

Court Rejects FERC's Expansive Interpretation of Backstop Transmission Siting Authority

On February 18, 2009, the U.S. Court of Appeals for the Fourth Circuit issued a decision reversing, vacating and remanding key elements of the Federal Energy Regulatory Commission's (FERC) final rule implementing its backstop siting authority under Section 216 of the Federal Power Act (FPA). *Piedmont Environmental Council v. FERC*, No. 07-1651 (4th Cir. Feb. 18, 2009).

In its first key holding, the Fourth Circuit rejected FERC's interpretation that it may exercise Section 216 backstop siting authority after a state commission denies a transmission facility siting application within a national interest transmission corridor. Second, the Court vacated on procedural grounds the backstop-siting related modifications to FERC's National Environmental Policy Act (NEPA) regulations.

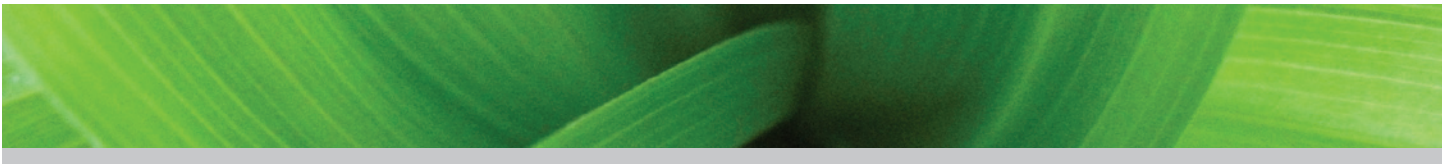
BACKGROUND

Section 216 of the FPA, added by the Energy Policy Act of 2005, authorizes FERC, in certain circumstances, to issue permits for the siting, construction or modification of transmission facilities in constrained areas designated by the Secretary of Energy as national interest transmission corridors. In December 2006, FERC promulgated regulations interpreting and implementing this backstop siting authority. The focus of the appeal was FERC's interpretation that its authority under Section 216(b)(1)(C)(i) of the FPA to act when a state commission has "withheld approval [of an application] for more than 1 year," includes instances when a state commission denies the application outright instead of merely failing to act within the deadline.

The challenge brought on appeal by a coalition of utility commissions, environmental groups and States argued, among other things, that: (1) FERC erred in interpreting the FPA to provide it with backstop siting authority where a state commission has timely denied an application outright; and (2) FERC's backstop authority implementing regulations were not effective because FERC failed to consult with the Council on Environmental Quality (CEQ) before their promulgation.

THE FOURTH CIRCUIT'S DECISION

The Court's principal holding rejected FERC's interpretation that it may exercise its backstop siting authority when a state commission has denied a project application outright. The Court held that FERC's interpretation of the "withheld approval" phrase is contrary to the plain meaning of the statute and that "[Section 216] does not give FERC permitting authority when a state has affirmatively denied a permit application within one year." The Court further observed that the backstop siting triggers under Section 216 are limited, in that "Congress intended only a measured, although important, transfer of jurisdiction . . . read as a whole, [Section 216] does not indicate that Congress intended to bring about the sweeping transfer of jurisdiction suggested by FERC."



The Fourth Circuit's order also vacated FERC's modifications to its NEPA-implementing regulations because FERC failed to first consult with the CEQ on the amendments. The Court noted that, after consultation with the CEQ, FERC may reinstate the amendments if it determines that no modifications are warranted. Should the CEQ consultation result in further modification to FERC's proposed rules, additional public notice and comment proceedings may be required.

IMPLICATIONS

The Fourth Circuit's interpretation of Section 216 of the FPA appears to reestablish the authority of state regulators to deny authorization for transmission projects in designated congestion corridors without risk of a Federal override. The only Section 216 proceeding initiated to date at FERC – Southern California Edison's application to build the Arizona portion of the Devers-Palo Verde No. 2 project – involves just such a state denial. The other triggers in Section 216 for backstop authority – including limitations on state authority to grant permits or consider out-of-state benefits, failure to act on an application for over one year, and conditions on a permit that render a project infeasible – remain unaffected.

The Fourth Circuit's decision may provide impetus to the emerging Congressional debate whether changes to FERC's transmission siting authority are appropriate to promote the development of renewable resources. This debate is likely to occur as Congress is expected to consider energy legislation early in 2009. The primary driver for Congressional consideration of transmission issues is concern that a very substantial build out of transmission infrastructure will be needed to support the renewable energy development required to meet existing state and a possible new Federal renewable electricity standard.

FOR ADDITIONAL INFORMATION

Van Ness Feldman provides a full range of services to electric utilities and transmission developers, including representation before FERC and federal and state permitting entities. For more information, please contact Joe Nelson, Doug Smith or your usual Van Ness Feldman contact.

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