

Locke Lord QuickStudy: FERC Proposes Rulemaking to Spark Interstate Electric Transmission Development, but Politics May Short-Circuit Proposal

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On December 15, 2022, the Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking seeking to revise its regulations governing the siting of interstate electric transmission lines. The NOPR implements congressional directives included in the Infrastructure Investment and Jobs Act (IIJA) of 2021. The IIJA directed FERC to issue a rule establishing the manner in which FERC would issue a permit for construction or modification of a transmission line located in a National Interest Electric Transmission Corridor (National Corridor) designated by the Department of Energy. Importantly, FERC's authority under the IIJA to issue such a permit is limited to situations where a state has either (1) denied or (2) failed to act in a timely manner on an applicant's request to site transmission facilities located in a National Corridor.

While it is welcome news for FERC to provide a further avenue for transmission development in National Corridors, including for merchant high-voltage direct current (MHVDC) lines, certain elements of the proposal may prove onerous for developers, and the departure of FERC Chairman Richard Glick leaves the future of the rulemaking in question.

FERC Asserts Authority; Establishes Simultaneous Processing of Applications

While FERC has long had the power to permit interstate pipelines under the Natural Gas Act of 1938, it has not had corresponding authority over electric transmission. The lack of federal authority over interstate transmission has been a significant impediment to the construction of new transmission lines. Many proposed interstate transmission projects have failed despite substantial investment due to an inability to obtain a permit from one of the states along the route. It has been a particular challenge for long-haul transmission lines traversing multiple states, as state utility commissions have in some cases been reluctant to grant permits or needed condemnation authority for transmission projects that primarily serve generation and load located in other states.

The NOPR clarifies the expanded siting authority granted to FERC in the IIJA by expressly stating that the Commission may issue a permit for the construction or modification of electric transmission facilities in National Corridors if a state has denied an application to site transmission facilities. It also proposes to eliminate the one-year delay following the submittal of a state application before FERC's mandatory pre-filing process may

commence. Instead, the NOPR proposes to allow the simultaneous processing of state applications and FERC pre-filing proceedings. This change will allow applicants to simultaneously pursue approval before a state and FERC in order to minimize delays in the event the state denies the application. However, in a nod to the state's role and interest in any such project, the NOPR proposes to establish a 90-day window for the state to provide comments on any aspect of the pre-filing process, including any information submitted by the applicant.

Applicant Code of Conduct for Dealings with Landowners

The IIJA required the Commission to determine that an applicant “has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process” as a precondition to the permit holder acquiring the necessary right-of-way by eminent domain. The NOPR proposes an Applicant Code of Conduct that includes particular recordkeeping and information-sharing requirements for engagement with affected landowners, as well as more general prohibitions against certain misconduct in such engagement. Commitment to the Applicant Code of Conduct is voluntary but if the applicant does not comply, it must provide information regarding its chosen alternative method of demonstrating that it meets the good faith efforts standard.

New Environmental Reports – Environmental Justice, Tribal, Air Quality/Noise

The NOPR would add three new resource reports to the pre-filing process for the FERC application: an Environmental Justice Resource Report, a Tribal Resources Report, and an Air Quality and Environmental Noise Resource Report. These new resource reports reflect the Biden Administration's focus on equity and inclusion and environmental issues in the energy transition.

FERC Seeks Comment on the NOPR

Comments are due 90 days from publication of the NOPR in the Federal Register (mid-March 2023). FERC will then determine whether to take further action on the proposal. Notably, Thursday's meeting at FERC marked the last for current Chairman Richard Glick as his term expires at the end of the year. His re-nomination had been blocked by Senator Joe Manchin, prompting Chairman Glick to step down from the Commission. Starting January 1, 2023, FERC will have a 2-2 Democratic/Republican split which may stall efforts to move the NOPR, and many other orders of business at FERC, forward. Both Republican commissioners (James Danly and Mark Christie) wrote concurring opinions to the NOPR, critical of FERC's efforts to reach beyond the intent of the IIJA. Thus, there is some question whether FERC will move forward with the NOPR after the comment period expires.

For further questions regarding this issue or if you are interested in filing comments on the NOPR, please contact the authors or any of Locke Lord's energy regulatory attorneys.

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