UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Applications for Permits to Site Interstate Electric Transmission Facilities	)))	Docket No. RM22-7-000

JOINT COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND WIRES

I. INTRODUCTION

The Edison Electric Institute ("EEI") and WIRES respectfully submit the following initial comments in response to a Notice of Proposed Rulemaking issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") in the above-captioned proceeding on December 15, 2022.[1] In the NOPR, the Commission proposes to revise its existing regulations governing applications for permits to site electric transmission facilities under section 216 of the Federal Power Act ("FPA"),[2] as amended by the Infrastructure Investment and Jobs Act of 2021 ("IIJA"). The Commission seeks comment on the contents of the NOPR, including the proposed pre-filing process and National Environmental Policy Act ("NEPA") regulations.[3]

EEI is the association that represents all investor-owned electric companies in the United States. EEI members provide electricity for more than 235 million Americans and operate in all fifty states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. EEI's member companies own

[1] *Applications for Permits to Site Interstate Electric Transmission Facilities*, 181 FERC ¶ 61,205 (2022) ("NOPR").

[2] 16 U.S. Code § 824p.

[3] The Commission issued a notice extending the deadline for comments on the NOPR to May 17, 2023. Notice of Extension of Time, Docket No. RM22-7-000 (filed March 3, 2023).

and operate generation, transmission, and distribution facilities in regions in all areas of the country. EEI members are united in their commitment to get the energy they provide as clean as they can, as fast as they can, while keeping reliability and affordability front and center, as always, for the customers and communities they serve. Across the nation, EEI members are leading a clean energy transformation, making significant progress to reduce greenhouse gas emissions in our sector, while also creating good-paying jobs and an equitable clean energy future. Accordingly, EEI members are directly affected by and can provide a broad-based perspective on the issues raised in the NOPR.

WIRES is a non-profit trade association of investor-, publicly-, and cooperatively-owned transmission providers and developers, transmission customers, regional grid managers, and equipment and service companies. WIRES's members include many of the largest transmission owners in the country. WIRES promotes investment in electric transmission and consumer and environmental benefits through development of electric transmission infrastructure.[4] Since its inception, WIRES has focused on supporting investment in needed and beneficial transmission infrastructure – investments that Congress and the Commission have recognized are critical to establish a resilient, reliable, cost-effective, modern, and clean bulk power system. As a result, WIRES is uniquely positioned to address many of the issues the Commissions seeks comment on in the NOPR.[5]

II. BACKGROUND

Under section 216 of the FPA, Federal siting authority for electric transmission facilities is divided between the Department of Energy ("DOE") and the Commission. Section 216(a)

[4] For more information about WIRES, please visit www.wiresgroup.com.

[5] This filing is supported by the full supporting members of WIRES but does not necessarily reflect the views of the RTO/ISO associate members of WIRES.

directs DOE, on a triennial basis, to conduct a study and issue a report on electric transmission congestion and permits DOE to designate certain transmission-constrained or congested geographic areas as national interest electric transmission corridors ("National Corridors").[6] Section 216(b) authorizes the Commission in certain instances to issue permits for the construction or modification of electric transmission facilities in areas that DOE has designated as National Corridors (FERC's "Backstop Authority").[7] Section 216(c)(2) of the FPA requires the Commission to issue rules specifying the form of, and the information to be contained in, an application for proposed construction or modification of electric transmission facilities in National Corridors, and the manner of service of notice of the permit application on interested persons.[8] Pursuant to this statutory requirement, FERC issued Order No. 689 in 2006, which implemented new regulations for section 216 permit applications by adding part 50 to the Commission's regulations.[9]

In 2009, the U.S. Court of Appeals for the Fourth Circuit, in *Piedmont Environmental Council v. FERC*,[10] held that part of the Commission's interpretation of the FPA in Order No. 689 was incorrect because FERC's permitting authority does not apply when a State has affirmatively denied a permit application within the relevant one-year deadline. On November 15, 2021, the IIJA amended section 216 of the FPA. Among other things, the IIJA changed the

[6] 16 U.S. Code § 824p(a).

[7] 16 U.S. Code § 824p(b).

[8] 16 U.S. Code § 824p(c)(2).

[9] *Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities*, Order No. 689, 71 FR 69440 (Dec. 1, 2006).

[10] 558 F.3d 304 (4th Cir. 2009), *cert. denied*, 558 U.S. 1147 (2010) (*Piedmont*).

FPA to resolve the jurisdictional issue at the heart of *Piedmont* by giving the Commission permitting authority when a State has denied an application.[11]

III. COMMENTS

A. Commission Jurisdiction and State Siting Proceedings

In the NOPR, the Commission proposes to revise § 50.6 of its regulations to reflect the IIJA's amendments to section 216(b)(1)(C) and announces a policy change with respect to the commencement of the Commission's pre-filing process for cases where the Commission's jurisdiction rests on section 216(b)(1)(C).[12] More specifically, the Commission proposes to require applicants to submit evidence demonstrating that a State has: (i) not made a determination on an application; (ii) conditioned its approval in such a manner that the proposed facilities would not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible; or (iii) denied an application. The Commission also proposes to allow simultaneous processing of State applications and Commission pre-filing proceedings,[13] and to provide an additional opportunity for State input before determining that the pre-filing process is complete and that an application may be filed.[14] Lastly, the Commission also seeks comment on the advantages or disadvantages of entertaining requests to commence the pre-filing process before a state application has been filed.[15]

[11] 16 U.S.C. 824p(b)(1)(C) (as amended by IIJA section 1221).

[12] NOPR at PP 17-23.

[13] NOPR at P 21.

[14] NOPR at P 23 ("Specifically, one year after the commencement of the Commission's pre-filing process, if a State has not made a determination on an application, we propose to provide a 90-day window for the State to provide comments on any aspect of the pre-filing process, including any information submitted by the applicant.").

[15] *Id.*

Credible studies that consider pathways for achieving a net-zero economy by 2050 find that the amount of transmission infrastructure in the United States will have to expand by two—if not three—times to support greater electrification and the integration of an increasing amount of clean energy.[16] Transmission is a key enabling technology for the clean energy transition because it allows interconnection of new resources and better utilization of both new and existing resources, including reduced curtailment of wind and solar energy. It helps to smooth the variability of both electricity supply and demand across large regions and various timescales. Large-scale regional and interregional transmission can enhance reliability by expanding electricity imports and exports and by improving coordination across wider geographies.

The Commission is right to highlight the need for efficient and timely processing of applications under its Backstop Authority.[17] However, in setting parameters around the timing of the pre-filing process, the Commission should be careful not to undermine state regulatory processes that are designed to enable the permitting and siting of transmission projects. State regulators are important stakeholders in the transition to a clean energy future, and the Commission's Backstop Authority should not unduly impinge on their ability to provide input on the siting of transmission projects.

B. Eminent Domain Authority and Applicant Efforts to Engage with Landowners and Other Stakeholders, Including the Environmental Justice Public Engagement Plan

In the NOPR, the Commission proposes to require applicants to develop and file an Environmental Justice[18] Public Engagement Plan as part of their Project Participation Plan

[16] *See, e.g.*, Eric Larson, et al., *Net Zero America: Potential Pathways, Infrastructure and Impacts,* Final Report, 108 (Oct. 29, 2021), https://netzeroamerica.princeton.edu/the-report.

[17] See NOPR at P 21.

[18] Pursuant to the NOPR, the term "environmental justice community" includes disadvantaged communities that have been historically marginalized and overburdened by pollution. NOPR at P 30. The Commission should align

under § 50.4(a)(4) of the Commission's regulations.[19] The Environmental Justice Public Engagement Plan must describe the applicant's completed and planned outreach activities that are targeted to identified environmental justice communities.

It is appropriate for the Commission to incorporate outreach to environmental justice communities into the Project Participation Plan. EEI and WIRES are focused on supporting initiatives to ensure that investments targeting clean energy and electric transportation, as well as resilience, are being made in underserved communities. EEI's and WIRES's member companies are essential partners in these efforts and are engaging with community leaders and other stakeholders to increase access to jobs and contracting opportunities and to expand access to clean energy, while maintaining our focus on customer affordability.[20]

In addition, the Commission proposes to supplement the existing landowner and stakeholder participation provisions to require that it determine, as a precondition to granting eminent domain authority, that the permit holder has made good faith efforts to engage with landowners and stakeholders early in the permitting process.[21] The Commission proposes that an applicant may demonstrate that it has met the statutory good faith efforts standard by complying with an Applicant Code of Conduct in its communications with affected landowners.[22] The

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the definitions it uses for key terms in the final rule with those utilized by the Council on Environmental Quality ("CEQ").

[19] NOPR at PP 30-31.

[20] For example, Avista Corp. ("Avista") established an Equity Advisory Group comprised of environmental justice and public health advocates, tribes, highly impacted communities and vulnerable populations, as well as other relevant groups for the purpose of advising Avista on issues including the equitable distribution of energy and non-energy benefits and reduction of burdens to Vulnerable Populations and Highly Impacted Communities. *See generally* Avista's Equity Advisory Group Charter (Sept. 2021), https://www.myavista.com/-/media/myavista/content-documents/about-us/ceta/equity-advisory-group-charter-fall-2021.pdf. Other EEI members have taken similar steps.

[21] NOPR at P 24.

[22] NOPR at P 26.

Commission emphasizes that voluntary compliance with the Applicant Code of Conduct is not the only way an applicant may demonstrate that it has met the "good faith efforts" standard. The Commission proposes to require that an applicant that chooses not to rely on compliance with the Applicant Code of Conduct specify its alternative method of demonstrating that it meets the good faith efforts standard, including any specific commitments to record-keeping and information-sharing. While the Commission explains that it will first assess whether the applicant's alternative method is equal to or superior to the Applicant Code of Conduct and then evaluate whether the applicant substantially complied with the commitments of its alternative method, it does not identify when in the process it will perform these activities. FERC should make these determinations early enough in the application process to avoid disrupting the process or otherwise delaying project development.

The spirit of the proposed Applicant Code of Conduct is reasonable and fair, however, some of the details may be difficult for potential project developers to comply with. For example, depending on how developers approach land acquisition, they may need some flexibility to accommodate potential changes in routes and internal processes associated with such changes; given how quickly projects can change, developers may also need additional time to correct communications to landowners.[23]

C. Pre-Filing Procedures

Section 50.5 of the Commission's regulations describes the required pre-filing procedures for applicants seeking a permit under FPA section 216, including the information that an applicant must provide in a pre-filing request.[24] In the NOPR, the Commission proposes to

[23] Proposed § 50.12(a)(4)(ii).

[24] NOPR at P 40.

require that any pre-filing request include a detailed description of how the proposed project will "reduce capacity constraints and congestion on the transmission system."[25] The Commission also proposes to require an applicant to file a draft version of Exhibit H, *System analysis data*, showing how the proposed project will reduce capacity constraints and congestion on the transmission system.[26] In addition, FERC proposes to require the applicant to file additional supporting information such as system impact study reports, relevant regional transmission plans, and, if applicable, expert witness testimony and other relevant information submitted with the State application(s).[27]

In addition to demonstrating reductions in capacity constraints and congestion, the Commission should require applicants to make some sort of demonstration that the project meets a clear and identified transmission need and isn't duplicative of other proposed or existing transmission projects. To do this, the Commission should consider implementing a process whereby it consults with the relevant planning entities to ensure that the applicant's project supports system reliability. The Commission should also keep in mind that while reducing capacity constraints and congestion are laudable goals, FERC continues to have an obligation to ensure that the resulting rates for any transmission project are just and reasonable.

D. <u>Regulations Implementing the National Environmental Policy Act ("NEPA")</u>

Prolonged NEPA reviews and the often inevitable attendant litigation can be a significant barrier to the continued clean energy transformation—particularly as swift action to reduce emissions is critical. Therefore, FERC should ensure that its NEPA regulations are legally valid and consistent with the CEQ's recent and upcoming amendments to its NEPA implementing

[25] *Id.*

[26] NOPR at P 41.

[27] NOPR at P 41.

regulations, as CEQ is responsible for developing procedures for federal agency implementation of NEPA.[28] As FERC has not updated its regulations since they were vacated by the courts more than a decade ago, the Commission should update its regulations to conform to CEQ's existing regulations, including the recent proposal to update those regulations, to provide consistency and as required. Consultation with CEQ is key in the development of these regulations.[29] FERC should also utilize available NEPA efficiencies to both meet environmental protection goals and facilitate quicker siting and permitting for clean energy and transmission projects.

1. Categorical exclusions.

Categorical exclusions ("CEs") provide an efficient process for activities that do not individually or cumulatively have a significant effect on the human environment by exempting the project proponent's activity from undergoing a full NEPA review—that is, either an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS"). Therefore, FERC should adopt (and expand) the existing CEs in DOE's NEPA implementing regulations.[30]

For example, FERC should adopt and expand CE B4.12 and B4.13, which provide exclusions for the construction of powerlines and the upgrading and rebuilding of powerlines that are approximately 10 miles or less or 20 miles or less within previously disturbed or developed powerline or pipeline rights-of-way ("ROWs"). FERC should expand the distance requirement of these CEs to 100 miles for new, replacement, and upgraded powerlines within previously disturbed or developed ROWs. Such ROWs are already managed from an

[28] *See Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (holding that CEQ regulations are binding on federal agencies).

[29] It would not speed transmission siting if FERC's implementing regulations were subject to challenge as failing to confirm to CEQ requirements or for failing to consult with CEQ. *See, e.g., Piedmont Envt'l Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

[30] *See* 10 C.F.R Part 1021, Subpart D, Appendices; An agency may adopt another agency's determination that a categorical exclusion applies to a proposed action if the action covered by the original categorical exclusion determination and the adopting agency's proposed action are substantially the same. 40 C.F.R. § 1506.3(d).

environmental, safety, and reliability standpoint and thus, projects in these areas should not result in significant effects on the human environment. Expanding this CE would provide appropriate incentive for project sponsors to prioritize projects in existing ROWs over new greenfield projects and would be the most effective way to enable project sponsors to more efficiently build the transmission infrastructure necessary for the clean energy transformation, as explained above by more effectively utilizing existing ROWs. This would also allow project sponsors to more efficiently upgrade, expand, and rebuild powerlines—including increasing transmission capacity—within an existing ROW to integrate additional clean energy generation.

Adopting and expanding DOE's CEs would be consistent with environmental reviews for transmission lines and would facilitate faster transmission development by obviating litigation.

2. Programmatic environmental reviews.

To facilitate more expeditious and legally durable project-specific NEPA and other environmental reviews, such as Endangered Species Act ("ESA") Section 7 consultations, FERC could prepare programmatic reviews that encompass all potential transmission development projects at a regional scale. Any site-specific analysis, to the extent further review is necessary, can tier off the programmatic review. Proceeding in this manner, rather than having to prepare piecemeal environmental analyses for every transmission project that involves a major federal action, would be more efficient and help facilitate the clean energy transformation. This approach recognizes that transmission expansion addresses regional efforts to support a cleaner, more resilient energy grid, which, in turn, will support greenhouse gas emissions reductions across the economy.

i. Programmatic NEPA reviews can facilitate timely implementation of transmission related legislation.

FERC should encourage the other agencies that also may have to address environmental reviews for new or expanded transmission lines to streamline the NEPA processes through the preparation of programmatic NEPA analyses for transmission on a regional scale. Alternatively, FERC could perform these programmatic reviews itself. CEQ guidance gives agencies broad discretion to decide whether to prepare a programmatic NEPA analysis. In particular, CEQ has advised agencies to give particular consideration to preparing a programmatic EA or EIS when "(1) initiating or revising a national or regional rulemaking, policy, plan, or program; (2) adopting a plan for managing a range of resources; or (3) making decisions on common elements or aspects of a series or suite of closely related projects."[31] Of particular relevance, CEQ's guidance states that a programmatic NEPA review is appropriate in the case of an agency decision to proceed with "[s]everal similar actions or projects in a region or nationwide (e.g., a large-scale utility corridor project)."[32] Furthermore, CEQ advises that it may be appropriate for an agency to prepare a "single NEPA document to support both programmatic and project-specific proposals," such as "when an agency plans to make a broad program decision, as well as timely decisions to implement one or more specific projects under the program."[33]

A recent example of a programmatic NEPA analysis comes from the wind energy development and interconnection context. Specifically, Western Area Power Administration ("WAPA") and the U.S. Fish & Wildlife Service ("FWS" or "Service") prepared an EIS "in response to an increase in wind energy development and interconnection requests" in the Upper

[31] CEQ, *Effective Use of Programmatic NEPA Reviews*, at 15 (Dec. 18, 2014), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf.

[32] *Id.* at 14.

[33] *Id.* at 15.

Great Plains Region (Iowa, Minnesota, Montana, Nebraska, North Dakota, and South Dakota).[34] In so doing, "WAPA and the Service streamlined the procedures for conducting environmental reviews of these wind energy applications by implementing standardized evaluation procedures and identifying common measures to avoid or minimize environmental impacts associated with these projects." As noted above, FERC could develop similar region wide NEPA analyses.

ii. Programmatic ESA analyses can further facilitate timely transmission expansion.

In addition to preparing programmatic regionwide NEPA analyses, FERC could request that the federal agencies conduct programmatic ESA Section 7 consultations with FWS along the lines of the programmatic biological assessment or FERC could do such programmatic consultations itself.[35] When preparing the programmatic EIS described above, WAPA and the Service also prepared a programmatic biological assessment.[36] Through that programmatic consultation, the agencies identified various avoidance, minimization, and mitigation measures to address potential adverse effects of wind energy development on approximately two dozen listed species in that region. So long as project proponents committed to implementing those measures, no further ESA consultation would be required unless a particular project involves a listed species or critical habitat that was not addressed in the programmatic consultation. Expediting ESA compliance in this manner is another way that FERC and FWS can help facilitate timely expansion of transmission infrastructure. The geographic areas covered by these

[34] *See* WAPA, Upper Great Plains Wind Energy Programmatic EIS, DOE/EIS-0408 (last updated Dec. 28, 2022), https://www.wapa.gov/regions/UGP/Environment/Pages/ProgrammaticWindEIS.aspx.

[35] Programmatic reviews may be on a site- or project-specific level or on broader level. Programmatic analyses have value by setting out the broad view of environmental impacts and benefits for a proposed decision.

[36] *See id.*

programmatic ESA consultations should mirror the geographic areas identified in the programmatic NEPA analyses to minimize permitting delays.

3. EISs for transmission projects in existing ROWs.

FERC should reconsider whether to require EISs for transmission projects in existing ROWs. As stated above, such ROWs are already managed from an environmental, safety, and reliability standpoint and thus, projects in these areas should not result in significant effects on the human environment. At minimum, FERC should consider only requiring an EA for all transmission projects.

Lastly, FERC should ensure that National Historic Preservation Act consultations are appropriately time bound to ensure that protracted negotiations do not slow down transmission development.

IV. CONCLUSION

EEI and WIRES appreciate the opportunity to submit comments in this proceeding and urge the Commission to act on the NOPR's Backstop Authority proposal as discussed herein.

Respectfully submitted,

/s/ Kevin Huyler
Kevin Huyler
Managing Director, Federal Regulatory Affairs
Edison Electric Institute
701 Pennsylvania Avenue NW
Washington, DC 20004
khuyler@eei.org

/s/ Larry Gasteiger
Larry Gasteiger
Executive Director
WIRES
529 Fourteenth Street, NW
Suite 1280
Washington, DC 20045
lgasteiger@exec.wiresgroup.com

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