UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE MARYLAND PUBLIC SERVICE COMMISSION

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On December 15, 2022, the Federal Energy Regulatory Commission ("Commission" or "FERC") issued a Notice of Proposed Rulemaking ("NOPR") proposing to revise its existing regulations governing applications for permits to site electric transmission facilities under section 216 of the Federal Power Act, as amended by the Infrastructure Investment and Jobs Act of 2021 ("IIJA.")[1] In response to the Commission's NOPR, the Maryland Public Service Commission ("Maryland PSC") provides the following comments.

I. INTRODUCTION AND SUMMARY

The Maryland PSC largely supports the Commission's NOPR, which proposes important regulatory changes to enable the Commission to facilitate the upgrade of the nation's aging transmission system to meet reliability needs, to improve resilience to extreme weather events, to reduce transmission congestion, and to achieve the public policy goals of states that are leading the transition to renewable energy. Significant expansion of transmission infrastructure is necessary to meet the challenges facing the grid and to capitalize on the opportunities offered by renewable energy.

Nevertheless, the Maryland PSC recommends caution regarding the Commission's proposed backstop authority and commencement of parallel federal proceedings. While

[1] *Applications for Permits to Site Interstate Electric Transmission Facilities,* 181 FERC ¶ 61,205, (Dec. 15, 2022) ("NOPR").

immediate use of Commission backstop authority may be helpful for transmission projects located in states that lack the authority to consider regional transmission needs, for states that possess such authority, the Commission should delay commencing parallel federal proceedings until the state public utility commission ("PUC") has completed its review, issued a decision, and attached conditions.

Primacy of state authority over transmission siting is logical given the local nature of land use decisions that are made in transmission siting proceedings and the long history of state PUCs making such decisions. State PUCs are ideally positioned to evaluate the land use, viewshed, socioeconomic, and environmental impacts of proposed transmission projects. Moreover, there is a nexus between state PUCs and the local communities that will be affected by the proposed transmission projects. State PUCs are also well situated to balance the benefits of proposed projects with the costs, including the rate increases that will be imposed on the citizens of the affected states.

Delaying commencement of parallel federal proceedings would provide the Commission with valuable information, including the state's findings of fact regarding local impacts to land use, historic and cultural sites, and aesthetics. The Commission could then rely upon and adopt the state PUC's record and findings of fact as a foundation for moving forward with its own pre-filing process, adjudication, and decision, should such a decision become necessary.

In situations where the state PUC denies the transmission siting application, or issues conditions on its grant of a certificate of public convenience and necessity ("CPCN"), the Maryland PSC recommends that the Commission give deference to such decisions. The Maryland PSC advises that the Commission only overrule a state PUC conclusion of law that a CPCN is not in the public interest under the extraordinary circumstance where the regional

benefits of the interstate transmission project substantially outweigh the costs as determined by the state PUC. Similarly, the Commission should only consider overriding a state PUC's conditions for approval where the conditions are not supported by the record, are contrary to law, or where the benefits of the conditions in mitigating harm are substantially outweighed by the regional benefits of the project and the project would not be possible with inclusion of the conditions. In no event should the Commission allow applicants to use the parallel federal proceeding as a mechanism to venue shop for less burdensome conditions.

With the inclusion of these recommendations, the Maryland PSC supports the Commission's NOPR, which should facilitate upgrade of transmission infrastructure to meet the reliability, resiliency, and public policy goals facing the nation.

II. COMMENTS

A. The Maryland PSC Generally Supports Increased Construction of Transmission to Meet Regional Reliability Needs and to Achieve Renewable Goals

The nation's aging transmission system requires significant investment to meet reliability needs, improve resilience to extreme weather events, reduce transmission congestion, and achieve the public policy goals of states that are leading the transition to renewable energy. Many of the changes proposed in the Commission's NOPR could encourage the development of needed electric transmission infrastructure and support the build-out of electric transmission envisioned in the IIJA.

There is increasing recognition of a national need for substantial build-out of high-voltage transmission lines, as evidenced by the IIJA itself, as well as Congress' recent appropriation of over $2 billion for loans for transmission facilities pursuant to the Inflation

Reduction Act ("IRA").[2] Additionally, federal and state regulators have partnered through the Joint Federal-State Task Force on Electric Transmission—established by FERC in August 2021—to focus on topics related to planning and paying for new transmission infrastructure, and how to navigate shared federal-state regulatory authority and processes.[3] The Joint Task Force's goals include identifying barriers that inhibit planning and development of optimal transmission necessary to achieve federal and state policy goals, as well as potential solutions to those barriers.[4]

Congress and the Joint Task Force recognize that the rapid expansion of renewable generation capacity is increasingly dependent on the development of new transmission. In particular, the renewable energy transition requires new regional and interregional transmission lines capable of moving energy from renewable-rich zones – often in remote locations – to demand centers, largely located on the East and West Coasts. Significant investment in high-voltage, long-distance infrastructure (as well as local distribution, and lower-voltage infrastructure), is also needed to increase resilience to extreme weather events and to reduce the consumer cost impact of such weather events. This infrastructure investment is also necessary to

[2] For example, Section 50151 of the IRA appropriates $2 billion to the Secretary of Energy through September 30, 2030, for direct loans for the construction or modification of electricity transmission facilities located within National Interest Electric Transmission Corridors ("NIETCs") designated by the Secretary of Energy under Section 216(a) of the Federal Power Act ("FPA"). Additionally, Section 50152 appropriates $760 million to remain available through September 30, 2029, for making grants aimed at facilitating the siting of certain onshore and offshore transmission lines. Section 50153 appropriates $100 million to remain available until September 30, 2031, for expenses for convening stakeholders and conducting analysis related to interregional transmission development and development of transmission for offshore wind energy.

[3] The Joint Task Force was established on June 17, 2021, and is composed of all sitting FERC Commissioners and 10 state commissioner representatives, nominated by the National Association of Regulatory Utility Commissioners ("NARUC"), and affirmed by FERC. *See, Joint Federal-State Task Force on Electric Transmission*, 175 FERC ¶ 61,224 (2021). All materials related to the Joint Task Force are published in FERC Docket AD21-15-000.

[4] Other goals include: exploring ways for states to use FERC-jurisdictional transmission planning processes to advance policy goals and to voluntarily coordinate to develop regional transmission solutions; reviewing and recommending reforms to FERC rules regarding planning and cost allocation of transmission projects; examining and recommending solutions to barriers to the efficient interconnection of new resources through the FERC-jurisdictional interconnection processes; and discussing mechanisms to ensure that transmission investment is cost effective. *See*, Joint Federal-State Task Force on Electric Transmission at https://www.ferc.gov/TFSOET.

prepare the grid for increased demand for electricity to meet expanding technologies, such as electric vehicles.

Transmission expansion is also essential to reduce congestion costs to ratepayers. The U.S. Department of Energy ("DOE") recently reported in its Draft National Transmission Needs Study that congestion costs increased considerably from 2020 to 2021 in the Mid-Atlantic region, even surpassing energy costs.[5] The report singled out the southern tip of the Delmarva Peninsula in Maryland, noting it has experienced consistently high prices for at least the past five years, and finding that the construction of transmission to access low-cost generation would significantly alleviate high costs to consumers.[6]

Expanding transmission infrastructure is vital to meeting the challenges facing the grid and key to capitalizing on the opportunities offered by renewable energy. For these reasons, the Maryland PSC largely supports the Commission's NOPR. Nevertheless, because transmission siting is largely within the exclusive authority of state PUCs, the Maryland PSC has concerns with some of the ideas proposed in the Commission's NOPR, as discussed below.

B. Maryland Law Provides a Comprehensive Process for Efficient Siting of Electric Transmission Facilities

Maryland law currently provides for a comprehensive "one-stop shop" process for siting power plants and electric transmission facilities, where all local and state requirements and environmental reviews are subsumed into the CPCN issued by the Maryland PSC. *See* MD. CODE ANN., Public Utilities Article ("PUA") § 7-207 *et seq*. PUA § 7-207(b) empowers the Maryland PSC to approve an application for a CPCN for any portion of a transmission line proposed in the State that is designed to carry a voltage in excess of 69 kV, or any modification

[5] Draft DOE National Transmission Needs Study at xiv; 116.

[6] Draft DOE National Transmission Needs Study at xiv.

thereto to an existing transmission line. The burden is on the applicant to demonstrate that the project meets the public convenience and necessity.

As discussed below, for state PUCs like the Maryland PSC that have extensive statutory requirements to review and site electric transmission projects in a timely manner, the Commission should limit its backstop authority until after the state PUC has completed its proceeding. The Maryland PSC describes each of the essential elements of its comprehensive CPCN process below.

Timeline

Maryland law provides for an efficient stakeholder process for reviewing transmission siting applications. PUA § 7-208(c) requires that an applicant file a CPCN application at least two years before construction of the facility will commence; however, the Maryland PSC may waive the two-year requirement upon a showing of good cause. Moreover, PUA § 7-208(f) mandates that the Maryland PSC rule on the CPCN application within 90 days of the conclusion of the hearing on the CPCN application. In certain circumstances, the applicant can also petition for non-discretionary waiver of the CPCN, if, for example, the Maryland PSC finds that the construction of the project does not require the applicant to obtain new real property or additional rights-of-way through eminent domain; or construction does not necessitate larger or higher structures to accommodate increased voltage or larger conductors.[7]

These statutory deadlines ensure that the Maryland PSC diligently processes CPCN applications, thereby avoiding the types of state PUC delays that purportedly encouraged FERC backstop authority under EPAct 2005 and the IIJA. The Maryland PSC therefore comments that the Commission should avoid conducting simultaneous transmission siting proceedings for state

[7] PUA § 7-207(b)(4).

PUCs like Maryland that have statutory deadlines for reviewing and ruling on CPCN applications.

Notice and Opportunity for Public Comment

Maryland law requires that notice be provided to various stakeholders, including the governing body of each county or municipal corporation in which any portion of the overhead transmission line is to be constructed; members of the Maryland General Assembly representing affected counties; and each owner of land located near the project or adjacent to an affected landowner. Maryland law also mandates that the application be sent to interested State agencies and units of local government for review, evaluation, and comment, including the Maryland Departments of Agriculture; Commerce; Environment; Natural Resources; Transportation; Planning; and the Maryland Energy Administration.[8]

Maryland's CPCN process includes significant opportunity for public comment. PUA § 7-207(d)(1) requires that the Maryland PSC provide opportunity for public comment and that it hold a public hearing on the application in each county and municipal corporation in which any portion of the construction of an overhead transmission line is proposed to be located. Additionally, the applicant is obligated to provide weekly notices of the public hearing and the opportunity for public comment.[9] These notice and comment provisions are designed to ensure that stakeholders have the opportunity to participate in transmission siting proceedings and that the Maryland PSC considers a complete record.

[8] PUA § 7-208(e).

[9] The notices must be advertised in a newspaper of general circulation in the county or municipal corporation affected by the application; on two types of social media; and on the Maryland PSC's website. PUA § 7-207(d)(3).

Input from Local Counties and Municipalities

Maryland law recognizes that county input into the stakeholder process is essential for successful CPCN applications. In addition to the requirements to extensively advertise the proposed project and hold public hearings in affected counties, Maryland law provides that the Maryland PSC must offer to hold the public hearing jointly with the governing body of the county or municipal corporation affected by the project.[10] Additionally, the first required consideration in reviewing any CPCN application is the recommendation of the governing body of each county or municipal corporation in which any portion of the overhead transmission line is proposed to be located.[11] With regard to the Commission's NOPR, the Maryland PSC comments that it is imperative that the county and municipal governments affected by a proposed transmission line be given the opportunity to participate fully in the proceeding and provide recommendations, including in any parallel federal proceeding.

Required Factors for Consideration

A CPCN application requires consideration of multiple factors. As discussed above, the first factor under Maryland law is the recommendation of the county or municipal corporation in which the overhead transmission line will be located. The Maryland PSC is also required to consider the effect of the proposed transmission line on the stability and reliability of the electric system; economics; aesthetics; historic sites; aviation safety; air quality and water pollution; and the effects of climate change.[12] Additionally, the Maryland PSC must consider alternative routes, including the estimated capital and operating costs of each alternative route and an

[10] PUA § 7-207(d)(2).

[11] PUA § 7-207(e)(1).

[12] PUA § 7-207(e).

explanation from the applicant of the reason why the alternative route was rejected.[13] *See also* PUA § 7-209, requiring examination of alternatives to the construction of a new transmission line, including the use of an existing transmission line of another company.[14]

In its long history reviewing transmission CPCNs, the Maryland PSC observes that consideration of alternative routes is essential to reaching a transmission solution that optimizes benefits and minimizes harm to affected stakeholders, and one that is ultimately acceptable to stakeholders. In that regard, the Maryland PSC comments in favor of the Commission's proposal to include Resource Report 12—Alternatives, which requires a description of alternatives to the project and a comparison of the environmental impacts of such alternatives to those of the proposal.

An additional required consideration under Maryland law is the need to meet existing and future demand for electric service.[15] This provision has authorized the Maryland PSC to consider regional electricity needs outside of the borders of the State. See, for example, the recent Maryland PSC order approving the Transource transmission project, which provides: "The [Maryland PSC] concludes that the Maryland portions of the proposed transmission line project, as reconfigured, will address regional congestion issues as well as Maryland and regional reliability needs while reducing the project's impacts on Maryland's agricultural, environmental, and natural resources."[16] Maryland law also obligates an applicant to comply with regional

[13] PUA § 7-207(f).

[14] PUA § 7-209(a) requires that the Maryland PSC examine alternatives to the construction of a new transmission line in a service area, including the use of an existing transmission line of another company, if: (i) the existing transmission line is convenient to the service area; or (ii) the use of the transmission line will best promote economic and efficient service to the public.

[15] PUA § 7-207(f)(1).

[16] *In the Matter of the Application of Transource Maryland LLC for a Certificate of Public Convenience and Necessity to Construct Two New 230 kV Transmission Liens Associated with the Independence Energy Connection Project in Portions of Howard and Washington Counties, Maryland*, Case No. 9471, Order No. 89571 (June 30, 2020).

requirements, including all relevant agreements with PJM related to the ongoing operation and maintenance of the overhead transmission line; as well as all obligations imposed by the North America Electric Reliability Council and FERC.[17]

As discussed further below, the Maryland PSC recognizes that immediate use of Commission backstop authority may be helpful for states that lack the authority to consider regional transmission needs. However, for states like Maryland that are authorized to consider regional needs, the Maryland PSC advises delaying commencement of Commission action until the state PUC has completed its CPCN review.

Comprehensive Review and Recommendations of State Agencies

A division of the Maryland Department of Natural Resources – the Power Plant Research Program, or PPRP – consults with each State agency[18] and makes a comprehensive review of the proposed transmission (or power plant) application. In consultation with those agencies, the PPRP makes a coordinated recommendation on approving or denying the application, together with recommended conditions to comply with all required federal, state, and local laws. If the Maryland PSC approves the proposed transmission line, it must include in the CPCN all federal and State environmental laws and standards that are identified by the PPRP's coordinated review, as well as the methods and conditions that the Maryland PSC determines are appropriate to comply with those environmental laws and standards.[19] The Maryland CPCN application process is therefore intended to be a "one-stop shop," and to obviate the need for seeking other agency permits.

[17] PUA § 7-207(f)(2).

[18] In particular, the PPRP coordinates review and recommendation of each CPCN application with the Departments of Agriculture, Commerce, Environment, Natural Resources, Transportation, Planning, and the Maryland Energy Administration.

[19] PUA § 7-208(g).

State Preemption of Local Laws

Maryland law provides unequivocally that the Maryland PSC's grant of a CPCN supersedes and preempts any local laws and ordinances, such as zoning ordinances and land-use regulations, which might otherwise restrict or impede the project. Maryland courts have affirmed the preemptive nature of Maryland PSC CPCNs in transmission cases. *See, Bd. of Cty. Comm'rs v. Solar*, 239 Md. App. 380, 390-391 (2018) ("Based on the comprehensiveness of § 7-207, local zoning regulations and comprehensive plans are impliedly preempted by state law"). Maryland courts have made the same finding regarding power plant CPCN applications. *See, East Star, LLC v. County Comm'rs of Queen Anne's County*, 203 Md. App. 477, 485, 38 A.3d 524 (2012) ("it is clear that, in the field of public utility service, the [Maryland] General Assembly intended to grant broad powers to the PSC to execute its principal duty of assuring adequate electrical service statewide.") A grant of a Maryland CPCN for an electric transmission project therefore ensures compliance with all applicable federal and state laws and avoids conflict with local requirements.

Rights upon being granted the CPCN

Once an applicant obtains the CPCN for the construction of an overhead transmission line, the applicant may acquire by condemnation any property or right necessary for the construction or maintenance of the transmission line.[20] The grant of a CPCN also constitutes authority for the applicant to dredge and construct bulkheads in the waters or private wetlands of the State and to appropriate or use the waters; as well as a permit to construct.[21] The Maryland CPCN thereby provides the successful applicant with the means to construct a proposed transmission line within the State.

[20] PUA § 7-207(b)(3)(v)(2).

[21] PUA § 7-208(i).

C. States Have Historically Exercised Exclusive Siting Authority Over Transmission Projects

Historically, state PUCs have exercised exclusive jurisdiction over the siting of electric transmission projects. Over the course of multiple decades, state PUCs have developed expertise in this subject as they have docketed countless transmission siting proceedings, reviewed evidence, and balanced divergent stakeholder interests. The Commission, in contrast, lacks experience in transmission siting. As a general matter, therefore, the Maryland PSC would advise caution in the Commission's use of its backstop authority, with invocation of this authority limited to those situations described further below.

Primacy of state PUC authority over transmission siting is logical given the local nature of land use decisions that need to be made in transmission siting proceedings. Transmission lines are large and highly visible pieces of industrial infrastructure with wide rights of way, in some instances up to 200 to 500 feet from the asset. The transmission towers and wires can impose significant visual impacts to historic, cultural, and natural landscapes – vital resources that are particularly local in nature.

State PUCs are well equipped to weigh evidence related to alternative land-use decisions, and to choose alternatives that avoid environmentally or culturally sensitive areas. As discussed above, the Maryland PSC is statutorily required to hold its public hearings in the counties affected by the proposed project and to consider the recommendations of county and municipal leaders. State PUCs are in an ideal position to mitigate harmful effects, by, for example, requiring the co-location of transmission infrastructure along existing or previously impacted areas, such as state highway corridors or existing infrastructure rights of way.

State PUCs are also well situated to elicit local stakeholder feedback, and to weigh opposing local interests, including affected landowners. As described above, the Maryland PSC

is statutorily required to ensure extensive advertising of transmission projects, to hold public hearings, and to consider alternative routes that minimize impacts. Given that state PUCs sit in the jurisdiction affected by the transmission line, they are also in a good position to communicate through their orders the benefits of selected transmission projects, as well as the reasons necessitating any tradeoffs.

Exclusive state PUC authority over transmission siting came to an end, in theory if not practice, with the passage of the Energy Policy Act of 2005 ("EPAct 2005"). EPAct 2005 granted the Commission "backstop" siting authority over the construction or modification of electric transmission facilities in certain limited circumstances. Specifically, EPAct 2005 added section 216(b) of the Federal Power Act to authorize the Commission to issue permits for the construction or modification of electric transmission facilities in areas that DOE has designated as National Interest Electric Transmission Corridors ("NIETCs.") As originally enacted, section 216(b)(1) authorized the Commission to issue permits to construct or modify electric transmission facilities in NIETCs only if (i) the state in which the transmission project would be located lacks authority to approve the siting of the facilities or consider the interstate benefits expected to be achieved;[22] (ii) the applicant utility does not qualify to apply for a permit or siting approval in the affected state because the applicant does not serve end-use customers in that state;[23] or (iii) the state PUC with siting authority has withheld approval of the facilities for more than one year after an application is filed or one year after the designation of the relevant NIETC, whichever is later, or the state PUC conditions the construction or modification of the facilities in

[22] 16 U.S.C. 824p(b)(1)(A) (2018).

[23] 16 U.S.C. 824p(b)(1)(B) (2018).

such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.[24]

In Order No. 689, the Commission interpreted the phrase "withheld approval" to include any action that resulted in an applicant not receiving state approval within one year, including a state's express denial of an application to site transmission facilities.[25] However, in *Piedmont Environmental Council v. FERC*, the U.S. Court of Appeals for the Fourth Circuit held that the Commission's permitting authority does not apply when a state has affirmatively denied a permit application within the one-year deadline.[26] Shortly thereafter, in *California Wilderness Coalition v. DOE*, the U.S. Court of Appeals for the Ninth Circuit vacated DOE's NIETC designations related to two critically congested areas in the Mid-Atlantic and Southern California. The court found that DOE failed to properly consult with affected states or consider the environmental effects of the NIETC designations under the National Environmental Policy Act ("NEPA.")[27] Since the Ninth Circuit decision in 2011, DOE has not made any NIETC designations, and the Commission has not received any applications for permits to site electric transmission facilities.

Congress' passage of the IIJA on November 15, 2021 amended section 216 of the FPA by providing that the Commission's permitting authority is triggered when a state PUC or other entity with authority to approve the siting of the transmission facilities has denied an application.[28] Congress thereby removed the restrictions imposed in the *Piedmont* decision by

[24] 16 U.S.C. 824p(b)(1)(C) (2018).

[25] *Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities*, Order No. 689, 71 FR 69440 (Dec. 1, 2006), 117 FERC ¶ 61,202 (2006) (Order No. 689 Final Rule), reh'g denied, 119 FERC ¶ 61,154 (2007) (Order No. 689 Rehearing Order).

[26] *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009), cert. denied, 558 U.S. 1147 (2010).

[27] *California Wilderness Coalition v. DOE*, 631 F.3d 1072 (9th Cir. 2011).

[28] 16 U.S.C. 824p(b)(1)(C).

granting the Commission permitting authority when a state has denied an application for a transmission CPCN.[29]

Given the exclusive historical exercise of transmission siting authority by state PUCs, however, the Maryland PSC comments that the Commission should exercise its backstop authority cautiously. As explained below, federal exercise of backstop authority is recommended where state PUCs lack authority to site the relevant transmission line, or where the state PUC does not have the authority to consider regional benefits. In those situations, the Commission should exercise its authority, and indeed, it should proceed simultaneously with any proceeding docketed by the state. However, in situations where the state PUC has full authority to efficiently conduct a transmission siting proceeding and to consider regional benefits, the Maryland PSC recommends that the Commission delay any parallel federal proceeding until the state PUC has completed its review and issued a decision. Likewise, where the state PUC denies the transmission siting CPCN, or issues conditions on its grant of a CPCN, the Maryland PSC recommends that the Commission give deference to such decisions.

D. FERC Should Limit Its Proposal to Conduct Simultaneous Proceedings with State PUCs to Certain Unique Situations

In its NOPR, the Commission has proposed to revise § 50.6 of its regulations to broaden the categories of state PUC actions (or inactions) that would authorize the commencement of Commission CPCN proceedings, consistent with the IIJA. Specifically, the Commission has revised § 50.6(e)(3) to provide that the applicant is required to submit evidence demonstrating that a state has: (i) not made a determination on an application; (ii) conditioned its approval in

[29] The Commission continues to have backstop authority where a state PUC has not made a determination on an application by one year after the later of the date on which a transmission CPCN application was filed or the date on which the relevant NIETC was designated; or the state PUC has conditioned its approval such that the proposed project will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible.

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 has also proposed to significantly alter the timeframe for commencement of the parallel federal proceeding. The Commission's previous policy – as articulated in Order No. 689 – provided that the pre-filing process for a section 216 construction permit would not begin until one year after an applicant sought state approval.[30] The Commission viewed this policy as providing states a full year to process an application without any intervening federal proceedings, including the pre-filing and application processes. In the NOPR, however, the Commission states that it is "reconsidering" this policy. The NOPR provides that in order to "encourage the development of needed transmission infrastructure and to minimize the risk of delays, we propose to allow simultaneous processing of State applications and Commission pre-filing proceedings."[31] In lieu of the one-year delay for state PUCs to process applications, the Commission has proposed to allow states to provide comments on an applicant's pre-filing process during a 90-day window one year after an applicant starts that process, if the state has not made a determination.[32]

As further explained below, the Maryland PSC comments that the Commission should expeditiously commence federal siting proceedings in the specific situations where a state PUC lacks adequate authority to site the transmission line or where an interstate transmission line is proposed and the state PUC lacks authority to consider regional benefits. Otherwise, the Maryland PSC urges the Commission to delay commencement of any pre-filing federal process

[30] *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilitie*s, Docket No. RM06-12-000, 117 FERC ¶61,202 (2006) ("Order No. 689").

[31] NOPR at P 21.

[32] NOPR at P 23.

until after the state PUC has completed its proceeding, or at least until the one-year period provided in Order No. 689 has lapsed. Regarding state denials of CPCN applications, the Maryland PSC advises the Commission to give state PUCs deference and to act contrary to the state's decision only in extraordinary circumstances.[33] The Maryland PSC urges similar caution in reviewing applicant petitions to overrule state PUC conditions that applicants view as overly expensive or unduly burdensome.

1. Where State PUCs Lack Adequate Statutory Authority, FERC Should Proceed With Its Backstop Siting Proceeding

There are several specific instances where the Commission should commence federal siting procedures forthwith. When a state lacks the authority to approve the siting of the proposed transmission facilities, the Commission should move ahead immediately with any application for federal approval. Similarly, when the permit applicant is a transmitting utility that does not qualify to apply for a permit or siting approval in a state because the applicant does not serve end-use customers in the state, the Commission should commence federal proceedings in parallel with any proceedings begun at the state level. In these situations, the state application would be rendered essentially futile because the state either lacks authority to act, or the applicant lacks standing to obtain the necessary authority from the state.

The Maryland PSC further comments that the one-year delay in commencing pre-filing procedures should be waived when the state PUC lacks authority to consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities, at least in instances where the proposed project would span multiple states. Some proposed transmission projects will span multiple states and provide regional benefits, but may

[33] As more fully described below, the Maryland PSC recommends that the Commission only overrule a state PUC conclusion of law that a CPCN is not in the public interest if the regional benefits of the interstate transmission project substantially outweigh the costs as determined by the state PUC.

also essentially constitute "pass through" projects for particular states. If a state PUC is statutorily limited to considering in-state benefits only, it could be required to deny the project due to the lack of in-state benefits even when the regional benefits significantly outweigh the total costs of the project. Such an outcome is counterproductive from a regional perspective and economically inefficient. The IIJA and the Commission's proposed implementing regulations appropriately authorize the Commission to commence a federal siting proceeding immediately under those circumstances.

The Maryland PSC seeks one point of clarification on this matter, however. State statutes that explicitly remove authority of the PUC to consider regional benefits should trigger waiver of the one-year delay for the Commission to commence pre-filing procedures. Where the state statute is silent on the matter, however, the Maryland PSC asserts that the Commission should delay pre-filing procedures by at least one year and allow the state to complete its process.[34] In other words, the one-year delay of the parallel federal proceeding should be waived only where the state statute explicitly provides that the PUC may not consider regional benefits.

2. Where States PUCs Possess Adequate Statutory Authority, FERC Should Await Completion of the State Proceeding to Begin Any Parallel Proceeding

The Commission has found that EPAct 2005 provides it with authority to conduct a federal pre-filing proceeding that occurs simultaneously to a parallel state PUC transmission case.[35] Consistent with that authority, the NOPR proposes to reverse the policy set forth in FERC Order No. 689 by allowing simultaneous processing of state transmission applications and

[34] If the state PUC does not expressly assert that it lacks the necessary authority, the Commission may reasonably conclude that it lacks the authority where the state PUC fails to open a proceeding within 90 days of the applicant filing a transmission siting application with the state PUC, or some other reasonable time frame.

[34] Order No. 689 at P 19.

[35] Order No. 689 at P 19.

Commission pre-filing proceedings.[36] Nevertheless, neither EPAct 2005 nor the IIJA *require* the Commission to begin its proceeding simultaneously with the state case, and there are several compelling reasons for waiting until the state PUC has completed its process.

As the Commission recognizes, states have historically exercised exclusive jurisdiction over transmission siting decisions.[37] State PUCs possess extensive experience in presiding over transmission siting litigation and in reviewing and weighing divergent stakeholder positions. State PUCs also sit in close geographic proximity to proposed transmission projects that will affect local landowners (including through diminished property values, obstructed viewsheds, and eminent domain proceedings), as well as environmentally sensitive habitats, and historic and cultural sites. That proximity provides state PUCs with insight into balancing local land use decisions and places state PUCs in the best position to adjudicate the issues that arise in transmission CPCN cases. The Commission's NOPR recognizes the states' vital roll in transmission siting, providing: "The Commission continues to recognize the primacy of the States' role in siting transmission infrastructure…."[38] Nevertheless, the NOPR's proposal to simultaneously hold federal proceedings would undermine that historical primacy.

The NOPR's 90-day window proposal is ultimately unworkable. The NOPR proposes to allow states to provide comments on an applicant's pre-filing process during a 90-day window one year after an applicant starts that process if the state has not made a determination. However, it would be difficult for a state PUC to sit as an objective adjudicator while its state proceeding is underway, while simultaneously advocating for a position in front of the Commission. State PUCs issue their opinions on adjudicative proceedings through orders. Until

[36] NOPR at P 21.

[37] *See* NOPR at P 2, stating: "The authority to site electric transmission facilities has traditionally resided solely with the States."

[38] NOPR at P 22.

the state PUC has issued its decision, which must necessarily come at the end of its proceeding, there can be no state view or recommendation concerning the need for and impact of the proposed facility. That outcome would undercut the FPA Section 216(d) requirement that the Commission "afford each State in which a transmission facility covered by the permit is or will be located … a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit."

Delaying the Commission's pre-filing proceeding until the end of the state case would avoid inefficient use of resources. As Commissioner Christie pointed out in his concurrence, "if the [transmission] line is truly needed, the state regulators will in all likelihood approve it, and no FERC staff time and resources will need to be expended at all."[39] Holding the federal process in abeyance until the end of the state proceeding would also relieve stakeholders from the obligation of making duplicate filings in the parallel federal proceeding, or waiving their rights at the federal level. Inexperienced litigants might find the requirement to simultaneously file in federal and state proceedings confusing, which could cause them to inadvertently waive their rights in one forum or the other. Moreover, stakeholders with limited resources may make a choice to participate in only one forum, leading to an incomplete record.

Instead, the Maryland PSC urges the Commission to hold its proceeding in abeyance until the state PUC has completed its process. That outcome would provide the Commission with valuable information, including the state's findings of fact regarding local impacts to land use, historic sites and cultural sites, and aesthetics. The Commission could then rely upon and adopt the state PUC's record and findings of fact as a foundation for moving forward with its own pre-filing process, adjudication, and decision, or just hold the federal proceeding in abeyance until

[39] Christie Concurrence on NOPR at P 3.

such time as it might become necessary.[40] Adopting that recommendation could save the Commission significant time and resources.

3. The Timeline for Commencing the Federal Pre-Filing Procedure Should Be Tolled in Certain Circumstances

As discussed above, the Commission should not commence its pre-filing process until at least one year from the beginning of the state PUC proceeding. However, the one-year clock should not start until such time as the CPCN applicant has filed a complete application with the state PUC. In other words, an applicant should not be able to make a facially deficient filing with the state PUC and run out the one-year clock in order to invoke the Commission's federal backstop jurisdiction.

Additionally, the one-year deadline should be tolled if the applicant materially modifies its proposed project. Large-scale transmission projects are often modified during the pendency of CPCN proceedings, as engineering plans change in response to real world circumstances, such as topography, local zoning or land-use issues, or unexpected cost impacts. Such events may require a mid-course correction. If such mid-course modifications are made, each stakeholder should be given the opportunity to reevaluate its position. Accordingly, the one-year time period for the state PUC to review and rule upon the CPCN application prior to commencement of federal pre-filing proceedings should be tolled for the time required for stakeholders to respond to mid-course modifications.[41]

[40] As Commissioner Christie articulated, the federal process may become moot if the state PUC approves the CPCN application.

[41] Should the Commission find it necessary, it could require that the applicant submit periodic status reports updating the Commission on the progress on the state PUC proceeding. Such status reports could enable the Commission to better manage its resources and avoid surprise by changed circumstances in the state CPCN proceeding.

Finally, the Maryland PSC asserts that holding the federal pre-filing process in abeyance until the state PUC completes its evaluation, and then providing deference to and building upon the state record thereafter, if necessary, is consistent with principles of cooperative federalism. The simultaneous parallel proceedings proposed in the NOPR, in contrast, would simply make the state proceeding redundant and ultimately unnecessary.

4. FERC Should Only Reverse a State's Denial of a CPCN – Or Imposition of a Condition – Under Extraordinary Circumstances

The IIJA expressly provides that the Commission may issue a permit for the construction or modification of electric transmission facilities in DOE-designated national corridors if a state has denied an application to site transmission facilities.[42] Consistent with that change in law, the Commission's NOPR proposes revisions to § 50.6(e)(3) of its regulations to provide for federal backstop authority where an applicant can demonstrate that a state PUC has denied a state CPCN application.[43] Nevertheless, the Maryland PSC urges the Commission to overrule a state PUC denial of a transmission siting application only in extraordinary circumstances.

The consequences of overruling a state denial of an electric transmission project would be profound. As discussed above, state PUCs are in an ideal position to evaluate the land use, viewshed, socioeconomic, and environmental impacts of proposed transmission projects. State PUCs sit within close geographic proximity to the land that will be impacted by the project, and PUC commissioners are normally appointed by governors or elected by citizens within those state boundaries. Moreover, state PUCs are well situated to balance the benefits of proposed projects with the costs, including the rate increases that will be imposed on the citizens of the

[42] 16 U.S.C. 824p(b)(1)(C).

[43] NOPR at P 18.

affected states. The nexus between the state PUCs and the local communities that will be affected by the proposed transmission projects puts the state PUCs in the best position to make informed land use decisions and to balance stakeholder interests. As Commissioner Christie expressed in his concurrence: "[W]henever the day comes when FERC orders a line built after a state has found it was not needed or found the cost was not reasonable and prudent, FERC will not only be choosing a route that was rejected by state regulators, but FERC will be ordering the state's consumers to pay for the project…"

Commissioner Christie's concurrence also raises the issue of abandonment costs. To the extent a proposed project pursues parallel federal and state PUC approvals, residential ratepayers in proximity to the project will face double regulatory approval costs if the project is ultimately abandoned beyond the control of the applicant. The Maryland PSC therefore urges the Commission to consider the risk of increased abandonment costs associated with holding parallel proceedings.

The applicant whose CPCN was denied by the state PUC should not receive a second bite at the proverbial apple merely because it can also file with the Commission. Instead, the Commission should evaluate the record developed at the state PUC and give appropriate deference to its order denying the CPCN, especially with regard to findings of fact. For example, a state PUC finding that a proposed transmission line will significantly impact the viewshed of a historic site should be accepted by the Commission, as long as the finding is supported by evidence on the record or is not clearly erroneous.[44]

[44] Principles of collateral estoppel should preclude the applicant and stakeholders from re-litigating in the federal proceeding those factual issues that were decided by the state PUC. A better practice would be for the applicant in the federal proceeding to propose mitigation measures to address the findings of fact made by the state PUC, such as measures to reduce impacts to historic sites.

In contrast, a conclusion of law, such as that the proposed transmission line is not in the public interest because it will significantly impact a historic site, may not merit the same level of deference. The Commission's statutory criteria for evaluating CPCN applications are different than for state PUCs, and the Commission has a unique perspective for weighing the regional benefits of a multistate transmission line that a state PUC might lack. Nevertheless, the state PUC decision should be given significant weight. The Maryland PSC would suggest that the Commission only overrule a state PUC conclusion of law that a CPCN is not in the public interest if the regional benefits of the interstate transmission project substantially outweigh the costs as determined by the state PUC.

The Maryland PSC has similar concerns regarding Commission changes to state PUC conditions. The NOPR's proposed revisions to § 50.6(e)(3) provide for Commission authority over a transmission application where the applicant has demonstrated that a state PUC has "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."[45]

As described above, Maryland law provides for a comprehensive, multi-agency review of proposed transmission projects, coordinated by PPRP, which leads to a recommendation of approval or denial, in conjunction with recommended conditions to make the project compliant with all applicable laws and regulations, and to mitigate harm caused by the project. The Maryland PSC then issues an order on the application, which if approved, will include a comprehensive list of conditions supported by the record and required by law. The Commission should not allow applicants to use the parallel federal proceeding as a mechanism to venue shop

[45] NOPR at P 18.

for less burdensome conditions. Instead, the Commission should give deference to the conditions imposed by state PUCs to make the project compliant with law and acceptable to the state.

The importance of developing state PUC conditions is another reason for the Commission to delay commencement of the federal pre-filing proceeding by at least one year. The state PUC cannot issue its list of required conditions until the end of its CPCN proceeding, and if the Commission concludes its parallel case before the state PUC issues its decision, the Commission will be left without the benefit of those conditions. Again, those conditions provide essential information, including how the project should comply with all applicable laws and regulations of the affected state, and how project costs can be mitigated in a manner that is acceptable to the state.

Finally, the Maryland PSC observes that the term "not economically feasible" is broad and undefined. It should not be read to relieve the applicant of the duty to comply merely because it imposes an economic burden on the applicant. Instead, the Commission should only consider overriding a state PUC's conditions where the conditions are not supported by the record, are contrary to law, or where the benefits of the conditions in mitigating harm are substantially outweighed by the regional benefits of the project and the project would not be possible with inclusion of the conditions.

III. CONCLUSION

The Maryland PSC respectfully requests that the Commission consider these comments and adopt the recommendations made herein.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am on this date serving a copy of the foregoing document upon each person designated on the official service list compiled by the Federal Energy Regulatory Commission in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Baltimore, Maryland this 17th day of May, 2023.

/s/ Ransom E. Davis
Ransom E. Ted Davis