

# RECENT DEVELOPMENT

## RUNNING ROUGHSHOD? EXTENDING FEDERAL SITING AUTHORITY OVER INTERSTATE ELECTRIC TRANSMISSION LINES

### I. INTRODUCTION

In the 111th Congress, multiple bills have been introduced to expand federal authority over the siting of interstate transmission lines. Legislation has been introduced by Senate Majority Leader Harry Reid (D-Nev.)<sup>1</sup> as well as Senators Jeff Bingaman (D-N.M.),<sup>2</sup> Byron Dorgan (D-N.D.),<sup>3</sup> and Ben Nelson (D-Neb.).<sup>4</sup> In the House, Representative Jay Inslee (D-Wash.) introduced a similar transmission bill on April 30, 2009.<sup>5</sup> Introduced solely by Democrats, these bills were presumably designed to advance the Obama administration's renewable energy goal to double the nation's renewable energy supply in the next three years.<sup>6</sup> In his February 24, 2009 address to Congress, President Barack Obama promised to "lay down thousands of miles of power lines that can carry new energy to cities and towns across [the] country," and stated that "clean, renewable energy" is needed to "truly transform [the] economy, protect [national] security, and save [the] planet from the ravages of climate change."<sup>7</sup> While states have historically controlled the siting of interstate electric transmission lines,<sup>8</sup> many federal legislators and regulators believe stronger federal authority over siting is necessary.<sup>9</sup> These federal policymakers argue that states have failed to adequately implement the new administration's goals, such as interconnecting

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<sup>1</sup> See Clean Renewable Energy and Economic Development Act ("CREEDA"), S. 539, 111th Cong. (2009).

<sup>2</sup> See American Clean Energy Leadership Act of 2009 ("ACELA"), S. 1462, 111th Cong. (2009).

<sup>3</sup> See National Energy Security Act of 2009 ("NESA"), S. 774, 111th Cong. (2009).

<sup>4</sup> See SMART Energy Act, S. 807, 111th Cong. (2009).

<sup>5</sup> See National Clean Energy Superhighways Act of 2009 ("NCESA"), H.R. 2211, 111th Cong. (2009); see also Katherine Ling, *Electricity: Senators Cautious About 'Vague' Definitions in Transmission Siting Draft*, E&E DAILY, May 1, 2009, <http://www.eenews.net/public/EEDaily/2009/05/01/2>.

<sup>6</sup> President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009), 2009 WL 259901, at \*6.

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., *Piedmont Env'tl. Council v. Fed. Energy Regulatory Comm'n*, 558 F.3d 304 (4th Cir. 2009).

<sup>9</sup> See *Transmission Infrastructure: Hearing Before the Subcomm. on Energy and Natural Resources*, 111th Cong. 8-13 (2009) [hereinafter *Transmission Infrastructure Hearing*] (statement of Jon Wellinghoff, Acting Chairman, Federal Energy Regulatory Commission); Andy Stone, *Feds To Take Control of Electric Superhighway*, FORBES.COM, Mar. 9, 2009, <http://www.forbes.com/2009/03/09/energy-harry-reid-business-energy-superhighway.html>.

new renewable power sources to the transmission grid.<sup>10</sup> In fact, the statutory schemes of many states, including New York<sup>11</sup> and Florida,<sup>12</sup> do not even mention considerations of interstate benefits in state siting decisions.

Federal demand for such legislation has also grown in the wake of 2009's *Piedmont Environmental Council v. Federal Energy Regulatory Commission* ("FERC"), where the Fourth Circuit held that section 216 of the Federal Power Act ("FPA")<sup>13</sup> precludes FERC from exercising "back-stop" authority—the power to overturn state siting decisions—based solely on a state's rejection of an interstate siting application.<sup>14</sup> However, FERC may exercise backstop authority within a designated national interest electric transmission corridor ("NIETC") when a state lacks the authority to act on an application, fails to act within one year, or conditions its approval in ways that would prevent a proposed transmission line from reducing congestion or that would not be economically feasible.<sup>15</sup> In his testimony before the Senate Committee on Energy and Natural Resources, FERC Chairman Jon Wellinghoff described the *Piedmont* decision as "a significant constraint on [FERC]'s already-limited ability to approve[ ] appropriate projects to transmit energy in interstate commerce."<sup>16</sup> He advocated for expanded federal siting authority, emphasizing the national "goal of reducing reliance on carbon-emitting sources of electric energy and bringing new sources of renewable energy to market."<sup>17</sup>

This Note examines the debate about the expansion of federal jurisdiction over siting interstate electric transmission lines. Many federal legislators and regulators argue that the federal government is institutionally preferable to states for siting decisions because of its procedural efficiencies, its experience in siting energy projects, and its ability to balance national and state concerns.<sup>18</sup> However, some states, major utilities, and grid operators fear that national regulators will focus on national priorities to the detriment of state

<sup>10</sup> See *Transmission Infrastructure Hearing*, *supra* note 9 (statement of Jon Wellinghoff, Acting Chairman, Federal Energy Regulatory Commission); Stone, *supra* note 9.

<sup>11</sup> See N.Y. PUB. SERV. LAW § 126 (Consol. 2009). The need to accommodate an interstate or regional market is never explicitly mentioned.

<sup>12</sup> See Florida Electric Power Plant Siting Act, FLA. STAT. §§ 403.501–.518 (2009); Florida Electric Transmission Line Siting Act, FLA. STAT. §§ 403.52–.5365 (2009). Neither the Florida Electric Power Plant Siting Act nor the Florida Electric Transmission Line Siting Act explicitly takes into account the interstate market. However, the latter act includes a savings clause in section 403.537 that allows the Florida Public Service Commission to consider other relevant matters when determining need. Florida Electric Transmission Line Siting Act, FLA. STAT. § 403.537 (2009).

<sup>13</sup> 16 U.S.C. § 824p (2006).

<sup>14</sup> *Piedmont Envtl. Council v. Fed. Energy Regulatory Comm'n*, 558 F.3d 304, 313 (4th Cir. 2009).

<sup>15</sup> 16 U.S.C. § 824p.

<sup>16</sup> *Transmission Infrastructure Hearing*, *supra* note 9, at 11 (statement of Jon Wellinghoff, Acting Chairman, Federal Energy Regulatory Commission).

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., *id.* at 8–10.

and local interests.<sup>19</sup> States also possess a wealth of local and regional expertise, which is necessary for complex regional planning, and which may be lost under expanded federal siting authority.<sup>20</sup> Expanded federal power may further stall potential transmission projects by encroaching upon traditional state authority and provoking a backlash by the states. For example, in March 2009, Connecticut Governor M. Jodi Rell released a statement in which she supported renewable energy, but opposed federal siting power that would allow “FERC to run roughshod over state authority.”<sup>21</sup>

This Note suggests that a voluntary regional planning process might enjoy greater procedural efficiency by attracting wider public acceptance and avoiding the traditional political tensions between state and federal governments. Regional Transmission Organizations (“RTOs”), which are responsible for administering electrical transmission grids on a regional basis, may aid a voluntary planning process in some geographic regions by giving utility stakeholders a venue in which to develop a coordinated regional transmission grid.<sup>22</sup> Each of the transmission bills currently pending preserves state authority to some extent.<sup>23</sup>

This Note interprets these bills, and then suggests several policies that may minimize political backlash from states and capitalize on the institutional advantages of both federal and state governments. To the extent possible, this Note recommends that federal legislators create procedures to preserve state input and authority both in the grid planning process and in the siting of individual transmission projects.

To frame the current controversy, Part II of this Note provides a brief history of electric transmission siting in the United States, including general policy reasons that are often cited to support expanding federal jurisdiction. Part III then outlines the current pieces of proposed federal legislation, describing the key differences between the bills and their potential effects on state siting authority. Finally, Part IV focuses on the arguments for opposing expanded federal jurisdiction, with an emphasis on the concerns of utilities and grid operators, and on Connecticut’s rocky relationship with FERC.

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<sup>19</sup> See Peter Behr, *Utilities and Transmission Managers Try to Head off Congressional Grid Plans*, N.Y. TIMES, Apr. 29, 2009, available at <http://www.nytimes.com/cwire/2009/04/29/29climatewire-utilities-and-transmission-managers-try-to-h-12208.html>; Press Release, Governor M. Jodi Rell, State of Conn. Executive Chambers, Governor Rell Fights Expanded Powers for Federal Energy Regulators (Mar. 19, 2009), available at <http://www.ct.gov/Governorrell/cwp/view.asp?A=3675&Q=436554> [hereinafter Rell].

<sup>20</sup> See Denise L. Desautels, *Who Should Regulate the Siting of Electric Transmission Lines Anyway? A Jurisdictional Study*, ELECTRICITY J., May 2005, at 11, 13.

<sup>21</sup> Rell, *supra* note 19.

<sup>22</sup> NAT’L COUNCIL ON ELEC. POLICY, COORDINATING INTERSTATE ELECTRIC TRANSMISSION SITING: AN INTRODUCTION TO THE DEBATE 9 (2008), available at [http://www.oe.energy.gov/DocumentsandMedia/Transmission\\_Siting\\_FINAL\\_41.pdf](http://www.oe.energy.gov/DocumentsandMedia/Transmission_Siting_FINAL_41.pdf) [hereinafter NCEP REPORT].

<sup>23</sup> See ACELA, S. 1462, 111th Cong. sec. 121 (2009) (amending FPA, 16 U.S.C. § 824p (2006)); NCEA, H.R. 2211, 111th Cong. sec. 101(a) (2009) (amending 16 U.S.C. §§ 824–824w (2006)); NESA, S. 774, 111th Cong. sec. 101 (2009) (amending 16 U.S.C. § 824p); SMART Energy Act, S. 807, 111th Cong. sec. 101 (2009) (amending 16 U.S.C. §§ 824–824w); CREEDA, S. 539, 111th Cong. sec. 3(a), § 404(a), (g) (2009).

## II. OVERVIEW: INTERSTATE ELECTRIC TRANSMISSION SITING

The current state-centered legal regime for regulating the siting of interstate electric transmission lines can be explained by the manner in which the electric power industry in the United States developed.<sup>24</sup> Historically, the electric industry emerged from local markets, which were developed around local generation facilities and “short-distance transmission capabilities.”<sup>25</sup> In these markets, transmission planning and construction were conducted by vertically integrated utilities, which were companies that controlled the generation, transmission, and distribution of electric power within a local market.<sup>26</sup> The Public Utility Act of 1935<sup>27</sup> gave the states jurisdiction over transmission routing in local markets, and states “have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities.”<sup>28</sup>

Beginning in the 1970s, however, the electric industry began a process of deregulation and transition from a “highly balkanized, and locally based industry to an unbundled industry with broad regional markets.”<sup>29</sup> This gradual restructuring eliminated vertically integrated utilities and created energy markets where generation, transmission, and distribution were separately controlled and operated by several companies.<sup>30</sup> Therefore, the introduction of competition shaped the regional and national power markets that emerged in the 1990s.<sup>31</sup>

In the wake of deregulation, more transmission lines were needed to create a more reliable, interconnected national grid.<sup>32</sup> Such lines have become the “foundation for wholesale electricity market competition.”<sup>33</sup> As the number of wholesale power generators rose, new transmission lines were needed to connect competing suppliers to customers and to encourage the efficient distribution of surplus generation capacity across different public utility service territories.<sup>34</sup>

Despite the need for new transmission infrastructure, national transmission expansion moved at a “slow pace,”<sup>35</sup> and little investment was directed

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<sup>24</sup> See Richard Benjamin, *Principles for Interregional Transmission Expansion*, ELECTRICITY J., Oct. 2007, at 36.

<sup>25</sup> Desautels, *supra* note 20, at 12.

<sup>26</sup> See Benjamin, *supra* note 24, at 36.

<sup>27</sup> Public Utility Act of 1935 (Federal Power Act), ch. 687, 49 Stat. 803 (1935) (codified at 16 U.S.C. §§ 791–825r).

<sup>28</sup> *Piedmont Envtl. Council v. Fed. Energy Regulatory Comm’n*, 558 F.3d 304, 310 (4th Cir. 2009).

<sup>29</sup> Desautels, *supra* note 20, at 12.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 11.

<sup>33</sup> Benjamin, *supra* note 24, at 37.

<sup>34</sup> Desautels, *supra* note 20, at 12.

<sup>35</sup> Benjamin, *supra* note 24, at 37.

at increasing transmission capacity between large geographic areas.<sup>36</sup> However, conflicts arose when federal regulators began to encourage the siting and construction of interstate transmission lines during the Clinton and Bush administrations.<sup>37</sup> These conflicts arose from a disconnect between the regional or national economic benefits of interstate transmission lines and the “very local environmental and aesthetic liabilities.”<sup>38</sup>

For example, in the late 1980s and early 1990s, Pennsylvania permanently stalled a project that proposed moving power across the state from West Virginia to New Jersey.<sup>39</sup> In the early 2000s, another controversy erupted between New York and Connecticut over the placement of the Cross-Sound Cable (“CSC”), a 330-megawatt underwater direct current cable system, which was to be placed under the Long Island Sound to transfer power from New England to Long Island.<sup>40</sup> FERC supported the project, finding that the CSC would “enhance competition by expanding capacity and trading opportunities between the New England and New York markets.”<sup>41</sup> Although an agreement was eventually reached, Connecticut’s Attorney General Richard Blumenthal strongly objected to the project, citing economic, environmental, and legal concerns.<sup>42</sup> Among other complaints, Blumenthal claimed that the CSC threatened shipping and navigation, created an environmental hazard by requiring blasting of the seabed to install the cable lines, and unfairly subsidized Long Island ratepayers and cable owners at the expense of Connecticut ratepayers.<sup>43</sup>

The politics of interstate transmission siting has traditionally divided legislators along state and federal lines, rather than party affiliation.<sup>44</sup> For example, while each current piece of transmission legislation was proposed by a Democrat, it was Vice President Richard Cheney’s National Energy Policy Development Group that released a 2001 National Energy Policy Report that encouraged the expansion of federal power over interstate transmission line siting.<sup>45</sup>

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<sup>36</sup> *Id.* at 36.

<sup>37</sup> *Regional Energy Reliability and Security: DOE Authority to Energize the Cross Sound Cable: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 108th Cong. 38–42 (2004) [hereinafter *Energy and Air Quality Hearing*] (statement of Hon. Patrick Wood III, Chairman, Federal Energy Regulatory Commission); Kennedy Maize, *Smart Grid Still Just a “Vision Thing”*, *POWER*, June 2007, at 68, 70 (inset, Bodman and the Stupid Grid).

<sup>38</sup> Desautels, *supra* note 20, at 13.

<sup>39</sup> See Maize, *supra* note 37, at 70.

<sup>40</sup> *Energy and Air Quality Hearing*, *supra* note 37.

<sup>41</sup> *Id.* at 40.

<sup>42</sup> *Id.* at 45–49 (statement of Richard Blumenthal, Att’y Gen., State of Conn.).

<sup>43</sup> *Id.* at 47.

<sup>44</sup> In the CSC controversy, Connecticut’s Attorney General Blumenthal, a Democrat, clashed with a Republican White House and administration. Today, Connecticut’s current governor, a Republican, has spoken out vigorously against expanded federal siting authority proposed by Democrats. See discussion *infra* at Part IV.B.

<sup>45</sup> NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY: RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA’S FUTURE (2001)

In 2005, Congress adopted section 216 of the Federal Power Act<sup>46</sup> in response to arguments made by the Bush administration<sup>47</sup> that greater federal powers were needed to address state and federal conflicts.<sup>48</sup> Section 216 was also intended to create a reliable national electric transmission grid modeled after FERC's siting authority for interstate natural gas pipelines.<sup>49</sup> To achieve its goals, section 216 empowers the Secretary of Energy to designate congested areas of the transmission grid as NIETCs.<sup>50</sup> The designation of a NIETC is not a determination that a transmission line must be built.<sup>51</sup> Rather, NIETCs exist merely to "spotlight" congestion problems that affect consumers and to give FERC limited siting authority under FPA section

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[hereinafter NATIONAL ENERGY POLICY REPORT]. When former Secretary Bodman announced draft designations of two NIETCs in 2007, he responded to the politics of transmission siting by issuing *draft* rather than final designations "in order to allow additional opportunities for review and comment by affected states, regional entities, and the general public." Maize, *supra* note 37, at 70. Although the Department of Energy was not required to issue draft designations, the agency "realized that unilateral action would set off a political firestorm." *Id.* at 70.

<sup>46</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221, 119 Stat. 594, 946 (codified at 16 U.S.C. § 824p (2006)). Section 216(b) of the FPA reads:

Construction permit.—Except as provided in subsection (i), the Commission may, after notice and an opportunity for hearing, issue one or more permits for the construction or modification of electric transmission facilities in a national interest electric transmission corridor designated by the Secretary under subsection (a) if the Commission finds that—

- (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;
- (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 . . . .

*Id.* § 216(b) (codified at 16 U.S.C. § 824p(b)).

<sup>47</sup> See NATIONAL ENERGY POLICY REPORT, *supra* note 45.

<sup>48</sup> See *Piedmont Envtl. Council v. Fed. Energy Regulatory Comm'n*, 558 F.3d 304, 312–13 (4th Cir. 2009).

<sup>49</sup> See Mark K. Lewis, *Federal Siting Authority for Interstate Electric Transmission Lines: Transmission Capacity Cannot Grow if New Lines Cannot be Built*, *ELECTRICITY J.*, Oct. 2001, at 36, 36–37.

<sup>50</sup> 16 U.S.C. § 824p(a).

<sup>51</sup> DEPT OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION REPORT AND FINAL NATIONAL CORRIDOR DESIGNATIONS: FREQUENTLY ASKED QUESTIONS 1 (2007), available at [http://nietc.anl.gov/documents/docs/FAQs\\_re\\_National\\_Corridors\\_10\\_02\\_07.pdf](http://nietc.anl.gov/documents/docs/FAQs_re_National_Corridors_10_02_07.pdf).

216(b).<sup>52</sup> While the designation of NIETC is intended to resolve tensions between “what is perceived to be best for a region as a whole versus what is perceived to be best for an individual State or an individual portion of one State,” the designation of an NIETC does not override state authority.<sup>53</sup> To exercise “backstop” authority over state decisions, FERC must first determine that the proposed interstate transmission project meets one of the enumerated criteria included in section 216(b): a state must lack authority to act on the project’s application, fail to act within one year, or condition its approval in ways that would prevent a proposed transmission line from reducing congestion or that would not be economically feasible.<sup>54</sup> NIETCs are limited in nature<sup>55</sup> and are ineffective “mechanism[s] for analyzing the need for transmission from a national, rather than State or local, perspective.”<sup>56</sup>

Because the *Piedmont* decision limited FERC’s “backstop” authority under section 216, the case may have perversely incentivized some federal regulators to characterize *Piedmont*’s holding even more broadly in order to support Congressional action expanding federal siting authority. In his testimony before the Senate Committee on Energy and Natural Resources, FERC Chairman Jon Wellinohoff claimed that the *Piedmont* decision entirely eliminated FERC’s “backstop” authority in “situations where a state agency has timely denied an application for a proposed project, regardless of how important the project may be in relieving congestion on the interstate grid.”<sup>57</sup>

However, *Piedmont* clearly does not preclude FERC from exercising “backstop authority” over denied applications if any of the other criteria in section 216 are met. While the Fourth Circuit held that “the statute does not give FERC [backstop] authority when a state has affirmatively denied a permit application within the one-year deadline,” the court cited “a carefully drawn list of five circumstances when FERC may preempt a state and issue a permit for the construction or modification of electric transmission facilities in a national interest corridor.”<sup>58</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 8.

<sup>54</sup> 16 U.S.C. § 824p(b) (2006).

<sup>55</sup> In October 2007, FERC designated two NIETCs for the Mid-Atlantic and the Southwest Area. The Department of Energy gave both NIETCs twelve-year terms and determined the NIETC’s boundaries using a “source-and-sink approach.” This approach analyzed the geographic distribution of consumers harmed by congestion (“sink” areas) and the locations with underutilized generation capacity or potential for renewable energy development (“source” areas). DEP’T OF ENERGY, *supra* note 51, at 2–3.

<sup>56</sup> *Id.* at 8.

<sup>57</sup> *Transmission Infrastructure Hearing*, *supra* note 9, at 11 (statement of Jon Wellinohoff, Acting Chairman, Federal Energy Regulatory Commission).

<sup>58</sup> *Piedmont Envtl. Council v. Fed. Energy Regulatory Comm’n*, 558 F.3d 304, 313–14 (4th Cir. 2009) FERC may preempt a state when:

(1) a state in which the transmission facilities are to be constructed or modified does not have the authority to approve the siting; (2) a state does not have the authority to consider the expected interstate benefits to be achieved by the proposed project; (3) a permit applicant is a transmitting utility under the FPA, but does not qualify for a permit in a particular state because it does not serve end-use customers in that state;

Regardless of party affiliation, federal legislators and regulators traditionally advance similar procedural and substantive reasons in favor of expanded federal siting authority. First, federal siting authority may be procedurally beneficial.<sup>59</sup> Research has shown that efficiency is higher when a single agency oversees transmission siting, eliminating several potential layers of bureaucratic red tape.<sup>60</sup> By contrast, interstate transmission projects often require the developer to comply with the approval processes mandated by both the federal government and several state agencies, including agencies in different states and different agencies within the same state.<sup>61</sup> Therefore, under complete federal control, the implementation of one federal siting power should result in a more timely, streamlined approval process.<sup>62</sup> This would allow developers to regularly build new transmission lines to keep up with increasing demand. A streamlined process would also promise stability for project developers, thereby incentivizing more transmission projects under a less time-consuming and more efficient process.

Second, a federal siting procedure might result in a substantively better decision on whether to approve or deny a given interstate transmission project. FERC may be the most institutionally competent body to make such a decision because of the agency's wealth of experience in siting energy infrastructure.<sup>63</sup> For the past sixty-five years, FERC has served as the primary authority over the siting of interstate natural gas pipelines<sup>64</sup>, and, since 1920, FERC has overseen the licensing and operation of all non-federal hydro-power projects.<sup>65</sup>

FERC may also be in a better institutional position than the states to balance localized concerns with the broader public interest. Generally, state siting commissions make siting decisions based on determinations of the state's public need and necessity. While state commissions are more likely to determine "need" based partly on residents' not-in-my-backyard ("NIMBY") concerns or to focus solely on the state-level economic or environmental impacts, federal regulators may be in the best "position to see both the forest and the trees," and to provide "a fresh look at how regional or national transmission lines are sited."<sup>66</sup> For example, Pennsylvania and

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(4) . . . a state commission has withheld approval for more than one year after filing the application or the designation of the relevant nation interest corridor, whichever is later; or (5) a state commission has conditioned its approval in such a manner that the proposed construction or modification is not economically feasible or will not significantly reduce transmission congestion in interstate commerce.

*Id.* at 314 (citations omitted).

<sup>59</sup> See CREEDA, S. 539, 111th Cong. sec. 2(10) (2009).

<sup>60</sup> Benjamin, *supra* note 24, at 40.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 41–42.

<sup>63</sup> *Transmission Infrastructure Hearing*, *supra* note 9, at 8 (statement of Jon Wellinghoff, Acting Chairman, Federal Energy Regulatory Commission).

<sup>64</sup> *Id.* at 11.

<sup>65</sup> *Id.*

<sup>66</sup> Lewis, *supra* note 49, at 37.



Connecticut's opposition prevented the placement of transmission lines that were proposed to be sited, but not utilized, in their respective states.<sup>67</sup> However, in the same situations a more powerful FERC might have served as a neutral arbiter, taking state concerns into account, but ultimately making an objective final decision.

### III. TRANSMISSION LEGISLATION: 111TH CONGRESS

Transmission siting legislation has been introduced recently by Senate Majority Leader Reid,<sup>68</sup> Senator Bingaman,<sup>69</sup> Senator Dorgan,<sup>70</sup> Senator Nelson,<sup>71</sup> and Representative Inslee.<sup>72</sup> On July 16, 2009, Senator Bingaman's bill was reported by the Senate Energy and Natural Resources Committee and placed on the Senate Legislative Calendar to be considered by the Senate as a whole.<sup>73</sup> As of this writing, the other four bills remain in committee.<sup>74</sup>

#### A. *Clean Renewable Energy and Economic Development Act, S. 539* (Senator Reid)

On March 5, 2009 Senate Majority Leader Reid submitted a transmission bill to the Senate Committee on Energy and Natural Resources.<sup>75</sup> Entitled the Clean Renewable Energy and Economic Development Act ("CREEDA"), the bill proposes amending the FPA by adding a new Part IV—National Renewable Energy Zones and Green Transmission.<sup>76</sup> In addition to the Secretary of Energy's powers to designate NIET areas under section 216(a) of the FPA, section 402 of CREEDA would allow the President to designate areas with significant potential to generate renewable energy, but with inadequate transmission, as Renewable Energy Zones ("REZs").<sup>77</sup> CREEDA would also require FERC to designate regional planning entities, which would prepare interconnection-wide green transmission project plans

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<sup>67</sup> *Id.*

<sup>68</sup> See CREEDA, S. 539, 111th Cong. (2009).

<sup>69</sup> See ACELA, S. 1462, 111th Cong. (2009).

<sup>70</sup> See NESA, S. 774, 111th Cong. (2009).

<sup>71</sup> See SMART Energy Act, S. 807, 111th Cong. (2009).

<sup>72</sup> See NCEA, H.R. 2211, 111th Cong. (2009).

<sup>73</sup> See S. 1462 (as reported by S. Comm. on Energy and Natural Res.).

<sup>74</sup> According to their statuses on GovTrack.us as of September 28, 2009. See GovTrack.us, Tracking the U.S. Congress, <http://www.govtrack.us/> (last visited Oct. 26, 2009).

<sup>75</sup> See CREEDA, S. 539, 111th Cong. (2009).

<sup>76</sup> See *id.* sec. 3(a).

<sup>77</sup> See *id.* § 402.

and identify green transmission grid projects.<sup>78</sup> These projects are needed to move renewable energy generation from supplier generators to consumers.<sup>79</sup>

In addition, and possibly most notably, section 404(a) of CREEDA would also give FERC new siting authority limited to green transmission facilities that move energy produced from renewable sources and that: (1) are included in an interconnection-wide plan or a project in which a developer assumes all of the risk and cost of the proposed facilities; (2) optimize transmission capability, project economics, land use limitations, and potential renewable generation; and (3) include project owners who have failed to make reasonable progress in getting state siting approval.<sup>80</sup> These powers would augment, not amend, FERC's existing authority under section 216(b) of the FPA.<sup>81</sup> If a transmission project utilizes federal siting authority under section 404(a), the developer must give priority to renewable suppliers and must annually certify that at least seventy-five percent of its capacity, or the greatest reliable amount, is available to renewable suppliers.<sup>82</sup>

Finally, under section 404(g) of CREEDA, FERC would be required to take into consideration state recommendations for siting a transmission line only if that state participated in interconnection-wide planning of the green transmission grid plan.<sup>83</sup> After participating states "identify siting constraints and mitigation measures," FERC must either (1) incorporate the concerns into the construction permit or (2) seek to resolve the issue and incorporate "appropriate" constraints.<sup>84</sup> Under CREEDA, if FERC rejects a participating state's suggestion, it must publish a statement of why the recommendation was infeasible, uneconomical, or inconsistent with other law.<sup>85</sup>

#### *B. National Energy Security Act of 2009, S. 774 (Senator Dorgan)*

Introduced on April 1, 2009 in the Senate Committee on Finance, Senator Dorgan's bill is entitled the National Energy Security Act of 2009 ("NESAs").<sup>86</sup> NESAs would remove FERC's current backstop authority,<sup>87</sup> but would give FERC exclusive siting authority over facilities included in a

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<sup>78</sup> See *id.* § 403(a)–(c). For the purposes of CREEDA, the term "green transmission grid project" means: (1) a project for "a new transmission facility rated at or above 345 kilovolts that is part of an Interconnection-wide plan developed . . . for an extra high voltage transmission grid to enable transmission of electricity from renewable energy . . . to electricity-consuming areas"; or (2) "a new renewable feeder line that an Interconnection-wide plan or [FERC] determines is needed to connect renewable generation to [an] extra high voltage transmission grid." *Id.* § 401(8)(A).

<sup>79</sup> See *id.* § 403(a)–(c).

<sup>80</sup> See *id.* § 404(a).

<sup>81</sup> See *id.*

<sup>82</sup> See CREEDA, S. 539, 111th Cong. sec. 3(a), § 404(a) (2009).

<sup>83</sup> See *id.* § 404(g).

<sup>84</sup> See *id.*

<sup>85</sup> See *id.* § 403(g)(2).

<sup>86</sup> NESAs, S. 774, 111th Cong. (2009).

<sup>87</sup> *Id.* at sec. 101 (amending 16 U.S.C. § 824p).

FERC-approved “Clean Energy Superhighway,”<sup>88</sup> which is an “interstate extra-high voltage transmission grid.”<sup>89</sup> Section 101 of NESA would amend section 216 of the FPA to require a FERC-supervised planning process by regional entities, which must identify sites for “Clean Energy Superhighway” projects.<sup>90</sup> Although FERC would have exclusive siting authority for projects within these sites, the agency must accept siting constraints submitted by states during a pre-filing process, unless FERC finds that a recommendation is inconsistent with the purposes<sup>91</sup> and requirements of NESA or other federal law.<sup>92</sup> The pre-filing process would ensure that an applicant’s project is included within the Clean Energy Superhighway, and would provide states with the opportunity to identify siting constraints and mitigation measures, including “habitat protection, environmental considerations, cultural site protection, or other factors.”<sup>93</sup>

If a project developer does not agree with a state’s siting constraints and mitigation measures, a designated Siting Dispute Resolution Board would hear the appeal and make a decision that serves as a recommendation for FERC during FERC’s final dispute resolution.<sup>94</sup> This dispute board must include a representative from FERC, a representative from each affected state designated by the governor, and an expert.<sup>95</sup> FERC may then either incorporate the state’s concerns, or find that they are inconsistent with the purposes and requirements of NESA.<sup>96</sup> If FERC chooses not to accept the state’s recommendations, it must publish its findings and reasoning.<sup>97</sup>

### C. SMART Energy Act, S. 807 (Senator Nelson)

On April 1, 2009, Senator Nelson introduced the Sound Management of America’s Resources and Technologies Energy Act (“SMART Energy Act”)<sup>98</sup> to the Senate Committee on Finance. The proposed bill would amend FPA section 216(h), and would append new provisions—sections 224 and

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<sup>88</sup> *Id.* at sec. 101, § 216(d)(4).

<sup>89</sup> *Id.* § 216(a)(2).

<sup>90</sup> *Id.* § 216(b)(2).

<sup>91</sup> The purposes of the Clean Energy Superhighway include: (1) “expand[ing] and moderniz[ing] the electrical transmission grid”; (2) “integrat[ing] location-constrained resources”; (3) “improv[ing] delivery of electricity from location-constrained resources to load centers”; (4) “ensur[ing] sufficient transmission capacity for future demand growth”; (5) “integrat[ing] smart grid technologies”; (6) “enhanc[ing] the reliability and efficiency of the electrical transmission grid”; (7) relieving grid congestion; (8) increasing the number of “light-duty grid-enabled vehicles”; (9) meeting other “renewable electricity standard[s]”; and (10) providing low-cost energy to markets. *Id.* § 216(b)(1).

<sup>92</sup> *Id.* § 216(d).

<sup>93</sup> NESA, S. 774, 111th Cong. sec. 101, § 216(d)(3)(A) (2009) (amending 16 U.S.C. § 824p (2006)).

<sup>94</sup> *Id.* § 216(d)(3)(B)–(C).

<sup>95</sup> *Id.* § 216(d)(3)(B)(ii).

<sup>96</sup> *Id.* § 216(d)(3)(C).

<sup>97</sup> *Id.* § 216(d)(3)(C).

<sup>98</sup> SMART Energy Act, S. 807, 111th Cong. (2009).

225—to the FPA.<sup>99</sup> The bill would not, however, amend FPA section 216(b),<sup>100</sup> and thus would preserve the FPA’s current description of FERC’s backstop authority. Under the SMART Energy Act, FERC would be required to submit a plan for establishing an Energy Superhighway to both the President and several congressional committees.<sup>101</sup> Provided that Congress does not issue a resolution of disapproval, FERC would have exclusive authority over the siting, permitting, planning, and construction of the Energy Superhighway.<sup>102</sup> Although the bill would require FERC to consider “input from all interested parties,”<sup>103</sup> the bill does not specifically discuss state input or the weight that federal regulators must place on recommendations from affected states.

In addition to giving FERC exclusive jurisdiction over actions related to the Energy Superhighway, section 101 of the SMART Energy Act would give FERC backstop authority over secondary line connections that may enter the superhighway.<sup>104</sup> But unlike the current backstop authority provided by section 216(b) of the FPA, section 101 of the SMART Energy Act would allow FERC to hear proposals whenever, within one year of filing, a state: (1) denies an application and FERC determines denial is contrary to public interest or detrimental to the Energy Superhighway; or (2) is unable to approve an application, and FERC determines that it is in the public interest or beneficial to the Energy Superhighway to approve the project.<sup>105</sup> Thus, although the bill would not explicitly amend FPA section 216(b), FERC’s backstop authority under section 101 of the SMART Energy Act would be significantly broader than its current powers under FPA section 216(b) alone.

*D. American Clean Energy Leadership Act of 2009, S. 1462  
(Senator Bingaman)*

Senator Bingaman’s American Clean Energy Leadership Act of 2009 (“ACELA”) proposes revamping FERC’s current backstop authority under section 216.<sup>106</sup> Under ACELA, FERC-supervised and appointed regional entities would prepare centralized interconnection-wide transmission grid plans

<sup>99</sup> *Id.* at tit. I.

<sup>100</sup> *See id.* at sec. 103.

<sup>101</sup> *See id.* at sec. 101 (adding § 224(c), (d), (f) to FPA, 16 U.S.C. §§ 824–824w (2006)). For the purposes of the SMART Energy Act, an Energy Superhighway combines high voltage transmission lines, a siting preference that uses existing federal, state, or other rights-of-way, and smart grid technologies. *Id.* at sec. 101, § 224(a).

<sup>102</sup> *See id.* § 224(c).

<sup>103</sup> *Id.* § 224(d)(1)(C)(i).

<sup>104</sup> *See* SMART Energy Act, S. 807, 111th Cong. sec. 101, § 224(e) (2009) (amending 16 U.S.C. §§ 824–824w). For purposes of the SMART Energy Act, a “secondary line connection” refers to a new transmission line, or an existing, rerouted, or modified line, connected with the Energy Superhighway. *Id.* § 224(b)(5).

<sup>105</sup> *Id.* § 224(e)(2).

<sup>106</sup> *See* ACELA, S. 1462, 111th Cong. sec. 121 (2009) (amending 16 U.S.C. § 824p (2006)).

that contain “high priority”<sup>107</sup> national transmission projects.<sup>108</sup> To encourage consistency among projects, FERC would reserve the right to modify these plans<sup>109</sup> consistent with its policy goals.<sup>110</sup>

Under ACELA, transmission project developers would first apply for state approval before seeking federal siting backstop authority under section 216(e).<sup>111</sup> Once a developer is authorized by the state to seek federal authority, section 216(e) requires the developer to obtain a certificate of public convenience and necessity,<sup>112</sup> which is a document authorizing the operation, construction, acquisition, or modification of a high priority national transmission project.<sup>113</sup> FERC may award such a certificate and authorize a “high-priority” national transmission project consistent with the public interest only if the state: (1) does not consider the project within one year; (2) rejects the project; or (3) imposes unreasonable conditions.<sup>114</sup> Although this language resembles FERC’s current “backstop” authority under section 216, it specifically overrides the limitations of *Piedmont* by including a state’s outright rejection of an application as a legitimate basis for the exercise of federal backstop authority.<sup>115</sup>

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<sup>107</sup> ACELA defines “high priority national transmission project” as:

an overhead or underground transmission facility, consisting of conductors or cables, towers, manhole duct systems, phase shifting transformers, reactors, capacitors, and any ancillary facilities and equipment necessary for the proper operation of the facility that—

- (A)(i) operates at or above a voltage of—
  - (I) 345 kilovolts alternating current; or
  - (II) 300 kilovolts direct current;
- (ii) . . . operat[es] at or above . . . 300 kilovolts direct current; or
- (iii) is a renewable feeder line that transmits electricity directly or indirectly to a transmission facility [that operates at or above a voltage of 345 kilovolts alternating current or 300 kilovolts direct current]; and
- (B) is included in a regional plan . . . .

*Id.* at sec. 121, § 216(b)(1).

<sup>108</sup> *Id.* § 216(c)(1). Under ACELA, the Department of the Interior would serve as the lead agency for permitting “high-priority national transmission” projects on federal lands. *See id.* § 216(f)(2).

<sup>109</sup> *See id.* § 216(c)(3)(C).

<sup>110</sup> These policy goals include the development of renewable resources, reduced emissions, reduced transmission congestion, enhanced opportunities for electricity trades, increased reliability, and enhanced competition in electricity markets. *Id.* § 216(a).

<sup>111</sup> *Id.* § 216(d)(3).

<sup>112</sup> ACELA, S. 1462, 111th Cong. sec. 121, § 216(e) (2009) (amending 16 U.S.C. § 824p (2006)).

<sup>113</sup> *Id.* § 216(e)(2)(A).

<sup>114</sup> *Id.* § 216(d)(3)(B).

<sup>115</sup> *See Piedmont Env'tl. Council v. Fed. Energy Regulatory Comm'n*, 558 F.3d 304, 313–14 (4th Cir. 2009); ACELA, S. 1462 sec. 121, § 216(e)(1)(A)(ii).

E. *National Clean Energy Superhighways Act of 2009, H.R. 2211*  
(Representative Inslee)

On April 30, 2009, Representative Inslee introduced the National Clean Energy Superhighways Act of 2009 (“NCESA”).<sup>116</sup> Referred to the House Committee on Energy and Commerce, the bill was intended to serve as companion legislation to Senator Bingaman’s Senate bill.<sup>117</sup> NCESA would amend the FPA by adding a new section 216A immediately after section 216.<sup>118</sup> Section 216A would authorize states within the Eastern and Western Interconnection Grids to establish multi-state transmission planning authorities (“MTAs”).<sup>119</sup> After obtaining certification by FERC, each MTA would be required to submit a Siting Transmission Grid (“STG”) plan to FERC within one year.<sup>120</sup> FERC then would have the authority to modify or reject the MTA plans, although an MTA would be allowed to revise its plan within ninety days of rejection.<sup>121</sup> If FERC and the MTA failed to resolve the matter jointly, FERC would be able to exercise “backup commission planning authority” and develop its own plan.<sup>122</sup>

In order to site or construct a transmission STG project, public utilities would be required to obtain a FERC-issued certificate of public convenience and necessity.<sup>123</sup> Unlike Senator Bingaman’s bill,<sup>124</sup> Representative Inslee’s bill permits transmission developers to apply directly to FERC for siting certification, rather than to an MTA or other state entity.<sup>125</sup> Certificates must reflect recommendations from state environmental, land management, and natural resource agencies.<sup>126</sup> Under the NCESA, state recommendations can only relate to the protection of natural resources.<sup>127</sup> Before rejecting a state’s

<sup>116</sup> NCESA, H.R. 2211, 111th Cong. (2009).

<sup>117</sup> See *New Legislation*, FEDERAL CLIMATE AND ENERGY ACTIVITIES WEEKLY ROUNDUP (Southern Governors’ Association, Wash., D.C.), Apr. 27–May 1, 2009, at 2–3 [hereinafter Southern Governors’ Association], available at <http://www.southerngovernors.org/portals/0/RoundUps/April%2027%20-%20May%201%20Weekly%20Roundup.pdf>.

<sup>118</sup> See H.R. 2211 sec. 101(a) (amending 16 U.S.C. §§ 824–824w).

<sup>119</sup> See *id.* at sec. 101(a), § 216A(b)(1)(A). One hundred and eighty days after enactment, FERC must promulgate organizational and procedural requirements for the MTAs, including: (1) a governance structure representing each interconnected state; (2) an “open, transparent, and participatory [sustainable transmission grid] planning process”; (3) a mechanism to assure adequate resources for MTA planning activities; and (4) other requirements deemed “necessary” by FERC. *Id.* § 216A(b)(1)(B)(1).

<sup>120</sup> *Id.* § 216A(b)(5)(A).

<sup>121</sup> See *id.* § 216A(b)(5)(B)(ii)–(iii).

<sup>122</sup> See *id.* § 216A(b)(6).

<sup>123</sup> See NCESA, H.R. 2211, 111th Cong. sec. 101(a), § 216A(d)(1)(A) (2009) (amending 16 U.S.C. §§ 824–824w). Entities other than public utilities described in FPA section 201(f) that propose an STG project may voluntarily choose to apply the procedures of section 216A(d)(1). *Id.* § 216A(d)(1)(B).

<sup>124</sup> See ACELA, S. 1462, 111th Cong. (2009); Southern Governors’ Association, *supra* note 117, at 3.

<sup>125</sup> See NCESA, H.R. 2211 sec. 101(a), § 216A(d)(2)(A).

<sup>126</sup> See *id.* § 216A(d)(4).

<sup>127</sup> See *id.*

recommendation, FERC must first attempt to resolve any inconsistencies with the purposes and requirements of NCEA or other applicable law, "giving due weight to the recommendations, expertise, and statutory responsibilities of such [state] agencies."<sup>128</sup> If unsuccessful, FERC may reject the recommendation, provided it publishes in the Federal Register findings that address the recommendation's inconsistency as well as FERC's compliance with section 216A(d)(4)(A).<sup>129</sup>

#### F. Implications for State Authority

Although the five transmission bills described above all extend federal jurisdiction over the siting of interstate transmission lines, each retains traditional state siting authority in varying degrees. Further, each proposed bill implements some form of FERC led, supervised, or certified regional planning process to identify desirable areas for locating interstate transmission lines.<sup>130</sup> In his Senate testimony, FERC Chairman Wellinghoff describes regional transmission planning as necessary to "reduce congestion, increase the deliverability of existing power supplies, and identify investments necessary to integrate significant potential sources of renewable energy . . . ."<sup>131</sup> Once the regional planning process identifies specific areas, however, each bill grants to FERC varying degrees of authority over the siting of transmission lines, with varying levels of state input.<sup>132</sup>

The proposals have different visions, both for the goals and for the scope of the regional planning process. For example, while Senator Reid's bill focuses on identifying areas for potential transmission lines that will increase renewable generation<sup>133</sup> and support "green transmission grid project[s],"<sup>134</sup> Senator Bingaman's bill seeks to identify "high-priority national transmission project[s]" under broader planning goals.<sup>135</sup> Thus, Senator Bingaman's bill is based not only on increasing the use of renewable energy, but also on reliability benefits, diversification of risk related to events affecting

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<sup>128</sup> *Id.* § 216A(d)(4)(B).

<sup>129</sup> *See id.*

<sup>130</sup> *See* ACELA, S. 1462, 111th Cong. sec. 121, § 216(c)-(f) (2009); H.R. 2211 sec. 101(a), § 216(A)(b); SMART Energy Act, S. 807, 111th Cong. sec. 101, § 224(c)-(f) (2009); NESA, S. 774, 111th Cong. sec. 101(1), § 216(b)(2) (2009); CRREDA, S. 539, 111th Cong. sec. 3(a), § 403(a)-(c) (2009).

<sup>131</sup> *Transmission Infrastructure Hearing, supra* note 9, at 12 (statement of Jon Wellinghoff, Acting Chairman, Federal Energy Regulatory Commission).

<sup>132</sup> *See* S. 1462; H.R. 2211; S. 807; S. 774; S. 539.

<sup>133</sup> *See* S. 539 sec. 2 (finding using renewable resources to produce electricity reduces emissions of pollutants, enhances national energy security, conserves finite resources, and provides substantial economic benefits).

<sup>134</sup> *Id.* at sec. 3(a), § 403(d).

<sup>135</sup> *Cf.* S. 1462 sec. 121(a), § 216(a) (enumerating ten policy goals that should guide transmission system development).

fuel supply,<sup>136</sup> enhancement of competition in electricity markets,<sup>137</sup> and the need for weighing competing land use priorities.<sup>138</sup>

Broader planning goals and criteria may provide FERC and FERC-appointed planning entities with wider authority to designate transmission sites, and thus may limit discretion by traditional state siting authorities. For this reason, legislators reacted cautiously to an earlier draft of Senator Bingham's bill.<sup>139</sup> During a "walk through hearing" of the draft bill on April 30, 2009, legislators in the Senate Energy and Natural Resources Committee questioned the breadth and "vagueness" of ACELA's purpose, including a provision allowing FERC to "take any necessary action" to address impediments to completing high-priority transmission projects.<sup>140</sup> However, this language remained in the final bill submitted to the Senate in July 2009.<sup>141</sup> Legislators also criticized the bill for lacking detail, and for imprecisely defining the legislation's beneficiaries.<sup>142</sup>

Senator Reid's bill, CREEDA, avoids vague, overly broad language by mirroring state approaches. CREEDA's planning approach resembles that of Texas legislation from 2005, which requires the Texas Public Utilities Commission to develop a plan to construct transmission capacity to deliver electricity from designated competitive renewable energy zones.<sup>143</sup> Under the 2005 bill, Texas state agencies are required to investigate the need for increased transmission and generation capacity throughout the state and biennially report to the legislature.<sup>144</sup> State administrators hoped the plan would "la[y] the groundwork for large transmission lines to accommodate present wind industry needs and to further accelerate the use of wind power in the state."<sup>145</sup> Senator Reid's bill similarly calls for the creation of renewable energy zones.<sup>146</sup>

Of the current pieces of legislation, Senator Nelson's SMART Energy Act may give FERC the greatest amount of authority over the grid planning process. This bill not only directs FERC (rather than an appointed regional body) to create the Energy Superhighway,<sup>147</sup> but also includes only general planning criteria.<sup>148</sup> The bill's specified "purpose" in new FPA section 224(a) also does not seem to provide legislators or FERC with a clear idea of the

<sup>136</sup> *Id.* § 216(a)(4).

<sup>137</sup> *Id.* § 216(a)(6).

<sup>138</sup> *Id.* § 216(a)(8).

<sup>139</sup> See Ling, *supra* note 5 (quoting Sen. Jean Shaheen (D-N.H.) and Sen. Dorgan).

<sup>140</sup> *Id.*

<sup>141</sup> ACELA, S. 1462, 111th Cong. sec. 121, § 216(g)(2) (2009).

<sup>142</sup> Ling, *supra* note 5.

<sup>143</sup> See 2005 Tex. Gen. Laws 1 (codified at TEX. UTIL. CODE §§ 36.053, 39.203, 39.904 (Vernon 2007)).

<sup>144</sup> *Id.* at 3 (codified at § 39.904(k)).

<sup>145</sup> Texas State Energy Conservation Office, Texas Wind Transmission Constraints, [http://www.seco.cpa.state.tx.us/re\\_wind-transmission.htm](http://www.seco.cpa.state.tx.us/re_wind-transmission.htm) (last visited Oct. 26, 2009).

<sup>146</sup> See CREEDA, S. 539, 111th Cong. (2009).

<sup>147</sup> See SMART Energy Act, S. 807, 111th Cong. sec. 101, § 224(c)-(f) (2009).

<sup>148</sup> See *id.* § 224(d).



policy goals that the Energy Superhighway will potentially advance, such as renewable energy, emissions reductions, and fuel diversification.<sup>149</sup>

Finally, federal authority over the regional planning process may be narrowest under Representative Inslee's bill, which gives states the authority to designate regional planning authorities.<sup>150</sup> Although FERC must eventually certify an STG plan under NCESA, federal regulators do not control the designation of regional planning authorities as they do in the other proposed bills.<sup>151</sup>

Each bill also gives varying degrees of weight to states' input on the siting of individual transmission projects, which is a critical factor in determining the practical scope of FERC's new extended authority over interstate transmission siting. While Representative Inslee's bill gives states the opportunity for expanded participation in the regional planning process through the MTAs,<sup>152</sup> it limits state authority over the siting of individual projects through FERC's backup planning powers.<sup>153</sup> Representative Inslee's bill, NCESA, was meant as a companion to Senator Bingaman's bill,<sup>154</sup> which requires transmission project developers to seek state approval before attempting to invoke federal authority.<sup>155</sup> Representative Inslee's legislation, however, allows developers to appeal directly to FERC.<sup>156</sup> Further, Representative Inslee's legislation instructs FERC to consider state input related solely to the protection of natural resources.<sup>157</sup>

Senator Reid's, Senator Dorgan's, and Representative Inslee's bills also attempt to safeguard state power over siting decisions by requiring FERC to publish its reasons for rejecting certain state recommendations.<sup>158</sup> Senator Nelson's bill, on the other hand, does not specifically discuss state input or

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<sup>149</sup> See *id.* § 224(a) (section 224(a) is titled "Purpose" and lists technical aspects of the superhighway but not broader reasons for its creation).

<sup>150</sup> See NCESA, H.R. 2211, 111th Cong. sec. 101(a), § 216A(b)(1)(A) (2009).

<sup>151</sup> See *id.*

<sup>152</sup> See *id.* § 216A(b)(5).

<sup>153</sup> See *id.* § 216A(b)(6).

<sup>154</sup> See Southern Governors' Association, *supra* note 117, at 3.

<sup>155</sup> See ACELA, S. 1462, 111th Cong. sec. 121, § 216(d)(3) (2009).

<sup>156</sup> See NCESA, H.R. 2211, 111th Cong. sec. 101(a), § 216A(d)(2) (2009).

<sup>157</sup> See *id.* While greater federal siting authority will arguably provide economic benefits to the region, one of its key drawbacks may be the "environmental, land use, and aesthetics" costs imposed solely on the individual locality. Desautels, *supra* note 20, at 21. Thus, limiting state input to the protection of natural resources might actually serve as an effective means to extend federal siting authority, while allowing affected communities to voice the most relevant local concerns. See *id.*

<sup>158</sup> If FERC rejects a participating state's siting suggestion under CREEDA, the agency must publish a statement explaining why the state's recommendation was "infeasible, not cost-effective, or inconsistent with [CREEDA] or other applicable provisions of law." CREEDA, S. 539, 111th Cong. sec. 3(a), § 403(g)(2) (2009). Under NESA, FERC must also publish its findings and reasoning if it chooses not to adopt a state's whole or partial recommendation. See NESA, S. 774, 111th Cong. sec. 101(1), § 216(d)(3)(C) (2009). Under Representative Inslee's bill, if FERC rejects a state agency's siting recommendation, FERC must publish in the Federal Register a finding of its own compliance and the recommendation's inconsistencies. See H.R. 2211 sec. 101(a), § 216A(d)(4)(B).

the weight that federal regulators should place on state recommendations.<sup>159</sup> Senator Reid's and Senator Dorgan's bills further allow states to directly attach siting constraints and mitigation measures to developers' projects.<sup>160</sup> However, Senator Reid's bill cuts back on this authority by requiring FERC approval of all measures and by not requiring the inclusion of recommendations by states that have not participated in the regional planning process.<sup>161</sup>

Senator Dorgan's legislation introduces the most elaborate procedures for developers to appeal these constraints.<sup>162</sup> After the Siting Dispute Resolution Board makes a recommendation, FERC would be able to incorporate the siting constraints and mitigation measures, or override the state's concerns entirely.<sup>163</sup> While such procedures may benefit the developer by providing two layers of review, the inability to appeal directly to FERC may conserve the state's siting power to the detriment of the developer: developers may try to avoid a lengthy review process by simply accepting state conditions and constraints.

Each bill proposes to extend federal jurisdiction over the siting of interstate transmission lines, and each could also constrict traditional state siting power to varying degrees. States, utilities, and other interest groups have had more time to react to Senator Reid's bill, but going forward they will likely submit lengthy testimony and input on the other legislation as well.

#### IV. OPPOSITION TO FEDERAL AUTHORITY: STATES, UTILITIES, AND GRID OPERATORS

The expansion of federal jurisdiction over siting of interstate transmission lines "could help overcome the limitations of the localized system by freeing the decision-making process from the singular pressures of local politics and interests."<sup>164</sup> However, opponents of extended federal jurisdiction argue that federal siting authority often advances national priorities at the expense of state and local interests.<sup>165</sup> For example, they argue that abolishing state and local control could eliminate "local expertise over energy infrastructure that might negatively impact the localities."<sup>166</sup> Moreover, the environmental and aesthetic impacts of new transmission lines are borne primarily by the affected locality.<sup>167</sup> In the words of Tony Clark, Vice President of the National Association of Regulatory Utility Commissioners

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<sup>159</sup> Senator Nelson's bill merely requires that FERC consider "input from all interested parties." SMART Energy Act, S. 807, 111th Cong. sec. 101, § 224(d)(1)(C)(i) (2009).

<sup>160</sup> See S. 774 sec. 101(1), § 216(d); S. 539 sec. 3(a), § 404(g).

<sup>161</sup> S. 539 sec. 3(a), § 404(g).

<sup>162</sup> See S. 774 sec. 101(1), § 216(d)(3)(B) (laying out the appeals process, including the Siting Dispute Resolution Board).

<sup>163</sup> See *id.* § 216(d)(3)(C).

<sup>164</sup> Lewis, *supra* note 49, at 37.

<sup>165</sup> See, e.g., Desautels, *supra* note 20, at 19.

<sup>166</sup> *Id.*

<sup>167</sup> See *id.* at 13.

("NARUC"), "siting . . . issues are often controversial because in most situations someone's gain comes at someone else's expense."<sup>168</sup> Accordingly, the opponents of expanded federal siting authority are most often utilities, grid operators, and states.<sup>169</sup>

#### A. Utilities and Grid Operators

On April 8, 2009, several major utilities and grid operators met to discuss how to prevent passage of the current congressional transmission legislation.<sup>170</sup> Their discussions focused on expanding the Eastern Interconnection Grid to accommodate more power from renewable sources.<sup>171</sup> Forming the Eastern Interconnection Planning Collaborative ("EIPC"),<sup>172</sup> the group intended to "show Congress that a grassroots planning approach will be more effective" than expanded federal siting legislation.<sup>173</sup>

In September 2009, EIPC released a proposal<sup>174</sup> to perform an interconnection-wide transmission analysis.<sup>175</sup> This analysis would serve as a "reference case" for potential regional grid expansions, and would help develop cost estimates to aid states and other stakeholders in assessing inter-regional policy options.<sup>176</sup> EIPC believes that an "interconnection-wide analysis" could be handled most efficiently by involving a variety of stakeholders and by expanding and building upon regional plans currently in development.<sup>177</sup> EIPC's members also doubt FERC's (or any federal agency's) ability to handle the responsibility of completing a complex regional planning process.<sup>178</sup>

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<sup>168</sup> *Transmission Infrastructure Hearing*, *supra* note 9, at 16 (statement of Tony Clark, Comm'r, North Dakota Public Service Commission).

<sup>169</sup> *See, e.g.*, Behr, *supra* note 19; Rell, *supra* note 19.

<sup>170</sup> Behr, *supra* note 19.

<sup>171</sup> *Id.*

<sup>172</sup> The Eastern Interconnection Planning Collaborative ("EIPC") has published a list of parties to the EIPC Analysis Team Agreement. *See* EIPC, EASTERN INTERCONNECTION TRANSMISSION ANALYSIS: DOE FUNDING OPPORTUNITY DE-FOA-0000068 attachment 1 (2009) [hereinafter EIPC PROPOSAL], available at [http://isonewengland.org/committees/comm\\_wkgrps/othr/eipc/project\\_a\\_eastern.pdf](http://isonewengland.org/committees/comm_wkgrps/othr/eipc/project_a_eastern.pdf) and [http://isonewengland.org/committees/comm\\_wkgrps/othr/eipc/att\\_1\\_eipc\\_analysis\\_team\\_entity\\_list.pdf](http://isonewengland.org/committees/comm_wkgrps/othr/eipc/att_1_eipc_analysis_team_entity_list.pdf). Leading the initiative is David Whiteley, a former senior executive with the North American Electric Reliability Corporation and with Ameren Corporation. Behr, *supra* note 19.

<sup>173</sup> Behr, *supra* note 19.

<sup>174</sup> EIPC PROPOSAL, *supra* note 172 (responding to a U.S. Department of Energy funding opportunity).

<sup>175</sup> *See Eastern Interconnection Planning Collaborative Submits Proposal in DOE Interconnection-Level Analysis and Planning Solicitation*, REUTERS, Sept. 14, 2009 [hereinafter *EIPC Press Release*].

<sup>176</sup> *See id.*

<sup>177</sup> In its proposal, EIPC promises to conduct "multi-constituency stakeholder workshops, webinars and other outreach initiatives to gather stakeholder input on scenario development for both communicating initial results and soliciting input on findings and draft reports." EIPC PROPOSAL, *supra* note 172, at 17.

<sup>178</sup> *Cf.* Behr, *supra* note 19 (quoting one energy industry consultant as saying, "If you don't get the regions right, you can't get the interconnection right.").

Utilities are not alone in opposing expanded federal jurisdiction; state regulators are skeptical as well. During his testimony before the Senate Energy and Natural Resources Committee in response to Senator Reid's bill, NARUC Vice President Clark stated that, "to have the greatest economical and environmental benefits[,] transmission facilities should not be nationalized but encouraged to be regionalized."<sup>179</sup> Thus, Clark believes that states should continue their "active role" in interstate transmission siting.<sup>180</sup>

In his testimony, Clark expressed doubts about the efficacy of an expanded federal siting power.<sup>181</sup> According to Clark, because "public acceptance" serves as a major obstacle to new siting infrastructure, simply shifting siting authority will not supply a "quick fix" to the situation.<sup>182</sup> Rather, FERC, or any other lead federal agency, will inevitably face an old political problem—confronting "angry and vocal constituents" whose local interests risk being sacrificed to serve the federal government's vision of interstate transmission siting.<sup>183</sup>

To quiet the conflict between states and federal agencies, Clark suggests encouraging voluntary planning organizations capable of synthesizing the views of multiple stakeholders.<sup>184</sup> As an example, Clark cites the Upper Midwest Transmission Development Initiative ("UMTDI"), led by the governors and state commissions of Minnesota, North Dakota, South Dakota, Iowa, and Wisconsin.<sup>185</sup> UMTDI plans to increase the use of renewable wind energy, first by designating "geographic zones" for wind energy development, and then by modeling a complementary transmission expansion plan.<sup>186</sup> By soliciting the input of "utility regulators, governors' staff, utilities, transmission owners, non-governmental organizations, and the Midwest ISO," UMTDI seeks to incorporate into its plans multi-state need and siting-review requirements.<sup>187</sup>

A July 2008 report compiled by the National Council on Electricity Policy<sup>188</sup> ("NCEP") suggests that RTOs may also serve as effective venues for states to coordinate the development of interstate transmission lines.<sup>189</sup> A

<sup>179</sup> *Transmission Infrastructure Hearing*, *supra* note 9, at 17 (statement of Tony Clark, Comm'r, North Dakota Public Service Commission).

<sup>180</sup> *Id.*

<sup>181</sup> *Cf. id.* at 18 (mentioning Clark's pleasure "to see that members of [Congress] are also concerned with the federal government involvement in the siting of electric transmission lines").

<sup>182</sup> *See id.* at 17.

<sup>183</sup> *See id.* at 18.

<sup>184</sup> *See id.* at 18–19.

<sup>185</sup> *Transmission Infrastructure Hearing*, *supra* note 9, at 17 (statement of Tony Clark, Comm'r, North Dakota Public Service Commission).

<sup>186</sup> *See id.* at 19.

<sup>187</sup> *See id.*

<sup>188</sup> The NCEP is a venture between NARUC, the National Association of State Energy Officials, the National Association of Clean Air Agencies, the National Governors Association, and the National Conference of State Legislatures. *See* NCEP REPORT, *supra* note 22, at iii (page immediately preceding Table of Contents).

<sup>189</sup> *See id.* at 9.

few regional state committees have already been established within RTOs to discuss interstate transmission line siting within the region, including the Organization of MISO States (“OMS”), Organization of PJM States, Inc. (“OPSI”), and Southern Power Pool Regional State Committee (“SPP RSC”).<sup>190</sup> For example, the OMS Northwest Subgroup coordinates interstate transmission line siting by analyzing the permitting and siting processes of its members (Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin) and by creating mechanisms to inform members about the progress of relevant transmission line applications.<sup>191</sup> OPSI and SPP RSC also provide a venue where state utility boards and commissions can work together on transmission issues.<sup>192</sup> NCEP’s report recommends that states use existing venues such as RTOs and affiliated state committees “to facilitate bilateral and multilateral transmission dialogue,” and to achieve interstate transmission coordination at a regional level.<sup>193</sup>

### B. States: Connecticut’s Experience

In addition to utilities and grid operators, some states have strongly opposed extending federal authority over the siting of interstate transmission lines.<sup>194</sup> In particular, the State of Connecticut has had a historically rocky relationship with FERC. On March 19, 2009, Governor Rell released a press release in response to Senator Reid’s bill, “strongly oppos[ing]” provisions of the Clean Renewable Energy and Economic Development Act.<sup>195</sup> In a letter to Senators Reid, Bingaman, and Murkowski, Governor Rell wrote that giving more power to FERC in order to override state siting authority “is the last thing Congress should be doing.”<sup>196</sup> In this letter, she also described her state’s past dealings with “out-of-control federal regulators” who had displayed a willingness “to trample on states’ rights and prerogatives and [on the] interests of millions of ordinary citizens.”<sup>197</sup>

Despite these objections, Connecticut’s opposition to the Cross Sound Cable (“CSC”) has been cited as significant evidence of the need for expanded federal siting authority over interstate transmission lines.<sup>198</sup> With respect to the CSC, greater federal authority may have enabled regulators to

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<sup>190</sup> See *id.* at 14.

<sup>191</sup> See *id.* at 15.

<sup>192</sup> OPSI coordinates state agencies and public utility commissions from Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. SPP RSC members include retail regulation commissioners from agencies in Arkansas, Kansas, Missouri, Oklahoma and Texas. See *id.*

<sup>193</sup> See *id.* at 19.

<sup>194</sup> See *Energy and Air Quality Hearing, supra* note 37, at 38 (statement of Hon. Patrick Wood III, Chairman, Federal Energy Regulatory Commission); Maize, *supra* note 37, at 70.

<sup>195</sup> See Rell, *supra* note 19.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See Lewis, *supra* note 49, at 37–38.

override attempts to stall the line because it did not directly promote Connecticut's interests.<sup>199</sup>

Governor Rell has stated that she recognizes that "interstate projects may provide greater and more direct benefits to certain locales than others through which the project may traverse."<sup>200</sup> However, by extending federal siting authority, she believes Congress would turn over a "critical state right" to federal regulators, which would then have free rein to advance federal planning objectives, without local input and to the detriment of local communities.<sup>201</sup>

In her press release regarding Senator Reid's bill, Governor Rell reminded federal legislators about Connecticut's "nightmarish" relationship with FERC, including a list of instances where FERC "proved itself distant—even imperious—in its dealing with state governments and utterly indifferent to the needs or desires of local municipalities or their residents."<sup>202</sup> For example, in 2005, another controversy arose involving the Long Island Sound when FERC refused to involve Connecticut in siting decisions concerning a potential liquefied natural gas platform located under New York jurisdiction.<sup>203</sup> In 2006, FERC again overrode community preferences by siting a natural gas compressor in Brookfield, Connecticut; the compressor was located near a school and residential homes.<sup>204</sup> In 2007, FERC once more disregarded local interests by siting another natural gas compressor on the Brookfield site.<sup>205</sup> Together, these experiences help to explain Connecticut's resistance to expanded federal jurisdiction over the siting of interstate transmission lines.

## V. CONCLUSION

With the election of President Obama and the corresponding "groundswell of support for renewable energy," Democratic legislators and other proponents of renewable energy have sought to expand federal power over interstate transmission line siting.<sup>206</sup> Legislation expanding federal power

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 39.

<sup>201</sup> See Rell, *supra* note 19.

<sup>202</sup> *Id.* For example, in 2004, a FERC-imposed Locational Installed Capacity ("LICAP") threatened to ruin the state's economy by charging ratepayers thirteen billion dollars over five years. FERC originally imposed the LICAP as an attempt to incentivize the construction of new power plants. As part of LICAP, FERC implemented a two-zone pricing scheme to artificially increase electricity prices. However, even FERC "acknowledged that the problem . . . was not generating capacity but transmission capacity." *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See Behr, *supra* note 19. In his testimony before the Senate Committee on Energy and Natural Resources on March 12, 2009, Rhone Resch, President and CEO of the Solar Energy Industries Association, claimed that full FERC siting authority for interstate electric transmission lines is needed in order "[t]o achieve dramatic increases in renewable energy production." *Transmission Infrastructure Hearing*, *supra* note 9, at 111 (statement of Rhone Resch,

presumes that federal agencies are institutionally superior to states in making interstate siting decisions.<sup>207</sup> However, the current federal legislation may unwisely ignore potentially superior regional agreements between states, utilities and grid operators. As detailed above, states, public utilities, and grid operators have been aware of, and responsive to, the need for a new transmission grid to fulfill renewable energy and emissions goals.<sup>208</sup> In her recent press release, for example, Governor Rell referenced Connecticut's designation by the U.S. Environmental Protection Agency as one of the Agency's top fifty "Green Power Partners."<sup>209</sup> States have also been heavily involved in voluntary regional planning processes, such as UMTDI, and other initiatives to encourage renewable power.<sup>210</sup> Although RTOs may not be useful in all areas of the country, in certain regions, such as the Northwest, Mid-Atlantic, and South, they represent a promising entry-point for addressing interstate siting complications.<sup>211</sup>

There is a continued concern that federal agencies with expanded siting authority may run roughshod over state interests and local communities. Whether federal agencies actually trample states' rights may not be as important as how the public, local communities, and states perceive federal actions. If increased federal authority sparks heated political controversies over transmission siting decisions, such tension could stall new projects and thwart the very goals the new federal siting legislation was meant to advance. In sum, "[f]inding and implementing solutions will require cooperation by, not confrontation among," various interest groups.<sup>212</sup>

Although members of Congress may be hesitant to rely strictly on regional planning bodies because of fears that these entities will not expand the grid quickly enough,<sup>213</sup> federal legislators should draft alternative proposals based on carefully defined goals and purposes, including the preservation of a substantial amount of state siting authority. Just as Senator Reid's legislation, CREEDA, mirrors approaches taken by state siting legislation, federal legislation could be improved by drawing on the expertise and innovations of the states. Otherwise, by leaving states in the dark, federal legislators risk

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President and CEO, Solar Energy Industries Association). Resch called for rejecting state siting approval at any level, and argued that renewables justify a "new regulatory approach . . . [.] giving FERC exclusive authority for siting green power highways." *Id.*

<sup>207</sup> Senator Reid's bill finds state and regional "transmission planning processes [to be] fragmented across many jurisdictions, [resulting] in difficult coordination between jurisdictions, delays in implementation of plans, and complex negotiations on sharing of costs." CREEDA, S. 539, 111th Cong. sec. 2(10) (2009).

<sup>208</sup> *Transmission Infrastructure Hearing*, *supra* note 9, at 19 (statement of Tony Clark, Comm'r, North Dakota Public Service Commission).

<sup>209</sup> Rell, *supra* note 19.

<sup>210</sup> *Transmission Infrastructure Hearing*, *supra* note 9, at 18–19 (statement of Tony Clark, Comm'r, North Dakota Public Service Commission).

<sup>211</sup> *See id.*

<sup>212</sup> *Id.* at 14.

<sup>213</sup> *Cf.* CREEDA, S. 539, 111th Cong. sec. 2(10) (2009) ("[E]xisting transmission planning processes are fragmented across many jurisdictions, which results in difficult coordination between jurisdictions, [and] delays in implementations of plans . . . .").

alienating important stakeholders whose cooperation is needed to create an interconnected transmission grid.

Because siting interstate transmission lines involves national, regional, and local interests, representatives on behalf of each of these groups should have a seat at the decision-making table. Members of Congress would be foolhardy to disregard state and local expertise or to believe that the traditional political tension surrounding interstate electric transmission can be cured by simply extending federal siting authority. Congress should not let Washington's fervor for renewable energy overshadow the substantive value of state input in siting decisions, or the reality of electric industry politics.

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