



## WESTERN GOVERNORS' ASSOCIATION

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August 25, 2006

The Honorable Joseph Kelliher, Chairman  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

Dear Chairman Kelliher:

Western Governors have serious concerns about the Federal Energy Regulatory Commission's Notice of Proposed Rulemaking (NOPR)<sup>1</sup> to preempt state siting authority of electric transmission facilities under Section 1221 of the Energy Policy Act of 2005. These proposed rules potentially undermine our past efforts to promote an intelligent and collaborative process for transmission expansion.

Western Governors have been consistent advocates of building transmission to enable the West to develop its clean and diverse generating resources. In 2001, we launched the first Western Interconnection-wide transmission planning effort and have successfully urged the Western industry to institute pro-active, transparent, stakeholder-driven regional transmission planning. In 2002, 12 Western Governors and four federal agencies (DOE, DOI, USDA, CEQ) signed a protocol to coordinate permitting of interstate transmission lines. In 2003, the Governors of Wyoming and Utah launched the Rocky Mountain Area Transmission Study which has spawned major transmission proposals. Individual Governors have initiated transmission planning efforts within their states.

Following enactment of the Energy Policy Act, last November Western Governors adopted a policy on National Interest Electric Transmission Corridors (See attached WGA Resolution 95-30). In the resolution, we note that the EPAct provisions for preemption of state transmission siting laws and designation of corridors on Federal lands "hold the potential for unproductive Federal interference in state and local land use decisions and undercutting State energy policies." We stated that "Federal agencies should only exercise these new responsibilities in collaboration with States and regional stakeholders." Our staffs and the western power industry have worked with DOE in the development of the Department's transmission congestion study.

Our staffs have had the benefit of a conference call with FERC staff to explore the Commission's proposed rules for implementing the preemption provisions of EPAct.

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<sup>1</sup> Notice of Proposed Rulemaking, Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, Docket NO. RM06-12-000, June 16, 2006.

We are concerned that the proposed rules fall short in six areas:

1. FERC's proposed rules ignore the statutory mechanism to trigger federal authority to preempt state siting laws. EPCA 2005 provides that states with siting authority have the first opportunity to site proposed transmission lines. FERC's backstop siting authority is not triggered until such a state (i) withholds approval for more than one year, or (ii) conditions approval in such a manner that the proposed project does not reduce congestion or the project is not economically feasible.<sup>2</sup>
2. The NOPR sets forth an inefficient review process that does not build upon or coordinate with state siting processes. Prior to federal preemption, states with siting authority will have been engaged in a state siting process for at least a year and completed important procedural steps, public outreach, and substantive findings. It would be wasteful to ignore the state siting accomplishments and to require public stakeholders to start over in a new federal process from the very beginning.
3. The proposed rules provide that FERC starts its pre-filing process prior to a state's one year siting deadline and the trigger for federal preemption. Concurrent state and federal siting proceedings prejudices a state's ability to retain jurisdiction over the siting decision. States will be forced to divert resources from the state permitting proceeding in order to advance the state's position in the FERC pre-filing proceeding.
4. The NOPR fails to specify that the 1 year period for state siting prior to federal preemption can only begin once the application for state approval is "complete". This key point must be codified in FERC's rules. The proposed rules allow FERC to reject a substandard application. It would be inconsistent for FERC not to recognize a similar policy at the state level.
5. FERC fails to provide any process for a state to represent its siting authority and counter claims that it withheld or unreasonably conditioned a state siting permit. FERC needs to identify an administrative adjudicative process and ensure that states have, at a minimum, basic due process protections to receive notice and have an opportunity to be heard.
6. The NOPR proposes that applicants demonstrate that proposed facilities will be located in a National Interest Electric Transmission Corridor (NIETC). DOE has not adopted rules yet to define NIETC geographic boundaries. FERC should delay finalizing the proposed rule pending DOE's new rules and comments on those rules establishing NIETC boundaries. .

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<sup>2</sup> "[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 (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." Section 216(b)(1)(C) of Federal Power Act (FPA).

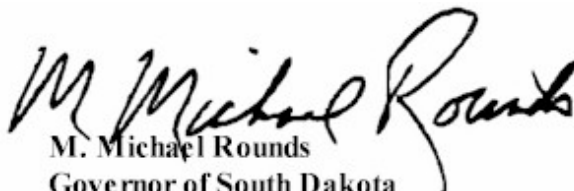
We are concerned that the proposed rules seem to ignore the statutory trigger mechanism and the work of state siting processes. If applicants ask FERC to site projects under its backstop authority, we remain concerned that FERC staff will grant those requests on a “case by case” basis, without any type of notice or due process. We do not believe that is Congress’s intent, and we hope it is not FERC’s.

During the course of EPAct implementation meetings over the past year, FERC and DOE representatives have consistently advised stakeholders that the FERC “backstop” authority will be exercised only if necessary. They have conveyed to stakeholders the expectation that states will continue to successfully site needed facilities without FERC involvement. We hope that this position will be clearly reflected in the FERC rulemaking. To do so, FERC must:

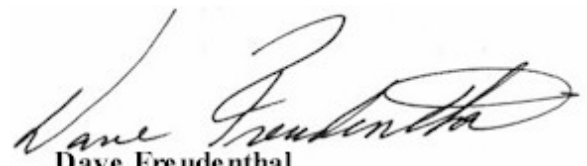
- Use a transparent and fair process to make the findings required by section (b)(1)(c);
- Entertain requests for backstop siting only after the states’ year is over;
- Recognize that the year begins when a state application is “complete”, and
- Give the states the same authority to determine completeness that it gives itself.

We believe that the Commission and Western Governors share a common objective in ensuring that needed transmission is built. However, we do not believe that the proposed rules represent progress toward this shared objective. We urge you to rewrite the rules to accommodate our concerns.

Sincerely,



M. Michael Rounds  
Governor of South Dakota  
Chairman



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Attachment: WGA Resolution 05-30