Siting Transmission Lines in a Changed Milieu: Evolving Notions of “Public Interest” in Balancing State and Regional Considerations

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Based on a paper of the same name co-authored with Ashley C. Brown, Executive Director, Harvard Electricity Policy Group, Kennedy School, Harvard University; Of Counsel, Dewey & LeBoeuf
Three themes re: federal preemption

- FERC has some existing tools that could be used - at least theoretically.
- House bill presents a curious distinction between the need for backstop authority in Western as opposed to Eastern states.
- Neither existing FERC authority nor the pending bills in the House and Senate sufficiently address the issue of cost allocation.
Growth of Federal Authority

- Section 216 of FPA gives FERC “Backstop” Authority in NIETCs

- Added in 2005 primarily to address transmission reliability and the expansion of the wholesale market
Circumstances where FERC may preempt states in NIETCs

- If the “State in which the transmission facilities are to be constructed or modified does not have authority to approve the siting of facilities,” or cannot “consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State [.]”

- Or, if “the applicant . . . does not qualify to apply for a permit or siting approval . . . because the applicant does not serve end-use customers in the State.”

- Or, if a state commission with authority to approve the facility has either “withheld approval for more than one year”, or has conditioned its approval so that the construction will not “significantly reduce transmission congestion in interstate commerce” or is not economically feasible.
Piedmont Case (4th Circuit)

- Reversed FERC’s interpretation that its authority under Section 216(b)(1)(C)(i) of the FPA to act when a state commission has “withheld approval [of an application] for more than 1 year,” includes instances when a state commission denies the application outright instead of merely failing to act within the deadline.

- E.g. SCE’s Palo Verde Application in AZ – if not withdrawn, may have been moot.
Limited Geography of NIETCs
FERC Chairman Jon Wellinghoff’s Senate Testimony

“We need a National Policy commitment to develop the extra-high voltage transmission infrastructure to bring renewable energy from remote areas where it is produced most efficiently into our large metropolitan areas where most of this Nation’s power is consumed.”
H.R. 2454 - Waxman-Markey

- Overrules the 4th Circuit’s *Piedmont* decision by authorizing FERC to issue certificates of public convenience and necessity for the construction or modification of transmission projects not only when a state commission delays action but also when it denies an application outright.

- Rather than limit FERC's jurisdiction to "national interest electric transmission corridors," FERC's jurisdiction would be expanded to cover the entire United States portion of the Western Interconnection, which spans from the Pacific coast to the Great Plains, excluding most of Texas.
Why limit broader preemption to the West?

- Stakeholders in Eastern states – e.g., MA -- have voiced concerns that broad federal "backstop" authority could disrupt potential offshore wind developments in the Atlantic by authorizing transmission projects to bring energy from wind resources in the West (or even lower cost carbon-intensive resources).

- Some have observed that Eastern infrastructure is largely built out – apart from a few areas, the major issue in the East is expansion, not location of transmission.

- Political influence of energy exporting states rich in renewable resources in the West seeking greater regional coordination.
Proposes regional planning entities for transmission and puts in place a system of FERC review of these plans for consistency with transmission planning principles.

These principles, which FERC would need to develop, will “facilitate the deployment of renewable and other zero-carbon and low-carbon energy sources for generating electricity to reduce greenhouse gas emissions while ensuring reliability, reducing congestion, ensuring cybersecurity, minimizing environmental harm, and providing for cost-effective electricity services throughout the United States....”
Planning Considerations

- This planning must take all demand-side and supply-side options into account, including energy efficiency, distributed generation, smart grid technologies, and electricity storage.

- FERC is mandated to establish grid planning principles derived from these policies within one year.
Reid Bill (Senate)

- Backstop Authority with Expanded National Renewable Energy Zones
- Established Based on Renewable Potential > 1000 mw
S. 1462 - American Clean Energy Leadership Act of 2009

- Allows States one year from time of filing of a proposal to site a high priority national transmission project.

- Gives FERC jurisdiction over siting when states have either been unable to site the facility or have denied the application.
S. 1462

- Transmission planning entities shall develop regional plans and submit them to FERC within 24 months.
- Provides for cost allocation but prevents FERC from spreading the costs of major new transmission broadly across multi-state regions unless the commission could justify it by showing specific economic and grid reliability benefits.
What’s not addressed?

- There is no clear sense that the factors to be balanced in siting decisions –relevant costs and benefits, etc. – will be focused on the national market or on broader climate change goals.

- Transmission cost allocation is not really addressed; House bill is silent, Senate bill only addresses cost allocation in a limited manner.

- Governance role of RTOs and other regional bodies remains highly uncertain.
Back to three themes ...

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