UNITED STATES OF AMERICA BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Joint Federal-State Task Force on Electric)	Docket No. AD21-15-000
Transmission)	

COMMENTS OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW¹

Pursuant to the Federal Energy Regulatory Commission's (FERC or the Commission) August 30, 2021 Order Listing Members, Announcing Meeting, an Inviting Agenda Topics ("August Order"),² and with reference to the June 17, 2021 Order Establishing Task Force and Soliciting Nominations ("June Order"),³ the Institute for Policy Integrity at New York University School of Law (Policy Integrity) respectfully submits these comments. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity's staff is expert in benefit-cost analysis and regulatory economics, and has participated in numerous proceedings before the Commission, regional transmission organizations, and state public utility commissions regarding the socially efficient pricing of energy resources, including transmission facilities.

FERC's August Order seeks comments "identifying barriers that inhibit planning and development of more efficient and effective transmission necessary to achieve federal and state policy goals, both within FERC rules and regulations regarding planning and cost allocation of transmission projects and at the state level, as well as potential solutions to those barriers." Here, we identify two barriers, one related to siting and one related to planning and cost allocation, and we note a potential solution for each.

1. State-Level Siting Authority

Siting transmission projects, which tend to be large, expensive, and susceptible to hold-ups, generally requires several state-level regulatory approvals. At a minimum, the project must be granted a certificate of convenience and necessity that confers eminent domain power; other approvals might involve environmental review or permission for different aspects of construction.⁵ This combination of factors makes it easy for opponents to slow or wholly stymie transmission projects, especially if the project passes through more than one state. Even if state

¹ These comments do not necessarily reflect the views of NYU School of Law, if any.

² 176 FERC ¶ 61,131 (2021) [hereinafter August Order].

³ 175 FERC ¶ 61,224 (2021) [hereinafter June Order].

⁴ August Order, *supra* note 2, at P 8.

⁵ FERC, Report on Barriers and Opportunities for High Voltage Transmission 21–22 (2020).

agencies do not themselves identify reasons to reject a proposed transmission project, private actors can challenge plans for development. Those challenges do not need to succeed outright to be effective—merely slowing approval and raising the possibility of denial raises the cost of development.

The Energy Policy Act of 2005 created a multistep process through which the Commission could take over permitting authority from one or more states, sometimes called "backstop siting authority." Congress's aim was to reduce the risk that parochial interests or anticompetitive motives impeding the development of transmission projects that would serve the national interest, but in a way that did not simply trample or sideline states' preferences. That process, which involves decisions and outputs by the Department of Energy as well as a rulemaking from the Commission, requires several years to execute and does not guarantee that litigation will be avoided. In addition, its end result is not a division of labor for deciding where and how to best site needed transmission but instead either takes the siting decision out of the hands of state authorities, or uses the threat of that outcome to pressure states into approving a proposed project. It is, in other words, a legally viable approach to overcoming the challenges summarized above, but one that suffers from important weaknesses.

Despite these weaknesses, FERC should begin work on the rulemaking required to implement backstop siting. FERC not only has the option to use the authority created by the 2005 Act but also, arguably, an obligation to employ that authority for the purpose of supporting transmission development that would make rates more just and reasonable. Although this backstop siting authority may take years to implement, not months, it is available to FERC should other preferable options fail. 8

During the first Joint Task Force meeting, members should discuss jurisdictional issues related to transmission siting, including the potential role of FERC's backstop siting authority. In addition to shedding light on opportunities to overcome siting challenges, this discussion is also likely to indicate how new approaches to siting can mitigate or wholly remove some barriers to transmission and planning and cost allocation as well.

2. Lack of Standardized Cost Benefit Analysis

As FERC clearly recognizes in its Advance Notice of Proposed Rulemaking, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, transmission planning and cost allocation is presently balkanized, and that status can lead planners to undervalue or wholly overlook transmission projects whose

⁶ *Id.* at 3–6. For an overview of what that process involves and the authority on which it is based, see Avi Zevin et al., *Building a New Grid Without New Legislation: A Path to Revitalizing Federal Transmission Authorities*, 48 ECOL. L.Q. 169 (2021).

⁷ Zevin et al. describes several important features of the rulemaking that FERC should undertake in order to implement its authority under the 2005 Act. *Id.* at 220–34.

⁸ Id. at 172 n.6 (noting conventional wisdom that federal courts "gutted" FERC's backstop siting authority).

development is likely to result in just, reasonable, and not unduly discriminatory or preferential rates. In particular, FERC inquires about whether the current approach "fails to consider the full suite of benefits—and the associated beneficiaries—produced by transmission facilities developed to meet the transmission needs of the changing resource mix."

The lack of any minimum prescription by FERC of which effects planners should treat as benefits when characterizing and evaluating proposals to meet identified transmission needs leads to several problems. For one, planners often ignore meaningful potential benefits of a given proposal. In addition, planners in different regions have come to adopt different characterizations of transmission benefits, meaning both that their respective lists of benefits differ and that they value nominally similar benefits in different ways. In turn leads to substantive and procedural problems: substantive because some effects that would manifestly benefit ratepayers are ignored or mis-valued, and procedural because the need to reconcile substantive differences across regions unduly encumbers the potential development of interregional projects.

One partial solution for the Task Force to consider is a standardized cost benefit analysis rubric for transmission projects. As FERC moves from reactive evaluation of transmission needs to proactive identification of them, it will be important to establish basic parameters for all stakeholders involved in the characterization and allocation of benefits and costs, including states. The fundamental rationale for the Task Force to consider this sort of rubric is straightforward: which effects of transmission benefit ratepayers is an empirical question and one that is properly and efficiently answered by federal regulators at FERC and the Department of Energy, with input from the national labs and states.

Respectfully submitted,

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⁹ See Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection, 176 FERC ¶ 61,024, at PP 61–64, 66, 69–70 (2021).

¹⁰ *Id.* at P 70.

Paul L. Joskow, Facilitating Transmission Expansion to Support Efficient Decarbonization of the Electricity Sector 30–31 (MIT Ctr. for Energy & Env't Pol'y Res. Working Paper No. 2021-009, 2021); Johannes Pfeifenberger, Brattle Grp., Transmission Planning and Benefit-Cost Analyses 2, 3 (Apr. 29, 2021).

¹² Pfeifenberger, *supra* note 11, at 2, 3; Liza Reed et al., Niskanen Ctr. & Clean Air Task Force, How Are We Going to Build All that Clean Energy Infrastructure? 9, 11 (2021).

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 10th day of September 2021.

Respectfully Submitted,

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