

Energy Policy Act §216: A Power Worth Preserving

by Thomas Hutton

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Editors' Summary

The 2005 Energy Policy Act contained a provision that gave federal authorities greatly enhanced power over the construction of electric transmission lines in states and counties in which they are unwelcome. Because this provision is viewed as intrusive, it is a popular target for politicians on both sides of the aisle; the courts have also shown distaste for it. But the provision was enacted for a reason: to respond to an increasingly dire inadequacy of transmission facilities in the United States. Thus, as the courts are considering cases involving this new federal power, they should take care not to construe it so narrowly as to prevent it from accomplishing its important purpose.

Energy industry and policy experts have long pointed to inadequate transmission facilities as a systemic problem for the reliability of the U.S. electricity grid.¹ Such transmission inadequacy has also been singled out as an important obstacle to the fuller development of renewable energy in the United States.² A key reason for the fitful development of electric transmission has been underinvestment due to the lack of economic incentives for private investment in transmission.³ One deep, powerful disincentive to private investment exists in the reluctance of some state public utility commissions to exercise their permitting authority to allow transmission projects to go forward.⁴

The 2005 Energy Policy Act (EPAct)⁵ contains a provision designed to confront the latter problem, by allowing the Federal Energy Regulatory Commission (FERC) to designate National Interest Energy Transmission Corridors (NIETCs), within which the federal government has a strengthened hand to ensure that state public utility commissions do not, for parochial reasons, hinder transmission projects that would benefit the interstate ratepaying public.

Because of the extent to which this provision empowers federal authorities, at the expense of state and local officials, to dictate intrastate land use, there have been attempts to eliminate it⁶ and also to ensure that it is only narrowly construed. But in light of the seriousness of the transmission inadequacy problem, it is preferable for courts to supervise, and if necessary restrain, FERC's applications of its new authority without irrevocably cabining the discre-

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1. See TRANSMISSION ACCESS POLICY STUDY GROUP, EFFECTIVE SOLUTIONS FOR GETTING NEEDED TRANSMISSION BUILT AT REASONABLE COST 5 (2004); Richard Pierce, *Environmental Regulation, Energy, and Market Entry*, 15 DUKE ENVTL. L. & POL'Y J. 167, 177 (2005). For a more recent example, consider FERC Chairman Jon Wellinghoff's recent testimony before the Senate Committee on Energy and Natural Resources. *Legislation Regarding Electric Transmission Lines: Hearing Before the Subcomm. on Energy and Nat'l Resources*, 111th Cong. (2009) (testimony of Jon Wellinghoff, Acting Chairman of FERC).
 2. See generally AM. WIND ENERGY ASS'N AND SOLAR ENERGY INDUSTRIES ASS'N, GREEN POWER SUPERHIGHWAYS: BUILDING A PATH TO AMERICA'S CLEAN ENERGY FUTURE 1 (2009) ("[a]lmost 300,000 MW of wind projects, more than enough to meet 20 percent of our electricity needs, are waiting in line to connect to the grid because there is inadequate transmission capacity to carry the electricity they would produce"); Alborz Nowamooz, *Inadequacy of Transmission Lines: A Major Barrier to the Development of Renewable Energy*, 3 ENVTL. & ENERGY L. & POL'Y J. 176 (2008).
 3. See Patrick J. McCormick III & Sean B. Cunningham, *The Requirements of the "Just and Reasonable" Standard: Legal Bases for the Reform of Electric Transmission Rates*, 21 ENERGY L.J. 389, 389 (2000); see generally Nowamooz, *supra* note 2.
 4. See Edward Krapels, *Goodbye Gridlock (2): How to End the Shortage in Transmission Investment That Led to the 2003 Northeast Blackout* (White Paper 2003) (describing the hurdles that make "[t]ransmission projects . . . as popular as root canals").
 5. Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified as amended in scattered sections of 7, 10, 15, 16, 22, 26, 30, 40, and 42 U.S.C.).
 6. See H. Amdt. 350, 110th Cong. §503 (proposing to amend an appropriations bill to provide that "None of the funds made available in this Act may be used by the Secretary of Energy to designate any geographic area as a national interest electric transmission corridor under section 216(a) of the Federal Power Act . . .").

tion that the legislature has granted it. In particular, courts should take care to preserve FERC's authority to extend NIETCs into remote, non-congested areas of low energy demand, and should particularly eschew any per se-type rule to the contrary.

I. The Short Life History of Federal Power Act §216

A. Statutory Background

The EAct, a fairly broad set of energy industry reforms, amended the Federal Power Act (FPA) to create §216, "Siting of interstate transmission facilities."⁷ Section 216(a)(1) provides that the Secretary must conduct a study of electric transmission congestion. Paragraph (a)(2) provides that the Secretary may designate "any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers" as a "National Interest Energy Transmission Corridor."

Within NIETCs, the Secretary has the special ability, under certain circumstances, to unilaterally issue permits to developers for the construction of transmission projects, even over the objections of state siting authorities. Before the 2005 EAct, in contrast, the decisions of these state siting officials were effectively final.⁸ The U.S. Congress did not grant the Secretary unlimited discretion to issue permits within NIETCs, of course. This fairly drastic step is possible only when one of four conditions is met. First, a federal permit is possible if the state commission does not have the authority to consider the interstate benefits of the project in making a permitting decision.⁹ Second, a federal permit may be issued if the applicant is ineligible for a state permit simply because it does not serve in-state customers.¹⁰ Third, the Secretary may issue a permit if the state has "withheld approval for more than 1 year."¹¹ Finally, the Secretary can preempt the state if the state has conditioned its approval in such a way as to prevent the project from "significantly reduc[ing] congestion," or has made the project "economically [in]feasible."¹²

Even when one of these prerequisite conditions is met, there are still several more considerations that must hold true before the federal government can issue a permit. Specifically, it must be the case that the proposed facility will be used to transmit electricity in interstate commerce; that the construction will be consistent with the public interest; that it will significantly reduce interstate transmission congestion, benefiting consumers; that it will be consistent with a

sound national energy policy and energy independence; and finally, that it will maximize the use of existing transmission structures, to the extent possible.¹³

Because the statute left many open questions for the U.S. Department of Energy (DOE) and FERC to address in administering the statute, there is much for the courts to consider in determining whether the agencies are properly carrying out their mandate. For example, is there some limit on how large a "corridor" should be? Does FERC's refusal to delineate NIETCs more precisely than at the county level sweep too broadly? What must the agency do to comply with environmental regimes like the National Environmental Policy Act (NEPA)¹⁴ and the Endangered Species Act (ESA)¹⁵ when designating an NIETC, and when issuing a permit *within* a designated NIETC? There is room for agency interpretation, and judicial review of those interpretations, for each of these questions.

B. Agency Implementation of §216

FERC has been delegated the authority to designate NIETCs and to exercise §216 permitting authority within them.¹⁶ Since the passage of EAct, FERC and DOE have issued regulations interpreting FERC's statutory mandate. It is probably fair to say that these interpretations probe the limits of the discretion granted in the 2005 Act.

In particular, FERC has provided for the extension of NIETCs outside of areas where high energy demand adversely affects consumers.¹⁷ It has also understood "constraint" to include areas where there is a complete absence of transmission, and not simply a presence of congested transmission.¹⁸ FERC has accordingly reserved the right "to designate a [NIETC] upon a showing of the existence of a constraint, including the total absence of a transmission line, that is hindering the development or delivery of one or more

7. *Id.* §1221 (codified at 16 U.S.C. §824p (2006)).

8. At least, they were the final decisions outside of a courtroom.

9. 16 U.S.C. §824p(b)(1)(A).

10. *Id.* §824p(b)(1)(B).

11. *Id.* §824p(b)(1)(C).

12. *Id.* §824p(b)(1)(C)(iii).

13. *Id.* §824p(b)(2)-(6).

14. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

15. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

16. U.S. DOE, Delegation Order No. 00-004.00A (May 2006).

17. National Electric Transmission Congestion Report, 72 Fed. Reg. 56992, 57006 (Oct. 5, 2007):

The Department does not think it is reasonable . . . to interpret the term "geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers" as restricting a National Corridor designation to the specific confines of the load being adversely affected by congestion [because the statutory distinction between the "corridor" and the "end markets" served thereby] indicates that Congress envisioned designation of National Corridors that extend beyond the location of the adversely affected consumers.

18. *Id.* at 57000 ("[t]he Department agrees with those commenters who argued that the total absence of a line connecting two nodes can be just as, if not more, limiting to consumers than [a badly congested line] and, therefore, constraints include the absence of transmission equipment between two or more nodes").

generation sources that is in the public interest, regardless of whether there is congestion¹⁹

DOE and FERC have moved expeditiously to implement §216. First, DOE completed a study of transmission congestion in August 2006,²⁰ and based on those findings, DOE proposed to designate two surprisingly vast NIETCs in May 2007.²¹ The Commission denied numerous petitions for rehearing, and in the face of vigorous opposition, it finalized the designation of these corridors in October 2007.²² The resulting Mid-Atlantic NIET corridor spans about 116,000 square miles, from New York to northern Virginia, including Delaware, New Jersey, and the District of Columbia in their entirety, nearly all of Maryland, and large parts of Ohio, Pennsylvania, and West Virginia.²³ The Southwest NIET corridor consists of about 70,000 square miles surrounding the Los Angeles metro areas and reaching into three Arizona counties.²⁴

C. Early Legal Challenges

The novel opportunity for federal preemption embodied in FPA §216, combined with DOE's broad sweep in designating NIETCs, has virtually guaranteed several rounds of litigation testing the limits of the new backstop siting provision.

I. The *Piedmont* Case

The first such challenge, *Piedmont Environmental Council v. F.E.R.C.*,²⁵ concerned the extent of the Commission's authority within designated corridors. The decision significantly diluted the potency of §216. The *Piedmont* petitioners challenged FERC's interpretation of its authority under §216(b)(1)(C)(i) to issue a federal permit if a state agency "with[holds] approval for more than 1 year"²⁶ The Commission's rule-making had claimed, quite controversially, that this language empowered the agency to issue a federal permit even after the *rejection* of an application by a state commission.²⁷ On this question, the court sided with dissenting FERC Commissioner Suedeen Kelly, holding on plain language grounds that "withholding approval" does not include a state commission's affirmative rejection of a permit application.²⁸ Thus, after *Piedmont*, FERC's authority remains where a state commission truly fails to act on a permit for a year,²⁹ and where

the state siting commission lacks the authority to site a project due to parochial state law.³⁰ The value of this surviving authority remains to be seen. Many states have granted their siting commissions the formal power to consider interstate benefits in permitting decisions, but this has been no guarantee that the commissions will eagerly exercise that authority. Accordingly, some of the commissioners apparently view *Piedmont* as having deeply crippled §216;³¹ it has also been characterized this way in the popular media.³²

2. The Perils of Future Challenges

The next round of challenges, this time against FERC's corridor designations, has been consolidated in a single case in the U.S. Court of Appeals for the Ninth Circuit.³³ The array of arguments raised by the Ninth Circuit petitioners are likely issues FERC will face whenever corridors are designated. The affected states have mustered a vigorous opposition, objecting to what they see as a permanent threat of federal intervention in local affairs. The federalization, they complain, will allow regulators to make critical decisions about local land use in a vacuum of political accountability, and will disproportionately burden a local few for the benefit of distant, dispersed others.³⁴

Importantly for our purposes, there is also a particular indignation among the litigants,³⁵ just as there has been among federal legislators³⁶ and the general public,³⁷ to the inclusion of remote, non-congested areas in these NIETCs. This objection is apparently fed by the perception that these non-congested, often rural areas are neither the cause of

19. *Id.*

20. U.S. DOE, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY (2006) [hereinafter DOE CONGESTION STUDY].

21. Draft National Interest Electric Transmission Corridor Designations, 72 Fed. Reg. 25838 (May 7, 2007). In the words of one litigant, these are not corridors, but "transmission parks." *Pennsylvania Pub. Util. Comm'n v. Bodman*, CV-07-2002, 2008 WL 3925840 (M.D.Pa. 2008), compl. ¶ 7.

22. National Electric Transmission Congestion Report, 72 Fed. Reg. 56992.

23. Aaron S. Lax, *A High-Wire Balancing Act: Federal Energy Transmission Corridors*, 23 NAT. RESOURCES & ENV'T 18, 18 (2008).

24. *Id.*

25. 558 F.3d 304, 39 ELR 20036 (4th Cir. 2009).

26. *Id.* at 312-13.

27. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69440, 69444-45 (Dec. 1, 2006).

28. *Piedmont*, 558 F.3d at 315 (citing Regulations for Filing Applications for Permits, 71 Fed. Reg. 69440, at 69476).

29. 16 U.S.C. §824p(b)(1)(C).

30. *Id.* §§824p(b)(1)(A), 824(b)(1)(B).

31. Of course, Commissioner Wellenhoff may be, intentionally or unintentionally, overestimating the damage wrought by *Piedmont*. A renewed grant of authority would make the agency more central and influential in emerging climate change regulation.

32. Christopher Joyce, *Power Hungry: Reinventing the U.S. Electric Grid, Part 3: Building Power Lines Creates a Web of Problems* (National Public Radio broadcast, Apr. 28, 2009) ("FERC had [the power to overrule states] until recently when a federal court took it away . . .").

33. *Wilderness Soc'y v. Bodman*, No. 08-71074 (9th Cir. filed Dec. 29, 2008).

34. Denise L. Desautels, *Who Should Regulate the Siting of Transmission Lines Anyway? A Jurisdictional Study*, 18 ELECTRICITY J. 11, 14 (2005).

35. See, e.g., *Wilderness Soc'y v. Bodman*, Western Pet'r's Br. 20 [hereinafter Brief of Western Petitioners] (complaining that "DOE . . . erroneously relied on factors in FPA §216(a)(4) to include a noncongested generation source area in Imperial County . . . in the Southwest NIETC"). The complaint goes on to assert that for some parts of the Southwest NIETC, "the relevant technical analyses in fact showed limited historical congestion on these paths relative to other important paths," and that FERC erred in relying on anticipated future congestion. *Id.* at 45-46.

36. See 153 CONG. REC. S13524 (daily ed. Oct. 23, 2007) (remarks of Sen. Casey) ("They could place the lines on farmland, through neighborhoods [and through the] furthestmost southwestern corner of Pennsylvania . . . Most of those counties designated there are in rural communities." Sen. Robert P. Casey (D-Pa.) threatened to block FERC Commissioner Kelliher's renomination. *Id.* While he is animated by impact on his rural constituents, Senator Casey opposes FERC's Section 216 authority completely, and not merely for its impact in rural communities.

37. See, e.g., Anthony DePalma, *Chafing at a Plan to Add Power Lines to the Landscape*, N.Y. TIMES, July 10, 2006, ("So far, one state official after another has come out against the power line, siding with the rural towns fighting a power system that would only benefit the city where the lights never go out."); COMMUNITIES AGAINST REGIONAL INTERCONNECT, Federal Issues, <http://www.cari-coalition.org/federal.html> (calling for state and local power to designate "safe zones," exempt from NIETC designation).

energy shortfalls, nor have they been particularly stricken by the effects. Thus, they complain, it is unfair that they be rendered vulnerable to federally sanctioned eminent domain.³⁸

A court sympathetic to these complaints and future arguments in the same vein could restrain §216 in a number of important ways. For instance, a court could hold that corridors must be limited in width, or that they must be “linear”; that transmission “congestion or constraint” can only include areas where transmission does not meet present demand (and not the areas where transmission would need to be built to service those areas); or that any non-congested “source” areas must meet certain judicially improvised criteria to be includable in an NIETC. Indeed, given the broad, undefined terms of the new provision, and the fact that it is a relative “blank slate” judicially, it is difficult to predict just what a court will do in construing FERC’s authority.

The Commission may well have overreached in its treatment of these early NIETC designations, and it seems clear that the contours of FERC’s authority will emerge from early judicial challenges narrower than the Commission initially envisioned. Indeed, it may be recognized in hindsight that the U.S. Court of Appeals for the Fourth Circuit has largely emasculated the provision before it was ever implemented.³⁹

The Fourth Circuit’s early judicial hemming, even if justified, raises an important concern: judicial interpretations could conceivably “throw the baby out with the bathwater” by narrowing FERC’s discretion in such a way as to impede the congressional purposes that originally animated the delegation of authority. As the NIETC idea seems to be here to stay, courts and the legislature will inevitably add and subtract from FERC’s powers within the corridors, refining agency authority in response to law, perceived needs, and political pressures. Thus, the more immediate danger of betraying the initial legislative purpose probably exists in challenges seeking to limit *where* corridors can be established. The courts must not compromise the Commission’s ability to confront a national transmission shortage by connecting congested “sink” areas with remote, non-congested, unpopulated areas of potential generation “source,” in its NIETC designations.

II. Arguments

A. Plain Language Supports the Extension of NIETCs Into Remote, Non-Congested Areas

A plain reading of the statute supports the contention that NIETCs should not be confined to those populated areas highlighted as “congested” by DOE in its congestion study. The text provides that the Secretary may designate as an NIETC “any geographic area experiencing electric energy transmission capacity constraints *or* congestion that adversely affects consumers.”⁴⁰ This disjunctive structure clearly con-

templates the extension of NIETCs in places that are not “congested,” so long as they are experiencing “capacity constraints.”⁴¹ Neither congestion nor constraint is defined in the statute, and there is no explicit requirement that the consumers adversely affected must be within the constrained or congested area.

While congestion may reasonably be understood to refer to populated, urban areas where transmission shortages choke heavy consumer demand,⁴² it is not immediately clear what Congress intended with the term constraint. The term could readily be understood to envision a complete lack of transmission capacity from an area that enjoys excess electricity generation, so long as this absence of transmission capacity adversely affects consumers. It is also colorable that the term applies where the absence of transmission hinders the very *construction* of generation, in a way that adversely affects consumers.

Further support for this statutory argument is found in the discretionary elements that the Secretary may consider in determining whether to establish an NIETC.⁴³ Sections 216(a)(4)(A) and (a)(4)(B) provide that the Secretary may consider economic impacts of NIETC designation both (a) within the corridor, and (b) within “the end markets served by the corridor.” As FERC has pointed out in its response to comments, this distinction between the corridor itself and the “end markets” served by it, suggests the extension of NIETCs beyond the immediate areas experiencing economic hardship as a result of transmission congestion.⁴⁴

If the permissible reach of NIETCs were meant to be confined solely to congested areas themselves, there would presumably be little difference between the “corridor” and the “end market,” because the “end market” would probably encompass the entire corridor. It is conceivable that Congress intended that there be multiple end markets within one larger area of constraint or congestion. If so, this would allow room for the argument that NIETCs were meant to be established only within the borders of such constrained or congested areas. Still, if Congress intended so precise a relationship between end markets and congestion areas, one would think it would have spoken more clearly, or at least defined the relevant terms. In short, the inclusion of the disjunctive terms congestion and constraint, and the fact that

38. Resistance to the NIETC regime is by no means limited to parties interested in remote or rural areas. It simply happens that these interests have one especially persuasive set of arguments against being included in NIETCs.

39. See *supra* notes 29-30.

40. 16 U.S.C. §824p(a)(2) (emphasis added).

41. National Electric Transmission Congestion Report, 72 Fed. Reg. 56992, 57000 (“[I]f Congress had intended to limit the Secretary’s designation authority over constraints to cases where constraints are currently causing congestion, then there would have been no need for the statutory language to refer to congestion or constraints.”). Interestingly, the Ninth Circuit petitioners have somewhat passed over the “constraint” element, instead treating congestion as the determinant issue: “DOE [included] entire counties in Arizona and California even though the Study failed to identify any congestion, let alone heavy congestion, in many of these areas.” Brief of Western Petitioners, *supra* note 35, at 33.

42. Nonetheless, the way FERC has defined “congestion,” the more intuitive of the two terms, is actually much less restrictive than a popular understanding of the term might be. See DOE CONGESTION STUDY, *supra* note 20, at 67 (defining “congestion” as “the condition that occurs when transmission capacity is not sufficient to enable safe delivery of all scheduled or desired wholesale electricity transfers simultaneously”).

43. 16 U.S.C. §824p(a)(4).

44. National Electric Transmission Congestion Report, 72 Fed. Reg. 56992, 57007.

Congress chose not to define either, indicates acquiescence in the designation of NIETCs in non-congested and potentially remote areas.

B. Legal Canon to Narrowly Construe Preemptive Laws Is Inapposite

The popular, often emotionally charged conviction that the federal government should not intrude into traditional areas of state authority has a powerful analog in law,⁴⁵ which has been marshaled to challenge FERC's implementation of §216. That is, some litigants have pointed out that U.S. Supreme Court Supremacy Clause precedents impose a "presumption against preemption," calling for a narrow construal of preemptive laws like §216.⁴⁶

Because the preemptive thrust of §216 is manifest,⁴⁷ the presumption against preemption does not threaten to strip the provision of its entire preemptive effect.⁴⁸ But the presumption against preemption does enable the argument that §216's siting authority should be narrowly construed, and that this entails a limited geographic scope for NIETCs. Further advancing this line of argument, the presumption against preemption has been applied with peculiar force in reviewing agency interpretations of federal law.⁴⁹

But the presumption against preemption should not apply to limit the reach of NIETCs into remote, non-congested areas, for several reasons. Most important, the Fourth Circuit addressed the issue squarely, in connection with the very same statutory section. In *Piedmont*, the petitioners argued that the presumption against preemption calls for a narrow interpretation of FERC's power, under §216(b)(1)(C) (i), to issue a federal permit if a state agency has "withheld approval for more than 1 year . . ."⁵⁰ The court pointed to a precedent established by the Supreme Court in *New York v. F.E.R.C.*, that where Congress has clearly granted authority for an agency to regulate, and the question is simply of the scope of that authority, no presumption against preemption is applied.⁵¹ Thus, while the court handed the petitioners a

victory overall, it roundly rejected their arguments for a narrow construal based on the presumption against preemption.

Second, even if a narrow construal of agency discretion were appropriate, it is simply too far "upstream" to cabin agency discretion at the point of NIETC designation. After all, merely designating an NIETC does not preempt any state law. Under the statute, no preemptive federal permit can be issued unless a series of conditions⁵² are met, which greatly narrows the circumstances under which preemption is a possibility. Even then, a preemptive permit may be issued only after "notice and opportunity for hearing."⁵³ In addition, FERC could designate NIETCs under §216 with an eye toward purposes other than merely laying the groundwork for preemption. These could include simply articulating where congestion exists for the benefit of all interested parties, supporting regional planning,⁵⁴ and not so subtly encouraging states to expedite transmission siting under their own laws.

Third, it seems intuitively unprincipled to call for a narrow interpretation of the preemptive power of a provision by attempting to limit the territory within which that power can be applied. The Commission's broad interpretation of *where* it can apply its explicitly prescribed preemptive authority is different from the case of an agency dreaming up preemptive authority that was not clearly intended.⁵⁵ If the agency's interpretation is overbroad, it is overbroad regardless of where in the United States it is applied. The presumption against preemption would be more appropriately applied to an expansive interpretation of *when* a preemptive permit may be issued, and not where.

Despite several reasonable arguments against narrowing NIETC designation authority under the presumption against preemption, it is famously difficult to predict the ultimate outcome of challenges based on the presumption against preemption doctrine. While the presumption is frequently raised in constitutional cases,⁵⁶ the resulting case law is very inconsistent.⁵⁷ In fact, some scholars have accused courts of masking substantive preferences with their application of the doctrine.⁵⁸ Still, it is likely that a court will be guided by the recent Fourth Circuit decision, as well as continuing legislative efforts to expand federal authority in the arena of transmission siting, and find that the presumption against preemption should not narrow the scope of §216.

45. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (presuming that "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

46. See Brief of Western Petitioners, *supra* note 35, at 21 ("Particularly where, as here, it is foreseeable [that] DOE's NIETC designation could result in federal preemption of authority traditionally vested in the states, it was improper for DOE to read into FPA §216(a)(2) language that does not exist . . .").

47. See 16 U.S.C. §824p(b) ("[T]he Commission 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 designated by the Secretary . . .").

48. That is, Congress provided at least some degree of "express preemption." See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion) (discussing the several ways in which federal law can preempt state law).

49. See Nina Mendelson, *A Presumption Against Agency Preemption* 102 Nw. U. L. REV. 695 (2008). Mendelson raises concerns with agency interpretations more aggressive than FERC's, including the practice of claiming preemptive effect in rulemakings. *Id.* at 697. See also Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 78 (2008) (classifying the presumption against agency preemption as one among several interpretive canons that may vitiate *Chevron* deference).

50. *Piedmont*, 558 F.3d at 312-13.

51. *Id.* (citing *New York v. F.E.R.C.*, 535 U.S. 1, 18 (2002)).

52. See *supra* notes 8-13.

53. 16 U.S.C. §824p(b).

54. Such regional planning is mandated of public utility transmission providers, under FERC Order 890. FERC Order No. 890 (2007) (codified at 18 C.F.R. §37 (2006)).

55. See Mendelson, *supra* note 49, at 699 (proposed presumption against agency preemption should apply "especially" in cases where preemptive authority is not explicitly provided).

56. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994) (identifying preemption as "almost certainly the most frequently occurring constitutional doctrine").

57. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232-33 (2000) (describing preemption doctrine as systemically, and not merely sporadically "muddled").

58. See, e.g., David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 (1999).

C. *Legislative History Indicates That the Purpose of the Statute Is to Reach Remote Areas*

Allowing the extension of NIETCs out from congested, typically urban areas and into non-congested remote areas will allow FERC to meet the goals Congress contemplated in passing the transmission siting provisions of the 2005 EPAct. Two inquiries into legislative history are offered to support this assertion. First, at least one major pre-2005 FERC transmission study showed Congress that the Commission considered transmission constraints to be a problem in some decidedly remote, rural areas of the United States. Congress was on notice of this when it passed the 2005 EPAct. Second, the appointment of FERC as the “lead agency” in permitting decisions within the NIETCs suggests that Congress anticipated extension of those corridors over areas where other agencies have authority—and these jurisdictional areas are characteristically remote regions.

Two potential counterarguments based on legislative history are explored as well. First, an investigation of state siting regimes does not particularly support the argument that Congress envisioned the extension of NIETCs into remote, non-congested electricity source areas. Second, recent calls by FERC officials for more explicit siting authority, and legislative proposals attempting to grant such authority, could be read to indicate that the existing 2005 EPAct authority is limited.

I. *Prior Awareness of Constrained and Congested Areas*

The idea of NIETCs was not something “new under the sun” in the 2005 EPAct. In the years prior, DOE and FERC had investigated what it termed “National Interest Transmission Bottlenecks,” or “areas of constraint,” with an eye toward encouraging transmission construction in those designated areas.⁵⁹

The significance of these early investigations into problem-area designation is that prior to the passage of the 2005 EPAct, Congress must have been aware of which areas within the United States suffered from grid congestion. Arguably, then, the 2005 EPAct implicitly approved of the extension of NIETCs into those areas, in particular by using the broad, unconditioned “constraint or congestion” language to define the permissible areas for NIETCs. To the extent that those areas illuminated as problematic before 2005 included non-urban or remote areas, there is a strong argument that Congress approved of backstop siting authority in areas meeting that description.

In 2001, FERC completed a National Transmission Constraint study, identifying sixteen areas of transmission constraint.⁶⁰ The constrained areas highlighted included some “usual suspects,” with three in southern New England, two in the mid-Atlantic region (corresponding roughly to Wash-

ington, D.C., and Philadelphia), and two in southern California.⁶¹ However, the 2001 FERC study also pointed to transmission constraints in some fairly rural areas, including the Wyoming-Idaho border, the Kansas-Missouri border, southern Michigan, northeast Arizona, and central Missouri.⁶²

It is reasonable to assume that Congress knew of this study when it passed the 2005 EPAct. In at least four instances, the 2001 FERC study was explicitly discussed in written testimony submitted to a congressional committee developing the 2005 EPAct.⁶³ On one of those occasions, the witness providing the testimony was then-FERC Chairman Pat Wood III.⁶⁴ An important consideration is whether Congress, in defining the permissible extent of NIETCs for purposes of the 2005 EPAct, meant to bring the areas highlighted by the 2001 study within FERC’s authority? This question appears to be answered in the affirmative, by a close similarity of language between the 2001 FERC study and the 2005 EPAct provision: the 2001 FERC study claimed to have “identified a number of significant transmission constraints that increase costs to Customers,”⁶⁵ while the 2005 EPAct provides for designation of NIETCs in areas of “transmission capacity constraints or congestion that adversely affects consumers”⁶⁶

In sum, the problem of transmission congestion was studied well prior to the passage of the 2005 EPAct, and Congress in its deliberations was apprised of the results of these studies. Particularly given the close resemblance in language used to address FERC-identified problem areas to the language in §216 defining the extent of the authority Congress intended to grant, it seems clear that Congress intended the §216 authority to empower FERC to establish NIETCs in the established congested areas.

2. *Federal Agency Relationships in the 2005 EPAct*

The allocation of responsibilities among other federal agencies in connection with FERC’s backstop siting authority can also be read to say something about where NIETCs were intended to be established. The first point indicating congressional intent to extend NIETCs into remote, non-congested areas is the appointment of DOE as the “lead agency” among other agencies involved in reviewing a permit issuance within

61. *Id.*

62. *Id.*

63. *Ensuring a Reliable Electricity System, Hearing Before the Subcomm. on Energy and Resources, H. Comm. on Gov’t Reform*, 109th Cong. (2005) (statement of Pat Wood III, Chairman of the F.E.R.C.); *Ensuring a Reliable Electricity System, Hearing Before the Subcomm. on Energy and Resources, H. Comm. on Gov’t Reform*, 109th Cong. (2005) (statement of David K. Owen, Edison Elec. Institute); *Medical Liability Issues, Hearing Before the Subcomm. on Health, H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Thomas Kuhn, Edison Elec. Institute); *Energy Policy Act of 2005, Hearing Before the Subcomm. on Energy and Air Quality, H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Thomas Kuhn, Edison Elec. Institute).

64. *See Ensuring a Reliable Electricity System*, *supra* note 63.

65. U.S. DOE, DIVISION OF MARKET DEVELOPMENT, *THE NATIONAL INTEREST IN RELIEVING TRANSMISSION BOTTLENECKS* 12 (2001) (Powerpoint presentation describing the results of the transmission bottleneck study).

66. 16 U.S.C. §824p(b).

59. U.S. DOE, *THE NATIONAL INTEREST IN RELIEVING TRANSMISSION BOTTLENECKS* (2001).

60. *Id.* at 18.

an NIETC.⁶⁷ In particular, the statute provides for DOE to comply with the National Forest Management Act⁶⁸ and the Federal Land Policy and Management Act,⁶⁹ the organic acts for the Forest Service and the Bureau of Land Management (BLM) respectively.

Simply stated, the Forest Service and BLM do not enjoy authority over areas characterized by heavy population or electricity demand. The authorities of the Forest Service and BLM are confined to the National Forests and BLM-administered lands, respectively.⁷⁰ For both agencies, the jurisdictional lands are overwhelmingly located west of the Mississippi, and east of the highly populated areas of the West Coast. The Mid-Atlantic corridor in particular, as large as it is, contains very little federal land.

More concrete support for this argument from legislative intent is found in §368 of the 2005 EPAct, under which the Forest Service and BLM, as well as the U.S. Department of Defense, are required to designate transmission corridors, in consultation with FERC, across their jurisdictional lands in the 11 contiguous western states.⁷¹ In late 2008, the agencies performed environmental impact statements and designated areas within their jurisdictions as suitable for transmission corridors. In executing this statutory mandate, the agencies together proposed 1,622 miles of corridor in Nevada, 823 miles in California, 692 miles in Utah, and 650 in Arizona.⁷²

In all, the fact that Congress anticipated the involvement of the Forest Service and BLM in FERC-administered NIETCs, and also ordered them under §368 to designate corridors of their own in coordination with the Commission, suggests that it envisioned NIETCs extending well beyond areas of present congestion. Of course, a fair counterargument is that this line of reasoning credits Congress too much; perhaps the legislature was merely being careful to preempt future jurisdictional conflicts, without having NIETC designation within any specific areas in mind. But Congress did more than simply provide a rule of decision for bureaucratic disputes; it affirmatively provided for coordinated corridor designation in §368, at considerable administrative expense. In all, it seems likely that Congress envisioned the extension of NIETCs into some of these characteristically remote areas.

3. State Siting Law Inquiry

An empirical investigation of state law reveals a potential problem with the arguments from legislative history above. Whether FERC is empowered to issue a transmission construction permit under §216 turns to a large extent upon the content of state law, and consequently, an examination of state law may say something about the regions Congress had in mind for NIETC designation and transmission construction. Thus, by considering which states have the disfavored “parochial” policies⁷³ that would subject them to federal preemption, one can, at least arguably, divine where Congress intended NIETCs to be established.

As discussed above,⁷⁴ FERC may issue a permit, *inter alia*, where the state public utilities commission does not have the authority to consider the interstate benefits of transmission construction, and where the utility does not qualify for a state permit because it does not serve end users in the state. In a word, the relative parochialism of state transmission siting regimes determines whether FERC will have a regulatory foothold.

a. Congested States

Among the states singled out in the 2006 DOE study as containing areas suffering from transmission congestion, there is a surprising absence of facially parochial siting regimes. California legislators were among the most vigorous in fighting the passage of FPA §216,⁷⁵ but the California Public Utilities Commission has an established history of accounting for the interstate benefits of transmission projects, even in the face of an acknowledged lack of in-state benefits.⁷⁶ Similarly, the Public Service Commission of New York is authorized to consider the systemic benefits of transmission construction in making permitting decisions.⁷⁷ Thus, FERC should have relatively less §216 authority to site transmission in an NIETC in New York and California than in states with truly parochial practices.

b. Source States

Some states that might be considered electricity “source” states have surprisingly liberal siting regimes, wherein state permitting authorities are empowered to consider the reliability of interstate systems in issuing permits. In states with such non-parochial siting regimes, the §216 authority of FERC is constrained—arguably an indication that Congress

67. *Id.* §§824p(h)(2), 824p(h)(5).

68. 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16.

69. 43 U.S.C. §§1701-1785, ELR STAT. FLPMA §§102-603.

70. As used in this context, BLM lands include a suite of legislative designations, including public lands, wilderness areas, wild and scenic rivers, and BLM-managed national “monuments” (typically *natural*, not man-made monuments). BLM lands are located overwhelmingly west of the Mississippi, including much of the arid, landlocked states of Arizona, Nevada, and Utah, and very little of the coastal states of California, Oregon, and Washington.

71. 42 U.S.C. §15926 (2006). “Corridors” are required for transmission of oil, gas, and hydrogen, as well as electric transmission. *Id.* §15926(a)(2).

72. BLM., RECORD OF DECISION FOR DESIGNATION OF ENERGY CORRIDORS ON BUREAU OF LAND MANAGEMENT-ADMINISTERED LANDS IN THE 11 WESTERN STATES 6 (2009).

73. See Ashley Brown & Damon Daniels, *Vision Without Site; Site Without Vision*, 16 ELECTRICITY J. 1 (2003) (discussing generally the endemic problem of parochial state siting regimes).

74. *Supra* notes 9-12.

75. See, e.g., 149 CONG. REC. S15217-02 (daily ed. Nov. 10, 2003) (statement of Sen. Boxer) (decrying a similar transmission siting provision as a “special interest provision” that her state and local constituents do not want).

76. See, e.g., *In re Sierra Pacific Power Co.*, 64 C.P.U.C. 2d 442, 1996 WL 37798, 3, 27 (Cal. P.U.C. 1996) (approving a transmission line, although “No power will reach California customers directly through the proposed Project [because] California benefits ratably in Sierra’s systemwide improvements.”). Still, the willingness of the California Public Utility Commission (CPUC) to infer in-state benefits should not diminish FERC’s authority to issue a permit based on the *formal* inability of the CPUC to consider extrajurisdictional benefits.

77. N.Y. PUB. SERV. LAW §126(d) (2008) (requiring that the Public Service Commission find that the facility under consideration “conforms to a long-range plan for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems, which will serve the interests of electric system economy and reliability . . .”).

was relatively less concerned with extending NIETCs into these states.

i. Energy Information Administration Statistics

The Energy Information Administration (EIA) within DOE publishes statistics describing which states are net electricity importers and exporters.⁷⁸ Alabama, Illinois, North Dakota, Pennsylvania,⁷⁹ West Virginia, and Wyoming are the largest net energy exporters.⁸⁰ Of these, Alabama's statute leaves the Public Service Commission unrestricted discretion to approve or disapprove transmission projects, and prescribes no particular considerations for making the determination.⁸¹ The North Dakota statute does not explicitly call for consideration of regional benefits in siting transmission, but the enumerated considerations are explicitly nonexclusive, allowing the Commission to account for other factors.⁸²

Of course, a few of these electricity "source" states have less permissive siting regimes. The Illinois statute, for example, appears to set out exclusively the factors the commission is authorized to consider in making siting decisions, and these factors do not include interstate benefits.⁸³ The Wyoming siting statute is designed similarly.⁸⁴ The West Virginia code is also silent on the consideration of interstate benefits in siting transmission.⁸⁵ In all, however, there are not enough source states displaying parochial siting policies to support an argument that Congress had them specifically in mind for NIETC designation.

ii. American Wind Energy Association Statistics

It may be that Congress, in passing §216, wanted to ensure access to a *particular* kind of energy surplus, and not to the generic energy surpluses illustrated in the EIA statistics. Some states are known to have a high potential for generating renewable energy, especially wind power. To the extent that these states are burdened by parochial siting regimes, then, it is conceivable that Congress intended the extension of NIETCs into source areas within these states. This, in turn, would support the broader argument that NIETCs were meant to reach the non-congested, remote areas endowed with plentiful wind resources.

The American Wind Energy Association, a trade group, has published statistics calculated by the Pacific Northwest National Laboratory, detailing which U.S. states are endowed with the greatest wind energy resources. The top five such states are North Dakota, Texas, Montana, Kansas, and South Dakota.⁸⁶

The wind resource states have comparatively permissive siting regimes, belying the argument that Congress intended to improve transmission within these states in particular. As discussed above, North Dakota regulators are neither explicitly required, nor forbidden, to consider the interstate benefits of siting projects.⁸⁷ The Texas statute has a similar structure, and also provides explicitly for consideration of the state's renewable portfolio standard in reaching siting decisions.⁸⁸ The Montana statute provides for consideration of "regional plans [for] the state and interconnected utility systems."⁸⁹ The Kansas statute provides for consideration of benefits to out-of-state consumers in transmission siting.⁹⁰ Finally, South Dakota's provision is a model of non-parochial siting policy worthy of reproduction: for an interstate transmission line, the commission must find, *inter alia*, "That the proposed trans-state transmission facility will be consistent with the public convenience and necessity in any area or areas which will receive electrical service . . . *regardless of the state or states in which such area or areas are located*" (emphasis added).⁹¹ Thus, it seems clear that the grant of backstop siting authority in §216 would be hard to justify as a congressional mandate to extend transmission into states with rich wind resources.

c. Caveats to the State-Law Inquiry

Two points push back against the significance being attached to state siting regimes here. First, the 2005 EPA Act authorized federal backstop siting, even in some situations without problems involving parochial state statutes. For instance, declining to act on a permit within one year will activate FERC's preemptive authority, even in the state with the most permissive transmission siting regime.⁹² The authority will also obtain where a state commission conditions its approval of a project in a way that makes it economically infeasible.⁹³

Second, and more broadly, it may be giving Congress too much credit to try to divine its intentions from the varied

78. ENERGY INFO. ADMIN., STATE ELECTRICITY PROFILES 2006 (2007).

79. Pennsylvania is subject to the confounding variable of being included within the Mid-Atlantic NIETC, so it must be excluded from this analysis.

80. ENERGY INFO. ADMIN., *supra* note 78 *passim*.

81. ALA. CODE §37-4-28 (2008). Note that in any case, the Alabama Public Service Commission only regulates one utility, and eminent domain questions raised by any other electric companies are resolved by the courts.

82. N.D. CENT. CODE §49-22-09 (2007).

83. 220 ILL. COMP. STAT. 5/8.406 (2008).

84. WYO. STAT. ANN. §37-2-205 (2005) ("The commission shall have power, after hearing involving the financial ability and good faith of the applicant and the necessity of additional service in the community, to issue said certificate . . .").

85. NAT'L COUNCIL ON ENERGY POLICY, COORDINATING INTERSTATE TRANSMISSION SITING: AN INTRODUCTION TO THE DEBATE 7 (2008).

86. PAC. NW. NAT'L LABORATORY, AN ASSESSMENT OF THE AVAILABLE WINDY LAND AREA AND WIND ENERGY POTENTIAL IN THE CONTIGUOUS UNITED STATES (1991).

87. *See supra* note 82.

88. TEX. UTIL. CODE ANN. §37.054 (Vernon 2008). It should come as no surprise that there is no explicit consideration of interstate benefits in the Texas certificate of convenience and necessity statute, because the Texas ERCOT system is largely independent.

89. MONT. CODE ANN. §75-20-301(d)(2) (2007).

90. KAN. STAT. ANN. §66-1180 (2008) ("The commission shall make its decision with respect to the necessity for and the reasonableness of the location of the proposed electric transmission line, taking into consideration the benefit to both consumers in Kansas and consumers outside the state and economic development benefits in Kansas.").

91. S.D. CODIFIED LAWS §49-41B-4.2(5).

92. 16 U.S.C. §824p(b)(1)(C)(i) (2006).

93. *Id.* §824p(b)(1)(C)(ii).

array of state siting regimes. Most likely, the legislature simply wanted to arm FERC for whatever state-law challenges it might encounter. In any case, the fact that non-parochial siting statutes make FERC comparatively less powerful with respect to NIETCs in certain states, does not mean that Congress did not intend NIETCs to exist in those states. In all probability, designating an NIETC will remain a powerful statement, even in a state with the most liberal siting rules, where FERC's bark is worse than its bite.

d. Conclusion to State-Law Inquiry

In all, the evidence derived from state siting regimes does not clearly support or refute that Congress intended the extension of NIETCs into any particular class of source or sink states; the state siting regime inquiry is inconclusive. In many non-congested source areas, FERC's authority to site transmission is comparatively limited because state law is non-parochial. On the other hand, FERC's authority is similarly limited in some of the congested states themselves, where Congress almost unquestionably intended NIETCs. There does not seem to be any unifying similarity among those states where FERC has greater authority because of parochial siting rules, or among those states where FERC has little authority because of progressive siting rules. Thus, it seems likely that Congress was not addressing itself to particular regions or states when it attached importance to the contents of state siting codes, but was instead confronting what it perceived to be a widespread, troublesome type of policy—without agonizing over exactly where those parochial policies were in effect.

4. Recent Calls for Expanded Federal Siting Authority

One argument against the broad construal of FERC authority in designating NIETCs can be found in recent proposals by officials and legislators that indicate that greater authority is needed. For example, FERC Chairman Jon Wellinghoff has recently appeared before Congress and advocated greater transmission siting authority.⁹⁴ Similarly, since 2005, several legislative proposals have been made to broaden the scope of FERC's §216 authority. The 2007 Energy Independence and Security Act nearly included a provision introduced by Sen. John Thune (R-S.D.) that would have allowed consideration of access to renewable energy in designating NIETCs.⁹⁵

This advocacy of heightened authority gives pause to anyone pressing the argument that FERC's current authority is broad, or that the Commission can liberally extend NIETCs

beyond geographic areas of immediate congestion. If §216 is so broadly applicable, why is there any demand for legislative enhancements? If the geographic reach of the provision is expansive, why is it important for FERC to be able to consider renewable energy in making NIETC decisions?

The first answer to these questions is that §216 encompasses more than one type of authority that can be subjected to expansion or curtailment. For instance, Chairman Wellinghoff emphasized the importance of the ability to overcome a state commission's timely rejection of an application.⁹⁶ His frustration with the *Piedmont* decision is undoubtedly a large part of his motivation in advocating a generically "stronger" §216, but is not connected with the permissible geographic reach of NIETCs. Notably, Chairman Wellinghoff did not specifically advocate for broader geographic reach.⁹⁷

But more fundamentally, post hoc calls from officials and legislators for heightened authority should not disrupt the proper interpretation, informed by plain language and legislative history, of an existing provision. After all, it is possible that the agency underestimates its authority under the statute, the same way it overestimated its authority in *Piedmont*. Moreover, it is clearly in the interest of FERC, and of sympathetic legislators, to take advantage of a time when Congress appears solicitous by securing a broader, more explicit mandate. Such additional clarity brings the benefit of avoiding additional contentious litigation, like that which has already beset the agency in its administration of §216.

III. Policy Arguments

Having made what I hope is a strong legal and normative case for a particular construction of FERC's §216 authority, I turn now to the question of why it matters—to the policy argument. The reasons for this go beyond an adherence to a proper manner of statutory interpretation, but instead have major implications for the future of energy regulation and the U.S. energy industry.

A. Accommodating Likely Future Legislative Programs

First, a broadly construed §216 will go a long way toward implementing a federal climate change regime, and in particular a renewable portfolio standard. Such portfolio standards have been a mainstay among proposed energy sector reforms for years, but the idea has gained considerable momentum in the 111th Congress.⁹⁸ Chairman Jon Wellinghoff has remarked upon the need for robust transmission siting authority as a prerequisite to increased exploitation of renewable resources.⁹⁹ In light of the well-documented, chicken-

94. *Legislation Regarding Electric Transmission Lines: Hearing Before the Subcomm. on Energy and Nat'l Resources*, 111th Cong. (2009) (testimony of Jon Wellinghoff, Acting Chairman of FERC).

95. S. Amdt. 1502, 110th Cong. (amending the §216 "constraints or congestion" to include those that would "limit[] access to sources of clean energy, such as wind, solar energy, geothermal energy, and biomass"); see also S. 323, 111th Cong. §101 (similarly providing for consideration of renewable energy in designating NIETCs, and calling for a DOE study on using corridors to maximize renewable energy).

96. Wellinghoff Testimony *supra* note 94, at 6. On the other hand, Wellinghoff was clearly interested in better securing the ability to bring "location-constrained" renewable energy to load centers. "Without broader Federal siting authority to accommodate high levels of renewable electric energy . . . it is unlikely that the Nation will be able to achieve energy security and economic stability." *Id.*

97. *Id.*

98. For a recent example, a portfolio standard introduced by Sen. Tom Udall (D-N.M.) calls for 25% of electricity in the United States to be derived from some defined set of "renewable" technologies by 2039. S. 433, 111th Cong. §610(c).

99. See *supra*, note 96.

and-egg problem of an inability to attract private investment in renewable energy prior to the existence of transmission facilities,¹⁰⁰ it will simply be essential that any federal legislation aimed at increasing renewable energy generation be complemented by a transmission siting regime that is national in scope.

Greater certainty in transmission siting could help encourage private investment in both transmission and generation, since providing predictability and swiftness in transmission permitting equates to saving developers money. An early experiment in this area is the Texas Competitive Renewable Energy Zone program. Under this Texas law, Competitive Renewable Energy Zones are established throughout the state, within which several of the prerequisites for siting transmission under normal circumstances do not apply. Specifically, the commission need not be shown that existing service is inadequate, nor that there is a need for additional service.¹⁰¹

Of course, it is too early to evaluate the overall success of a law passed in 2005, but construction of a web of new transmission lines now appears certain, and the program seems to have attracted considerable private investment, much of it from non-utilities.¹⁰² Thus, this could be one of those situations envisioned by Justice Louis Brandeis, wherein one state acts as a policy “laboratory,” developing a system ultimately shown to be worthy of national-level adaptation.¹⁰³

Thus, because §216 limits the ability of state siting commissions to capriciously reject proposals, it can be expected, like the Texas Competitive Renewable Energy Zone law, to have a positive impact on the incentives of private developers to build transmission, and complement a renewable portfolio standard.¹⁰⁴ More generally speaking, already-congested areas are typically the worst possible areas in which to build new generation facilities.¹⁰⁵ Thus, any future need to build new generation, renewable or not, will be well served by the availability of FERC’s backstop siting authority, which makes it easier to transmit power to congested areas from non-congested areas.

B. Extensive NIETCs May Be in the Interest of the States

There is a case to be made that FERC’s backstop siting authority could assist states in meeting their own renewable portfolio goals. Most states have adopted such portfolio standards,¹⁰⁶ some purportedly mandatory, and others only recommended. Thus far, however, their prospects for success generally appear bleak. There are several reasons for this, including a pervasive lack of guidance as to how the state renewable portfolio standards (RPS) should be implemented, and a similar lack of an effective enforcement mechanism.

While there are multiple program design issues hampering the effective implementation of most state RPSs, a dearth of transmission, and the cost of building new transmission, have also been singled out as practical obstacles to the success of state RPSs.¹⁰⁷ Just as backstop siting could encourage investment in renewables and support a federal standard, it could also help to meet analogous state standards. The inevitable counterargument, of course, is that the idea of “helping” states to meet their espoused RPS goals, over the objection of the states themselves, is hard to swallow. But although backstop siting authority can probably not be justified on this ground alone, it certainly bears consideration that most states have enacted policies that they will be unable to meet without significant improvements in transmission—improvements of a type FERC can deliver through §216.

C. Other Ways of Limiting Agency Discretion

The liberal ability to locate NIETCs in non-congested and remote areas could be protected, even while imposing other significant limitations on FERC’s authority to establish NIETCs and to issue federal siting permits. Thus, there may be a way to shape FERC’s §216 authority that is agreeable, even to those deeply concerned about accumulation of power at the federal level and encroachment on local rights.

For instance, a court could require that NIETCs be more “linear” in shape, or just generally less vast. After all, the expansiveness of the corridors is a fairly sensational point bolstering the complaints of those who would limit or repeal §216. The Commission’s response to such challenges has been that the language of §216 provides for the designation of “any geographic area” experiencing the requisite constraints or congestion.¹⁰⁸ Nonetheless, there is a reasonable plain language argument that FERC’s amorphous NIETC designations offend the meaning of the term corridor. But importantly, this battle can be waged without affecting the ability of FERC to extend NIETCs

100. See Nowamooz, *supra* note 1, at 178-79.

101. TEX. UTIL. CODE ANN. §§39.904(g), 39.904(h) (Vernon 2008).

102. See Joint Transmission Plan of AEP Central Texas Co. et al., Docket No. 35665 (Sept. 12, 2008) (filing with the Public Utility Commission of Texas).

103. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting) (describing the states as potential “laboratories” for policy experimentation). On the other hand, the Texas Competitive Renewable Energy Zone law, in addition to streamlining the process, eliminated some important business risks. Specifically, the legislature virtually guaranteed that developers would earn returns—a generous subsidy indeed. See TEX. UTIL. CODE ANN. §36.053 (transmission facilities within a CREZ are presumptively “used and useful . . . and are prudent and includable in the rate base, regardless of the extent of the utility’s actual use of the facilities.”). It must be observed that section 216 has no analogous guarantee of a return, so its incentivizing impact should be expected to be somewhat less dramatic.

104. The American Wind Energy Association, a wind industry trade group, strongly supported the §216 backstop siting authority—evidently, they anticipate that the siting authority will support wind development as well.

105. Pierce, *supra* note 1, at 7.

106. See Robert J. Michaels, *A Federal Renewable Electricity Requirement: What’s Not to Like?*, Policy Analysis No. 627, (Nov. 2008), at 1.

107. *Id.* at 5, 17; CAL. ENERGY COMM’N, RETI COORDINATING COMMITTEE, RENEWABLE ENERGY TRANSMISSION INITIATIVE FREQUENTLY ASKED QUESTIONS 2 (2008) (explaining that a proposed renewable transmission siting program will not impede RPS implementation in California, because “Lack of transmission is the critical barrier to RPS implementation for IOUs and POUs . . .”).

108. National Electric Transmission Congestion Report, 72 Fed. Reg. 56992, 57006.

into remote and non-congested areas. Even if significant “breadth” or “surface area” limitations were determined to be appropriate, they would not need to limit the ability to reach non-congested areas.

Second, Congress or the courts could impose higher “process” obligations on FERC as prerequisites to its establishment of NIETCs, or to issuance of a §216 permit. The Pennsylvania Public Utilities Commission requested the Federal District Court for the Middle District of Pennsylvania to pronounce that FERC must perform NIETC designations in such a manner as to avoid interference with regional planning.¹⁰⁹ Legislators have made proposals with similar effects. For example, draft legislation by Sen. Arlen Specter (D-Pa.) would mandate FERC, prior to the issuance of a transmission permit within an NIETC, to hold a public hearing in each affected county or locality.¹¹⁰

Finally, in order protect local prerogatives, legislators could use various mechanisms to tilt the permitting balance more in the favor of state siting commissions. As we have seen, the Fourth Circuit has already embarked on this initiative, by clarifying that FERC will not automatically have permitting authority in the event of a timely denial of a state permit.¹¹¹ Even before the Fourth Circuit decision, Sen. Charles Schumer (D-N.Y.) introduced legislation having the same effect, and also lengthening the window for states to approve or deny permits from one to two years.¹¹² Finding the “right” set of narrow, specific circumstances under which FERC’s siting authority is activated may be the best way to answer concerns that vast territories are being subjected to potential federal eminent domain.

IV. Conclusion

Although I have argued for an expansive construction of one aspect of FERC’s §216 authority, it must be borne in mind that this is not the same as calling for FERC to assert its authority aggressively. Indeed, as the commissioners must appreciate after *Piedmont*, it is crucial to act with restraint in order to avoid sustaining a crippling judicial construction of the statute before its potential can be realized.¹¹³ A facially powerful but untested provision like §216 must be administered cautiously.

It is fair to say that the §216 language “any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers”¹¹⁴ is unusually vague. That Congress declined to define the key terms of that already ambiguous directive makes the provision subject to a wide variety of interpretations by interested parties, each of whom would like the provision to mean something different.

Whatever the merits of such vague draftsmanship generally, the resulting provision is, providentially, quite consistent with meeting the pressing needs of America’s electric grid. Notwithstanding the serious and valid concerns that FERC’s interpretation of its own §216 authority has been overly generous, courts should be wary not to impair the Commission’s ability to encompass remote, non-congested areas within NIETCs—for plain language, legislative history, and policy considerations support a liberal interpretation of that particular aspect of the agency’s authority.

109. *Pennsylvania Pub. Util. Comm’n*, 2008 WL 3925840, compl. ¶ 65 (calling for the court to impose a “requirement that, in order to be considered to be within a designated NIETC, the developer must demonstrate that the project does not conflict with the existing regional planning process”).

110. S. 32, 111th Cong. (2009); see also H.R. 1922, 111th Cong. (2009).

111. *Piedmont*, 558 F.3d at 315.

112. S. 1972, 110th Cong. (2007).

113. Energy Secretary Steven Chu has indicated his hope to avoid “bullying” the states to site transmission. Joyce, *supra* note 32.

114. 16 U.S.C. §824p(a)(2) (2006).