

The Reality of Permitting Interstate Transmission Facilities

Federal preemption of state siting and eminent domain processes will jeopardize the construction of needed transmission facilities by: (1) centralizing land use decisions in Washington, D.C., far from those impacted; (2) imposing new requirements on transmission line permitting (e.g., NEPA requirements in areas where EISs are not currently required); and (3) requiring FERC, an agency already overburdened with its current workload and frequently unable to make timely decisions, to take on massive new responsibilities. Granting FERC eminent domain authority will undermine existing state processes that are working. As outlined below, the facts do not support an argument for federal preemption of state authority. The federal government needs to act to get its own house in order.

THE WESTERN INTERCONNECTION

- **No state has ever denied a permit for an interstate transmission line.**
- **The major challenge to siting transmission in the Western Interconnection is securing rights-of-way across federal lands.**
- **A Protocol has been signed by Western states and federal agencies to formalize cooperation in the review of proposed interstate transmission facilities.**

One of the reasons for this sterling record is that for the past 20 years the states and provinces in the Western Interconnection have been sharing information on transmission issues through the Western Interstate Energy Board's Committee on Regional Electricity Power Cooperation. The common view of the interconnected nature of transmission issues that has emerged has smoothed the way for state action on individual interstate transmission proposals.

The major challenge to securing permits for interstate transmission facilities in the West has been securing permits from federal agencies. This is particularly troublesome in the West where the federal government owns vast tracts of land in the West (e.g., the federal government owns 83% of the land in Nevada, 65% of Utah, 63% of Idaho, 53% of Oregon, 50% of Wyoming, 46% of Arizona, 45% of California, 36% of Colorado, 34% of New Mexico, 29% of Washington, and 28% of Montana.) Federal land management agencies operate under a myriad of laws.

In the summer of 2002 Western states took action to enhance their coordination efforts and to encourage better coordination among and with federal agencies. Twelve Western governors, including every state in the Western Interconnection, and four federal agencies, the Departments of Interior, Agriculture, and Energy and the Council on Environmental Quality, signed the "[Protocol Governing the Siting of Interstate Transmission Lines in the West](#)." The Protocol provides for cooperation and collaboration among state and federal agencies in the permitting of proposed interstate transmission facilities in the Western Interconnection.

THE EASTERN INTERCONNECTION

Three projects are consistently cited as examples of states blocking the siting of interstate transmission projects: a TransEnergie project that involves an underwater cable between Long Island and Connecticut; an American Electric Power proposed line between West Virginia and Virginia; and a proposed line between Minnesota and Wisconsin sponsored by Minnesota Power and Wisconsin Public Service Corporation.

Projects Status:

1. The TransEnergie project (Cross Sound Cable) is a merchant power line to cross Long Island Sound. It was initially rejected by the Connecticut Siting Council. The decision turned on two

issues. The first issue was environmental: the route chosen by TransEnergie would cross and disturb some sensitive and valuable oyster beds. Other routes were not considered. The second issue was germane to the Federal preemption issue: Connecticut found that the purpose of the line was solely to supply power to Long Island and there would be no perceptible Connecticut benefits. The decision was a balancing of the issues – there would be no benefits to Connecticut but there would be high in-state environmental costs. The Siting Council invited TransEnergie to resubmit their application with an alternate route that avoided the sensitive areas impacted by their original route. In 2002, the Connecticut Siting Council approved an alternative route submitted by TransEnergie. Construction of the line was completed in 2002, however, due to the company's failure to adhere to permit conditions, the line is not in operation.

2. Regarding the second project, according to the AEP web site, both West Virginia and Virginia issued permits for the line, with West Virginia approving the applicant's initial proposal in May 1998. After AEP amended its application, Virginia approved the project in 2001. Both West Virginia and Virginia approved the revised project in March 2002. The federal land management agencies (National Park Service and National Forest Service), which objected to the line, finally issued rights-of-way at the end of 2002. See attached AEP chronology up to April 2002.
3. Regarding the third project, the Wisconsin Public Service Commission approved the Wisconsin segment of the proposed 345 Kv line from Arrowhead to Weston on August 17, 2001 (Order dated October 2001) based on the company's cost estimate. In approving the line, one Wisconsin PSC commissioner said, "The Commission has already gone on record stating, based on numerous studies, that infrastructure improvements will be necessary. This line meets that need." After the PSC granted the certificate for the line, three different lawsuits were filed by groups challenging the decision. On March 15, 2001, Minnesota granted an exemption from the state requirement to secure a siting certificate for its portion of the line. In June 2001, landowners appealed the exemption. In January 2002, the Minnesota State Court of Appeals denied the landowners' appeal. In November 2002, the project went back to the Wisconsin commission with a request that more than doubled the cost of the project.

UNSUPPORTED THEORETICAL ARGUMENTS FOR FEDERAL PREEMPTION

To our knowledge three additional cases have been cited¹ as justification for federal preemption of state authority over the permitting of interstate transmission lines.

1. *Mississippi Power and Light v. Connerly* (1984): a power line proposed to carry power from the Grand Gulf nuclear plant in Mississippi to Louisiana.
2. *Tampa Electric v. Joe Garcia* (2000): permitting of a merchant plant in Florida
3. *Point of Pines Beach Association v. Energy Facility Siting Board*: a PURPA contract does not establish need in Massachusetts.

The last two of these cases are not relevant to transmission lines.

Tampa Electric. The Tampa Electric case turned on a reading of Florida law that says only regulated utilities serving Florida customers can build power plants. Presumably this case is quoted to show that states can be myopic and only accept energy facilities to serve their own residents. However, whether the

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Florida law concerning power plants is myopic or not, it does not apply to transmission lines and cannot be used to justify a federal override on transmission lines.

Point of Pines. Massachusetts facility siting law says the “need for power” determination required to approve a power plant is to be established by a comparison of state supply and demand. The court ruled that a mandatory purchase under PURPA does not meet this standard. The law applies to power plants, and while the reasoning may or may not be myopic, it does not apply to transmission lines. The reasoning could some day be applied to transmission lines, but this case and this example do not justify federal preemption on transmission siting.

The other case does involve transmission lines.

Mississippi vs. Conerly (1984). The Grand Gulf plant is located in northwest Mississippi on the east bank of the Mississippi River. A line had already been built to the Franklin substation. The transmission line that was proposed by Mississippi Power and Light (MP&L) to the Mississippi Public Service Commission would run from the Franklin substation to the Louisiana state line. At that point Louisiana Power and Light would build the remainder of the line.

MP&L filed the permit application in 1981. The PSC granted the permit and MP&L began acquiring right of way. Four landowners refused to sell, so MP&L filed condemnation proceedings. The landowners challenged the condemnation, and the lower court (Special Eminent Domain Court) dismissed the condemnation petitions of MP&L. MP&L appealed to the Mississippi Supreme Court, which ruled that the Mississippi eminent domain law required a Finding of Public Need, which was different than the PSC’s Certificate of Public Necessity and Convenience. For purposes of public need for the eminent domain proceeding, the Supreme Court ruled that no Mississippi customers would be served by the line, hence there was no public need. The Court found that the any Mississippi benefit from regional reliability due to the line was minimal. MP&L appealed to the US Supreme Court, which dismissed the appeal on the grounds there was no substantial federal question.

This case is interesting from the perspective of the “state myopia” argument but, according to the Chief Legal Counsel for the Mississippi Public Service Commission, it was unique and is unlikely to be repeated. He questioned whether it would even get the same decision today, because the prevalence of regional reliability concerns and the importance of the regional market would make it far easier to show benefits to Mississippi customers.

Conclusions

States in the Western Interconnection have a long history of permitting, routing and building interstate electric transmission lines. Western state siting authorities recognize the interconnected nature of electricity markets and the essential contribution of interstate transmission lines to regional reliability. We can find no justification for federal preemption in examples that have been sited in the Eastern Interconnection. Through the adoption of a Transmission Permitting Protocol in 2002 Western states have acted to formalize their coordination of permit reviews and to work to improve federal agency performance in the review of interstate transmission lines.

It is bad policy to preempt states on the permitting of transmission facilities that will jeopardize the ability of the West to construct transmission in a timely manner. The federal government’s first priority should be to get its own house in order by improving the timeliness and quality of reviews of rights-of-way applications to construct transmission lines across federal lands.

Chronology of the AEP 765 Kv Project from West Virginia to Virginia to 2002 (from AEP web site)

March 1990

AEP announces Wyoming-Cloverdale 765 kV transmission line project.

August 1990

Universities Study Team (Virginia Tech and West Virginia University) formed to identify best route for power line.

March 1991

AEP files application for Special Use Permit with U.S. Forest Service, lead federal agency among U.S. Park Service and U.S. Army Corps of Engineers. Forest Service to study environmental impact of transmission line crossing of Jefferson National Forest and prepare Environmental Impact Statement.

August 1991

Application for Certificate of Public Convenience and Necessity filed with Virginia State Corporation Commission. Environmental Assessment filed in November 1991.

June 1992

Application for Certificate of Public Convenience and Necessity filed with West Virginia Public Service Commission. Withdrawn in August 1992 at request of PSC and refiled in February 1993.

July 1992

U.S. Congress Designates 19.2 miles of the New River (between Glen Lyn, Va., and Bluestone Lake, W. Va.) as a study area for wild and scenic river status under federal guidelines.

February 1993

AEP announces the formation of the Coalition for Energy and Economic Revitalization in support of line. Application for power line certificate refiled with West Virginia PSC.

May 1993

West Virginia PSC dismisses refiled application and decides to await Forest Service completion of Draft Environmental Impact Statement.

December 1995

Virginia SCC issues Interim Order citing compelling need for additional electric capacity and directs AEP to file additional information on alternate routing, regional transmission improvements and use and benefit to Virginia ratepayers.

May 1996

U.S. Park Service recommends denial of proposed power line crossing of the New River in Wild and Scenic study area.

June 1996

U.S. Forest Service releases Draft Environmental Impact Statement (DEIS) and states its preliminary preference for no action, which would deny permit to build line through Jefferson National Forest if it stands in the final EIS.

August 1996

U.S. Department of Energy files Report to the President on The Electric Power Outages in the Western

United States, July 2-3. Report also cites threats to reliability in mid-Atlantic area due to delays in approval of AEP transmission line.

August 1996

U.S. Department of Energy requests three reliability councils, in coordination with the North American Electric Reliability Council (NERC), to study impacts of the delayed completion of the Wyoming-Cloverdale line. The councils are the East Central Area Reliability Coordination Agreement (ECAR), the Mid-Atlantic Area Council (MAAC), and the Southeastern Electric Reliability Council (SERC).

March 1997

The reliability councils, ECAR, MAAC, SERC and NERC, file their report Reliability Impact of the Delayed Completion of the Wyoming-Cloverdale 765 kV line to the U.S. Department of Energy.

The report concluded there is a power supply reliability risk in southwestern Virginia and southern West Virginia. The report stated, "The addition of the Wyoming-Cloverdale 765 kV line is an effective alternative for serving AEPs West Virginia and Virginia service areas as well as mitigating the risk of potential widespread power interruptions."

September 1997

AEP files its application for certification to construct the Wyoming-Cloverdale line in West Virginia and Virginia. The filings include a modified route for the project as identified by the Universities Study Team.

May 1998

The Public Service Commission of West Virginia approves construction of the 765 kV Wyoming - Cloverdale line along the preferred corridor in West Virginia.

September 1998

Virginia SCC order directs AEP to fully develop the Wyoming-Jacksons Ferry 765 kV alternative. Report due June 1, 1999.

May 1999

AEP files Wyoming-Jacksons Ferry 765 kV alternative with the SCC.

October 1999

SCC sets evidentiary hearing date for May 1, 2000.

May 2000

Evidentiary hearing conducted in Richmond.

October 2, 2000

SCC hearing examiner finds 765 kV project needed, recommends approval of Wyoming-Jacksons Ferry 765 kV project. Final decision of full SCC still pending.

October 27, 2000

AEP requests PSC of West Virginia to amend order granting approval of Wyoming-Cloverdale 765 kV line. Company requests PSC approval of project to either Cloverdale or Jacksons Ferry.

May 31, 2001

Virginia SCC issues final order approving construction of the 765 kV Wyoming-Jacksons Ferry line.

March 13, 2002

West Virginia Public Service Commission amends its 1998 Wyoming-Cloverdale 765 kV project order and approves the project's construction from Wyoming Station in West Virginia to Jacksons Ferry Station in Virginia.

April 24, 2002

US Forest Service Supervisor makes a draft recommendation to allow AEP's 765 kV project to cross federal lands along its preferred corridor. A final recommendation is expected by the end of 2002 following public comment.