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Who Has the First Say? Additional Jurisdictional Conflicts Involving the FERC

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WHO HAS THE FIRST SAY? ADDITIONAL JURISDICTIONAL CONFLICTS INVOLVING THE FERC

I. CONFLICTS BETWEEN FERC AND STATE GOVERNMENTS CONCERNING JURISDICTION OVER LNG REGULATION

Not only has the Federal Energy Regulatory Commission (“FERC”) battled the bankruptcy courts for jurisdictional power, it has also gone head-to-head with state regulatory agencies for similar reasons. Although jurisdictional battles between FERC and the states are nothing new,¹ one of the most recent disputes has centered on the approval and siting of liquefied natural gas (“LNG”) ² terminals located onshore and in state waters,³ most notably over the proposed terminal at the Port of Long Beach, California. The recently-enacted Energy Policy Act of 2005, Public Law 109-58 (signed August 8, 2005) (the “Energy Policy Act”), amends the Natural Gas Act (“NGA”)⁴ to clarify FERC’s exclusive regulatory authority over the siting, construction, expansion and operation of such LNG terminals, but contains numerous provisions that address continued state involvement.

A. Long Beach Terminal Case

On January 26, 2004, Sound Energy Solutions (“SES”) filed an application under Section 3 of the NGA to site, construct and operate a new LNG terminal at the Port of Long Beach, California for the importation of LNG. The Public Utilities Commission of California (“CPUC”) filed a protest to the scope of the application, claiming that it, rather than FERC, had jurisdiction

¹ “Cases are legion affirming the exclusive character of FERC jurisdiction where it applies.” *Public Utilities Commission of the State of California v. FERC*, 900 F.2d 269, 274 (D.C. Cir. 1990) (discussing FERC jurisdiction under the NGA and the Federal Power Act), as quoted in Sound Energy Solutions, Declaratory Order Asserting Exclusive Jurisdiction, 106 FERC 61,279 (Docket No. CP04-58-000) (Mar. 24, 2004) (discussing conflicts between FERC jurisdiction under the NGA and State law).

² LNG is natural gas (primarily methane) that has been supercooled to a liquid at –260 degrees Fahrenheit, reducing its volume more than 600 times, making it more practical for storage and transportation. For introductory information concerning LNG and its safety record and regulation, see the FERC publication “A Guide to LNG—What Every Citizen Should Know” (Apr. 29, 2005), available at <http://www.ferc.gov/industries/lng.asp>.

³ The amendments to Section 3 of the NGA (15 U.S.C. §717b) made by Section 311 of the Energy Policy Act of 2005 (Public Law 109-58, signed August 8, 2005) clarify FERC’s jurisdiction over “LNG terminals,” which are defined to include facilities “located onshore or in State waters.” These terminals have been the subject of the dispute between state regulatory agencies and FERC and are the focus of this discussion. LNG facilities located offshore in federal waters are subject to the jurisdiction of the Coast Guard and the Department of Transportation’s Maritime Administration (“MARAD”) and Research and Special Programs Administration under the Deepwater Port Act of 1974, as amended (33 U.S.C. §§ 150 *et seq.*) and related regulations. In February of 2004, FERC, the Coast Guard and the Department of Transportation’s Research and Special Programs Administration signed an Interagency Agreement that delineates the roles and responsibilities of each agency relative to LNG terminals and LNG tanker operations, and states that FERC would be the lead agency for environmental review, coordinating its review efforts with the other two agencies.

⁴ 15 U.S.C. §717 *et seq.*

to regulate siting and safety of the proposed facility.⁵ Because the imported LNG would be regassified and used entirely within the state of California, FERC, SES, and CPUC agreed no interstate commerce was involved. The CPUC claimed that since no interstate commerce was involved, FERC had no jurisdiction under Section 7 of the NGA. Additionally, CPUC argued, since Section 3 (dealing with the importation of natural gas) did not specifically mention FERC's authority over the facilities used to import LNG, Congress had not intended to preempt state authority, and thus the state's regulatory scheme should prevail.

In response to the CPUC's claim of jurisdiction, FERC issued a Declaratory Order Asserting Exclusive Jurisdiction.⁶ Although FERC acknowledged the need for cooperation between state and federal agencies to assess the SES proposal, FERC stated that it interpreted Section 3 of the NGA (as then currently written) to give it exclusive jurisdiction over the importation of LNG, even in the absence of interstate commerce.⁷ After CPUC's request for rehearing was denied, the group Californians for Renewable Energy sued FERC to appeal this ruling, with CPUC intervening in the case.⁸ Changes to Section 3 of the NGA made by provisions of the Energy Policy Act, as discussed below, now clarify FERC's exclusive regulatory authority over the siting, construction, expansion and operation of shore-based LNG terminals such as the proposed terminal at Long Beach.

B. "Jersey Justice" and the Proposed Terminal at Logan Township

One of the reasons FERC asserted its jurisdiction over onshore LNG terminals, rather than leave this area of regulation to the states, can be illustrated in the dispute between the states of Delaware and New Jersey concerning the proposed BP LNG terminal at Logan Township, New Jersey, on Delaware River.⁹ Most of the border between these two states is marked by the center of the main shipping channel in the Delaware River and Delaware Bay. However, within the "Twelve Mile Circle" surrounding New Castle, Delaware, the Delaware River itself is located almost entirely within Delaware, with the border set at the mean low-tide line on the New Jersey side of the river.¹⁰ Therefore, although the land-based facilities of the proposed

⁵ Sound Energy Solutions, Declaratory Order Asserting Exclusive Jurisdiction, 106 FERC 61,279 (Docket No. CP04-58-000) (Mar. 24, 2004).

⁶ *Id.*

⁷ *Id.* (Citing *Districtgas Corp. v. FPC*, 495 F.2d 1057, 1064 (D.C. Cir. 1974) and numerous other authorities).

⁸ *Californians for Renewable Energy v. FERC*, Docket No. 04-73650 (9th Cir. 2004). On Sep. 29, 2005, the CPUC filed a response in support of a consent motion to dismiss its appeal as moot.

⁹ See Adam Fifield, *Lawmaker Says Delaware Crossed Line*, PHILADELPHIA INQUIRER, Feb. 9, 2005, reprinted in GARDEN STATE ENVIRONEWS Feb. 10, 2005.

¹⁰ *Id.* (explaining that because the 1682 land grant from the Duke of York (later King James II of England) to William Penn that granted a 12-mile circle around New Castle actually extended into New Jersey, the mean low-tide line was set as the border and upheld by the US Supreme Court in 1934). See also "Cody Directs Attorney General to Sue the State of Delaware: State to File Suit Tomorrow in U.S. Supreme Court on Right to Regulate Development along Delaware River," press release dated Jul. 27, 2005, available at www.state.nj.us (accessed Sep. 9, 2005); Jeff Linkous, *NJ to Sue Delaware over LNG Plan Along River*, ASSOCIATED PRESS Jul. 27, 2005 available at www.timesleader.com.

terminal would be located entirely on the New Jersey shore of the river, incoming LNG tanker ships would have to pass through Delaware, and a large portion of the facility's 1,900-foot pier would be located in Delaware. On this basis, the Delaware Department of Natural Resources and Environmental Control and its Coastal Zone Industrial Control Board have asserted jurisdiction and decreed that the pier would violate Delaware's Coastal Zone Act, effectively blocking the project.¹¹ In response, the State of New Jersey has sued Delaware in the U.S. Supreme Court.¹²

Interestingly, even while declaring that it was "payback time" and calling for a boycott on credit cards issued from Delaware-based banks to exact a measure of "Jersey justice" on "meddling bureaucrats" in Delaware, New Jersey State Assemblyman John Burzichelli (D., Gloucester) was on record as opposing federal control and regulation of LNG terminals. "This is a state issue—a New Jersey issue. The federal government and Delaware should keep their hands to themselves. Only New Jersey can decide what is best for itself."¹³ He added that "I am no happier about the federal government telling New Jersey what to do as I am about Delaware telling New Jersey what to do."¹⁴ This state-versus-state scenario demonstrates even more clearly the need for a single authority for the approval process for critical energy infrastructure assets, such as LNG terminals.

C. LNG Issues Addressed in the Energy Policy Act

1. Amendments to Section 3 of the NGA

Section 311 of the Energy Policy Act amends portions of the NGA to clarify FERC's "exclusive authority to approve or deny an application for the siting, construction, expansion or operation of an LNG terminal [located onshore or in State waters]."¹⁵ This was intended as essentially a codification of what was widely believed to be the law, rather than a new grant of authority to FERC.¹⁶ The new legislation states that "nothing in this Act is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals."¹⁷ Efforts on the part of some policymakers to remove the LNG provisions from

¹¹ See Anne B. Jolis, *Burzichelli: Government Should Steer Clear of LNG Issue*, TODAY'S SUNBEAM (Salem, NJ), Apr. 10, 2005, reprinted in GARDEN STATE ENVIRONews, Apr. 11, 2005.

¹² "Cody Directs Attorney General to Sue the State of Delaware: State to File Suit Tomorrow in U.S. Supreme Court on Right to Regulate Development along Delaware River," press release dated Jul. 27, 2005, available at www.state.nj.us. The suit filed by New Jersey is actually a Motion to Reopen and for a Supplemental Decree of the 1934 decision upholding the current border (U.S. Supreme Court Docket No. 22011 ORG).

¹³ *Id.*

¹⁴ Adam Fifield, *U.S. Liquefied-Gas Bill Opposes Locally*, PHILADELPHIA INQUIRER, Apr. 18, 2005, reprinted in GARDEN STATE ENVIRONews Apr. 19, 2005.

¹⁵ Pub. L. 109-58 § 311(c)(2), to be codified at 15 USC 717b (e)(1).

¹⁶ See "Energy Bill Provisions Represent Most Significant Change in Energy Law in 70 Years, Chairman Says," Aug. 8, 2005, available at www.ferc.gov, in which FERC Chairman Joseph T. Kellier characterizes the statute as affirming FERC's exclusive authority under the NGA to authorize new import terminals.

¹⁷ Pub. L. 109-58 § 311(e)(1).

both the House version of H.R. 6 and the conference bill version of the Energy Policy Act were unsuccessful.¹⁸

Although it clarifies FERC's exclusive jurisdiction, the Energy Policy Act also amends Section 3 of the NGA (and adds a new Section 3A) to ensure the role of states in a comprehensive new approval process and provides a role for states in the inspection of operational facilities.¹⁹ First, the rights of states under three key pieces of federal environmental legislation, the Coastal Zone Management Act of 1972 ("CZMA"),²⁰ the Clean Air Act,²¹ and the Federal Water Pollution Control Act²² would not be affected by the Energy Policy Act. As pointed out in FERC's materials interpreting the Energy Policy Act, this provision preserves the states' power to effectively "veto" an LNG facility by denying permits associated with any of these three laws.²³ Second, FERC is required to promulgate regulations under the National Environmental Policy Act of 1969 ("NEPA")²⁴ to establish a mandatory, rather than elective, pre-filing process, under which potential developers of new LNG terminals would be required to initiate pre-filing procedures at least six months prior to filing a formal application and would be encouraged to cooperate with state and local officials early in the process.²⁵ FERC has used a voluntary pre-filing process for potential applicants for all NGA facilities (rather than just LNG facilities) for several years. Third, the governor of a state in which an LNG terminal is proposed shall be responsible for designating the appropriate state agency for the purpose of consulting with FERC regarding state and local safety considerations, which include the kind and use of the

¹⁸ See Robert L. Bamberger and Carl E. Behrens, "Congressional Research Service Issue Brief for Congress—Energy Policy: Comprehensive Energy Legislation (H.R. 6) in the 109th Congress" (Jun. 20 and Jul. 29, 2005 updates) at the Summary pages. See also Adam Fifield, *U.S. Liquefied-Gas Bill Opposes Locally supra* note 13 above (indicating U.S. Representatives Edward J. Markey (D., Mass.) and Robert E. Andrews (D. N.J.) attempted to strike these provisions). This provision saw the reversal of traditional party stances on states rights and federalism, with Democrats arguing for state control and Republicans supporting authorization and regulation by a federal agency.

¹⁹ Although not directly related to the conflict between states and FERC, Section 311 of the Act also requires FERC to enter into a Memorandum of Understanding with the Secretary of Defense concerning the siting, construction, expansion and operation of LNG facilities that may affect active military facilities, and prohibits FERC from denying an application solely on the basis that the terminal will be used only by the applicant or its affiliates. This prohibition essentially codifies the policy set forth in Hackberry LNG Terminal, L.L.C. (101 FERC 61,294 (Dec. 18, 2004)), that LNG operators may operate free of FERC-regulated open-assess tariffs. For a discussion on the background of the Hackberry policy, see Kathy Lake, *FERC Announces New Regulatory Policy for LNG Import Terminals*, PIPELINE & GAS JOURNAL (Jun. 2003).

²⁰ 16 U.S.C. 1451 et seq.

²¹ 42 U.S.C. 7401 et seq.

²² 33 U.S.C. 1251 et seq.

²³ See "LNG—Laws and Regulations" page, available at <http://www.ferc.gov/industries/lng/gen-info/laws-regs/state-rights.asp>.

²⁴ 42 U.S.C. §4321 et seq.

²⁵ Pub. L. 109-58 § 311(d), to be codified as Section 3A to the NGA. FERC issued a Notice of Proposed Rulemaking concerning this requirement at 112 FERC 61,232 (issued Aug. 6, 2005), and issued the final rule October 7, 2005, at 113 FERC 61,015 (Docket No. RM05-31-000) (to be codified 18 CFR Parts 153, 157 and 375).

proposed facility, the existing and projected population, demographic characteristics and land use near the proposed location, the natural and physical aspects of the proposed location, the emergency response capabilities, and the need to encourage remote siting. The Energy Policy Act provides that this designated state agency may issue an advisory report concerning such state and local safety considerations no later than thirty days after the filing of the application, and requires FERC to review and respond to the issues raised in such advisory report before approving the application. Fourth, upon written notice to FERC, the appropriate state commission may conduct safety inspections of operational LNG terminals within such state's borders to ensure compliance with federal regulations and guidelines, and notify FERC of any alleged safety violations. FERC is then charged with notifying the appropriate federal agency to take action and keep the reporting state commission informed. Finally, LNG terminal applicants are required to develop an emergency response plan for the facility in consultation with the Coast Guard and state and local agencies. Such plan must be approved by FERC before FERC may grant final approval to begin construction on the LNG terminal.

D. LNG Forums

Although Section 311 of the Energy Policy Act contains the amendments to the NGA specific to LNG, it is not the only section that impacts FERC's relations with state and local officials regarding its regulation of LNG. Section 317 of the Energy Policy Act²⁶ requires the Secretary of Energy, in cooperation and consultation with FERC, the Secretary of Transportation, the Secretary of Homeland Security, and the governors of the coastal states, to convene at least three forums concerning LNG by August 2006 in areas where LNG facilities are under consideration.²⁷ The forums shall be designed to foster a dialogue among federal, state and local officials, industry representatives, independent experts, and the general public, and, ideally, should be a means to identify and develop "best practices" for addressing the "issues and challenges" associated with LNG. Additionally, the forums should provide an opportunity for "public education and dialogue" on various topics such as the potential risks and rewards associated with the importation of LNG, the safety and environmental requirements and procedures designed to prevent and respond to LNG hazards and the roles of various levels of government in the permitting process.

E. Amendments to Sections 15 and 19 of the NGA

The Energy Policy Act also modifies portions of the NGA concerning process coordination, hearings, and rules of procedure, which affect LNG terminals along with other facilities regulated by FERC. Section 313²⁸ amends Section 15 of the NGA by confirming that

²⁶ Pub. L. 109-58 §317.

²⁷ As of August 22, 2005, FERC lists fourteen LNG terminals as "approved" (twelve by FERC, two offshore by MARAD/Coast Guard), twenty-one as "proposed" to either FERC or MARAD/Coast Guard, and nine additional "potential sites" identified by project sponsors. Six terminals are already operational on the US East and Gulf Coasts, Alaska, and Puerto Rico. The largest concentrations of these approved, proposed and potential sites in or near the continental United States appears to be the western and central Gulf Coast, the Northeast, Southern California, and the Northwest (particularly near the Portland, OE area). See FERC's "Liquefied Natural Gas" page and accompanying .PDF maps, available at <http://www.ferc.gov/industries/lng.asp>.

²⁸ Pub. L. 109-58 §313.

FERC is the “lead agency” for NEPA authorization and compliance purposes. Section 313 also amends Section 19 of the NGA by (1) granting the Court of Appeals for the circuit in which a facility subject to Section 3 or 7 NGA jurisdiction is located original and exclusive jurisdiction over disputes related to the issuance, condition, or denial of any permit or approval under federal law, other than the CZMA; and (2) granting the Court of Appeals for the D. C. Circuit original and exclusive jurisdiction to review claims that a federal agency or a state agency acting pursuant to federal law has refused to act to issue, condition, or deny a permit required under federal law, other than the CZMA.

II. CONFLICTS CONCERNING TRANSMISSION FACILITIES –EXPANDING ROLE FOR FERC

A. The Cross Sound Cable

Transmission facilities are another area where jurisdictional conflicts have arisen, and have been addressed in part by the Energy Policy Act. One example of this conflict can be seen in the dispute over the Cross-Sound Cable. The Cross Sound Cable (the “Cable”), which runs along the floor of the Long Island Sound, is a 24-mile (40km), 330-MW subsea transmission line linking Long Island, New York, with Connecticut. The Cable, owned by TransEnergie Co. and built by Cross Sound Cable Company (a subsidiary of TransEnergie), connects the New England Power Pool (NEPOOL) regional transmission system in Connecticut to the New York Independent Transmission System Operator (NYISO) transmission system in Long Island.²⁹ Construction of the Cable began in early 2000 with the goal of alleviating the costs associated with the tremendous energy requirements of Long Island. The builders of the Cable sought to access the relatively cheap power available in New England and transfer it to Long Island.

The Cable itself was innovative in several ways. It became the first operational example of entrepreneurial, risk-bearing “merchant” transmission that FERC had sought to encourage since the deregulation of the energy market in the early 1990s. In short, “merchant” transmission differs from traditional transmission in that its costs are not recovered through regulated rates, but rather through negotiated arrangements between the transmission line owner and the customer, thereby placing the monetary risks on the project’s investors rather than captive ratepayers.³⁰ The Cable was also innovative in that it constituted one of the first transmission lines to employ digital switching, a technique that allows unprecedented control over electrical flows in the network while simultaneously filtering out dangerous spikes and sags.³¹

²⁹ Pat Wood, III, Chairman, Fed. Energy Regulatory Comm’n, Summary Testimony before the Subcommittee on Energy and Air Quality (May 19, 2004), available at www.ferc.gov/press-room/ct-archives/2004/05-19-04-wood.pdf [hereinafter Wood, Summary Testimony].

³⁰ *Id.*

³¹ Peter Fairley, *TransEnergie: Playing Two Power Games* (April 2005), available at http://www.technologyreview.com/articles/05/04/issue/brief_power.0.asp [hereinafter Fairley, *TransEnergie*].

B. Cross-State Politics Ground the Cross Sound Cable

In 2000, FERC approved rates, terms, and conditions for transmission service over the Cable and issued findings that the Cable would enhance competition by expanding capacity and trading opportunities between the New England and New York markets.³² However, Connecticut politicians believed otherwise. The Connecticut lawmakers were convinced that the cable would serve only to feed Long Island's unquenchable thirst for energy at the expense of Connecticut's consumers and natural environment.

From the outset, construction of the Cable was the focus of public scrutiny. Connecticut attorney general Richard Blumenthal led the greatest opposition. Blumenthal believed that the cable was a bad deal for his state, and several economists generally agreed that the cable would siphon off cheap power, thereby lowering supply and raising prices in Connecticut.³³ Despite a challenge by Blumenthal in both the media and in the courts, construction of the Cable pressed on. On April 9, 2002, a Connecticut Superior Court judge rejected Blumenthal's request for an injunction to halt construction.³⁴

Soon thereafter, however, the builders of the Cable blundered badly, causing the pendulum of public support to swing back in favor of the Connecticut politicians and nearly derailing the project for good. To avoid interference with boat traffic and fishing, the permits issued to TransEnergie required that it bury its cables about two meters (approximately six feet) below the seabed. In May 2002, however, while burying the cable below Long Island Sound, the trenching company struck rock in the seabed that prevented it from burying certain short sections of the cable to the minimum depth specified in the permits.³⁵ Between the date the original permits were issued and the date of the builder's mistake, Blumenthal and supporters had won a minor battle when the Connecticut legislature passed a moratorium on consideration of permits for cross-sound infrastructure projects. Because of the moratorium on permits and TransEnergie's need for new permits allowing operation of the Cable in spite of its depth infractions, the Cable's operators could not get the go-ahead to energize the Cable. For all its technological advances and future promise, the Cable sat trapped and silent beneath Long Island Sound for the next year and a half.³⁶

C. The Cable is Resurrected Amidst the Blackout of 2003

Borrowing from the popular adage "there's a silver lining in every cloud," the Cable's owners made the most of one of the largest electrical failures in our nation's history. The massive blackout of the Northeast on August 14, 2003, provided an unexpected opportunity for TransEnergie to demonstrate how vital the Cable was to the region's supply of energy. Within

³² See Wood, Summary Testimony, *supra* note 29, at 2.

³³ See Fairley, *TransEnergie*, *supra* note 31, at 2.

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ *Id.*

twelve hours of the monster power outage, the Cable was transferring power to Long Island, helping customers get energy and providing stabilization to the grid as the generators in Long Island began coming back on.³⁷ Shortly after the blackout, U.S. Energy Secretary Spencer Abraham issued an emergency order to energize the Cable.

Abraham's emergency order to power the Cable was initially set to expire two weeks after the blackout, but he extended the order indefinitely, arguing that the grid was in jeopardy until the cause of the blackout was determined.³⁸ In fact, the emergency order was not rescinded until May 2004, after the Energy Department and Canadian investigators issued an exhaustive dissection of the blackout. By then, nine months of operating experience and a radically altered political environment had worked wonders for the Cable's image in the eyes of the public.³⁹ Following the expiration of the temporary permit, Governor Pataki of New York quickly directed his staff and the Long Island Power Authority to immediately petition FERC seeking federal authorization to re-energize the cable.⁴⁰ An agreement between the parties was reached quickly, and the Cable has now been in full-time operation for more than sixteen months. The Long Island Power Authority estimates that the Cable has saved the Authority roughly \$17.5 million in its first year of operation.

D. The Cross Sound Cable Saga Emphasizes the Need for Federal Intervention in the Arena of Interstate Electrical Transmission Facility Siting

The story of the Cross Sound Cable illustrates the struggles that exist when states—in this case, Connecticut and New York—battle over electric transmission rights, and underscores the interstate nature of electric transmission facilities. The planning, construction, and operation of the Cable—or any new electric transmission facility, for that matter—affect both the regional marketplace and regional reliability. Decisions regarding the operation of interstate electric transmission facilities highlight the importance of assessing economic and reliability issues from a regional, rather than State-wide, perspective. All too often, coordination and cooperation between States on these matters has fallen victim to interests that stand to lose from increased competition. As Pat Wood, III, former Chairman of FERC stated, “[t]he parochial view of one State should not be the sole determinant of whether a region's electrical customers receive the economic and reliability benefits of facilities that have already been built.”⁴¹

³⁷ *Id.* (explaining that shortly after the blackout, the suggestion to use the Cross Sound Cable came from the Long Island Power Authority, whose directors asked their grid operators whether the Cable “could help them get the lights back on”).

³⁸ *Id.*

³⁹ *Id.* (noting that the Cable had not been the serious economic or environmental threat that Connecticut politicians had envisioned, and that prices for New England's electricity consumers had not risen dramatically after several months of the Cable's operation).

⁴⁰ Press Release, State of New York, “Governor Announces Agreement on Cross Sound Cable” (Jun. 24, 2004), available at http://www.ny.gov/governor/press/04/june24_2_04.htm.

⁴¹ See Wood, Summary Testimony, *supra* note 29, at 1.

While a great amount of the political argument that centered on The Cable occurred while construction was already ongoing, a direct analogy can be drawn to the political fights and various environmental hurdles associated with the initial siting of any new interstate electric transmission facility. The Energy Policy Act seeks to alleviate struggles between states regarding siting of interstate electric transmission facilities by placing more power in the hands of the federal government with regard to these issues.

E. The Energy Policy Act and Transmission Facilities

Section 1221 of the Energy Policy Act, entitled “Siting of Interstate Electric Transmission Facilities,” provides for many changes to the current manner in which these facilities are sited in the United States. Relevant provisions, which bestow greater power upon the federal government in the area of interstate transmission facility siting, are examined below.

Within one year, the Secretary of Energy is required to issue a report designating certain geographic areas as *national interest electric transmission corridors*.⁴² In order for a geographic area to be so deemed, the Secretary must find that the area experiences electric energy transmission capacity constraints or congestion that adversely affects the area’s consumers.⁴³ The Energy Policy Act details several factors the Secretary must take into account when designating a certain geographic area as a national interest electric transmission corridor, including (among others):

1. whether the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;
2. whether economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy;
3. whether the energy independence of the United States would be served by the designation; and
4. whether the designation would be in the interest of national energy policy⁴⁴

Once the Secretary has designated an area a national interest electric transmission corridor, FERC then has the ability to step in and streamline the process of granting permits for the siting of electric transmission facilities in such corridor. FERC may, after notice and an opportunity for hearing, issue one or more permits for the construction or modification of electric transmission facilities in a national interest electric transmission corridor if, among other

⁴² See Pub. L. No. 109-58 § 1221.

⁴³ *Id.*

⁴⁴ *Id.*

requirements, FERC finds that a State commission or other entity that has authority to approve the siting of the facilities has:

1. withheld approval for more than one year after the filing of an application seeking approval pursuant to applicable law or one year after the designation of the relevant national interest electric transmission corridor, whichever is later; or
2. conditioned its approval in such a manner that the proposed construction will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.⁴⁵

Additionally, in order for FERC to step in and assume the role of permit issuer, it must find that:

1. the facilities to be authorized by the permit will be used for the transmission of electric energy in *interstate* commerce;
2. the proposed construction or modification is consistent with the public interest;
3. the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits customers among others;
4. the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and
5. the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.⁴⁶

The Energy Policy Act also provides that holders of permits for electric transmission facilities may acquire rights of way on privately owned lands through the exercise of eminent domain, if the permit holder is unable to reach an agreement with the owner of the property as to compensation. Permit holders seeking to acquire rights-of-way by way of eminent domain will bring suit in the federal district court for the district in which the property concerned is located, or in the appropriate court of the state in which the property is located. Any right of way acquired in this manner shall be used exclusively for the construction or modification of electric transmission facilities within a reasonable period of time after the acquisition⁴⁷

Section 1221 of the Energy Policy Act also provides that not later than one year after enactment, the Secretary and the heads of all federal agencies with authority to issue federal

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

authorizations shall enter into a memorandum of understanding to ensure the timely and coordinated review and permitting of electricity transmission facilities.⁴⁸

F. Conclusion

FERC Chairman Joseph T. Kelliher heralded the Energy Policy Act as representing “the most significant policy changes for FERC since the Federal Power Act of 1935 and the Natural Gas Act of 1938.” In the same press release, FERC acknowledged that one of its “new” responsibilities is overseeing the nation’s electric transmission grid. The release goes on to state that “[t]he law gives [FERC] new ‘backstop authority’ responsibility to site power transmission facilities in ‘national interest electric transmission corridors.’”⁴⁹ With FERC accepting so much authority after passage of the Energy Policy Act, it appears certain that the federal government will play a stronger role in the arena of electrical transmission facilities in the future.

III. CONFLICTS BETWEEN THE STATES AND THE EPA CONCERNING SECTION 126 OF THE CLEAN AIR ACT

Although it does not directly involve FERC, another example of conflict between federal and state governments that affects the energy industry can be seen in recent activity concerning Section 126 of the Clean Air Act.⁵⁰ Section 126(b) of this statute allows a state or other political subdivision to petition the Environmental Protection Agency (“EPA”) for a finding that emissions from a major stationary source or sources located in upwind states are significantly contributing to the petitioning state’s non-attainment pollution problem, and to control such pollution.⁵¹ The provision gives the EPA sixty days in which to grant or deny the permit, but the EPA may extend the deadline by up to six months if it determines that additional time is needed for the rulemaking process.⁵² Nitrogen oxide (NOx) and sulfur dioxide (SO₂) emissions from coal-fired electric generation plants from “upwind” of the petitioning states have been the primary focus of a number of Section 126 petitions.

The EPA has responded to previous petitions under this section in the past, but in at least a few instances the petitioning states have resorted to litigation to compel the EPA to take action regarding the petition. For example, in August of 1997, eight Northeastern states filed petitions under Section 126, requesting that the EPA examine the transport of ozone pollution and force reductions in NOx emissions from Midwestern and Southern states.⁵³ After the state of New

⁴⁸ *Id.*

⁴⁹ FERC press release, *supra* note 16.

⁵⁰ 42 U.S.C. §7426

⁵¹ *Id.* See also “Fact Sheet—EPA Extends the Deadline for Action on Section 126 Petition from North Carolina,” available at www.epa.gov; *Clean Air Act*, WINSTON-SALEM JOURNAL, Feb. 24, 2005, available at www.journalnow.com.

⁵² *Id.*; 42 U.S.C. §7426.

⁵³ See EPA “Fact Sheet—Advanced Notice of Proposed Rulemaking for the Section 126 Petitions,” Apr. 1998, available at www.epa.gov/ttncaaa1; “Highlights of the Memorandum of Agreement Concerning Schedule for EPA Action on Section 126 Petitions,” Dec. 19, 1997, available at www.epa.gov/ttn/oarpg/; Press Release, State of New

York notified the EPA in October of 1997 that it intended to sue the agency to compel a ruling on the petition, the EPA and the eight Northeastern states entered a consent decree that established a schedule for the rulemaking process concerning the petition, and eventually rules that required a reduction in NOx emissions were promulgated.⁵⁴

More recently, on March 18, 2003, North Carolina Attorney General Roy Cooper filed a Section 126 petition asking the EPA to force coal-fired electric power plants in thirteen upwind states to reduce emissions of SO₂ and NO_x to enable North Carolina to attain federal clean air standards.⁵⁵ Although North Carolina had made improvements to the state's air under its Clean Smokestacks Act,⁵⁶ it sought similar reductions in emissions from the upwind states.⁵⁷ After the EPA extended its deadline to respond,⁵⁸ and the extended deadline had passed, the North Carolina Attorney General and a citizens group, Environmental Defense, sued to compel a ruling.⁵⁹ As was the case with the petitions from the Northeastern states, the EPA entered into a consent decree on the schedule for proposing new standards for the upwind states, which it has done with the proposed Clean Air Interstate Rule, introduced March 10, 2005.⁶⁰

When fully implemented, the Clean Air Interstate Rule, along with the closely-related Clean Air Mercury Rule,⁶¹ may have far-reaching impact on the coal-fired power plant sector. Although a complete analysis of these rules is beyond the scope of this paper, more information is available at the EPA's website, www.epa.gov.

York, "Governor Pataki, AG to Sue Over Interstate Air Pollution" (Oct. 15, 1997), *available at* www.ny.gov/governor/press .

⁵⁴ *Id.*

⁵⁵ See numerous press releases from Attorney General Roy Cooper on the topic, available at the North Carolina Department of Justice website, www.ncdoj.com (accessed Oct. 4, 2005). Interestingly, North Carolina had been one of the "upwind" states which had challenged the EPA's action concerning the Northeastern states' Section 126 petitions. North Carolina appealed the EPA requirement that 35 North Carolina facilities reduce their NO_x emissions by 62% to reduce pollution in Connecticut, New York and Pennsylvania. See J.M. Kuszaj, *North Carolina Appeals CCA Section 126 Petitions*, Mar. 20, 2000, *available at* www.environmentalinsight.com.

⁵⁶ N.C.G.S. §143-215.107D.

⁵⁷ Letter and Notice of Intent to Sue from Roy Cooper, North Carolina Attorney General to Michael O. Leavitt, Administrator of EPA, November 19, 2004, *available at* www.epa.gov.

⁵⁸ "EPA Extends the Deadline for Action on Section 126 Petition from North Carolina," *supra* note 51.

⁵⁹ See Letter and Notice of Intent to Sue, *supra* note 57.

⁶⁰ Proposed changes to 40 CFR Parts 51, 52, 72, 73, 74, 78, 96 and 97, *available at* www.epa.gov/cair.

⁶¹ 40 CFR Parts 62, 63, 72 and 75.