Id.* at 7-8.

136. *Id.* at 8.

137. Information on the Organization of MISO States can be found at <http://www.misostates.org/>.

138. Prior to the enactment of EAct 2005, an interstate compact was entered into by the States of Idaho, Montana, Oregon, and Washington to form the Northwest Power and Conservation Council. This Council, authorized by the Northwest Power Act of 1980, was formed to implement a regional power plan that balances the Northwest's energy and environmental needs. [NWCouncil.org](http://www.nwcouncil.org), *Northwest Power and Conservation Council*, October 16, 2007, www.nwcouncil.org. In September 2009, the Council released its Draft Sixth Northwest Electric Power and Conservation Plan which identified transmission reliability and efficiency issues in the regional power plan for the first time. [NWCouncil.org](http://www.nwcouncil.org), *The Sixth Northwest Power and Conservation Plan* (September 2009), available at <http://www.nwcouncil.org/energy/powerplan/6/default.htm> (last visited Sept. 30, 2009).

2005, none of the states within the NIETCs entered into a compact establishing a regional transmission siting agency.

While cooperation among states does occur, it tends to break down when cost allocation disputes arise. States understandably are hesitant to give up their autonomy with respect to cost allocation issues. Politically, it is difficult for state officials to justify a high-cost transmission project when their ratepayers are asked to foot the bill for the project, but the project arguably benefits others. But, if states do not pro-actively resolve cost allocation issues among themselves on a regional basis, they risk losing that autonomy to the FERC.

2. Preconditions to the FERC's Siting Authority in a NIETC

In the absence of an interstate compact, some applicants may apply directly to the FERC for a permit, while others must first apply to a state commission or other state entity with authority over the siting of transmission facilities.

a. When an Applicant Can Apply Directly to the FERC

There are three provisions enabling an applicant to go directly to the FERC, without first passing through a state's siting process, including where: (1) the state lacks any authority to approve the siting of the proposed facilities; (2) the state lacks any authority to consider the interstate benefits of the proposed facilities; or (3) the applicant is a "transmitting utility,"¹³⁹ "but does not qualify to apply for a permit or siting approval for the proposed facilities in a State because the applicant does not serve end-use customers in the State."¹⁴⁰

Of these three provisions, the last one is likely the easiest route for proceeding directly to the FERC, without triggering extensive litigation over what authority a state actually does or does not possess. Whether or not an applicant serves end-use customers in a state is a relatively easy factual question to determine. It may be more difficult to proceed under the other two provisions because, traditionally, states do have authority to approve the siting of transmission facilities, at least when the facilities are proposed by utilities serving consumers in their states. Also, so long as a state statute does not expressly prohibit a state commission from considering interstate benefits, either directly or indirectly by limiting a required showing of need solely to consumers in its state, the state commission may be able to fit its consideration of interstate benefits under the broad umbrella of a public interest or reasonableness test.¹⁴¹

The provision enabling a transmitting utility, which does not qualify for a state permit due to a lack of end-use customers, to proceed directly to the FERC is most useful for the burgeoning, new breed of merchant and joint venture companies in the electric transmission industry. These stand-alone companies are created solely to provide interstate transmission service, rather than to perform traditional load-serving functions. Not only have new merchant transmission companies entered the market to compete with traditional utilities, but traditional utilities (or their parent companies) have themselves started

139. A "transmitting utility" is defined as "an entity...that owns, operates, or controls facilities used for the transmission of electric energy— (A) in interstate commerce; (B) for the sale of electric energy at wholesale." 16 U.S.C. § 796(23) (2005).

140. 16 U.S.C. § 824p(b)(1)(A) & (B) (2005).

141. Alternatively, to mitigate the risk of federal preemption, a state's legislature could add language to its statute authorizing its state commission to consider interstate benefits.

investing in separate joint venture companies focusing exclusively on large interstate transmission projects. When building a transmission project in a NIETC, these companies potentially can seek a permit directly from the FERC, rather than from one or more states.

In this regard, one possible test case to watch involves the siting of a large new transmission project, known as the Potomac-Appalachian Transmission Highline (PATH), created through a joint venture of American Electric Power (AEP) and Allegheny Energy (Allegheny). The project is a 765 kV transmission line that would originate at an existing substation near St. Albans, West Virginia, cross through Virginia, and end at a proposed, new substation near New Market, Maryland.¹⁴²

The Potomac Edison Company (the utility subsidiary of Allegheny in Maryland) filed an application, with the Maryland Public Service Commission (Maryland Commission), on behalf of the joint venture company, PATH Allegheny Transmission Company, L.L.C. (PATH), for a certificate to construct, own and operate the segments of the line in Maryland. Those segments fall within the Mid-Atlantic NIETC.¹⁴³ On September 9, 2009, the Maryland Commission rejected the application on the ground that PATH did not qualify as an “electric company” under Maryland law and therefore could not obtain a certificate of public convenience and necessity.¹⁴⁴ It reasoned: “An electric company is defined as ‘a person who physically transmits or distributes electricity in the State to a retail electric customer’” and PATH did not meet that criteria.¹⁴⁵ Thus, it is possible an application could now be submitted to the FERC.

b. When an Applicant Must First Apply to a State

If an applicant does not fit within any one of the three provisions above, it cannot proceed to the FERC until it first applies for a state permit and the state commission or other entity with authority has either:

- (i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or
- (ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.¹⁴⁶

State commissions have taken the position that the one-year clock for their approval does not begin to run until deficiencies in an application are remedied

142. See PATH: Potomac Appalachian Transmission Highline, <http://www.pathtransmission.com/> (2009).

143. Order No. 82729, *In the Matter of Application of the Potomac Edison Company on Behalf of PATH Allegheny Transmission Co., L.L.C. For a Certificate of Public Convenience and Necessity to Construct the Maryland Segments of a 765 KV Electric Transmission Line and a Substation in Frederick County, Maryland*, Case No. 9198, Maryland Public Service Commission (May 19, 2009).

144. Order No. 82892, *In the Matter of the Application of the Potomac Edison Company on behalf of PATH Allegheny Transmission, L.L.C. for a Certificate of Public Convenience and Necessity to Construct the Maryland Segments of a 765 kV Electric Transmission Line and Substation in Frederick County, Maryland*, Case No. 8918, Maryland Public Service Commission (Sept. 9, 2009).

145. *Id.* at 4 (citing Maryland PUC § 1-101(h) (2008)).

146. 16 U.S.C. § 824p(b)(C) (2005).

and the application is deemed “complete” to their satisfaction.¹⁴⁷ We anticipate savvy state commissions will soon mimic the FERC’s “pre-filing” process (described in Section VI C. of this article) and require many details of an application, including an identification of environmental impacts, to be fleshed out in advance of the formal filing of that application.

Particularly if an applicant is hesitant to upset the apple cart with a state regulator it must appear before frequently, it may decide not to proceed to the FERC immediately when the one-year clock runs out. Instead, the applicant may wait for its state commission to act, with the hope that the state commission will approve its application favorably if, at the end of the state proceeding, conditions are imposed on the project which the applicant cannot reasonably accept, it may then seek a permit from the FERC, arguing that these conditions render the project economically infeasible or nullify the significant reductions of transmission congestion the project originally was designed to achieve.

B. The FERC’s Legal Responsibility to Coordinate Authorizations by Other Federal Agencies and Act on Applications Expeditiously

Although Section 1221 designated the DOE as the lead agency for purposes of coordinating federal authorizations, the DOE Secretary delegated to the FERC authority to act as the lead agency once an application for backstop siting approval is filed at the FERC.¹⁴⁸ The FERC is therefore expected to coordinate federal authorizations, including environmental reviews, whenever an application is filed for backstop siting authority. To that end, the FERC must:

- [1] Coordinate the Federal authorization and review process . . . with any Indian tribes, multi state entities, and State agencies that are responsible for conducting any separate permitting and environmental reviews of the facility, to ensure timely and efficient review and permit decisions;
- [2] Establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facility;
- [3] Ensure that, once an application has been submitted with such data as the Secretary considers necessary, all permit decisions and related environmental reviews under all applicable Federal laws shall be completed:
 - (i) within 1 year; or
 - (ii) if a requirement of another provision of Federal law does not permit compliance with clause (i), as soon thereafter as is practicable.
- [4] Provide an expeditious pre-application mechanism for prospective applicants to confer with the agencies involved to have each agency determine and communicate to the prospective applicant not later than 60 days after the prospective applicant submits a request for such information concerning:
 - (i) the likelihood of approval for a potential facility; and
 - (ii) key issues of concern to the agencies and public.
- [5] Prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law.¹⁴⁹

An applicant should not expect the FERC’s process, as a whole, to take only one year, however, because the FERC divided its process into two phases, including a pre-filing phase and a post-filing phase. As interpreted by the FERC,

147. For example, the Maryland Commission held that the PATH application was “neither complete nor properly filed;” therefore, “any time periods that must expire before PATH might seek authority to construct the proposed project under federal law have not yet begun to run.” *Id.* at 6.

148. Department of Energy Delegation Order, No. 00-004.00A (May 16, 2006).

149. 16 U.S.C. § 824p(h) (2005).

the one-year statutory clock does not begin to run until the pre-filing process ends and a complete application is formally filed.

C. The FERC's Promulgation of Regulations to Implement Its Backstop Siting Authority

1. Overview of Pre-Filing and Post-Filing Processes

In 2006, the FERC issued Order No. 689, adopting regulations for filing applications for permits to site interstate electric transmission facilities.¹⁵⁰ In this Final Rule, the FERC interpreted the new permitting authority added to FPA Section 216 by EAct 2005, and discussed the interplay between the FERC's jurisdiction and the states' jurisdiction. The FERC concluded that FPA Section 216 "permits parallel Commission-State processes."¹⁵¹ Therefore, the FERC's pre-filing process could occur at the same time as the state process. Nevertheless, the FERC decided to allow states one full year to review and rule on a permit application before the FERC's pre-filing process begins.¹⁵² Under the regulations originally promulgated by the FERC, once this year has elapsed an applicant may commence a pre-filing process at the FERC if the state commission: (1) denies the application, (2) withholds approval of the application for more than one year after the application is filed, or (3) puts conditions on the construction or modification of the facilities in such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.¹⁵³

The first step of the FERC's pre-filing process requires the applicant to meet with the Director of the Office of Energy Projects (OEP) to provide preliminary project information. After the initial meeting, if the Director of OEP determines that it is appropriate to begin the pre-filing process, a notice will be issued seeking comment and outlining the FERC's plan to conduct an environmental review of the project. Notably, parties cannot formally intervene in the pre-filing process;¹⁵⁴ anyone that wishes to intervene must wait until the formal application process begins and then file a motion to intervene under Section 385.214 of the FERC's rules.¹⁵⁵ After the notice of the pre-filing process is issued, the applicant is required to implement its Participation Plan—i.e., a plan developed by the applicant designed to maximize stakeholder participation and provide accurate and timely information.¹⁵⁶ The next step in the process is the preliminary environmental review, which includes a NEPA scoping meeting and the preparation and publication of a draft EIS. At the conclusion of the preliminary environmental review, the Director of OEP may give the applicant the authority to formally file its application.¹⁵⁷ The FERC did not provide an

150. Order No. 689 & 689-A, *Regulations for Filing Applications for Permits to Site Interstate Facilities*, 18 C.F.R. parts 50 & 380 (2009) [hereinafter, *Order No. 689 & Order No. 689-A*].

151. *Id.* at 20.

152. *Id.* at 21.

153. *Id.* at 4.

154. *Id.* at 137.

155. *Id.* at 69.

156. 18 CFR 50.4 (2009).

157. *Order No. 689*, *supra* note 149, at 116.

opportunity for stakeholders to challenge the Director's determination that the pre-filing process is complete.¹⁵⁸

FPA Section 216(h)(4)(B)(i) requires that all permit decisions and related environmental reviews be completed within one year. By establishing a pre-filing process in addition to the actual application process, the FERC allowed itself the flexibility to take longer than one year to analyze and act on a proposed project. Although the FERC held that "time is of the essence in the siting of [transmission] facilities" and that the most expeditious way to site transmission facilities is at the state level,¹⁵⁹ the FERC declined to establish a firm timeframe for the pre-filing process and indicated that the pre-filing process may take one year to complete for extensive projects.¹⁶⁰

Upon the formal filing of a complete application, a notice will be issued by the FERC seeking comment and initiating a paper hearing on the merits of the application. Major milestones in the application process include review and stakeholder comment on multiple environmental reports.

2. The FERC's Conclusion that Pre-Filing Process Could Commence Based on State's Denial of Application

Although the FERC concluded that the expansion of its authority was well grounded in FPA Section 216, many states vigorously opposed certain aspects of the promulgated regulations. In Order No. 689, the FERC held that it would "to the maximum extent possible" allow the use of information developed in state proceedings; similarly, the FERC held that it would take all filed information into consideration. With respect to the ultimate determination about whether or not to issue a permit, however, the FERC held that its determination would be based on the "entire record developed in the [FERC] proceeding after due consideration of all of the issues raised."¹⁶¹

A particularly salient point of contention for the states was the FERC's inclusion of a state's denial of a permit application among the factors triggering the FERC's jurisdiction. On rehearing, the New York Public Service Commission (NYPSC) and Minnesota Public Utility Commission (Minnesota PUC), among others, argued that the phrase "withheld approval" in FPA Section 216 could not be interpreted reasonably to include a state's lawful denial of an application.¹⁶² In response, the FERC acknowledged that there is no legislative history on this issue, but denied rehearing of its decision, stating that interpreting the phrase "withheld approval" to include denial of an application is reasonable.¹⁶³

FERC Commissioner Kelly dissented from both the initial rulemaking and the rehearing order with respect to the majority's interpretation of the phrase "withheld approval." On that point, Commissioner Kelly stated that "the

158. *Id.* at 116-117.

159. *Id.* at 115.

160. *Id.* at 112.

161. *Id.* at 125.

162. Petition for Rehearing of the State of New York Public Service Commission at 2-3, Docket No. RM06-12-000 (Dec. 18, 2006); Motions for Leave to Intervene Out of Time and Rehearing Request of the Minnesota Public Utilities Commission and Minnesota Department of Commerce at 4, Docket no. RM06-12-000 (Dec. 18, 2006).

163. *Rehearing Order No. 689-A*, *supra* note 149, at 15.

majority's interpretation flies in the face of the plain language of the statute, the purposes of the statute, well established principles of statutory interpretation and supporting case law, and inappropriately preempts the States in the process."¹⁶⁴ Commissioner Kelly further stated that "[t]he authority to lawfully deny a permit is critically important to the States . . . [and] is a significant inroad into traditional state transmission siting authority."¹⁶⁵

3. Environmental Analysis

The FERC's Final Rule also implements the NEPA requirements that must be met during the review process for each application. The promulgated environmental regulations include an EA requirement, EIS requirement, and list of the environmental reports needed to obtain environmental approval for the project. The FERC held that the purpose of its environmental review is to:

- (1) identify and assess the potential impact on the natural and human environment that would result from the implementation of a proposed project;
- (2) identify and recommend reasonable alternatives, including, as appropriate, alternatives other than transmission lines, and specific mitigation measures to avoid or minimize environmental impact; and
- (3) encourage and facilitate public involvement in the environmental review process.

To that end, the FERC requires that applicants file the following resource reports in addition to meeting the EA and EIS requirements:

- Resource Report 1 – General Requirements
- Resource Report 2 – Water Use and Quality
- Resource Report 3 – Fish, Wildlife, and Vegetation
- Resource Report 4 – Cultural Resources
- Resource Report 5 – Socioeconomics
- Resource Report 6 – Geological Resources
- Resource Report 7 – Soils
- Resource Report 8 – Land Use, Recreation, and Aesthetics
- Resource Report 9 – Alternatives
- Resource Report 10 – Reliability and Safety
- Resource Report 11 – Design and Engineering

Order No. 689 held that the FERC's regulations governing these environmental requirements cover the basic information needed for a generic project, but because each project will be considered on a case-by-case basis additional information may be required.

Requests for rehearing of the Final Rule were filed by the Communities Against Regional Interconnection (CARI), Edison Electric Institute (EEI), Iowa Utilities Board (Iowa UB), Maine Public Utilities Commission and Maine Public Advocate (jointly Maine PUC), Minnesota Public Utilities Commission and Minnesota Department of Commerce (jointly, Minnesota PUC), National Association of Regulatory Utility Commissioners (NARUC), National Rural Electric Cooperative Association (NRECA), New York Public Service

164. *Order No. 689, supra* note 149, at 1.

165. *Id.* at 3.

Commission (New York PSC), and Piedmont Environmental Council (Piedmont). The principal issues addressed on rehearing include: 1) the FERC's interpretation of the phrase "withheld approval" in FPA Section 216 to include a state's lawful denial of an application to site transmission facilities; 2) the scope of the FERC's jurisdiction to issue a permit for the construction of electric transmission facilities in a NIETC; 3) the FERC's pre-filing process; 4) the extent of the authority delegated to the FERC by the DOE; and 5) various NEPA-related issues. After the FERC denied rehearing, appeals soon followed.

VII. JUDICIAL CHALLENGES TO THE FERC'S REGULATIONS IMPLEMENTING ITS BACKSTOP SITING AUTHORITY

In 2009, the U.S. Court of Appeals for the Fourth Circuit decided the first case involving the FERC's backstop siting regulations, *Piedmont Environmental Council v. FERC*.¹⁶⁶ In *Piedmont*, review was sought of the FERC's rulemaking orders implementing FPA Section 216 and the related environmental requirements set forth in NEPA. Petitioners argued that the FERC: (1) incorrectly interpreted the phrase "withheld approval for more than 1 year" to include a state's lawful denial of a permit application; (2) violated NEPA by issuing the Final Rule without preparing an EA or EIS; (3) erred in revising the FERC's NEPA-implementing regulations without consulting the Council on Environmental Quality (CEQ); and (4) arbitrarily and capriciously issued regulations that unduly restrict application requirements for the evaluation of a proposed project's environmental impacts, particularly in the areas of land use, socioeconomics, and the assessment of non-transmission alternatives.¹⁶⁷

The Fourth Circuit reversed the FERC's Orders with respect to the FERC's interpretation of the "withheld approval" language in FPA Section 216. It held that the language in FPA Section 216(b)(1)(C)(i), granting the FERC permitting jurisdiction when a state commission has "withheld approval for more than 1 year after the filing of an application," plainly does not include the denial of an application. As a practical matter, this gives the states the ability to avoid federal preemption entirely by simply denying an application outright (rather than taking too long to act or conditioning an approval excessively). In response to arguments that the Court's interpretation guts the statute, some Congressional Members are seeking to pass new legislation clarifying that a denial of a permit triggers the FERC's backstop authority.¹⁶⁸

With respect to environmental issues, the Court affirmed the FERC's determination that it was not required to prepare an EA or EIS in connection with the FERC's issuance of procedural regulations dealing with the content of permit applications. However, the Court held that the FERC did violate CEQ regulations when it failed to consult with the CEQ before amending its NEPA-implementing regulations to cover these permit applications. As such, the Court

166. *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 314 (4th Cir. 2009).

167. *Id.* at 310-11.

168. E.g., "[t]he Commission may, after notice and an opportunity for hearing, issue a certificate of public convenience and necessity for the construction or modification of a transmission facility if...a State commission...denied a complete application seeking approval for the siting of the facility." Additional information on legislative actions, post-EPAAct 2005, is included in Section X of this article. H.R. 2454, 111th Cong. § 216B.

vacated and remanded the FERC's amendments to its NEPA regulations and directed the FERC to engage in the required consultation with the CEQ.

One judge¹⁶⁹ dissented from the majority opinion of the Court, stating that the FERC correctly interpreted "withheld approval [of a permit application] for more than 1 year" to include cases in which the permit application was denied.¹⁷⁰

The FERC filed a request for rehearing of the Fourth Circuit's decision en banc on April 2, 2009, asserting that the lack of a unanimous decision by the panel points to the ambiguity of Congressional language: "As two judges of this Court have found that the relevant statutory text is clear, but in diametrically opposed directions, one favoring petitioners and one favoring the Commission, logically there must be an ambiguity for which . . . deference is appropriate."¹⁷¹

The FERC further argued that the majority opinion in *Piedmont* significantly impairs the FERC's authority to site facilities in NIETCs because the ruling permits "any state, by outright denying a permit to site or construct transmission facilities, to derail the multi-state transmission projects necessary to assure reliability in the national interest corridors, regardless of how important that project may be to the national interest."¹⁷²

Similarly, in 2009, intervenors in support of the FERC petitioned for rehearing of the Court's decision in *Piedmont*.¹⁷³ Supporting intervenors argued that the majority opinion in *Piedmont* effectively nullifies the transmission siting authority Congress gave to the FERC under EPAct 2005.¹⁷⁴ The Court denied the requests for rehearing en banc.¹⁷⁵

On September 17, 2009, the Edison Electric Institute, American Public Power Association, National Rural Electric Cooperative Association, American Wind Energy Association, Allegheny Power, Trans-Allegheny Interstate Line Co., and San Diego Gas & Electric Co. filed a Petition for a Writ of Certiorari in the U.S. Supreme Court.¹⁷⁶ Responses to that Petition are due on October 21, 2009.

VIII. THE FERC'S EXERCISE OF ITS BACKSTOP SITING AUTHORITY IN PRACTICE

To date, there has been only one pre-filing request for backstop siting authority initiated at the FERC and that request was subsequently withdrawn.¹⁷⁷ The request, by Southern California Edison Company (SCE), involved a

169. See also Dissent of Judge Traxler, *Piedmont Env'tl. Council*, 558 F.3d at 320.

170. *Id.*

171. Petition of Respondent Federal Energy Regulatory Commission For Rehearing En Banc, at 3 Docket Nos. 07-1651, *et al.* (April 2, 2009).

172. *Id.* at 4-5.

173. Petition of Intervenors In Support Of Respondent Federal Energy Regulatory Commission For Rehearing En Banc, at 2, Docket Nos. 07-1651, *et al.* (April 6, 2009). Intervenors In Support Of Respondent include: Edison Electric Institute, American Public Power Assoc., National Rural Electric Cooperative Assoc., American Wind Energy Association, San Diego Gas & Electric Co., Southern California Edison Co., Allegheny Power; Trans-Allegheny Interstate Line Company; And PPL Electric Utilities Corp.

174. *Id.*

175. Order on Request for Rehearing, Docket Nos. 07-1651, *et al.* (April 20, 2009).

176. Petition for Writ of Certiorari, *Edison Elec. Ins. v. Piedmont Env'tl. Council*, No. 09-343 (U.S. Sept. 17, 2009).

177. Application of S. Cal. Edison Co. for Certificate of Pub. Convenience and Necessity to Construct the Devers-Palo Verde No. 2 Transmission Line Project, Cal. PUC (Apr. 11, 2005).

proposed multi-state transmission line, known as the Devers-Palo Verde 2 line or Devers PV2. The line was proposed to be approximately 225 miles long, of which 128 miles would be in California and 97 miles would be in Arizona.¹⁷⁸ SCE stated that “[a] majority of the line would be built within existing rights-of-way within federally approved utility corridors.”¹⁷⁹

The Devers PV2 project required both California and Arizona to issue certificates to construct the transmission line. “SCE filed applications in 2005 and 2006 with the California Public Utilities Commission (CPUC) and the Arizona Corporation Commission (ACC) for approval to construct the . . . transmission project.”¹⁸⁰ The CPUC approved SCE’s application on January 25, 2007.¹⁸¹ However, the ACC denied SCE’s certificate application for the Arizona portion of the Devers PV2 project in June 2007.¹⁸² As a major reason for denying the certificate, the ACC stated that the project would not provide sufficient benefits to Arizona ratepayers.¹⁸³

Following the ACC’s denial of the certificate, SCE continued to pursue approval of the Arizona portion of the project. SCE stated that it was working with stakeholders, regional utilities and planning groups to develop a mutually acceptable alternative plan to present to the ACC and re-file an application for siting authority.¹⁸⁴ In May 2008, SCE also “initiated pre-filing activities with the FERC . . . [and] filed a petition with the CPUC seeking permission to start construction of the project in California to satisfy interconnection requests for new renewable and conventional generation projects near Blythe, California.”¹⁸⁵

But, SCE never ultimately submitted a new application to the ACC nor did it ever “officially” submit a completed application for backstop siting authority at the FERC.¹⁸⁶ Due to changed circumstances, SCE gave up its pursuit of a backstop permit from the FERC.¹⁸⁷ On May 18, 2009, SCE formally notified the FERC of the withdrawal of its pre-filing request, stating that its updated economic analysis does not support the Arizona portion of the project at this time.¹⁸⁸ SCE’s updated economic analysis demonstrated that the economic benefits to California customers to build the Arizona portion of the project are

178. See generally, Southern California Edison: An Edison International Company, *Project Description* (2009), <http://www.sce.com/PowerandEnvironment/Transmission/CurrentProjects/DPV/description.htm>.

179. *Id.*

180. Southern California Edison: An Edison International Company, *Current Project Status* (2009), <http://www.sce.com/PowerandEnvironment/Transmission/CurrentProjects/DPV/projectstatus.htm> (last visited September 30, 2009).

181. Opinion Granting A Certificate of Public Convenience and Necessity, Cal. PUC Dec. No. 07-01-040 (Jan. 25, 2007), available at http://docs.cpuc.ca.gov/published/FINAL_DECISION/64017.htm.

182. Order Denying CEC, 112 Ariz. PUC LEXIS (2007).

183. *Id.* at 5, 6, 11.

184. E.g., Southern California Edison Co., Monthly Pre-Filing Status Report No. 7 Southern California Edison Co. Devers-Palo Verde No. 2 Project, Docket No. PT08-1-000 (2008); Southern California Edison Co., Monthly Pre-Filing Status Report No. 11 Southern California Edison Co. Devers-Palo Verde No. 2 Project, Docket No. PT08-1-000 (2009).

185. See *Transmission Line Siting, Pre-filing Requests*, FERC, May 30, 2008, <http://www.ferc.gov/industries/electric/indus-act/siting/prefiling-req.asp>.

186. *Id.*

187. *Id.*

188. Letter from Gary A. Morgans, Southern California Edison Co., to Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, Re: Southern California Edison Co., Docket No. PT08-1-000 (May 18, 2009), available at <http://www.ferc.gov/industries/electric/indus-act/siting/PT08-1withdraw.pdf>.

now reduced significantly. Although SCE discontinued its pre-filing activities at the FERC, SCE indicated that it still plans to construct its project in California.¹⁸⁹

IX. EMINENT DOMAIN AUTHORITY TO CONDEMN RIGHTS-OF-WAY AFTER PERMIT IS ISSUED BY THE FERC

To facilitate construction of new electric transmission facilities, EPAct 2005 couples the FERC's backstop permit authority with a federal right of eminent domain to condemn rights-of-way for such facilities.¹⁹⁰ To date, this new eminent domain power, added to the FPA, has not been used. If, and when, it is used, however, the courts are likely to look to precedent under the Natural Gas Act (NGA) when implementing the eminent domain power in the FPA.

For many decades, the NGA has provided holders of federal certificates of public convenience and necessity a right of eminent domain to condemn property necessary to construct natural gas pipeline facilities.¹⁹¹ Before exercising that right, the certificate holder must attempt to negotiate with the property owner to acquire the property by contract.¹⁹² If it cannot acquire the property by contract, or is unable to agree with the owner on the compensation to be paid for that property, "it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts."¹⁹³ The NGA generally states: "The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding of the State where the property is situated."¹⁹⁴

EPAct 2005 adds very similar language to the FPA, subject to a few notable differences not codified in the NGA. These differences include, for example, FPA provisions describing the compensation method for condemned property and expressly limiting the type of property that can be condemned as well as the use of that property.

EPAct 2005 amended the FPA to state:

In the case of a permit . . . for electric transmission facilities to be located on property *other than property owned by the United States or a State*, if the permit holder cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or modify the transmission facilities, the permit holder may acquire the right-of-way by the exercise of the right of eminent domain in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located.

The practice and procedure in any action or proceeding under this subsection in the district court of the United States shall conform as nearly as practicable to the

189. *Id.*

190. 16 U.S.C. § 824p(e) (2005).

191. 15 U.S.C. § 717f(h) (2005).

192. *Id.*

193. *Id.*

194. *Id.*

practice and procedure in a similar action or proceeding in the courts of the State in which the property is located.¹⁹⁵

Thus, only private property, and not public property owned by federal or state governments, can be condemned by the holder of a FERC backstop permit. As compared to the NGA, this particular limiting language in the FPA appears to be a distinction without a difference. Commonly, eminent domain authority is invoked to take “private” property and there is case precedent holding that the eminent domain power, under the NGA, does not extend to lands owned by the United States.¹⁹⁶

Significantly, for electric transmission projects in the Western United States, where there is a vast amount of federal land, the authority to condemn only private land – in and of itself – is likely to be insufficient to accomplish the objective of constructing major new electric transmission lines. As discussed in Section III.B, however, EPAct 2005 also includes provisions to streamline and expedite multi-agency authorizations for the siting of electric transmission facilities on federal lands.¹⁹⁷

The FPA also limits the use of condemned land. It expressly mandates that any right-of-way, acquired through the power of eminent domain, must “be used exclusively for the construction or modification of electric transmission facilities within a reasonable period of time after the acquisition.”¹⁹⁸ Pursuant to the FPA, “[t]he right-of-way cannot be used for any other purpose, and the right-of-way shall terminate upon the termination of the use for which the right-of-way was acquired.”¹⁹⁹ While it can be inferred that the NGA only authorizes the condemnation of property necessary to construct natural gas pipeline facilities certificated by the FERC, the statutory language in the NGA does not explicitly limit the use of a right-of-way “exclusively” to natural gas pipeline facilities. Nor are the energy ROW corridors on federal lands limited to such an exclusive use. In certain energy ROW corridors, there can be “multi-modal” uses for facilities to transmit, for example, electricity, natural gas, and/or oil.

The NGA and FPA further differ with regard to the compensation paid to a property owner. The NGA is silent on the specific standard or methodology to be used to determine the value of the condemned property for which compensation is due.²⁰⁰ The FPA, in contrast, explicitly states that “[j]ust compensation shall be an amount equal to the fair market value (including applicable severance damages) of the property taken on the date of the exercise of eminent domain authority.”²⁰¹

While there are some statutory language differences between the NGA and FPA, at bottom, both Acts are designed to achieve substantially the same

195. 16 U.S.C. § 824p(e)(1), (3) (2005) (emphasis added).

196. *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878 (10th Cir. 1974); *cert. dismissed*, 419 U.S. 1097 (1975).

197. 16 U.S.C. § 824p(h) (2005).

198. 16 U.S.C. § 824p(e)(2) (2005).

199. 16 U.S.C. § 824p(e)(4) (2005).

200. At least one court found that the NGA’s eminent domain provision incorporates the law of the state in which the condemned property is located as the standard to be used in determining the value of the condemned property. *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992); *reh’g denied*, 1992 U.S. App. LEXIS 16896 (6th Cir. July 23, 1992); *cert. denied*, 506 U.S. 1022 (1993).

201. 16 U.S.C. § 824p(f)(2) (2005).

purpose: to fulfill the supreme authority of the federal government to permit or certificate facilities necessary to transmit electricity or natural gas in interstate commerce, without undue interference from the states.²⁰²

X. ONGOING CONGRESSIONAL INVOLVEMENT IN TRANSMISSION SITING

The ink was barely dry on EAct 2005 when new legislative efforts began to change the ability of the DOE to designate NIETCs or the FERC to site electric transmission facilities. Several Congressional members attempted to stop the DOE from designating NIETCs or to mitigate the impacts of such designations through new legislative initiatives.²⁰³ For example, in early 2007, Representative Frank Wolf of Virginia authored a bill, H.R. 829, which would have required, among other things, the DOE to consider alternative measures to alleviate congestion. Congressman Maurice Hinchey from New York also proposed legislation, H.R. 809 and H.R. 810, intended to strip the federal government of authority to overrule state permitting decisions.²⁰⁴ Mr. Hinchey's bills stemmed from his concern about a proposal by New York Regional Interconnection Inc. to run transmission lines from Oneida County, New York, to Orange County, New York. These and other legislative initiatives were not successful, and the DOE went forward with its NIETC designations.

More recently, several bills were introduced in the House and Senate that address transmission siting. The most significant bills were introduced in the House by Henry Waxman, Chairman of the Energy and Commerce Committee, and Ed Markey, Chairman of the Energy and Environment Subcommittee (H.R. 2454), and in the Senate by Majority Leader Harry Reid (S. 539) and Jeff Bingaman, Chairman of the Senate Energy and Natural Resources Committee (S. 2454). Each bill would reform the existing EAct 2005 provisions governing the DOE's authority to designate NIETCs and the FERC's authority to issue permits for the construction of new transmission facilities. Of these bills, the Waxman-Markey bill in the House and Bingaman bill in the Senate have moved the farthest along in the legislative process thus far.

On June 26, 2009, the full House passed the Waxman-Markey bill and referred it to the Senate. Among other things, this bill would require the FERC to adopt a set of national transmission planning principles, including principles encouraging energy efficiency and the use of renewable or other zero-carbon energy sources.²⁰⁵ The principles would then be used by members of the industry to develop regional and interconnection-wide transmission plans.²⁰⁶

The Waxman-Markey bill would render the NIETC approach to transmission siting, based on congested areas, applicable only to the Eastern Interconnection and would adopt a different approach for the Western

202. In several natural gas pipeline cases, the courts found that state and local governments could not prevent the construction of federally-authorized natural gas pipeline facilities, at least in the absence of a substantial showing that the pipeline would endanger the health, safety, or welfare of local citizens, because such inference would constitute an undue burden upon interstate commerce. *See generally* New York State Natural Gas Corp. v. Town of Elma, 182 F. Supp.1 (W.D. N.Y. 1960); Transcontinental Gas Pipe Line Corp. v. Borough of Milltown, 93 F. Supp. 287 (D. N.J. 1950).

203. H.R. 829, 110th Cong. (2007).

204. H.R. 809, 110th Cong. (2007); H.R. 810, 110th Cong. (2007).

205. H.R. 2454, 110th Cong. (2007).

206. *Id.*

Interconnection.²⁰⁷ In the Western Interconnection, the FERC would have backstop siting authority for multi-state transmission facilities, identified in regional or interconnection-wide transmission plans submitted to the FERC, that are needed in significant measure to meet demand for renewable energy.²⁰⁸ To qualify for a backstop permit, the applicant must show that a state commission or other entity that has authority to approve the siting of the facility: (1) did not issue a decision on the application within one year after the date the applicant submitted a completed application; (2) denied a completed application; or (3) authorized the siting of the facility subject to conditions that unreasonably interfere with the development of the facility. Thus, if finally enacted, this legislation would moot, at least in part, the Court's decision in *Piedmont*. It also would clarify that the one-year clock for state action does not start running if a deficient application is submitted to a state commission or other entity that has authority to approve the siting of the facility.

Senator Bingaman's bill was reported out of Senate Energy and Natural Resources Committee on July 16, 2009, but has not yet been voted on by the Senate as a whole. His bill calls for interconnection-wide transmission planning and grants the FERC backstop siting authority for high-priority national transmission projects, including high voltage and renewable energy feeder lines. To qualify for a backstop permit, the applicant must show that a state: (1) failed to approve the construction and authorized routing of a high-priority national transmission project not later than one year after the applicant submitted a completed application for authorization to the state; (2) rejected the application for a high-priority national transmission project; or (3) authorized the high-priority national transmission project subject to conditions that unreasonably interfere with the development of the project.²⁰⁹ This bill too would potentially moot the *Piedmont* decision, in part, and clarify that the one-year clock does not begin ticking until a "completed" application is filed with the state.

XI. ANALYSIS OF EFFECT OF EPACT 2005 PROVISIONS ON SITING OF NEW TRANSMISSION FACILITIES

Many different factors affect the development of new transmission projects. In the currently weak U.S. economy, economic factors play a particularly important role. Some of these economic factors include, for example, access to and the cost of capital, transmission rate incentives, and the availability of federal grants or loans. Other factors, such as the siting process, cost allocation disputes, renewable energy standards, reliability standards, and regional transmission planning, also affect transmission project development.

In 2008, the FERC held a technical conference exploring barriers to transmission entry, including several of the factors listed above.²¹⁰ As demonstrated by the wide array of views expressed at that technical

207. *Id.*

208. *Id.*

209. *Id.*

210. Notice of Technical Conference, Transmission Barriers to Entry, Docket No. AD08-13-000 (Sept. 24, 2008); Supplemental Notice of Technical Conference, Transmission Barriers to Entry, Docket No. AD08-13-000 (Oct. 3, 2008); Supplemental Notice of Technical Conference, Transmission Barriers to Entry, Docket No. AD08-13-000 (Oct.10, 2008).

conference,²¹¹ it is difficult to pinpoint just one particular factor, standing alone, as the driving force for the development or non-development of transmission projects. A confluence of factors can affect transmission project development.

Our research, however, resulted in the following significant findings: 1) there appears to be an increase in the number of applications filed with state commissions and the amount of investments made in transmission projects post-EPAAct 2005; 2) more applications appear to have been filed for projects outside of NIETCs than for projects inside NIETCs; 3) many state commissions acted on applications in approximately one year, both pre-and post- EPAAct 2005; (4) the FERC's transmission rate incentive policy, as authorized by EPAAct 2005, appears to be one of the most significant factors currently stimulating investments in new transmission projects, as evidenced by the large volume of applications for rate incentives approved by the FERC and statements from industry; and (5) mandatory renewable energy standards, adopted by a large number of states, are influencing the development of new transmission projects. Of course, reliability also always has been, and continues to be, a core factor driving the development of new transmission projects.

Going forward, we expect regional transmission planning initiatives (including any actions taken on the allocation of costs on a regional or interconnection-wide basis), smart grid policies, and federal funds flowing from the American Recovery and Reinvestment Act of 2009 (Recovery Act) to have an increased affect on transmission investments.

A. *Has Amount of Proposed New Transmission Facilities Increased Since Enactment of EPAAct 2005?*

Since the enactment of EPAAct 2005, the number of applications filed with state commissions to site new transmission facilities appears to have increased. We draw this conclusion based on a sample of seventy-eight applications requesting permits to site transmission facilities submitted to state commissions over a ten-year period, including: 1) the five year period preceding enactment of EPAAct 2005 in August of 2005; and 2) thereafter through June 2009. Of the seventy-eight applications we reviewed, twenty-nine were filed prior to the enactment of EPAAct 2005 and forty-nine were filed after the enactment of EPAAct 2005. This is an approximately twenty-five percent increase in the number of applications filed.

Statistical data from EEI also shows an upward trend in transmission investment. In 2006, just one year after the passage of EPAAct 2005, EEI member companies made a total investment of \$6.9 billion and forecasted that from the period of 2007 to 2010 they would invest an additional \$37 billion into the transmission system; this is a fifty-five percent increase over the amount invested from 2003-2006.²¹²

We do not attribute this increase to the DOE NIETC and FERC backstop siting provisions in EPAAct 2005, but instead attribute it to other factors,

211. Transcript of FERC Technical Conference on Barriers to Transmission Entry, at 2:17-2:20 (Oct. 14, 2008).

212. Edison Electric Institute, *Transmission Projects: At a Glance*, at 2 (Jan. 2008), available at http://www.eei.org/ourissues/ElectricityTransmission/Documents/Trans_Project_lowres.pdf.

including, for example, transmission rate incentives, renewable energy standards, and reliability standards, for reasons discussed below.

B. How Has the DOE's Designation of NIETCs and the FERC's Backstop Siting Authority Affected Applications to Site Transmission Facilities?

Of the transmission project applications we reviewed, approximately thirty were filed after the DOE designated NIETCs on October 5, 2007. Roughly eighteen percent of the applications filed after October 5, 2007 were within a NIETC, while the remaining eighty-two percent were outside a NIETC. There has not been a flurry of applicants seeking backstop siting authority from the FERC thus far. In fact, just the opposite is true. Only one company, SCE, even initiated a pre-filing process at the FERC and it has since withdrawn its request for such process.

The mere threat of federal preemption may influence states' behavior by inducing them to approve more projects or act more quickly on applications. But, based on the sample of certificate applications we reviewed, the vast majority of the applications filed *both* before and after the passage of EAct 2005 were reviewed and approved by the state commission within approximately one year. While there certainly are exceptions to this general rule, we found many states act promptly on certificate applications for transmission projects and that they did so even before the threat of federal preemption arose from EAct 2005.

It is easier to obtain prompt approval for smaller, in-state projects. But even some very large, multi-state projects have been approved in approximately one year. One example of a multi-state project approved reasonably quickly is the Trans-Allegheny Interstate Line (TrAIL) project. Trans-Allegheny Interstate Line Company (TrAILCo), a subsidiary of Allegheny Energy Inc., is leading the development of the TrAIL, a 500kV transmission line project extending across Southwestern Pennsylvania to West Virginia to Northern Virginia. TrAIL was conceived in June of 2006 as part of a five year plan to maintain reliability in the Allegheny Power transmission zone. Applications seeking authorization from the necessary State regulatory commissions were submitted in the spring of 2007. Following public hearings in the fall of 2007, and evidentiary hearings in early 2008 before commissions of the three States in which the line will be built, regulators in the three affected States—Pennsylvania, West Virginia, and Virginia—approved the line. The approval process from the date the applications were filed through the date the project was approved by the three separate commissions was just a little over one year. The project has a scheduled completion date of June 2011 and will cost an estimated \$820 million.²¹³

Our research focused on applications for certificates from state public utility or public service commissions. We recognize that, in some states, additional approvals may be required from, for example, counties. Those additional approvals may further affect the timing of a project and potentially cause delays. In this regard, it is noteworthy that in the recent PATH decision issued by the

213. Trans-Allegheny Interstate Line, *Project Overview*, <http://www.aptrailinfo.com/index.php?page=overview> (last visited Sep. 20, 2009).

Maryland Commission,²¹⁴ the scope of the Maryland Commission's certificate authority vis-a-vis a Maryland County's zoning authority was addressed. There, the County asserted that its approval must be obtained to site a substation that formed part of the proposed transmission project. The Maryland Commission overruled the County, stating:

We hold that the Commission's overarching authority to site transmission lines includes the location, specifications and conditions of substations that are integral to a proposed transmission line project that requires a [certificate of public convenience and necessity] CPCN . . . the General Assembly has directed us to decide whether and how to site a transmission line. To the extent a local authority could, in effect, veto the Commission's CPCN decision by denying approval of a necessary substation (or other component), we hold that our broader regulatory authority over the transmission line supersedes the local land use authority.²¹⁵

Possibly, a similar legal argument might be made in other states to limit the number of approvals required and expedite the siting process.

C. What Other Factors Have Affected Transmission Project Development Following the Enactment of EPAct 2005?

1. Economic Recession

In the absence of the economic recession, it is likely that the increase in siting applications and investments in new transmission projects would have been even greater. The current recession has affected both the demand for electricity and the need for transmission expansion, as well as the costs and availability of capital to fund transmission projects. In a recent study, the NERC predicted a decrease in the forecasted demand for electricity for Summer 2009 driven in large part by the recent economic downturn.²¹⁶ A FERC report on the "State of the Markets" also reflects that the economy negatively affected the availability and cost of credit, as well as the ability and willingness of investors to provide additional equity for transmission projects.²¹⁷

Demand reductions and high capital costs have caused some companies to terminate or scale back planned transmission projects. For example, in May 2009, SCE announced that it no longer planned to build its proposed \$1.7 billion, high voltage transmission line to bring electricity from Arizona to Southern California.²¹⁸ In the face of decreased consumer demand and increased project costs, SCE abandoned the massive multi-state project, but continued ahead with plans to build a less expensive \$273 million, 170-mile project within California.²¹⁹

214. See generally *In the Matter of the Potomac Edison Company on Behalf of Path Allegheny Transmission Company, L.L.C. for a Certificate of Public Convenience and Necessity to Construct the Maryland Segments of A 765 kV Electric Transmission Line and a Substation in Frederick County, Maryland*, Case No. 9198, Maryland PUC, Order No. 82892 (2009).

215. *Id.* at 8, 11, 12.

216. NERC, 2009 SUMMER RELIABILITY ASSESSMENT 1 (2009), available at <http://www.nerc.com/files/USsummer2009assessment.pdf>.

217. FERC, STATE OF THE MARKETS 2008 at 14 (April 16, 2009).

218. Cassandra Sweet, *Update: SoCal Edison Cuts Arizona from Transmission Plans*, WALL ST. J., May 15, 2009, available at <http://www.geni.org/globalenergy/library/technical-articles/transmission/wsj.com/socal-edison-cuts-arizona-from-transmission-plans/index.shtml>.

219. *Id.*

Actions underway at both federal and state levels are helping to combat the negative effects of the economic recession and succeeding in stimulating new transmission investments despite the weak economy.

2. Transmission Rate Incentives

We believe one of the most significant factors influencing the recent increase in transmission siting applications (despite the downturn in the economy) is the FERC's policy and practice of granting rate incentives for investments in new transmission projects. This belief is supported by the large number of applications for transmission rate incentives granted by the FERC, post-EPA 2005, as well as by statements from leading members of the industry. In fact, during the FERC technical conference on barriers to transmission entry, American Electric Power presented remarks stating "the Commission's incentive policies are the *single biggest contributor* to rapidly growing investor interest in new interstate transmission investment."²²⁰

EPA 2005 amended the FPA to require the FERC to adopt rules providing "incentives for transmission infrastructure investment that will help ensure the reliability of the bulk power transmission system in the United States or reduce the cost of delivered power to customers by reducing transmission congestion."²²¹ FERC's Final Rule on Promoting Transmission Investment through Pricing Reform was adopted in Order No. 679. That Order identifies the following requirements for transmission rate incentives, as set forth in FPA Section 219, which the FERC's Final Rule is designed to achieve:

1. Promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities.

2. Provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies).

3. Encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities.

4. Allow the recovery of all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to Section 215 of the FPA, and all prudently incurred costs related to transmission infrastructure development, pursuant to Section 216 of the FPA (transmission national interest corridors).²²²

5. Provide incentives to each transmitting utility or electric utility that joins a Transmission Organization and ensure that any recoverable costs associated with joining may be recovered through transmission rates charged by the utility or through the transmission rates charged by the Transmission Organization that provides transmission service to the utility.

220. FERC Technical Conference, Transmission Barriers to Entry, Prepared Remarks of Susan S. Tomasky at 10, Docket No. AD08-13-000 (Oct. 14, 2008) (emphasis added).

221. Promoting Transmission Investment through Pricing Reform, 71 Fed. Reg. 43,294 (Jul. 31, 2006); F.E.R.C. Stat. & Regs. ¶ 31,222 at 1 (2006); [hereinafter, *Order No. 679*]; *order on reh'g*, 72 Fed. Reg. 1152 (Jan. 10, 2007); F.E.R.C. Stat. & Regs. ¶ 31,236 (2007); [hereinafter, *Order No. 679-A*]; *order on reh'g*, 119 F.E.R.C. ¶ 61,062 (Apr. 19, 2007); [hereinafter, *Order No. 679-B*]

222. *Id.* at 7.

6. Ensure that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.²²³

Since the FERC adopted its transmission rate incentive policy, it has granted, in whole or in part, over thirty petitions for transmission incentive rate treatment.²²⁴

To qualify for incentives, an applicant must prove that there is a nexus between the incentives being requested and the investment being made.²²⁵ There are also three rebuttable presumptions that, if satisfied, cause the project to presumptively qualify for transmission incentives.²²⁶ The rebuttable presumptions include:

1) that transmission projects resulting from a fair and open regional planning process that considers and evaluates projects for reliability and/or congestion will satisfy the requirements of the FERC's Rule;

2) that an applicant with a proposed project located in a NIETC will satisfy the requirements of the FERC's Rule; or

3) that if a project has received construction approval from an appropriate state commission or state siting authority; it will satisfy the requirements of the FERC's Rule.²²⁷

Although the FERC declined to condition all incentives on state approval, the FERC held that the approval of a state commission or siting authority creates a rebuttable presumption of eligibility for incentives. Furthermore, the FERC held that this approach "appropriately coordinate[s] [the FERC's] consideration of incentives with the views of responsible state agencies."²²⁸ On rehearing, the FERC clarified its position regarding state commission approval of a project and held that to create the rebuttable presumption, the state commission or siting authority must determine whether the project ensures reliability or reduces the cost of delivered power by reducing congestion.²²⁹

3. Federal Funding

To stimulate the economy and promote new investments in energy infrastructure, the federal government is offering grants and other forms of loans or loan guarantees. Indeed, the Recovery Act allocated \$4.5 billion to modernize the Nation's transmission grid, including for "Smart Grid" investments. The DOE is responsible for distributing Smart Grid grants and the FERC will

223. *Id.* at 8.

224. Our research included reviewing over thirty orders on the incentive rate requests of the following entities: Allegheny Energy, Inc., American Electric Power Service Corp., Baltimore Gas & Electric Co., Central Main Power Co. and Maine Public Service Co., Duquesne Light Co., Green Power Express L.P., ITC Great Plains, L.L.C., New York Regional Interconnect, Inc., Northeast Utilities Service Co., Northeast Utilities Service Co. and National Grid USA, Pacific Gas and Electric Co., PacifiCorp, Pepco Holdings, Inc., Pioneer Transmission, L.L.C., Potomac-Appalachian Transmission Highline, L.L.C., PPL Electric Utilities Corp., Public Service Electric and Gas Co., Southern California Edison Co., Southern Indiana Gas and Electric Co., Tallgrass Transmission, L.L.C., The United Illuminating Co., Trans-Allegheny Interstate Line Co., Virginia Electric and Power Co., Westar Energy, Inc., and Xcel Energy Services, Inc.

225. Order No. 679 at 48.

226. *Id.* at 57.

227. *Id.* at 58.

228. *Id.* at 54.

229. Order No. 679-A, at 5.

promulgate the standards for interoperability and reliability of the electric transmission grid.

Smart Grid was established previously as a national policy by Section 1301 of the Energy Independence and Security Act (EISA), which states:

[i]t is the policy of the United States to support the modernization of the Nation's electricity transmission and distribution system to maintain a reliable and secure electricity infrastructure that can meet future demand growth and to achieve each of the following, which together characterize a Smart Grid: (1) Increased use of digital information and controls technology to improve reliability, security, and efficiency of the electric grid; (2) Dynamic optimization of grid operations and resources with full cyber-security; (3) Deployment and integration of distributed resources and generation, including renewable resources; (4) Development and incorporation of demand response, demand-side resources, and energy-efficiency resources; (5) Deployment of 'smart' technologies (real-time, automated, interactive technologies that optimize the physical operation of appliances and consumer devices) for metering, communications concerning grid operations and status, and distribution automation; (6) Integration of 'smart' appliances and consumer devices; (7) Deployment and integration of advanced electricity storage and peak-shaving technologies, including plug-in electric and hybrid electric vehicles, and thermal-storage air conditioning; (8) Provision to consumers of timely information and control options; (9) Development of standards for communication and interoperability of appliances and equipment connected to the electric grid, including the infrastructure serving the grid; and (10) Identification and lowering of unreasonable or unnecessary barriers to adoption of smart grid technologies, practices, and services.²³⁰

Simply stated, Smart Grid involves technologies to improve the way electricity is supplied, transmitted, distributed, stored, and consumed, including, for example, new sensor, communication, and information-sharing technologies.

Some project developers also may be able to obtain loans or loan guarantees from the federal government.²³¹ In the West, a unique opportunity exists for federal loans as a result of the predominant role of the Western Area Power Administration (WAPA) in transmission development. Section 402 of the Recovery Act expanded WAPA's borrowing authority from the U.S. Treasury.²³² WAPA's additional borrowing authority may enable it to provide loans for transmission projects within WAPA's area of service, provided that such projects would aid or facilitate the delivery of power generated from renewable resources. WAPA's service area includes Arizona, California, Colorado, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming, along with certain areas in Iowa, Kansas, Montana, Minnesota, and Texas.

4. State Infrastructure Authorities

At the state level, several infrastructure authorities have been created, which can issue revenue bonds for the development of electric transmission infrastructure.²³³ Since 2004, when the Wyoming Infrastructure Authority (WIA) was created, seven additional States have created infrastructure authorities; these include the South Dakota Energy Infrastructure Authority,

230. Energy Independence and Security Act 15 U.S.C. § 17381 (2006).

231. American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 141 (2009).

232. American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 141 (2009).

233. Kevin Porter & Sari Fink, *State Transmission Infrastructure Authorities: The Story So Far*, ELECTRICITY JOURNAL, March 2009.

North Dakota Transmission Authority, Idaho Energy Resources Authority, Kansas Electric Transmission Authority, Montana Energy Infrastructure Promotion and Development Division, New Mexico Renewable Energy Transmission Authority, and Colorado Clean Energy Development Authority.

As the oldest infrastructure authority in the country, WIA is the most active. WIA was the first to issue bonds and, in September 2005, WIA financed a portion of the Hughes Transmission Project, a 230 kV transmission line in Northeast Wyoming.²³⁴ Additionally, WIA is considered one of the developers of the Wyoming-Colorado Intertie Transmission Project and the High Plains Express Project.²³⁵ The Wyoming-Colorado Intertie Transmission Project is a 345 kV AC transmission line between Wyoming and Colorado and the High Plains Express Project would extend a 500 kV AC transmission system to connect Wyoming, Colorado, New Mexico, and Arizona. In Kansas, the Kansas Electric Transmission Authority is assisting with the development and planning of a 345 kV line in Kansas being constructed by ITC Great Plains.²³⁶

5. Renewable Energy Development

Another driving force behind the recent increase in transmission investments (and federal efforts to adequately incent infrastructure investments) is the need to interconnect renewable energy sources to the transmission grid. Many states enacted laws mandating renewable portfolio standards (RPS). These standards require utilities to obtain a certain percentage of their electricity from renewable resources. As illustrated in the following chart provided by the DOE, twenty-seven states plus the District of Columbia have mandatory RPS.²³⁷ In lieu of mandatory requirements, North Dakota, South Dakota, Utah, Virginia, and Vermont, set voluntary renewable energy goals.²³⁸

State	Amount	Deadline
Arizona	15%	2025
California	33%	2030
Colorado	20%	2020
Connecticut	23%	2020
D.C.	20%	2020
Delaware	20%	2019
Hawaii	20%	2020
Iowa	105 MW	

234. KANSAS ELECTRIC TRANSMISSION AUTHORITY, ANNUAL REPORT TO THE GOVERNOR (2007), available at www.kansas.gov/keta/Reports/2007_Annual%20Report_FINAL.pdf.

235. Wyoming Infrastructure Authorities, *List of Transmission Projects*, <http://wyia.org/projects/transmission-projects/> (last visited Sept. 30, 2009).

236. KANSAS ELECTRIC TRANSMISSION AUTHORITY, *supra* note 231.

237. U.S. Dept. of Energy, *States with Renewable Portfolio Standards*, http://apps1.eere.energy.gov/states/maps/renewable_portfolio_states.cfm (last visited Sept. 30, 2009).

238. *Id.*

Illinois	25%	2025
Massachusetts	15%	2020
Maryland	20%	2022
Maine	40%	2017
Michigan	10%	2015
Minnesota	25%	2025
Missouri	15%	2021
Montana	15%	2015
New Hampshire	23.8%	2025
New Jersey	22.5%	2021
New Mexico	20%	2020
Nevada	20%	2015
New York	24%	2013
North Carolina	12.5%	2021
North Dakota*	10%	2015
Oregon	25%	2025
Pennsylvania	8%	2020
Rhode Island	16%	2019
South Dakota*	10%	2015
Texas	5,880 MW	2015
Utah*	20%	2025
Vermont*	10%	2013
Virginia*	12%	2022
Washington	15%	2020
Wisconsin	10%	2015

While states are the pioneers of renewable energy standards, in the future, it is possible a federal renewable energy standard may be adopted. If so, this could potentially spur the need for additional transmission investment across the United States. Legislation to establish a federal standard was introduced by Senate Energy and Natural Resources Committee Chairman Bingaman in the Senate, and also by Representatives Markey and Platts in the House.²³⁹

6. Reliability Standards

Reliability traditionally has been the driver of most transmission projects. The increased threat of penalties, deriving from NERC's enforcement of the

239. American Clean Energy Leadership Act of 2009, S.1462, 111th Cong. § 132 (July 16, 2009); American Renewable Energy Act, H.R. 890, 111th Cong. § 2 (Feb. 4, 2009).

mandatory reliability standards adopted under EPCRA 2005, may spur even more transmission project development in the future. On June 4, 2008, NERC filed its first notice containing penalty determinations for reliability standard violations. Although the majority of the penalty determinations carried a zero penalty amount, two utilities were assessed penalties of \$180,000 and \$75,000, respectively, for alleged violations of the Transmission Vegetation Management Standard, which requires a transmission owner to create and implement an annual plan for vegetation management to protect the reliability of the system.²⁴⁰ More recently, the dollar amounts of penalties proposed by NERC for other alleged violations have increased.

7. Regional Cooperation and Planning Initiatives of the FERC, RTOs, and States

Greater regional cooperation and planning also is facilitating the development of new transmission projects in both RTO and non-RTO states. At the federal level, the FERC is actively promoting the coordination of both local and regional transmission planning efforts via its transmission planning policy adopted in Order No. 890.²⁴¹ On June 30, 2009, the FERC issued a notice scheduling technical conferences to examine transmission planning processes undertaken pursuant to Order No. 890.²⁴² The focus of the Order No. 890 technical conferences is to: 1) determine the progress and benefits realized by each transmission provider's transmission planning process, obtain customer and other stakeholder input, and discuss any areas that may need improvement; 2) examine whether existing transmission planning processes adequately consider needs and solutions on a regional or interconnection-wide basis to ensure adequate and reliable supplies at just and reasonable rates; and 3) explore whether existing processes are sufficient to meet emerging challenges to the transmission system, such as the development of inter-regional transmission facilities, the integration of large amounts of location-constrained generation, and the interconnection of distributed energy resources.²⁴³ There is no doubt that the FERC's transmission planning policy will continue to evolve and provide a federal regulatory framework for facilitating new transmission projects going forward.

Many states also are making great strides with respect to coordinated transmission planning. One particularly noteworthy example of this regional cooperation is the Western Renewable Energy Zones (WREZ) Initiative, created by the Western Governors' Association and the DOE.²⁴⁴ The WREZ Initiative was started to help increase transmission access to the vast renewable resources in the West by identifying Renewable Energy Zones and developing transmission paths to transmit energy from those Zones to load centers:

The intention of the [WREZ] initiative is not simply to identify western [r]enewable [e]nergy [z]ones in the Western Interconnection, but. . . to facilitate the

240. *Guidance Order on Reliability Notices of Penalty*, 124 F.E.R.C. ¶ 61,015, at 10 (2008).

241. *See generally* Order No. 890, *supra* note 149.

242. Technical Conference Notice, 74 Fed. Reg. 130 (July 9, 2009).

243. Supplemental Technical Conference Notice, 74 Fed. Reg. 153 (August 11, 2009).

244. WESTERN GOVERNORS' ASS'N, WESTERN RENEWABLE ENERGY ZONES: PHASE I REPORT (June 2009), available at <http://www.westgov.org/wga/publicat/WREZ09.pdf>

development of high voltage transmission to those areas with [the potential for] abundant. . . renewable resources and low or easily mitigated environmental impacts. To [accomplish]. . . this. . . [objective], a modeling tool was created. . . [to evaluate] the relative economic costs of. . . [renewable resources on a delivered basis], including transmission costs, from specific renewable resource areas to specific [population] (load) center.²⁴⁵

The four main goals of the WREZ Initiative are to:

1. Develop a framework for consensus among the states and provinces within the Western Interconnection on how best to develop and deliver energy from renewable resource areas to load centers;
2. Generate reliable information for use by decision makers that supports the cost-effective and environmentally sensitive development of renewable energy in or near certain identified renewable energy zones, as well as the conceptual transmission plans needed to deliver the renewable energy to load centers;
3. Provide a foundation for interstate collaboration on commercial delivery of renewable energy to meet growing demand throughout the Western Interconnection; [and]
4. Provide for the development of cost-effective renewable resources in order to promote the clean and diversified energy goals of the Western governors.²⁴⁶

On June 15, 2009, the WREZ Phase 1 report was released which, among other things, identifies areas in the Western Interconnection that have both the potential for large scale development of renewable resources and low environmental impacts.

One aspect of regional planning that requires continued improvement is cost allocation. At the FERC's technical conference on barriers to transmission entry, the issue of cost allocation was identified by many of the participants as a hugely contentious issue.²⁴⁷ Indeed, one of the panelists at the technical conference said uncertainty regarding cost allocation is a de facto barrier to transmission development in some regions.²⁴⁸ A significant project in the Eastern Interconnection that was suspended due to cost allocation issues is the New York Regional Interconnect (NYRI) project. The NYRI project is a 190-mile, 1,200 megawatt electrical transmission line proposed by the NYRI. In an open letter to friends and supporters of the project issued April 6, 2009, NYRI's President officially announced the suspension of the project.²⁴⁹ The open letter indicated that the project was suspended because of a provision in the NYISO tariff granting "a 'benefiting party' [the right] to pocket veto an economic project that has been objectively studied and approved by the NYISO as a project that would reduce congestion and benefit market participants."²⁵⁰ The open letter further stated that the NYISO rules, as they stand, create an unacceptable financial risk for NYRI's investors.

245. *Id.* at 17.

246. *Id.* at 3-4.

247. Transcript of FERC Technical Conference on Barriers to Transmission Entry at 5:3-5:7, 50:19-52:19, 82:12-86:11, 95:21-96:20, 107:20-108:21, 138:11-144:15 (Oct. 14, 2008).

248. FERC Technical Conference Regarding Transmission Barriers to Entry, Prepared Remarks of Susan S. Tomasky, at 12, Docket No. AD08-13-000 (Oct. 14, 2008).

249. Posting of Chris Thompson, Open Letter from the President of NYRI (Apr. 9, 2009), available at <http://www.nyri.us/index.html>.

250. Motion to Intervene and Protest of New York Regional Interconnect, Inc., at 1, Docket No. OA08-52-000 (July 9, 2008).

XII. CONCLUSION

EPA 2005 contributed to a recent increase in transmission investments. While the DOE NIETC and FERC backstop siting provisions have not been a major factor driving new investments, other provisions in EPA 2005 – especially the transmission rate incentive provisions – have played a predominant role in stimulating new transmission investments. The recent passage of the Recovery Act, which includes billions of dollars for infrastructure development, may help stimulate the economy and capital improvements to transmission lines across the country, especially with respect to the addition of Smart Grid technologies. Over time, the energy efficiencies achieved from Smart Grid may lessen the need for future transmission investments.