

# Energy Transition

## INSIGHTS

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## Proposals for Transmission Reform in the United States

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The federal government's plan to reduce greenhouse gas emissions to 50% below 2005 levels by 2030 is enormously ambitious. It relies on the Inflation Reduction Act of 2022 ("IRA"), which is expected to provide over \$370 billion in funding for clean energy projects over the next decade, as well as the Infrastructure Investment and Jobs Act ("IIJA") and American ingenuity. However, at least one study has estimated that up to 80% of the IRA's expected emissions reductions may be lost without significant development of new electric transmission infrastructure<sup>1</sup> and improvement in the functioning and build-out of the interstate electric grid. New renewable energy generating facilities that are not connected to the grid, or that do not supply electricity to end users, will become stranded assets. The transition to a cleaner energy economy and the hoped for and anticipated boost in GDP and jobs that is expected to come from the development and construction of new infrastructure ultimately depends on the success of green energy projects in delivering their output to consumers.

Unfortunately, the expansion of grid capacity and construction of new transmission lines throughout the United States face significant obstacles that were not addressed in the IRA. However, there are murmurs that Congress is beginning to see the need to greenlight these projects at the federal level and that new federal legislation supporting interstate electric transmission will be required to expedite the increase in renewable energy production which is essential to achieving the goals of the IRA and IIJA.

Historically, electric transmission permitting and siting has been a matter of state jurisdiction and the fate of an individual project will hinge on local or state-wide considerations adjudicated at the local and state level in multiple, separate, drawn-out permitting processes. Moreover, in many jurisdictions, only franchised public utilities are authorized to construct transmission facilities and only they possess the ability to exercise the right of eminent domain to obtain, if negotiations fail, the right-of-way necessary to construct those facilities. From the perspective of generators, the process by which Regional Transmission Operations ("RTOs") and Independent System Organizations ("ISOs") determine how and when new generators can connect to the grid is cumbersome, slow, expensive, unpredictable and backlogged.

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While some of these issues can theoretically be addressed through the use of existing federal authority, the Department of Energy (“DOE”) and the Federal Energy Regulatory Commission (“FERC”) have generally not moved quickly and practical solutions are often stymied by litigation, the lack of a full complement of Commissioners at FERC, or partisan infighting. Critics of the current regime argue that the DOE should prioritize use of its existing authorities and also that unambiguous new rules with clearly stated timelines for action are needed. It is now hoped that transmission reform will receive long overdue close attention from Congress, and below we summarize a few ideas for transmission reform that are under discussion, some of which have been talked about for years but have yet to be implemented.

### Utilization of Existing Authority to Expand Grid Capacity and Expedite Review of New Transmission Projects

- **Existing law establishes federal “backstop siting” authority for transmission projects, and the DOE should be more proactive in exercising this authority.** States have traditionally had the exclusive authority to permit transmission facilities. However, Section 216 of the Federal Power Act authorizes FERC to grant construction permits<sup>2</sup> located in “national interest electric transmission corridors” (“national corridors”) if state regulators deny an applicant’s permit or fail to render a decision within one year of the permit being submitted. While federal backstop siting authority was initially challenged in the courts,<sup>3</sup> the IJIA confirmed and strengthened FERC’s authority to site transmission lines in national corridors. Subject to certain regulatory criteria, the DOE may designate<sup>4</sup> such national corridors. Although the DOE designated two national corridors in 2007, the Court of Appeals for the Ninth Circuit vacated those designations<sup>5</sup> on procedural grounds. The DOE has not designated any national corridors since that time.
- **Existing federal law would also allow federal permit-holders to acquire land via eminent domain.** Under existing law, the holder of a Section 216 permit may exercise a federal right of eminent domain<sup>6</sup> if the permit-holder is otherwise unable to acquire the land necessary for the project. Even if not exercised, the threat of eminent domain in the hands of a duly authorized developer of a transmission line could accelerate the construction timeline of new transmission facilities. Thus, there is an argument that were the DOE to be more assertive in the exercise of its existing authority under the Federal Power Act, more transmission could be built more quickly. We note, however, that this argument does not address the practical realities associated with environmental permitting and litigation that are present in all major infrastructure projects.
- **A recently proposed regulation would accelerate the federal permit review process.** A recent Notice of Proposed Rulemaking<sup>7</sup> would allow FERC to begin its “pre-filing” review process while a developer’s permit application is pending before state regulators. Although FERC cannot grant a federal permit until the corresponding state permit has been denied or has been pending for at least one year, the proposed pre-application review process would reduce waiting time in the federal permitting process. The proposal indicates that FERC is focused on eliminating back-to-back lags in the permitting process that can be used by intervenors to re-litigate issues that have already been decided.

### Additional Authority Would Expedite Transmission Reform

- **Congress could grant FERC direct authority to permit new transmission facilities within national corridors.** Congress could authorize FERC to use broad preemptive authority to permit significant interstate electric transmission facilities (even before state regulators consider permitting). Greater federal control over new electric transmission development could both accelerate and optimize the energy transition. A larger role for FERC would also provide the power industry some comfort regarding the insulation of energy policy from political changes from administration to administration.

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- **FERC could require both generation and transmission providers to incorporate more fully both future generation and transmission into their planning processes.** Because regional transmission planning processes typically only consider generators that will be connected in the short term, long-range interconnection planning is limited. As a result, new interconnection facilities are constructed on an ad-hoc basis, often fail to capture economies of scale available with future generation capacity, and may not be ready by the time the requesting generator comes online. Requiring transmission providers to consider future generation projects (as some developers have urged) could enhance efficiency, reduce overall cost and accelerate the interconnection of new generation assets.
- **FERC could allocate contracts for new transmission projects via competitive auctions.** Many states grant incumbent local utilities a right of first refusal over new transmission projects within their service territories. In these states, competitive bidding by third parties only occurs if the incumbent utility declines to participate. FERC could require that RTOs and ISOs allocate contracts for certain types of transmission facilities via competitive auctions, thereby encouraging developers to compete on timing and cost. Moreover, FERC could itself hold auctions for certain interstate transmission projects, eliminating the role of regional transmission providers in the process. The federal government has already successfully used competitive auctions to allocate offshore wind leases.<sup>8</sup>
- **FERC could enforce stricter timelines on transmission providers with respect to the interconnection process.** Most transmission providers address interconnection requests in their queues chronologically, regardless of when the generators in the queue are expected to commence operation. The request process, including the required studies, can run years behind schedule. These queues are typically very long and particularly problematic for new renewables like wind and solar, which can be constructed relatively quickly. FERC currently only requires transmission providers to use “reasonable efforts” to meet key deadlines.<sup>9</sup> A process focusing on generator readiness could yield faster results and incentivize efficiency.

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ENDNOTES

- <sup>1</sup> Jenkins, J.D., Farbes, J., Jones, R., Patankar, N., Schivley, G., “Electricity Transmission is Key to Unlock the Full Potential of the Inflation Reduction Act,” REPEAT Project, Princeton, NJ (September 22, 2022), available at [https://repeatproject.org/docs/REPEAT\\_IRA\\_Transmission\\_2022-09-22.pdf](https://repeatproject.org/docs/REPEAT_IRA_Transmission_2022-09-22.pdf).
- <sup>2</sup> 16 U.S.C. § 824p(b)(1)(C).
- <sup>3</sup> *Piedmont Environmental Counsel v. FERC*, 558 F.3d 304 (4th Cir. 2009), cert. denied, 558 U.S. 1147 (2010); *California Wilderness Coalition v. DOE*, 631 F.3d 1072 (9th Cir. 2011).
- <sup>4</sup> 16 U.S.C. § 824p(a).
- <sup>5</sup> *California Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072.
- <sup>6</sup> 16 U.S.C. § 824p(e).
- <sup>7</sup> Notice of Proposed Rulemaking, Applications for Permits to Site Interstate Electric Transmission Facilities, 88 Fed. Reg. 2770 (proposed January 17, 2023) (to be codified at 8 C.F.R. 50).
- <sup>8</sup> Press Release, U.S. Department of the Interior, Biden-Harris Administration Sets Offshore Energy Records with \$4.37 Billion in Winning Bids for Wind Sale (February 25, 2022), available at <https://doi.gov/pressreleases/biden-harris-administration-sets-offshore-energy-records-437-billion-winning-bids-wind>.
- <sup>9</sup> FERC, Small Generator Interconnection Procedures, Order No. 842, 162 FERC ¶ 61, 128 (2018); FERC, Large Generator Interconnection Procedures, Order No. 845-B, 168 FERC ¶ 61, 092 (2019).

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