



May 17, 2023

Ms. Kimberly Bose
Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Notice of Proposed Rulemaking, Federal Energy Regulatory Commission Docket No. RM22-7-000; Applications for Permits to Site Interstate Electric Transmission Facilities (88 Fed. Reg. 2,770-2,794; January 17, 2023)

Dear Secretary Bose:

The U.S. Chamber of Commerce and its Global Energy Institute (collectively, “the Chamber”) appreciate the opportunity to submit these comments on the Notice of Proposed Rulemaking issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”) on December 15, 2022, entitled “Applications for Permits to Site Interstate Electric Transmission Facilities.”¹ The Backstop Siting NOPR aims to amend the Commission’s regulations to include certain revised aspects of the agency’s transmission backstop siting authority as such was enhanced with the passage of the Infrastructure Investment and Jobs Act (IIJA).²

The mission of the Chamber’s Global Energy Institute is to unify policymakers, regulators, business leaders, and the American public behind a common-sense energy strategy to help keep America secure, prosperous, and clean. These comments intend to provide the business community’s input to the Commission as it considers specific modifications to its regulations and procedures governing the backstop siting process developed under the Energy Policy Act of 2005, as such was enhanced through the passage into law of the IIJA.

The IIJA sets forth the first meaningful updates to the Commission’s backstop siting authority as such was initially established through the addition of section 216 to the Federal Power Act (FPA) *via* the passage of the Energy Policy Act of 2005.³ Such initial regulations implementing the Commission’s backstop siting authority were established through a prior

¹ 181 FERC ¶ 61,205 (2022) (published in the Federal Register at 88 Fed. Reg. 2,770 (January 17, 2023)) (the “Backstop Siting NOPR”).

² Pub. L. 117-58, § 40105, 135 Stat. 429 (2021).

³ Pub. L. 109-58, § 1221, 119 Stat. 594 (2005).

rulemaking process.⁴ While the addition of FPA section 216 was intended to provide an avenue for the federalized siting of electric transmission infrastructure, certain legal infirmities held back the practical implementation of the authorities envisioned within the statute. The IIJA amendments to FPA section 216 were intended to cure certain of these shortcomings.

The Backstop Siting NOPR would appear to reflect a one step forward, two steps back approach to updating the Commission's transmission siting authorities under Section 216, however. The IIJA's modifications to FERC's backstop siting authority were targeted with the intent of resolving certain legal infirmities resulting from the initial implementation of FPA section 216, but the Backstop Siting NOPR proposes modifications well beyond those directed by the IIJA.

While the IIJA expands FERC's authority to instances where a state has formally denied an application to site transmission facilities and separately requires that an entity seeking eminent domain through FERC demonstrate that they have undertaken good faith efforts to engage with landowners and other stakeholders, the Backstop Siting NOPR proposes to require numerous additional reporting requirements before an entity can qualify for FERC's exercise of its siting authority under FPA section 216. In addition, the Backstop Siting NOPR shifts the timeline for the activation of such siting authority to run concurrently with state siting activities – thereby potentially making the default state process irrelevant and at the same time guaranteeing that one of the siting efforts – either through the state or in front of FERC – will be a wasted use of time, money, and resources for all involved stakeholders. Moreover, the Backstop Siting NOPR proposes to undermine the finality of Commission proceedings conducted pursuant to FPA section 216 by postponing any activity associated with the construction of a permitted transmission line until all challenges before FERC to such infrastructure siting, no matter how feeble, are exhausted.

Each of these above concerns serve to erect hurdles to the effective and efficient siting of electric transmission facilities, contrary to the legislative intent underlying FPA section 216. As such, the Commission should reconsider the real-world impacts of its sought changes and, at a minimum, consider whether more – or rather less – transmission will be developed as a result of the changes set forth in the Backstop Siting NOPR.

I. Reporting Requirements Beyond Those Mandated by Statute will Impede the Application for and the Commission's Exercise of its Enhanced Backstop Siting Authority

Consistent with the IIJA's modification to FPA section 216(e)(1) requiring that backstop siting permit holders promptly undertake good faith efforts to engage with landowners and other impacted stakeholders,⁵ the Backstop Siting NOPR proposes the

⁴ *Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities*, Order No. 689, 71 Fed. Reg. 69,440 (Dec. 1, 2006), 117 FERC ¶ 61,202 (2006) (the "Order No. 689 Final Rule"), *reh'g denied*, 119 FERC ¶ 61,154 (2007).

⁵ 16 U.S. C. § 824p(e)(1) (as amended by IIJA section 1221).

development and application of an Applicant Code of Conduct.⁶ As this addition to the Commission’s regulations is largely consistent with the legislative intent of the IJA, the Applicant Code of Conduct does not appear to erect an unreasonable barrier to the effective exercise of the Commission’s backstop siting authority as such was strengthened through that law. Moreover, the Commission proposes to adopt a flexible approach to this requirement through the provision of the alternative that an applicant may demonstrate compliance with the IJA’s “good faith engagement” requirement through activities and methods that are adjudged equal to or superior to compliance with the proposed Applicant Code of Conduct.⁷ These proposals fulfill legislative intent without undermining the intent of FPA section 216 to provide an avenue, through FERC, to get needed interstate transmission facilities built.

The Backstop Siting NOPR also proposes to require applicants to submit an “Environmental Justice Public Engagement Plan.”⁸ In addition, the Commission proposes to incorporate additional reporting requirements to any applicant request that FERC exercise its backstop siting authority under FPA section 216. These reports include the “Tribal Resources Resource Report,”⁹ an “Environmental Justice Resource Report,”¹⁰ and an “Air Quality and Environmental Noise Resource Report.”¹¹ Meaningful engagement of affected communities including low income and disadvantaged communities is important to help ensure the development of locally-led, collaborative solutions. However, adding these mandatory reporting requirements absent congressional direction – which is lacking within the IJA – expands beyond the scope of FERC’s authority under FPA section 216.

It is estimated that more than 200,000 miles of new high voltage electric transmission lines would need to be built to meet an ambitious net-zero emissions target by 2050.¹² The growing demand to connect new renewable energy generation is, in part, driving this demand for new transmission capacity. At the same time, it is also contributing to improvements in air quality. Air quality and other tangible issues have typically weighed into the classification of environment justice communities, while viewsheds associated with transmission line infrastructure have not. In fact, the Commission, in this same rulemaking proceeding, proposes to define the term “environmental justice community” as “any disadvantaged community that has been historically marginalized and overburdened by *pollution*, including, but not limited to, minority populations, low-income populations, or indigenous peoples.”¹³

⁶ Backstop Siting NOPR at P 26.

⁷ Backstop Siting NOPR at P 28.

⁸ Backstop Siting NOPR at PP 30-31.

⁹ Backstop Siting NOPR at PP 63-64.

¹⁰ Backstop Siting NOPR at PP 65-67.

¹¹ Backstop Siting NOPR at PP 68-71.

¹² https://repeatproject.org/docs/REPEAT_IRA_Transmission_2022-09-22.pdf.

¹³ Backstop Siting NOPR at P 30.

Notwithstanding whether adequate notice has been provided that FERC is seeking to define such burdened communities in this rulemaking proceeding,¹⁴ transmission line infrastructure is not a source of “pollution” unless a comprehensive upstream analysis is employed to connect such facilities to specific electric generation resources. A polluting resource directly connected to any given transmission line, or with the potential to indirectly export electrons across a transmission line, could be geographically remote from any portion of a transmission project for which federal backstop siting is sought. Moreover, the Commission does not regulate electric generation planning, construction, or such facilities’ associated emissions, with the latter reserved for the Environmental Protection Agency. Thus, the Commission cannot use its limited authorities under FPA section 216 to determine from what types of facilities such transmitted electrons should originate.

A similar concern arises with respect to the newly minted “Air Quality and Environmental Noise Resource Report” proposed as part of the Backstop Siting NOPR.¹⁵ Aside from the minimal emissions associated with the initial construction of a transmission project and, thereafter, even more limited emissions associated with future maintenance activities, it is unclear what emissions result from the direct *operation* of a transmission line itself. Nonetheless, the Backstop Siting NOPR proposes to require that applicants quantify such emissions and even propose mitigation measures thereto, as deemed necessary.¹⁶ Again, the focus on “air quality” with respect to the operations of transmission infrastructure seems misplaced in this proceeding and is devoid of congressional direction. As such, the Commission should remove this resource report requirement from its Backstop Siting NOPR.

Similarly, the Tribal Resources Resource Report and Environmental Justice Resource Report that are each proposed for inclusion in the Commission’s enhanced backstop siting regulations appear without any concomitant congressional direction for their inclusion. Meaningful engagement with communities is essential for timely permitting and moving projects forward; however, these provisions add additional requirements that would appear to conflict with the intent of the IIJA to facilitate – rather than impede – the siting and construction of necessary new transmission facilities.

II. Concurrent State and Federal Transmission Siting Processes Should be Avoided

The Commission’s preexisting regulations implementing FPA section 216 provided for a bifurcated process where the state-based transmission siting process had the

¹⁴ The Backstop Siting NOPR appears to be seeking to define the term “environmental justice community” for not just the purposes of this instant proceeding, but for FERC parlance *writ large*. While there is merit in the Commission seeking to standardize this definition across Commission proceedings, the establishment of this definition in a proceeding entitled “Applications for Permits to Site Interstate Electric Transmission Facilities” likely fails to provide adequate notice to all interested stakeholders that the actual scope of such environmental justice communities is being evaluated herein.

¹⁵ Backstop Siting NOPR at P 69.

¹⁶ Backstop Siting NOPR at P 70.

opportunity to run its course – for one year – before the Commission *backstop* siting process would commence.¹⁷ This staged process properly acknowledged the underlying (and default) jurisdiction that individual states possess with respect to the siting of transmission infrastructure. As such, the authority provided to FERC within FPA section 216 has widely been referred to as a federal “backstop” to State siting processes.

The proposed adjustment to this process within the Backstop Siting NOPR turns this relationship on its head, however, by effectively rendering FERC’s FPA section 216 authority as a co-equal alternative to State siting activities. Specifically, the Commission now proposes to eliminate the preexisting one-year delay between when an application is filed with a State and when the FERC-based pre-filing process may commence.¹⁸ While the Commission affirmatively “recognize(s) the primacy of the States’ role in siting transmission infrastructure,” it concludes that unspecified efficiency gains support its proposal to run its own siting process in parallel.¹⁹ Remarkably, overall “efficiency” strongly counsels against the accelerated backstop siting process now proposed by FERC.

It may be true that a parallel process enables FERC to get to “yes” more quickly, but such a process also requires all affected stakeholders, including the applicant, relevant States, and interested landowners, to simultaneously monitor and participate in two proceedings – one occurring at the State level and with the second occurring before FERC in Washington, D.C. All efficiency gains are quickly eliminated for all interested parties as they are either forced to duplicate their efforts and associated investments in time and money, or simply sit-out one of the concurrent processes in the hope that other aligned stakeholders will carry their water. Spreading stakeholder engagement thin may lead to a more expedient decision at the federal level, but it could be at the potential cost of not all stakeholders having an adequate opportunity to participate in such process and be heard.

Moreover, the forced duplication of transmission project advocacy (or opposition) efforts, on a concurrent basis, guarantees that one of the processes and the stakeholder efforts dedicated thereto will amount to a void and wasted effort. All time and money invested in the FPA section 216 process will be of no value if the impacted State(s) approves a transmission siting request. Similarly, applicants may treat the State siting process as inferior, thereby forcing the Commission to more actively utilize its FPA section 216 authority to overrule State permit denials in instances where an applicant more focused on the state process would have otherwise convinced the relevant State authorities to grant their project siting request. More bluntly, the Commission’s proposal to exercise its “backstop” authority concurrently with state permitting processes could be viewed by States as relegating their transmission siting oversight to junior varsity status. If that is not the Commission’s intent, it should revert to the delayed backstop siting process currently codified in Commission regulations.

¹⁷ Order No. 689 Final Rule, 117 FERC ¶ 61,202 at P 21.

¹⁸ Backstop Siting NOPR at P 21.

¹⁹ Backstop Siting NOPR at P 22.

III. The Delayed Effectiveness of Federal Siting Authorizations Would Create Concerning Precedent Undermining the Finality of Commission Action

The Backstop Siting NOPR proposes to delay the issuance of any authorizations to proceed with transmission facility construction for the entire duration during which *any* request for rehearing remains pending with the Commission.²⁰ This delay would appear to apply regardless of the merit – or lack thereof – underlying any pending rehearing request. Further, this proposed delay to the effectiveness of an otherwise legally issued Commission order is inconsistent with the default guidance within the Federal Power Act, which specifically states that “[t]he filing of an application for rehearing ... shall not ... operate as a stay of the Commission’s order.”²¹ The text of the IIJA does nothing to undermine the expectation that the completion of the FERC backstop siting process will result with an actionable permit to construct transmission facilities.

While it represents a small fraction of the text comprising the Commission’s Backstop Siting NOPR, this discrete proposal has the potential to unnecessarily extend – rather than streamline – the time necessary for an applicant to obtain a meaningful permit to construct new transmission infrastructure. Moreover, while the Commission has adopted a similar practice in the natural gas pipeline context,²² the extension of this practice to unrelated Commission authorizations would significantly degrade the value and import of what previously would have been considered “final agency action.” The unnecessary broadening of this policy will delay the finality of FERC-jurisdictional decisions until contested proceedings move to the appellate stage before a court of appeals, in conflict with the FPA.

The Commission’s proposed change here would act to weaponize the submission of a rehearing request, turning such action into a tool to both delay the construction and increase the associated costs of otherwise needed transmission infrastructure. At the least, this delay would span many months and, at its worst, potentially a year or longer. Quite simply, this change would offset the time savings sought through the acceleration of the backstop siting application process, which itself comes at increased costs and time commitments for all involved stakeholders. Thus, the procedure as currently outlined in the Commission’s regulations should be retained, thereby retaining the delayed commencement of the backstop application process combined with the recognition that

²⁰ Backstop Siting NOPR at P 47.

²¹ 16 U.S.C. 825l(c).

²² See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-B, 86 Fed. Reg. 26,150 (May 13, 2021), 175 FERC ¶ 61,098, *order on reh'g*, Order No. 871-C, 86 Fed. Reg. 43,077 (Aug. 6, 2021), 176 FERC ¶ 61,062 (2021).

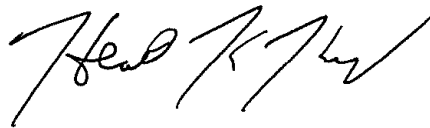
such a completed process results in final – and actionable – agency action upon which transmission construction activities may immediately commence.

IV. Conclusion

The Chamber appreciates the Commission’s efforts to codify within its regulations the enhancements to FERC’s backstop transmission siting authority resulting from the passage of the IIJA. The expansion of the transmission grid will play a vital role in supporting the ongoing transition of our nation’s electric generation fleet to a lower-emitting portfolio of resources. At the same time, we must recognize that FERC’s transmission siting authority remains “backstop” in nature, meaning that most transmission facilities will continue to be sited through state regulatory bodies. This process works well for much of the transmission being built today, though some larger, multi-state lines may need to fall back on the enhanced federal siting authorities provided by FPA section 216. In that instance, however, the Commission should not incur its authority through the imposition of unnecessary hurdles that mandate unnecessary reporting requirements or otherwise delay the effectiveness of a FERC order granting a federal backstop siting request. By enacting the IIJA’s enhanced backstop siting authorities, without the inclusion of extraneous provisions that work at counter purposes to such tools, the Commission can both accurately reflect legislative intent and facilitate the future exercise of its backstop power under FPA section 216.

The Chamber appreciates the opportunity to comment on the Backstop Siting NOPR. If you have any questions or need additional information regarding these comments, please contact me at (202) 463-5874 or hknakmuhs@uschamber.com.

Sincerely,



Heath K. Knakmuhs
Vice President and Policy Counsel
Global Energy Institute
U.S. Chamber of Commerce