



**Federal Energy Regulatory Commission
November 16, 2006
Open Commission Meeting
Statement of
Chairman Joseph T. Kelliher**

**Item C-2: Regulations for Filing Applications for Permits to Sit
Transmission Facilities (RM06-12-000)**

"Today, the Commission issues a final rule to implement its federal transmission siting responsibilities under the Energy Policy Act of 2005. This is only the latest step in our implementation of this important federal law.

Last year, Congress concluded that the status quo was failing to develop the strong transmission grid that our country needs. It took a number of steps to change the status quo in order to improve reliability, reduce congestion, and strengthen competitive markets. One change was directing FERC to issue a transmission incentives rule to attract greater investment. We issued that final rule in July, by unanimous vote, and have approved incentives in a number of orders. Another change was providing federal transmission siting authority.

We believe the final transmission siting rule is faithful to Congressional intent. We recognize that the siting authority entrusted to FERC is limited in scope. Congress took a very different approach with respect to federal transmission siting than it took with federal pipeline siting. When Congress provided for federal siting of interstate natural gas pipelines, it completely displaced the states, and provided for exclusive and preemptive federal siting. By contrast, federal transmission siting is not exclusive. Federal transmission siting supplements state siting, it does not supplant state siting.

We recognize that as a practical reality states will continue to site most transmission facilities. Federal jurisdiction to site transmission projects under the Energy Policy Act of 2005 is limited. First, FERC can only issue a construction permit for transmission projects that are located in "national interest electric transmission corridors", as designated by the Department of Energy.

Second, even in the national interest corridor regions, FERC can only issue a construction permit where states do not have authority to site these facilities or consider the interstate benefits of a project, where an applicant does not qualify for siting under state law, or where the state siting body has withheld approval for more than a year or conditioned approval in a particular manner.

In my view, the most significant change between the proposed rule issued in June and the final rule is with respect to initiation of the pre-filing process. The Commission uses pre-filing in both hydropower licensing proceedings and natural gas project proceedings. In our experience, pre-filing is an important and necessary part of a construction permit proceeding. Important because it encourages early identification and resolution of issues, engages all stakeholders in determining study needs, and enhances the possibility of all permitting agencies acting in unison. Necessary because, based on our experience, a mandatory pre-filing process is needed for the Commission to meet the one year statutory deadline for authorization. For that reason, pre-filing is mandatory under the final rule.

Under the proposed rule, FERC barred formal filings during the first year of a state proceeding. However, we would have allowed pre-filing to be initiated during the first year. States have expressed serious concerns about pre-filing occurring

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contemporaneously with state proceedings. They are concerned that ex parte rules would impede or bar their participation in the FERC prefiling process, that a contemporaneous FERC prefiling proceeding will be a burden on state resources as they conduct their own proceeding, and that contemporaneous proceedings, even if the FERC proceeding is informal, would allow for gaming by project developers. We take these concerns seriously and believe they have merit.

Prefiling has not been controversial in either the hydropower or natural gas project contexts. In fact, prefiling enjoys broad support from private landowners, environmental and recreation groups, state and federal lands agencies, and state siting bodies. However, federal siting authority in these contexts is both exclusive and preemptive. By contrast, federal transmission siting authority is not exclusive. Allowing prefiling to occur contemporaneously with state siting proceedings creates potential for conflicts that do not exist in either the hydropower or natural gas pipeline contexts.

For that reason, we go further than the proposed rule, and not only bar a formal application for a construction permit in the first year of a state proceeding, but also bar the initiation of prefiling during this period. Doing so gives state siting agencies one clear year to site electric transmission facilities in designated transmission corridors, free from any burden or competition of a contemporaneous FERC proceeding. That will help state siting bodies make timely siting decisions during this period.

I should point out that we could have gone much further in the final rule. Under a strict reading of the relevant statutory provisions, FERC could have allowed contemporaneous filings with state and federal regulators, so that FERC could take final action and issue a construction permit a year and a day after such contemporaneous filings. That is not what we do today. We do something quite different, bar prefiling during the first year of a state proceeding, mandate prefiling, and only allow a formal filing at the end of prefiling. We give states one clear year to site proposed transmission facilities in designated corridors.

The final rule also clarifies the meaning of the term "withheld approval" in the statute. As indicated earlier, one of the circumstances where FERC is authorized to issue a construction permit for a transmission project in a designated corridor is where a state siting body has "withheld approval" for a year. The question has arisen as to whether that term only means state failure to act, or means both state failure to act and denial. We interpret this term using the usual rules of statutory construction, and conclude the most reasonable interpretation is that the term encompasses both state failure to act and denial. There seems to be no merit in deferring this decision until a later day when we can interpret the term now and provide greater regulatory certainty.

A few months ago, we decided to issue final rules along a schedule so that when the Department of Energy was in a position to designate national interest electric transmission corridors, our rules would be in place. We meet that schedule today."