



Backstop Siting: FERC Issues Notice of Proposed Rulemaking

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On December 15, 2022, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a notice of proposed rulemaking to update the Commission’s regulations on “backstop” siting of electric transmission facilities under section 216 of the Federal Power Act (“FPA”). The [Proposed Rule](#) includes changes to existing regulations to align with recent amendments to section 216 and current FERC policies. Notable changes include reframing the process by which applicants may request that FERC exercise siting authority over a transmission facility in lieu of siting review under state law, expanding the evaluation of project effects on environmental justice communities and Tribal resources, and altering the requirements for the applicant’s analysis of visual, air quality, and noise impacts. Finally, through recommended compliance with an Applicant Code of Conduct, the Proposed Rule includes a series of measures focused on landowner engagement and protections surrounding acquisitions of rights-of-way.

BACKGROUND

The Energy Policy Act of 2005 granted FERC the authority to review and authorize the siting of electric transmission facilities, including exercising eminent domain, in Department of Energy (“DOE”)-designated transmission corridors if a state siting authority failed to timely act on the project’s siting application. However, two court cases constrained this backstop siting authority, significantly narrowing the window within which backstop siting authority would be triggered and requiring significant, additional environmental review requirements for approval of the prerequisite designated national interest corridors.¹

In order to re-establish section 216 as a useful mechanism for siting transmission facilities, the 2021 Infrastructure Investment and Jobs Act (“IIJA”) amended section 216. Among other things, the IIJA provided that FERC’s backstop siting authority can be triggered when a state commission or other entity with authority to approve the siting of transmission facilities has:

- (i) not made a determination on a permit application by one year after the date on which the application was filed or the date on which the DOE designated the relevant national corridor;
- (ii) conditioned “approval in such a manner that the proposed construction or modification will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible”; or
- (iii) denied an application.

The IIJA retained other existing triggers for backstop siting within section 216, specifically allowing for FERC backstop siting where a state does not have sufficient jurisdictional authority to act upon a siting application for a proposed transmission line or where a transmission developer does not qualify to apply for state siting approval because it does not serve end-users in the state. Additionally, the IIJA amendments limited the exercise of eminent domain authority to those instances where FERC has determined that the permit holder has made good faith efforts to engage with landowners and other stakeholders early in the FERC backstop permitting process.

PROPOSED RULE

The Proposed Rule would update FERC’s current backstop siting regulations (18 C.F.R. Part 50) to address the IIJA’s modifications, as well as to align the regulations with FERC’s current policies and priorities. In addition, FERC has proposed changes to its National Environmental Policy Act (“NEPA”) implementing

¹ See *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009); *California Wilderness Coalition v. DOE*, 631 F.3d 1072 (9th Cir. 2011).

regulations (18 C.F.R. Part 380) as such regulations relate to the NEPA analysis for backstop siting applications.

In accordance with the IIJA amendments, the Proposed Rule would require an applicant to submit evidence establishing the basis for FERC's backstop siting authority. Under FPA section 216 and the Proposed Rule, there are five circumstances that may trigger backstop siting authority: (i) where the state does not have the authority to approve the siting of the facilities or to consider the interstate or interregional benefits expected to be achieved from the project; (ii) the applicant is not eligible for state siting approval because it does not serve end-use customers within the state; (iii) a state has not made a determination on an application within the specified timeframes, (iv) the state siting authority conditioned its approval such that the proposed facilities would not significantly reduce transmission capacity constraints or congestion in interstate commerce or in such a way that is not economically feasible, or (v) the state has denied an application. The Proposed Rule also amends the regulations in the following ways:

- **Pre-Filing Process and Notice to States:** Previously, there was a waiting period where an applicant could not begin FERC's pre-filing process until one year after filing its state permitting application. The Proposed Rule would eliminate this waiting period, allowing a developer to simultaneously file the state application and initiate the FERC pre-filing process. Additionally, the Commission has indicated that it will provide for a further level of outreach and consultation with states in those instances where FERC backstop siting has been triggered because the relevant state failed to make a determination within one year of the later of either the filing of the state application or the DOE corridor designation. In discussing the Proposed Rule, the Commission stated that it will allow for an additional 90-day window in which that state can provide comments on the applicant's pre-filing submissions.
- **Expanded Series of Effects Analysis:** As a part of the siting application review and NEPA process, FERC requires applicants to prepare and file a series of reports providing data on various elements of a project and the effects of construction, operation, maintenance, and any later decommissioning. In the Proposed Rule, the Commission proposes expanded impacts reports in several areas:
 - **Environmental Justice:** A new Environmental Justice Resource Report would require information (i) identifying environmental justice communities within the project's area of potential impacts; (ii) describing the project's impacts on environmental justice communities; and (iii) proposing mitigation measures to avoid or minimize such impacts.
 - **Tribal Resources:** The Proposed Rule's Tribal Resources Report would consolidate existing requirements regarding the project's effects on Tribes, Tribal lands, and Tribal resources.
 - **Air Quality and Environmental Noise:** The Air Quality and Environmental Noise Resource Report would require applicants to estimate emissions, air quality impacts, and noise impacts, and to propose mitigation measures for such impacts.
 - **Visual Resources:** The Proposed Rule seeks comments on whether the Bureau of Land Management's Visual Resource Management methodology or the Federal Highway Administration's Visual Impact Assessment for Highway Projects, or other tools, are appropriate for the Commission's analysis of impacts to visual resources from transmission siting.
- **Requirements for System Impact Studies and Planning Information:** As part of the siting application review, FERC proposes that applicants file completed system impact study reports for the project as well as other information regarding existing regional planning reports and assessments for the areas in which the facilities will be located.

- **NEPA:** The Proposed Rule modifies FERC’s NEPA implementing regulations under 18 C.F.R. Part 380 to reflect the newly required Resource Reports (noted above) and to update the requirements for the Reliability and Safety Resource Report. Additionally, the Commission seeks comments on the Commission’s NEPA regulations as they pertain to siting electric transmission facilities in 18 C.F.R. Part 380.
- ***Eminent Domain Practices and Landowner Protections:*** To address concerns about landowner rights in the exercise of eminent domain, in its Proposed Rule, the Commission recommends that siting applicants abide by a new Applicant Code of Conduct in order to demonstrate, in accordance with the IJJA’s amendments to section 216, that it “has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process.” Under the Code of Conduct, applicants must meet various record-keeping and information sharing standards. Notably, applicants must ensure that they engage in early communications with affected landowners and other public stakeholders explaining the Commission’s pre-filing and application processes for the proposed project, sharing the Landowner Bill of Rights created for this purpose, and summarizing the rights of the affected landowner. If an applicant chooses not to abide by the Code of Conduct, it must explain its alternative method of demonstrating that it meets the good faith efforts standard for landowner engagement required by the IJJA’s changes to section 216.

IMPLICATIONS

Through the Proposed Rule, following Congress’s direction in the IJJA, FERC is taking a significant step towards reinvigorating backstop siting in a way that incorporates FERC’s recent policies and approaches to environmental protection, environmental justice, and state and Tribal engagement. This development, more than a decade after federal court decisions severely limited the utility of the Energy Policy Act of 2005 backstop siting authority, is a notable, necessary milestone. However, as emphatically noted by Commissioner Christie: “This is not a magic bullet.” Other hurdles to faster action by federal and state authorities on the siting and permitting of electric transmission projects in the U.S. remain.

Several key issues in the Proposed Rule are likely to garner particular attention during the public comment period. For example, the Commission expressly requested comments on the definition of an “environmental justice community”—and this appears to be the first time a federal agency has defined an “environmental justice community” for purposes of a regulatory permit or authorization. Additionally, the Proposed Rule would continue FERC’s increasing focus on protecting landowner rights associated with the exercise of eminent domain. Finally, comments are expected to focus on the respective roles and coordination between states and the Commission in the siting process.

Comments on the Proposed Rule are due 90 days after its publication in the Federal Register.

For More Information

Van Ness Feldman’s nationally regarded electric and permitting practices provide counsel on regulatory and policy matters to a broad range of clients in the power sector. If you are interested in additional information regarding this NOPR, or would like to discuss its implications, please contact [Joe Nelson](#) or [Jonathan Simon](#) at (202) 298-1800 in Washington, D.C. or in Seattle at (206) 623-9372.

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