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A twenty-first century Lazarus?

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Item Type	Article
Authors	Sager, Santosh
Publisher	UC Berkeley School of Law
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Download date	2026-07-06 00:20:30
Link to Item	http://hdl.handle.net/20.500.12424/175830

A Twenty-First Century Lazarus? The Demise and Possible Rebirth of FERC Backstop Siting Authority

INTRODUCTION

In early 2009, the Fourth Circuit struck down a rule issued by the Federal Energy Regulatory Commission (FERC) interpreting section 1221 of the Energy Policy Act of 2005 (EPAAct).¹ This provision authorized FERC to approve the proposed siting of transmission projects in specially designated areas subject to congestion, known as “National Interest Electric Transmission Corridors,” where a state agency had “withheld” approval of the project for more than a year.² FERC’s final rule interpreted this provision to apply to instances where the state agency had actively denied a siting application, in addition to instances where the agency merely failed to make a decision. As a result of the Fourth Circuit’s decision that “withheld” does not encompass a denial, a single state regulator may kill an interstate transmission project and FERC has no authority to intervene, regardless of the value of the project. Given the importance of interstate transmission projects to relieving congestion and developing location-constrained renewable energy generation, Congress has taken preliminary steps to further expand federal authority over transmission siting in the wake of *Piedmont Environmental Council v. FERC*.³

I. LEGISLATIVE BACKGROUND

EPAAct greatly expanded the federal government’s role in setting transmission policy, particularly with regard to the siting of transmission

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1. *Piedmont Env’tl. Council v. Fed. Energy Regulatory Comm’n*, 558 F.3d 304, 309–10 (4th Cir. 2009).

2. *Id.* at 310–11.

3. See American Clean Energy Leadership Act of 2009, S. 1462, 111th Cong. § 121 (2009); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 151 (2009); Clean Renewable Energy and Economic Development Act, S. 539, 111th Cong. § 404 (2009).

infrastructure.⁴ Historically, state regulators have wielded exclusive authority to approve the proposed siting of transmission projects.⁵ State control was the norm even for interstate transmission projects, enabling individual state regulators to delay or effectively block projects that traversed multiple states.⁶ Such hindrances by state regulators are especially problematic, as interstate transmission projects are often essential to ensuring reliability of the transmission grid and reducing congestion costs.⁷

EPAct created a federal role in transmission infrastructure siting decisions for the first time.⁸ EPAct instructs the Department of Energy to “designate any geographic area experiencing electricity transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor [NIETC].”⁹ The designation of a NIETC authorizes FERC to issue construction permits for the proposed siting of transmission infrastructure within the corridor under a limited number of circumstances, which can be grouped into two broad categories.¹⁰ The first category includes cases where the relevant actors may lack the authority to get approval for the project because: (1) the entity building the project lacked authority to apply for a construction permit in a state through which the project passed (because the utility does not serve customers within the state and is simply seeking to route

4. See Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221, 119 Stat. 594 (2005) (granting FERC transmission siting authority); *id.* § 1211 (granting FERC jurisdiction over transmission reliability standards); *id.* § 1241 (giving FERC authority to create transmission rate incentives for reliability and transmission purposes).

5. *Piedmont*, 558 F.3d at 310; Debbie Swanstrom & Meredith M. Jolivert, *DOE Transmission Corridor Designations and FERC Backstop Siting Authority: Has the Energy Policy Act of 2005 Succeeded in Stimulating the Development of New Transmission Facilities?*, 30 ENERGY L.J. 415, 418 (2009).

6. See DEP’T OF ENERGY, 20% WIND ENERGY BY 2030: INCREASING WIND ENERGY’S CONTRIBUTION TO U.S. ELECTRICITY SUPPLY 99 (2008), available at <http://www.20percentwind.org> (“Local opposition to proposed transmission lines is often a major challenge to transmission expansion.”); Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1021–22 (2009) (citing examples of local opponents successfully delaying or defeating interstate projects absent consideration of the totality of environmental benefits); Promoting Transmission Investment through Pricing Reform, Order No. 679, ¶ 15 (Fed. Energy Regulatory Comm’n July 20, 2006), available at <http://www.epa.gov/EPA-IMPACT/2006/July/Day-31/i6495.htm> (citing the 16-year construction time for the construction of a high-voltage transmission project from West Virginia to Virginia).

7. See Promoting Transmission Investment through Pricing Reform, Order No. 679, ¶ 1.

8. Swanstrom & Jolivert, *supra* note 5, at 418.

9. Energy Policy Act, § 1221(a)(2).

10. Regardless of which of the two categories the issuance of the permit takes place under, FERC is required to make a number of other predicate findings: (1) the facility will be used for interstate electricity transmission, (2) the project is consistent with the public interest, (3) the project significantly reduces transmission congestion, (4) the project is consistent with sound national energy policy and enhances energy independence, and (5) the project maximizes the transmission capabilities of existing facilities. *Id.* § 1221(b)(2)–(6).

the project across the state's land)¹¹; (2) the state lacked the basic authority to approve the proposed siting of the project¹²; or (3) the state regulator lacked the authority to consider the interstate benefits of the project (and thus might reject an otherwise beneficial project because it didn't fit within the narrow guidelines it was statutorily allowed to consider).¹³

The second broad category includes two circumstances where the state regulator attempts to impede the project. In the first case, FERC can supersede the state regulator where the regulator approves the project, but with such conditions as to make it uneconomical or unlikely to have a beneficial effect on the transmission constraint or congestion it is designed to alleviate.¹⁴ In the second case, FERC can assert jurisdiction where a state regulator has "withheld approval for more than a year following the filing of an application seeking approval [of the project]."¹⁵

FERC's interpretation of the latter provision gave rise to *Piedmont v. FERC*.¹⁶ In November 2006, FERC issued a final rule interpreting its backstop siting authority under section 1221 of EPAAct.¹⁷ FERC interpreted the "withheld" language of section 1221(b)(1)(C)(i) to govern not only instances where the state regulator failed to act on an application within the one year timeframe, but also those where the state regulator actively denied the application.¹⁸

II. ANALYSIS

FERC's interpretation of EPAAct was challenged by the Piedmont Environmental Council, Communities Against Regional Interconnect, and the public utilities commissions of New York and Minnesota, and was ultimately overturned by a Fourth Circuit 2-1 decision.¹⁹ Both the majority and dissent analyzed FERC's interpretation under the test set forth in *Chevron U.S.A. v. Natural Resources Defense Council*.²⁰ The first

11. *Id.* § 1221(b)(1)(B).

12. *Id.* § 1221(b)(1)(A)(i).

13. *Id.* § 1221(b)(1)(A)(ii).

14. *Id.* § 1221(b)(1)(C)(ii). Such conditions are likely to ensure that the project is never built in spite of its approval.

15. *Id.* § 1221(b)(1)(C)(i).

16. *Piedmont Envtl. Council v. Fed. Energy Regulatory Comm'n*, 558 F.3d 304 (4th Cir. 2009).

17. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, Order No. 689 (Fed. Energy Regulatory Comm'n Nov. 11, 2006) (codified at 18 CFR pts. 50, 380), available at <http://www.ferc.gov/whats-new/comm-meet/111606/C-2.pdf>.

18. *Id.* ¶ 26. (stating "a reasonable interpretation of the language in the context of the legislation supports a finding that withholding approval includes denial of an application").

19. *Piedmont*, 558 F.3d at 309–10.

20. *Id.* at 312; *id.* at 321 (Traxler, J., dissenting).

step in the *Chevron* analysis is to determine whether Congress has “directly spoken to the precise question at issue.”²¹ Where Congress’s intent is clear, it is determinative.²² Though both the majority and dissent concluded that Congress had clearly and directly spoken to the issue, they came to diametrically opposite conclusions as to what Congress intended.²³

First, in looking at the actual language of the statute, the majority rejected FERC’s argument that “withheld approval for more than one year” encompassed a denial by the state regulator.²⁴ According to the court, “withhold” is defined as a continuous holding back of a decision for the entire statutorily-defined, year-long period, whereas “denial” is a finite act that does or does not occur within that period.²⁵ The court also rejected FERC’s contention that the two words are synonymous, concluding that, while “deny” is broad enough to encompass “withhold,” “withhold” is not similarly broad enough to include “deny.”²⁶ Second, in examining the specific context in which the “withheld” language was used, the court held that FERC’s interpretation rendered the clause “nonsensical,” given the finality of “denied” and the continuous nature of the “for more than one year” language.²⁷ Finally, the court evaluated the term “withheld” in the broader context of the statute as a whole and concluded, in light of the other circumstances in which FERC was authorized to issue a construction permit, that FERC’s interpretation was overly broad.²⁸ FERC’s interpretation would effectively take jurisdiction from state regulators for any proposed project in a NIETC whose application they denied, making it “futile . . . for a commission to do its normal work.”²⁹ The court reasoned that because the other circumstances authorizing FERC to issue a permit were limited grants of jurisdiction, only to be used when the state lacked the authority to act or burdened the project with fatal conditions, FERC’s interpretation of the withholding language “renders it completely out of proportion with the four other jurisdiction-granting circumstances.”³⁰ The court concluded

21. 467 U.S. 837, 842 (1984).

22. *Id.* To determine whether Congress has clearly spoken, a court looks “to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

23. *Piedmont*, 558 F.3d at 312–15 (majority opinion) (holding that FERC’s interpretation was beyond the clear intent of Congress, making it unnecessary to complete the second step of the *Chevron* analysis); *id.* at 321–26 (Traxler, J., dissenting).

24. *Id.* at 313 (majority opinion).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 314.

29. *Id.*

30. *Id.*

that the plain meaning of the “withheld” language did not include a situation in which a state regulator actively denied a siting application.³¹

In contrast, the dissenting judge concluded that FERC’s interpretation was consistent with the clear intent of Congress.³² Of clear importance to the dissent was the legislative history of the backstop siting provisions, which suggested that Congress intended to grant FERC authority to site NIETC transmission projects in the face of active denial by state regulators.³³ In particular the dissent cited the House committee report of a bill with identical language to EPAct, which intended to give FERC jurisdiction “if after one year, a state, or other approval authority is unable *or refuses* to site the line.”³⁴ An appeal of the Fourth Circuit’s decision in *Piedmont v. FERC* was taken up by the Edison Electric Institute, but the Supreme Court denied certiorari in January 2010.³⁵ As such, NIETC transmission projects can currently be blocked by state regulators without recourse to FERC or any another federal agency.

III. NEXT STEPS

In the wake of *Piedmont v. FERC*, there appears to be substantial interest at the federal level in broadening the scope of FERC’s transmission siting authority.³⁶ Much of the recent activity seems to be driven by the recognition that the development of significant amounts of location-constrained renewable electricity generation is contingent on the construction of large, interstate transmission projects.³⁷ Indeed, in advocating for an expansion of its transmission siting authority following *Piedmont v. FERC*, FERC has explicitly premised its argument on the need for interstate transmission projects to connect location-constrained renewable generation to major load centers.³⁸

A number of bills currently under consideration in Congress would significantly increase FERC’s authority over transmission siting and

31. *Id.* at 315.

32. *Id.* at 326 (Traxler, J., dissenting).

33. *Id.* at 325.

34. *Id.* (quoting H.R. Rep. No. 109-215(I), at 261 (2005)) (emphasis added).

35. *Edison Elec. Inst. v. Piedmont Envtl. Council*, 130 S. Ct. 1138 (2010).

36. See American Clean Energy Leadership Act of 2009, S. 1462, 111th Cong. § 121 (2009); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 151 (2009); Clean Renewable Energy and Economic Development Act, S. 539 111th Cong. § 404 (2009).

37. DEPARTMENT OF ENERGY, *supra* note 6, at 95–96 (estimating that up to 12,000 miles of new transmission facilities are needed in order to arrive at wind meeting 20 percent of domestic generation capacity).

38. *To Examine Financial Transmission Rights and Other Electricity Market Mechanisms: Hearing on H.R. 473 Before the S. Comm. on Energy and Natural Res.*, 111th Cong. (2009) (statement of Jon Wellinghoff, Chairman, FERC), available at <http://www.ferc.gov/EventCalendar/Files/20100309121423-10-03-09-testimony.pdf>.

planning.³⁹ Each of these bills gives FERC a broader mandate, replacing the congestion-specific mandate of EPAct, and some specifically instruct FERC to consider the connection and development of renewable resources in making transmission planning and siting decisions. Though the scope of FERC's siting authority is substantially different under each bill, they would all effectively negate the holding of *Piedmont v. FERC*.

Senator Jeff Bingaman introduced the American Clean Energy Leadership Act (ACELA) in 2009, which would essentially give FERC unified authority over interstate transmission planning and siting decisions.⁴⁰ Significantly, the Bingaman bill replaces the NIETC framework, unifying transmission planning and siting authority for a broad class of "high-priority national transmission projects" (HPNTP) within FERC.⁴¹ While EPAct narrowly focused on localized areas plagued by congestion or potential reliability problems, ACELA instructs FERC to oversee transmission planning with a holistic, interconnection-level view designed to: (1) ensure the development of renewable generation, (2) reduce congestion, and (3) improve reliability, in addition to a number of other goals.⁴² Further, ACELA explicitly authorizes FERC to approve siting for any proposed HPTNP facility when a state actively denies an application.⁴³

The American Clean Energy and Security Act of 2009 (informally known as the Waxman-Markey bill), which passed the House of Representatives, is similar in approach to ACELA.⁴⁴ Like ACELA, the Waxman-Markey bill also places FERC in charge of national transmission planning, authorizing it to coordinate and harmonize the plans of regional transmission planning entities with a view towards a number of national imperatives.⁴⁵ However, while Waxman-Markey authorizes FERC to take jurisdiction of siting decisions where a state

39. See S. 1462; H.R. 2454; S. 539.

40. S. 1462 § 216(c).

41. *Id.* § 216(b)(1). HPNTP facilities include any transmission facility that is part of a regional transmission plan and (1) operates at 345kv (AC) or 300kv (DC) or (2) is of a high/super conductive nature or (3) is 100kv or above feeder line to a renewable generating facility. *Id.* § 216(b)(1)(A)(i)–(iii).

42. *Id.* § 216(a). To implement these goals FERC is effectively authorized to act as the national coordinator of transmission planning for states and the various transmission and system operators. *Id.* § 216(c)(2)–(3).

43. *Id.* § 216(d)–(e). While FERC is required to consider the record developed by the state authorities and the reasons for their decision, it has ultimate discretion. *Id.*

44. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 216A(a)(1) (2009) (setting similar goals of renewables deployment, reliability improvement, congestion reduction, cyber security, and cost-effective electricity services).

45. *Id.* § 216A(b). An explicit goal is the development of renewable energy. *Id.* § 216A(a)(1)

regulator has denied an application,⁴⁶ this grant is limited to the Western Interconnection only, excepting more than half the country from FERC's mandate.⁴⁷

Senator Harry Reid's bill, the Clean Renewable Energy and Economic Development Act, focuses more narrowly on renewable energy sources. The Clean Renewable Energy and Economic Development Act authorizes FERC to coordinate transmission planning towards the development of a "Green Transmission Grid" (GTG).⁴⁸ FERC would be authorized to oversee the creation of an interconnection-wide plan for the development of a GTG—a plan specifically designed to enhance transmission of renewable-generated electricity.⁴⁹ FERC's siting authority would be expanded such that it has ultimate jurisdiction only over transmission infrastructure that is part of the GTG.⁵⁰

The consensus view in Washington appears to be in favor of a robust expansion of FERC siting and planning authority. Each of these bills reflects the necessity of national authority for the development of location-constrained renewable generation, and, as such, goes beyond the limited, congestion-specific mandate embodied in EPAct. Regardless of which bill passes, the Fourth Circuit's decision in *Piedmont v. FERC* will likely be negated by passage of any of the discussed bills now pending in Congress. In the interim, state regulators retain the authority to block the construction of interstate transmission projects, regardless of their potential national benefits.

46. *Id.* § 216B(b) (giving FERC authority to issue a "Certificate of Public Convenience and Necessity" if a state fails to approve a facility found in one of the regional plans from section 216A(b) within one year).

47. *Id.* § 216(B)(a). The Western Interconnection is the transmission grid covering fourteen western states and parts of Canada and Mexico. Western Electricity Coordinating Council, About WECC, <http://www.wecc.biz/About/Pages/default.aspx> (last visited Apr. 18, 2010).

48. Clean Renewable Energy and Economic Development Act, S. 539 111th Cong. §§ 402(a)(1), 403 (2009).

49. *Id.* § 403(e)(1). Such planning is to be undertaken by an organization (such as a Regional Transmission Organization with authority to administer the transmission grid for a given region) designated by FERC. *Id.* § 403(c)(1).

50. *See id.* § 404(g) (authorizing FERC to issue permits in consultation with state agencies); *id.* § 404(g)(1)(ii)(II) (authorizing FERC to make the final determination of what siting constraints are appropriate).

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