



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.”<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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

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<sup>6</sup> *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).

<sup>7</sup> 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.

<sup>8</sup> *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.<sup>9</sup> 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.”<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> This 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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<sup>9</sup> 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).

<sup>10</sup> *Id.* at P 70.

<sup>11</sup> 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).

<sup>12</sup> 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 10<sup>th</sup> day of September 2021.

Respectfully Submitted,

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