

Energy Policy Act §216: A Power Worth Preserving

by Thomas Hutton

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Editors' Summary

The 2005 Energy Policy Act contained a provision that gave federal authorities greatly enhanced power over the construction of electric transmission lines in states and counties in which they are unwelcome. Because this provision is viewed as intrusive, it is a popular target for politicians on both sides of the aisle; the courts have also shown distaste for it. But the provision was enacted for a reason: to respond to an increasingly dire inadequacy of transmission facilities in the United States. Thus, as the courts are considering cases involving this new federal power, they should take care not to construe it so narrowly as to prevent it from accomplishing its important purpose.

Energy industry and policy experts have long pointed to inadequate transmission facilities as a systemic problem for the reliability of the U.S. electricity grid.¹ Such transmission inadequacy has also been singled out as an important obstacle to the fuller development of renewable energy in the United States.² A key reason for the fitful development of electric transmission has been underinvestment due to the lack of economic incentives for private investment in transmission.³ One deep, powerful disincentive to private investment exists in the reluctance of some state public utility commissions to exercise their permitting authority to allow transmission projects to go forward.⁴

The 2005 Energy Policy Act (EPAct)⁵ contains a provision designed to confront the latter problem, by allowing the Federal Energy Regulatory Commission (FERC) to designate National Interest Energy Transmission Corridors (NIETCs), within which the federal government has a strengthened hand to ensure that state public utility commissions do not, for parochial reasons, hinder transmission projects that would benefit the interstate ratepaying public.

Because of the extent to which this provision empowers federal authorities, at the expense of state and local officials, to dictate intrastate land use, there have been attempts to eliminate it⁶ and also to ensure that it is only narrowly construed. But in light of the seriousness of the transmission inadequacy problem, it is preferable for courts to supervise, and if necessary restrain, FERC's applications of its new authority without irrevocably cabining the discre-

1. See TRANSMISSION ACCESS POLICY STUDY GROUP, EFFECTIVE SOLUTIONS FOR GETTING NEEDED TRANSMISSION BUILT AT REASONABLE COST 5 (2004); Richard Pierce, *Environmental Regulation, Energy, and Market Entry*, 15 DUKE ENVTL. L. & POL'Y J. 167, 177 (2005). For a more recent example, consider FERC Chairman Jon Wellinghoff's recent testimony before the Senate Committee on Energy and Natural Resources, *Legislation Regarding Electric Transmission Lines: Hearing Before the Subcomm. on Energy and Nat'l Resources*, 111th Cong. (2009) (testimony of Jon Wellinghoff, Acting Chairman of FERC).
2. See generally AM. WIND ENERGY ASS'N AND SOLAR ENERGY INDUSTRIES ASS'N, GREEN POWER SUPERHIGHWAYS: BUILDING A PATH TO AMERICA'S CLEAN ENERGY FUTURE 1 (2009) ("[A]lmost 300,000 MW of wind projects, more than enough to meet 20 percent of our electricity needs, are waiting in line to connect to the grid because there is inadequate transmission capacity to carry the electricity they would produce"); Albert Nowamooz, *Inadequacy of Transmission Lines: A Major Barrier to the Development of Renewable Energy*, 3 ENVTL. & ENERGY L. & POL'Y J. 176 (2008).
3. See Patrick J. McCormick III & Sean B. Cunningham, *The Requirements of the "Just and Reasonable" Standard: Legal Basis for the Reform of Electric Transmission Rates*, 21 ENERGY L.J. 389, 389 (2000); see generally Nowamooz, *supra* note 2.
4. See Edward Krapels, *Goodbye Gridlock (2): How to End the Shortage in Transmission Investment That Led to the 2003 Northeast Blackout* (White Paper 2003) (describing the hurdles that make "[t]ransmission projects . . . as popular as root canals").
5. Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified as amended in scattered sections of 7, 10, 15, 16, 22, 26, 30, 40, and 42 U.S.C.).
6. See H. Amdr. 350, 110th Cong. 5503 (proposing to amend an appropriations bill to provide that "None of the funds made available in this Act may be used by the Secretary of Energy to designate any geographic area as a national interest electric transmission corridor under section 216(a) of the Federal Power Act . . .").