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No Easy Transmission Fixes

Until Congress takes action, transmission and renewable developers may have to draw on a variety of legal strategies to get their projects sited.

By Suedeen G. Kelly & J. Porter Wiseman

Renewable generation is living up to the promise that it can provide green power at a low cost, but the development of renewables is constrained by the need for new transmission capacity. Although it usually takes only a few years to develop a new renewable generation site, large-scale transmission projects often take much longer – in no small part because of state siting requirements. The ability of a single state to veto a multistate transmission project has been a long-standing dilemma with no easy answers.

Although traditional thermal generation can be constructed near the load it is intended to serve – and fuel transported to the facility site – renewable generation is location-dependent. It must be constructed where there is plenty of wind or sun, or where rivers and geology make hydroelectric or geothermal power feasible. Recent studies have shown that the nation could reduce the carbon output of the power sector by 80% from 1990 levels by 2030 – but only if the transmission grid were to be expanded to move that power to load. Another study finds that 30% of the demand in the Eastern Interconnection could be served by renewables within 10 years, but only with large-scale upgrades to the transmission system. One of the largest barriers to transmission expansion comes from the fact that each state has the power to reject, or may simply lack the power to approve, its portion of a multistate project.

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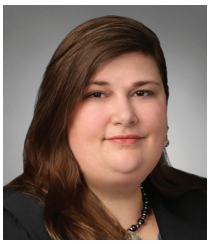

Wiseman

The federal government does not have authority over transmission siting, except where the transmission project crosses federal lands. Thus, a transmission developer must get approval from the regulators in each state through which its transmission line will run. These approvals have not proven easy to come by. The problems with siting large transmission projects are such that a sizable percentage of the successful independent transmission projects over the past decade have been located underwater, which tends to minimize landowner opposition.

For example, the Trans Bay Cable in San Francisco avoided major siting disputes, as did the Cross-Sound Cable and the Neptune Regional Transmission System on the East Coast. The Champlain Hudson Power Express, due in service in 2017, follows a riverbed for much of its length and otherwise uses existing rights of way. But rivers do not conveniently follow optimal transmission paths, and under-

Major Transmission Lines At A Glance

Project Name/ Developer	Approximate Total Capacity	Territory/ Region	Scheduled Completion Date	Status
TransWest Express Transmission Project (TransWest)	3,000 MW (this number includes some non-renewable energy, but mainly wind)	Transporting from Wyoming to desert Southwest (CA, NV, AZ)	Under development since 2005; anticipated construction date of 2017-2019	Awaiting BLM and Western Power Administration approval
Plains & Eastern (Clean Line)	4,000 MW (wind)	Oklahoma/ Arkansas/ Tennessee	Anticipated construction date of 2017 and in-service date of 2018	Permitted in OK and TN, denied by AR Public Service Commission, received federal approval from DOE
Rock Island (Clean Line)	3,500 MW (wind)	Iowa/Illinois	In-service date was expected to be 2016	Permitted in IL, though decision reversed by state appellate court; developer plans to appeal. Review in Iowa suspended due to landowner concerns
New England Clean Power Link (TDI New England)	1,000 MW (mainly hydro)	Canadian border/ Vermont	Anticipated in-service date of 2018-2020	Permitted in VT; received federal approval from DOE
Northern Pass (Eversource Energy)	1,090 MW (mainly hydro)	Quebec/New Hampshire/ New England	Anticipated in-service date of 2018-2019	Awaiting state (NH) and federal permits; anticipated state approval by September 2017
Great Northern Transmission Line (Minnesota Power)	883 MW (mainly hydro)	Canadian border/ Minnesota	Anticipated in-service date of June 2020	Permitted in MN; awaiting permits from DOE, Army Corps of Engineers, and U.S. Fish and Wildlife Service
SunZia Southwest Transmission Project (SunZia Transmission, though sponsoring project along with Salt River and Tri-State)	First Wind Energy has signed a letter of intent to reserve up to 1,500 MW of capacity	Arizona/New Mexico, across desert Southwest	Anticipated in-service date of 2021	Permitted in Arizona; received BLM approval
Cascade Crossing Transmission Project (Portland General Electric)	N/A	Oregon	Abandoned	Abandoned as a result of changes in demand on the BPA transmission grid

water siting is an expensive alternative that poses considerable engineering and environmental challenges.

Some of the problems in getting multiple state approvals lie with outdated state laws. Many state statutes governing transmission siting were written decades ago to regulate development by vertically integrated utilities that would pass on the cost of construction to their customers. Therefore, such statutes often require that the state regulators carefully weigh the benefits of a given project to the public before granting a siting permit to ensure that ratepayers are not paying for unnecessary infrastructure. Confronted with a transmission project that is primarily designed to provide service to other states, some state regulators have concluded that the project does not provide for its citizens the necessary public benefits that are required for permitting under state law. So-called "public benefits" can also provide justification to yield to pressure from local landowners and environmentalists that oppose the project and from local utilities that might prefer to avoid competition from imported power. Other state laws have precluded out-of-state transmission developers from getting status as a public utility, thus preventing the developers from being able to exercise the power of eminent domain. In the absence of eminent domain authority, landowners unwilling to accommodate transmission development can derail the project.

Opposition

Problems with siting transmission are not a red state/blue state issue. Producers of renewable power are

Major Transmission Lines At A Glance (continued)

Project Name/ Developer	Approximate Total Capacity	Territory/ Region	Scheduled Completion Date	Status
Texas Competitive Renewable Energy Zone (conglomeration of many transmission projects)	18,500 MW (wind)	Texas	In service	Permitted in TX; parts of some transmission lines canceled due to landowner concerns and the identification of more cost-effective alternatives
Prairie Wind Transmission Line (Westar and Electric Transmission America LLC)	3,000 MW (wind)	Kansas	In service	Permitted in KS
Gateway West Transmission Project (Rocky Mountain Power/Idaho Power)	1,500 MW (wind)	Idaho/Wyoming	Anticipated in-service date of 2020-2024	Awaiting BLM approval
Western Spirit Clean Line (Clean Line)	1,000 MW (wind)	New Mexico/ desert Southwest	Anticipated in-service date of 2018	Awaiting authorizations from federal, state, and local governments and agencies – likely to be obtained by the end of 2017
Centennial West Clean Line (Clean Line)	3,500 MW (wind)	Arizona/ New Mexico to California	Unclear	Delayed due to unclear market demand in CA
Southern Cross Transmission Project (Pattern Energy Group LP)	2,000 MW (wind)	Texas/ Southeast	Anticipated in-service date of 2021	Awaiting permits from LA and MS
Champlain Hudson Power Express (Champlain Hudson Power Express Inc.)	1,000 MW (hydro)	New York/ Hudson River Valley	Anticipated in-service date of 2017	Permitted in NY; received federal permits
Chinook Transmission Project (Chinook Power Transmission LLC)	3,000 MW (wind)	Montana to Las Vegas	Abandoned	Abandoned due to a lack of interest from wind developers

found throughout the country in both "red states" and "blue states" that support development of their native wind and solar potential. However, the infrastructure projects needed to support renewable power development are increasingly met with a growing and general bipartisan distrust of both corporations and the government, paired with the power of social media in expanding opposition.

A related complication is the backlash against the Supreme Court's 2005 controversial decision in Kelo v. City of New London, which found the exercise of eminent domain to transfer land from one private owner to another private owner for the purposes of economic development to be constitutional. In response, activists and state legislatures have become increasingly unfriendly to the idea of exercising eminent domain on behalf of a private company, even when that company is attempting to provide a service that ultimately benefits the public. This is true even where, as is the case with transmission lines, the right of eminent domain does not arise from Kelo. Transmission developers can be seen as profiting at the expense of landowners and communities despite more than a century of precedent recognizing that utilities and common carriers provide a public service and are thus entitled to exercise eminent domain.

Federal solutions limited

Although the Federal Energy Regulatory Commission (FERC) has the authority to grant a natural gas pipeline the right of eminent domain under the Natural Gas Act, it has no equivalent authority for electric trans-

mission under the Federal Power Act (FPA). In 2005, Congress amended the FPA to grant FERC limited "backstop" transmission siting and eminent domain authority for projects in U.S. Department of Energy (DOE)-designated transmission corridors, but the courts have interpreted this authority to apply only when a state fails to approve or deny a transmission siting application within a year. If the state denies the application outright, FERC cannot act. No new transmission has been sited under FERC's backstop authority.

Congress also provided an option for developers attempting to build transmission in the footprint of either the Western Area Power Administration or the Southwestern Power Administration. Developers in these regions may apply to partner with the DOE to take advantage of the power administrations' right of eminent domain. Clean Line Energy took this approach for its Plains & Eastern project after the Arkansas Public Service Commission refused to grant Clean Line public utility status. But this option is limited, both in geographic scope and by the need to partner with the DOE.

FERC's Order No. 1000, which promulgated regulations designed to encourage regional and interregional transmission planning, has had only limited success in facilitating new construction. A recent request by FERC for comments on the Order No. 1000 process resulted in 1,600 pages of comments from vastly different stakeholders, all offering their own critiques of the current regulations. But even if Order No. 1000 were wholly successful, it would not resolve state-level siting problems because FERC has no authority to preempt state or local laws governing transmission siting.

In the 1940s, natural gas pipeline developers faced similar challenges in siting transmission pipelines. Congress responded by amending the Natural Gas Act to give the Federal Power Commission (now FERC) federal eminent domain authority for pipeline siting. Such an amendment to the FPA might resolve many of the problems with electric transmission siting. But it is unclear when Congress would entertain such a "fix" to the FPA, and because pipeline development has become a political flashpoint, politicians may hesitate to promote a solution that evokes a comparison with natural gas pipelines.

FERC has no authority to preempt state or local laws governing transmission siting.

In the absence of a legislative fix, the courts may be able to provide some relief. FERC Chairman Norman Bay (then a commissioner) observed in 2015 that although FERC may lack the authority to overrule local law, the Constitution "limits the ability of the states to erect barriers to interstate commerce."

Bay was referring to the dormant commerce clause, a constitutional principle that holds that because Congress was expressly given authority over interstate commerce, the states cannot pass laws that discriminate against interstate commerce or that promote legitimate state interests but do so at a disproportionate cost to interstate commerce. For example, the dormant commerce clause has been invoked to prevent states from prohibiting the export of hydroelectric power to their neighbors. In another case, a state was prohibited from passing trucking regulations that provided little safety benefit but effectively barred many trucks from passing through the state.

The dormant commerce clause has yet to be tested in the context of transmission siting, but such a challenge has promise in the case of egregious and explicit state obstruction of transmission projects. Nonetheless, the doctrine is narrow enough that it may not be available if states were to impose conditions or delays causing the project to become uneconomic rather than deny siting authority outright.

However, use of delaying tactics may allow FERC, under certain circumstances, to invoke its backstop authority under EPAct 2005. Until Congress decides to act, transmission and renewable developers may have to draw on a variety of legal strategies to get their projects sited. WP

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