

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Regulations for Filing Applications) Docket Nos. RM06-12-000
For Permits to Site Interstate Electric)
Transmission Corridors)

**COMMENTS OF THE
WESTERN INTERSTATE ENERGY BOARD AND THE
COMMITTEE ON REGIONAL ELECTRIC POWER COOPERATION**

Pursuant to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Notice of Proposed Rulemaking (NOPR) issued in the above-referenced docket on June 16, 2006, the Western Interstate Energy Board (WIEB) and the Committee on Regional Electric Power Cooperation (CREPC) respectfully file the following comments.

EXECUTIVE SUMMARY

1. The NOPR is silent on one of the most important provisions of Section 1221 of the Energy Policy Act of 2005 (EPAAct 2005).¹ Specifically, the proposed rules do not address FERC’s obligation to find, prior to exercising its backstop authority under the Act, that “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.”² If FERC intends to make these findings through an administrative adjudication process, then stakeholders should be informed of this intention. FERC should direct stakeholders to existing administrative adjudication procedures, and provide a flow chart and timeline for proceedings which will result in these critical findings.

¹ Pub. L. No. 109-58, 119 Stat. 594 (2005). Section 1221 of EPAAct 2005 added section 216 to the Federal Power Act (FPA).

² Section 216(b)(1)(C) of FPA.

2. FERC misses an opportunity to conduct an efficient review process because there is no provision for FERC to acknowledge and make use of procedural steps, public outreach, and substantive findings already made by a state. In effect, the proposed rules require members of the public who have participated in a state review for at least a year to start over in a new federal process from the very beginning.
3. The proposed rules are duplicative because FERC begins its pre-filing process before it has determined that the conditions warranting the use of FERC's backstop authority have been met. This suggests that FERC would begin its pre-filing process before a state's year had elapsed. This is an inefficient use of FERC and applicant resources, and prejudices a state's ability to retain jurisdiction over the siting decision. With respect to the latter, concurrent state and FERC consideration of the same project will, in most instances, require that state resources be diverted from the state permitting proceeding in order to advance the state's position in the FERC pre-filing proceeding. This diversion of resources prejudices the state's ability to finally act upon an application within the one-year period allowed to it under section 1221 of the Act. Moreover, this process lends itself to the perception that the preliminary findings regarding the criteria set forth in FPA 216 (b) are a "done deal" and that they will be made *pro forma*. We cannot overstate how confusing and frustrating this will be to the general public.
4. The NOPR fails to clarify that the 1 year period referred to in FPA 216(b)(1)(C) can only begin once the application for state approval is "complete". This key point must be codified in FERC's rules. Otherwise, any applicant can submit a document to a state that patently fails to comply with applicable statutory requirements or applicable rules, and claim to have begun the 1 year period for state review of a filed application. The proposed rules at §50.8 clearly state that a substandard application submitted to FERC will not be filed and in fact will be rejected. It would be inconsistent for FERC not to recognize a similar policy at the state level. The rules should also address the not uncommon scenario of delays in a state approval process which are occasioned by deficiencies in the application, requests by the applicant, the amendments or modifications filed by the applicant, or when state statutes require state certification to be issued concurrent to a federal record of decision on the facility. The rules should clearly provide that state procedures relating to tolling time for these and other scenarios will be given effect by FERC in making the finding regarding untimely approval by states contemplated by FPA 216(b)(1)(C)(i).
5. FERC fails to provide any process for a state being preempted to argue that it did not, in fact, withhold or unreasonably condition a necessary state approval. If FERC does have an existing administrative adjudicative process which it intends to use, that process should be identified. In fact, the proposed rules do not even provide for a state being preempted to receive notice, nor an opportunity to be

heard. Therefore, findings will be arbitrary at best, and will have been made without the due process required at all levels of government.

6. The NOPR proposes that applicants demonstrate that proposed facilities will be located in a National Interest Electric Transmission Corridor (NIETC). DOE has stated that NIETC's will not have a centerline, width, or borders. DOE has not adopted rules yet to define NIETC geographic boundaries. We recommend that FERC delay finalizing the proposed rule pending DOE's new rules and comments on those rules establishing NIETC boundaries. FERC rules should specify what criteria the applicant must use to establish that the project is in the NIETC.

The Act clearly says that states will have the first opportunity to site proposed transmission lines, and that states retain jurisdiction for a year before FERC's backstop authority applies. It requires FERC to find that the state has withheld approval for a full year before using its backstop authority. We are concerned that the proposed rules seem to ignore this section of the Act. 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.

In summary, FERC must recognize that the states have legitimate and important interests in the subject matter of this rulemaking. FERC's August 8, 2006 fact sheet on the Energy Policy Act, as posted on FERC's website, describes FERC's role in siting transmission lines as "supplementing state transmission siting efforts in national interest electric transmission corridors."³

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

³ Federal Energy Regulatory Commission, Fact Sheet: Energy Policy Act of 2005 (August 8, 2005), at 1 (<http://www.ferc.gov/legal/maj-ord-reg/fed-sta/epact-fact-sheet.pdf>).

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.

I. INTRODUCTION

WIEB is an organization of 12 Western states (AZ, CA, CO, ID, MT, NE, NV, NM, OR, UT, WA, WY) and three Western Canadian Provinces (AB, BC, SK). WIEB members are appointed by the Governor or Premier. Its legal basis is an interstate compact approved by 12 states and Congress (PL 91-461). WIEB serves as the technical energy arm of the Western Governors' Association.

CREPC is a joint committee of the WIEB and the Western Conference of Public Service Commissioners. The Western Conference of Public Service Commissioners includes the PUCs from 11 states (AZ, CA, CO, ID, MT, NV, NM, OR, UT, WA, WY). CREPC was formed in 1983. All regulatory, energy planning and siting agencies in the states and provinces in the Western Interconnection are eligible to participate in CREPC. CREPC takes positions only if no state or province objects.

Western Governors created a [Transmission Permitting Protocol](#)⁴ to enable federal, state and provincial permitting agencies to collaborate in the review of proposed interstate transmission lines. The Transmission Permitting Protocol has been signed by

⁴ See <http://www.westgov.org/wieb/electric/Transmission%20Protocol/9-5wtp.pdf> for text of WGA Protocol.

12 governors (AK, AZ, CA, CO, ID, MT, NV, NM, OR, UT, WA, WY), the Premier of Alberta, and four federal agencies (DOE, DOI, USDA, CEQ). A similar instrument for coordinating interstate permitting has been adopted by Midwestern Governors. Western Governors urge Federal agencies build on the existing WGA Transmission Permitting Protocol and Midwestern Governors Transmission Permitting and Siting Protocol.⁵

Western Governors also adopted a policy resolution in November 2005 that provides in part:

- “1. Western Governors believe that the new authorities granted to Federal agencies to evaluate transmission congestion and designate energy corridors across Federal lands can potentially help the West meet its energy needs. However, the provisions for preemption of state transmission siting laws and designation of corridors on Federal lands also hold the potential for unproductive Federal interference in state and local land use decisions and undercutting State energy policies.
2. Federal agencies should only exercise these new responsibilities in collaboration with States and regional stakeholders.”⁶

The Western Congestion Assessment Task Force (WCATF) performed an analysis of transmission congestion in the Western Interconnection to assist U.S. Department of Energy (DOE) in developing a study of transmission congestion under Section 1221 of EPCA 2005. WIEB and CREPC participated in this effort along with the Western Electricity Coordinating Council, the Seams Steering Group – Western Interconnection, and five sub-regional planning groups in the Western Interconnection. The WIEB and CREPC comments in this NOPR build, in part, upon the discussions with western regional planning entities, industry, and DOE regarding the historical use and potential expansion of the western transmission system.

⁵ National Interest Transmission Corridors and Energy Corridors in the West, WGA Resolution 05-30. See <http://www.westgov.org/wga/policy/05/energy-corridors.pdf> .

⁶ Ibid.

Each Western state or province may be offering its own responses to the issues raised in the NOPR. WIEB and CREPC offer the following observations and recommendations that reflect a consensus regional perspective of the states and provinces linked by the Western Interconnection. The suggestions below are conceptual in nature and do not include proposed language. However, we request additional time to offer language implementing these ideas.

II. COMMENTS ON THE NOPR

Section I.7 of the NOPR says that DOE and FERC will both conduct pre-filing processes. WIEB and CREPC fully agree with and support the pre-filing concept, but we think it is duplicative and potentially confusing to have parallel pre-filing processes. In particular, we are very concerned that members of the general public will find participating in dual pre-filing processes to be confusing, burdensome and possibly quite frustrating. To a member of the general public, dual pre-filing process will look like twice as much to keep track of, twice as many comment deadlines to meet, without a proportionate influence on the ultimate outcome. The two should be coordinated.

Section II.A, project participation, refers to stakeholder participation and notification. Before assuming jurisdiction over a transmission line proposal, FERC must find that the state has withheld approval for a year or has imposed unreasonable conditions. This means that the state will already have established its own list of interested persons. That list will presumably include those contemplated under FPA 216(h)(3) but may include other persons as well. Proposed rules at §50.4(c) should require that FERC include as stakeholders, for participation and notification purposes, any list of persons compiled by the state under its own regulations.

Proposed §50.4(c) should also include a requirement for the applicant to periodically update the notification list as properties change hands.

Section II.A.3 of the NOPR states that the Commission believes all stakeholders will be notified during the pre-filing process. State siting agencies observe that alignments can change at any time up to the day the application is complete and filed, and in fact can change even after filing. Proposed §50.4(c) does require that any newly affected property owners be provided information, but does not ensure that property owners who are affected late in the process due to alignment changes are given the same comment opportunity as those who were affected from the start. We recognize that the review process cannot begin *de novo* every time the applicant makes a small change to the proposed alignment, but FERC must ensure that all affected property owners have due process.

Section II.A discusses how a stakeholder can request Confidential Energy Infrastructure Information (CEII). The Oregon Department of Energy requested CEII in another matter before FERC jurisdiction, and waited eight months for FERC to even acknowledge its receipt of the request. FERC's rules should include a maximum time for FERC to approve or deny a CEII request. In addition, because delays in receiving CEII that is required to process applications for siting proposed transmission lines, or in getting FERC permission for new state personnel to view such CEII, could delay state action beyond the one year provided for in Section 1221, FERC's CEII regulations should be modified in three other respects.

First, recognize that state agencies with permitting or other regulatory authority with respect to a project are distinguishable from individuals or businesses applying for CEII in connection with their own private interests. Such agencies

are invested by statute with safeguarding the public interest and as such, have a “need to know” with respect to CEII; they should not be required to demonstrate a need for the CEII when requesting this material.

Second, these state agencies should be allowed to apply to receive CEII in the name of the agency itself, rather than in the name of an individual employee or appointed official. It is the agency’s interests, and not the personal interests of a named employee or appointed official, which justify access to the CEII.

Finally, state agencies should be permitted to make a single, blanket request covering all employees and appointed officials who will need to access the CEII, as identified in the request. Under FERC’s current regulations, individual requests are required from each state agency employee or official needing access to the CEII.

Suggested amendments to FERC’s existing CEII regulations are provided at Appendix A.

In section II.A.3 of the NOPR, FERC “anticipates that the pre-filing process for extensive projects may take at least a year to complete.” Before FERC can even assume jurisdiction, it must find that the state has withheld approval for a year, or imposed unreasonable conditions. This means that the draft resource reports FERC received will be considerably more complete than the draft environmental studies that the state received a year earlier. Before prematurely exercising its backstop authority, FERC should make sure that states have had at least as much review time with all meaningful siting information and analysis as FERC gives itself.

In section II.B.4, the NOPR states that if the applicant fails to make sufficient progress towards compiling the information needed for a complete application, the Director may terminate the proceeding without prejudice. In other words, FERC recognizes that the applicant must submit a complete application before the application is considered “filed”. FERC reserves the right not to file an application that is incomplete. Before asserting its preemption authority, FERC must afford the reviewing state agencies the same right that FERC gives itself. If FERC is concerned that doing so could result in

unreasonable refusal of state agencies to start their processes when an application is, in fact, complete, the Commission could provide in a regulation a process (e.g., an open evidentiary hearing) by which it would make a determination if a state has been unreasonable in its determination of whether an application is complete. Such a determination would be a requisite for determining when the one year clock starts.⁷

In its description of proposed §50.6(d), the NOPR states that the applicant must demonstrate that the proposed facilities are located in a National Interest Electric Transmission Corridor (NIETC). There may not always be a way to demonstrate this conclusively, since DOE has stated that NIETC's will not have a centerline, width, or borders. With such geographically vague corridors, there is really no way to tell if the proposed project is inside or outside the NIETC. In the Executive Summary of the recently released (August 8, 2006) Department of Energy National Electric Transmission Study, which constitutes DOE's first study to comply with Section 1221 of EAct 2005, DOE identifies next steps in the process to designate NIETCs. DOE requests comments from stakeholders by October 10, 2006 on the question: "How and where should DOE establish the geographic boundaries for a National corridor?" Because DOE has yet to define how it will establish the geographic boundaries, we suggest that FERC delay finalizing proposed 50.6(d) pending receipt of comments to DOE. We also suggest FERC review those comments as a part of its own rulemaking process. Once DOE establishes the NIETC boundaries, FERC rules should specify what criteria the applicant must use to establish that the project is in the NIETC.

⁷ By making this recommendation we do not express any opinion regarding the legal merits of such a regulation.

FPA 216 includes a requirement that FERC find the transmission project is “consistent with sound energy policy”. The proposed rules should articulate a definition of “sound energy policy” that will have had the benefit of state energy offices nationwide and can be used consistently across the US. Otherwise, FERC will implement a different energy policy, on an ad hoc basis, for every proposal. The result will be a set of policies that are arbitrary and inconsistent.

FERC should include in its rules a definition of “sound energy policy” that it will use in making the finding required in FPA 216 that the transmission project is consistent with sound energy policy. We offer the following definition for use by FERC:

Sound energy policy requires that consumers have access to energy supplies that offer the best combination of low cost (including environmental costs) and low risk, compared with a wide range of alternatives including conservation. Sound energy policy is served when risk is borne by those parties who are best suited to judge the risk and who will benefit by their correct judgment. A transmission project is consistent with sound energy policy when there are (a) no cheaper and environmentally preferable alternatives; and (b) when (i) there is a demonstrated or guaranteed demand for the services it will provide demonstrated by financial commitments from customers, or (ii) it offers likely benefits in excess of costs and risks are borne by project developers and not shifted to consumers.

III. COMMENTS ON THE PROPOSED TITLE 18 PART 50

§50.4(c): Does not require that the applicant successfully notify all stakeholders, but instead requires only a “good faith effort”. At the state level, we set the bar higher. Some states are required to notify the property owners. Property owners in such states who were not notified are entitled to a remedy. The federal process should provide the same assurance.

§50.4(c): As noted above, by the time an applicant prefiles with FERC, it will already have been in state review for a full year. Interested persons should not have to make an extra effort to get their names on a federal mailing list after having participated for a year in a state process. Proposed 50.4(c)(1) should include “and persons on any list compiled by the state during its own review.”

§50.6 requires the applicant to provide the information FERC needs to make the findings listed at FPA 216, specifically that the proposed route lies within a national interest corridor designated by the Secretary of Energy and that it meets the four criteria of FPA 216(b)(2) through (6). The proposed rule is silent, however, on the finding required in FPA 216(b)(1) that the State has “. . . withheld approval for more than a year after the filing of the application with the state or that the state has conditioned approval in such manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.”

FERC should implement this provision of the Act in its proposed rules, as it has the other provisions.

Moreover, for an applicant to enter the prefiling procedures at §50.5 before FERC has made the findings of FPA 216(b)(1) would be premature. FERC should amend proposed §50.5 to require the applicant to make its case for this finding during the initial consultation. The amended §50.5 should include notification to the state agency being preempted. FERC should not make the finding that preemption is warranted until the state has been given the opportunity to present the procedural history of its review of the project under its statutes and regulations and to contest the allegation that it has unduly withheld or conditioned approval. The burden of proof should be on the applicant to

demonstrate that the conditions warranting FERC's preemption authority have been met. The FERC rule should say that the state automatically has standing in any process used by FERC to determine whether it can make the findings of FPA 216(b)(1). Most important, the rules at §50.5 should say clearly that the year begins when the application to the state is complete. As noted above, FERC does not consider an application "filed" until it has deemed an application complete after a pre-filing process of up to a year or more. Therefore, subject to oversight when necessary, FERC should defer to a state definition of a "filed" application, particularly where the state definition is no different from FERC's own.

We note that at §50.8 FERC has reserved the right to reject an application that "patently fails to comply with applicable statutory requirements or applicable Commission rules". FERC should add language to proposed §50.5 stating that subject to a reservation of the Commission's right to review the reasonableness of state application requirements, an application to the state that patently fails to comply with applicable state statutes or agency rules shall not be considered a filed application for purposes of determining whether the state has withheld approval for a year or more.

In determining whether FERC's backstop siting authority should be invoked, FERC should also consider whether federal siting requirements are the real obstacle. Often, when state approval is not granted within a year, the missing element is a finding required from a federal agency such as USFWS, USFS or NOAA. A wildlife "taking" may be involved, particularly in state or federal forest. If the applicant is unable to get the required federal finding during the state's review, there is no reason they will fare any better during FERC review and thus preemption of state siting authority will accomplish

nothing. The proposed FERC rule should clarify that an applicant who has not obtained required federal findings in support of an application to the state has not filed a complete state application and that the state has, in this case, not withheld or unreasonably conditioned approval for a year or more.

If an applicant requests that FERC preempt state siting authority, states need to be able participate and represent their interests in FERC proceedings on transmission siting. Shifting the siting forum from a state to FERC imposes a new burden on states that currently do not have the general appropriations or means to finance participating in FERC siting dockets. In appropriate cases to ensure state participation, FERC should require that applicants fund reasonable state participation in FERC siting proceedings.

APPENDIX A Confidential Energy Infrastructure Information

(18 C.F.R. § 388.113)

Suggested amendments indicated in blue/bold/italic text

Sec. 388.113 Accessing critical energy infrastructure information.

(a) Scope. This section governs access to critical energy infrastructure information (CEII). The rules governing submission of CEII are contained in 18 CFR 388.112(b). The Commission reserves the right to restrict access to previously filed documents as well as Commission-generated documents containing CEII.

(b) Purpose. The procedures in this section are available at the requester's option as an alternative to the FOIA procedures in Sec. 388.108 where the information requested is exempted from disclosure under the FOIA and contains CEII.

(c) Definitions. For purposes of this section:

(1) Critical energy infrastructure information means information about proposed or existing critical infrastructure that:

(i) Relates to the production, generation, transportation, transmission, or distribution of energy;

(ii) Could be useful to a person in planning an attack on critical infrastructure;

(iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and

(iv) Does not simply give the location of the critical infrastructure.

(2) Critical infrastructure means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

(d) Optional procedures for requesting critical energy infrastructure information.

(1) An owner/operator of a facility, including employees and officers of the owner/operator, may obtain CEII relating to its own facility directly from Commission staff without going through the procedures outlined in paragraph (d)(3) of this section.

(2) An agent or representative of an owner/operator must obtain information from the owner/operator.

(3) A state agency having permitting or other regulatory authority, or oversight responsibility with respect to a matter pending before the Commission is presumed to have a need for, and may request, information in that matter designated as CEII, using the following procedures:

(i) File a written request with the Commission's CEII Coordinator. The request shall contain the following: agency name, mailing address, and citation to legal authority under which the agency obtains jurisdiction or oversight responsibility with respect to the matter pending before the Commission; name, title, mailing address, telephone number, and electronic mail address of a contact person for the agency; a statement as to the agency's willingness to adhere to limitations on the use and disclosure of the information requested. As an alternative to the foregoing statement,

the agency may include with its written request a non-disclosure agreement (NDA) in a form acceptable to the Commission, identifying therein by name and title all employees or appointed officials of the agency for which access to the information is requested, executed by the head or chief executive officer or legal counsel of the agency, with such execution serving to bind identified employees or appointed officials to the terms of the agreement.

(ii) Once the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will verify the state agency's jurisdiction or oversight responsibility with respect to the matter pending before the Commission, and, upon this verification shall conclude that the requesting agency is eligible to receive the information requested. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information. If an executed non-disclosure agreement (NDA) in a form acceptable to the Commission is not included with the request, where appropriate, the CEII Coordinator will forward an NDA to the requester for execution. Once the requester signs any required NDA, the CEII Coordinator will make the critical energy infrastructure information available to the requester. The CEII Coordinator's decisions regarding release of CEII are subject to rehearing as provided in Sec. 385.713 of this chapter.

(iii) Within 10 days of receiving a request for CEII, the CEII Coordinator will provide to the requestor an acknowledgement that the request was received. Thereafter, the CEII Coordinator will attempt to respond to the requester under this section according to the timing required for responses under the Freedom of Information Act in Sec. 388.108(c), and will provide notice to the submitter in accordance with Sec. 388.112(d) and (e).

(4) If any other requester has a particular need for information designated as CEII, the requester may request the information using the following procedures:

(i) File a written request with the Commission's CEII Coordinator. The request shall contain the following: Requester's name, date and place of birth, title, address, and telephone number; the name, address, and telephone number of the person or entity on whose behalf the information is requested; a detailed statement explaining the particular need for and intended use of the information; and a statement as to the requester's willingness to adhere to limitations on the use and disclosure of the information requested. Requesters are also requested to include their social security number for identification purposes.

(ii) Once the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will balance the requester's need for the information against the sensitivity of the information. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information. Where appropriate, the CEII Coordinator will forward a non-disclosure agreement (NDA) to the requester for execution. Once the requester signs any required NDA, the CEII Coordinator will make the critical energy infrastructure information available to the requester. The CEII Coordinator's decisions regarding release of CEII are subject to rehearing as provided in Sec. 385.713 of this chapter.

(iii) Within 10 days of receiving a request for CEII, the CEII Coordinator will provide to the requestor an acknowledgement that the request was received. Thereafter, the CEII Coordinator will attempt to respond to the requester under this section according to the timing required for responses under the Freedom of Information Act in Sec. 388.108(c), and will provide notice to the submitter in accordance with Sec. 388.112(d) and (e).