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# INTERSTATE ELECTRIC TRANSMISSION LINES AND STATES' RIGHTS IN THE MID-ATLANTIC REGION

JAMES W. MOELLER\*

**Abstract:** Under their traditional jurisdiction over land use, the states permit and site interstate electric power facilities that traverse their boundaries. This jurisdiction may pose an obstacle to the development of new interstate transmission facilities. For that reason, Congress enacted section 216 of the Federal Power Act, which, in limited circumstances, will preempt state law and authorize the Federal Energy Regulatory Commission to permit interstate transmission lines. The implementation of section 216, however, has been frustrated by judicial challenges in federal courts. Seven years after the enactment of section 216, FERC has yet to exercise jurisdiction over the construction of an interstate transmission line. Under little threat of federal preemption, state jurisdiction over transmission facilities could pose an obstacle to the development in the Mid-Atlantic region of “backbone” transmission lines needed to provide electric power to the Washington-Baltimore-Northern Virginia area. Thus far, however, state proceedings to permit and site one such line rebut the notion that state jurisdiction will stymie the development of interstate transmission facilities.

*The states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities. As a result, the nation's transmission grid is an interconnected patchwork of state-authorized facilities.*

—Piedmont Environmental Council v. Federal Energy Regulatory Commission<sup>1</sup>

## INTRODUCTION

In its Strategic Plan for 2009 to 2014, the Federal Energy Regulatory Commission (FERC) stresses the need for new interstate electric

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<sup>1</sup> 558 F.3d 304, 310 (4th Cir. 2009).

transmission lines.<sup>2</sup> The Strategic Plan sets forth two principal goals.<sup>3</sup> First, and consistent with its mandates under the Federal Power Act,<sup>4</sup> the Natural Gas Act,<sup>5</sup> and other organic statutes,<sup>6</sup> FERC will ensure that rates, terms, and conditions of interstate wholesale electric and natural gas service are just and reasonable.<sup>7</sup> Second, FERC will “[p]romote the development of safe, reliable and efficient energy infrastructure that serves the public interest.”<sup>8</sup>

Federal legislation and FERC regulation of the last thirty years have deregulated electric power and introduced competition into wholesale bulk power markets.<sup>9</sup> Such competition, however, cannot fulfill its promise of reliable and economical electric power in the absence of modern high-voltage transmission lines that transmit power from generation plants to local electric distribution networks.<sup>10</sup> In addition, FERC regulation has promoted, and state legislation has mandated, the development of power generation from renewable resources such as wind and solar.<sup>11</sup> Renewable energy development will be stalled, however, without transmission lines that transmit renewable power

<sup>2</sup> FED. ENERGY REGULATORY COMM'N, THE STRATEGIC PLAN: FY 2009–2014, at 24 (2012), available at <http://www.ferc.gov/about/strat-docs/FY09-14-strat-plan-print.pdf>.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> See generally 16 U.S.C. §§ 791–828c (2006).

<sup>5</sup> See generally 15 U.S.C. § 717 (2006).

<sup>6</sup> See, e.g., Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified in scattered sections of 42 U.S.C.); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified in scattered sections of 26 U.S.C. and 42 U.S.C.).

<sup>7</sup> THE STRATEGIC PLAN: FY 2009–2014, *supra* note 2, at 3, 6–19; see 15 U.S.C. § 717c(a).

<sup>8</sup> THE STRATEGIC PLAN: FY 2009–2014, *supra* note 2, at 3, 20–33.

<sup>9</sup> See John S. Moot, *Economic Theories of Regulation and Electricity Restructuring*, 25 ENERGY L.J. 273, 274 (2004); see, e.g., Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385) (“The Commission’s goal is to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation’s electricity consumers.”).

<sup>10</sup> See Elec. ENERGY MKT. COMPETITION TASK FORCE, REPORT TO CONGRESS ON COMPETITION IN WHOLESALE AND RETAIL MARKETS FOR ELECTRIC ENERGY PURSUANT TO SECTION 1815 OF THE ENERGY POLICY ACT OF 2005, at 37 (2007) (“Without adequate transmission capacity, wholesale competition cannot function effectively.”); Hoang Dang, *New Power, Few New Lines: A Need for a Federal Solution*, 17 J. LAND USE & ENVTL. L. 327, 328 (2002) (“[T]he benefits of competition are negated by the inability of consumers to obtain the cheaper electricity.”).

<sup>11</sup> See James W. Moeller, *Of Credits and Quotas: Federal Tax Incentives for Renewable Resources, State Renewable Portfolio Standards, and the Evolution of Proposals for a Federal Renewable Portfolio Standard*, 15 FORDHAM ENVTL. L. REV. 69, 70 (2004); see, e.g., Interconnection for Wind Energy, 70 Fed. Reg. 47,093 (Aug. 12, 2005), *order on reh'g*, 70 Fed. Reg. 75,005 (Dec. 19, 2005); Integration of Variable Energy Resources, 75 Fed. Reg. 75,336 (proposed Dec. 2, 2010).

from the remote locations that often offer the greatest potential for development, for example, the Great Plains for wind power.<sup>12</sup>

Under its Strategic Plan, FERC will “[e]ncourage new electric transmission facilities that advance efficient transmission system operation.”<sup>13</sup> FERC will not, however, site those facilities.<sup>14</sup> In contrast to the Natural Gas Act, and Part I of the Federal Power Act, which authorize FERC to license and site interstate natural gas pipelines and hydroelectric facilities, respectively,<sup>15</sup> Part II of the Federal Power Act, with limited exceptions, does not authorize FERC to permit and site interstate electric power facilities.<sup>16</sup> Under their traditional jurisdiction over land use, the states permit and site interstate electric power facilities that traverse their boundaries.<sup>17</sup>

State jurisdiction may pose an obstacle to the development of new interstate transmission facilities.<sup>18</sup> State public service commissions and siting agencies, which permit and site those facilities, are responsive to local concerns with high-voltage transmission lines that may cross over productive farmland, pristine countryside, historic locations, and national or state forests.<sup>19</sup> If a transmission line does not interconnect with a local distribution network and thus provide local electric service, opposition to the line may be significant.<sup>20</sup> Although state jurisdiction

<sup>12</sup> See *Transmission Infrastructure: Hearing Before the S. Comm. on Energy & Natural Resources*, 111th Cong. 10 (2009) [hereinafter *Transmission Infrastructure Hearing*] (statement of Jon Wellinghoff, Acting Chairman, FERC) (“We need a National policy commitment to develop the extra-high voltage (EHV) transmission infrastructure to bring renewable energy from remote areas where it is produced most efficiently into our large metropolitan areas where most of this Nation’s power is consumed.”); *id.* at 5 (Statement of Sen. Harry Reid).

<sup>13</sup> THE STRATEGIC PLAN: FY 2009–2014, *supra* note 2, at 22.

<sup>14</sup> See Federal Power Act, 16 U.S.C. § 824p (2006).

<sup>15</sup> Natural Gas Act, 15 U.S.C. § 717f (2006); Federal Power Act, 16 U.S.C. §§ 791–823d (2006).

<sup>16</sup> See 16 U.S.C. § 824p(a).

<sup>17</sup> *Piedmont*, 558 F.3d at 310.

<sup>18</sup> See, e.g., Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the “Public Interest” in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705, 705 (2010) (discussing “how state public utility law presents a barrier to the siting of new high-voltage transmission lines to serve renewable resources”).

<sup>19</sup> See, e.g., Order Denying CEC at 1, *S. Cal. Edison Co.*, No. L-00000A-26-0295-00130 (Ariz. Corp. Comm. June 6, 2007) (denying siting permit for electric power line due to the negative impacts associated with power line construction).

<sup>20</sup> See, e.g., *id.* In June 2007, the Arizona Corporation Commission refused to approve the construction of a 230-mile interstate transmission line from Arizona to Southern California that would provide electric power to Southern California. *Id.* The California Public Utilities Commission had approved the construction of the transmission line. News Release, Cal. Pub. Utils. Comm’n, PUC Approves Devers-Palo Verde Transmission Line; Ratepayer Savings Expected (Jan. 25, 2007) (on file with author). The Arizona Commission,

over transmission line siting may pose an obstacle to the development of interstate transmission facilities, “[a]t the heart of the matter . . . is the age-old question of states’ rights versus regional and national interests.”<sup>21</sup>

In recognition of the potential for the states to stymie the development of interstate transmission facilities, the U.S. Congress, in 2005, enacted section 216 of the Federal Power Act to preempt state law in limited circumstances and authorize FERC to permit interstate transmission facilities.<sup>22</sup> The implementation of the statute, however, has been controversial, has rallied states’ rights advocates, and has been challenged in court.<sup>23</sup> The U.S. Courts of Appeals for the Fourth and Ninth Circuits have issued adverse decisions that have derailed the Congressional attempt to facilitate the development of interstate transmission lines through limited preemption.<sup>24</sup> Nonetheless, calls for federal preemption of interstate transmission line siting continue.<sup>25</sup>

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however, refused to approve an “extension cord for California.” Press Release, Ariz. Corp. Comm’n, Regulators Reject “Extension Cord for California”: Commissioners Reject Palo Verde to Devers II Power Line (May 30, 2007) (on file with author). Similarly, Connecticut refused to approve the operation of the Cross Sound Cable, a twenty-three mile transmission line from Connecticut to Long Island, New York that would provide electric power to Long Island. See, e.g., *Regional Energy Reliability and Security: DOE Authority to Energize the Cross Sound Cable: Hearing Before the Subcomm. on Energy & Air Quality of th H. Comm. on Energy & Commerce*, 108th Cong. (2004) (statement of Rep. Ralph Hall, Chairman, Subcomm. on Energy & Air Quality). The U.S. Department of Energy (DOE) ordered the operation of the transmission line to provide electric power to Long Island for six weeks in 2002. U.S. DEP’T OF ENERGY, Order No. 202-02-1 (2002). The order was issued pursuant to Title 16, § 824a(c) of the U.S. Code. The DOE also ordered the operation of the transmission line for two weeks in 2003. U.S. DEP’T OF ENERGY, Order No. 202-03-1 (2003). In June 2004, the Connecticut Department of Public Utility Control and the Connecticut Department of Environmental Protection concluded a settlement agreement for the operation of the Cross Sound Cable. See, e.g., Notice of Withdrawal of the Long Island Power Authority Application, Long Island Power Authority, No. TX04-1-000 (FERC filed June 28, 2004). See generally Linda Randell & Bruce McDermott, *Cross-Sound Blues*, PUB. UTIL. FORT., Feb. 2004, at 20; Linda L. Randell & Bruce L. McDermott, *Chronicle of a Transmission Line Siting*, PUB. UTIL. FORT., Jan. 2003, at 1.

<sup>21</sup> Michael T. Burr, *A Study in States’ Rights*, PUB. UTIL. FORT., Feb. 2004, at 21.

<sup>22</sup> See Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified in scattered sections of 26 U.S.C. and 42 U.S.C.).

<sup>23</sup> See *infra* notes 165–182, 199–220, 221–244 and accompanying text.

<sup>24</sup> Cal. Wilderness Coal., v. U.S. Dep’t of Energy, 631 F.3d 1072, 1107 (9th Cir. 2011); *Piedmont*, 558 F.3d 304.

<sup>25</sup> See generally Sandeep Vaheesan, *Preempting Parochialism and Protectionism in Power*, 49 HARV. J. ON LEGIS. 87 (2012) (arguing that Congress should preempt state and local jurisdiction over transmission line siting); Joshua P. Fershee, *Misguided Energy: Why Recent Legislative, Regulatory, and Market Initiatives Are Insufficient to Improve the U.S. Energy Infrastructure*, 44 HARV. J. ON LEGIS. 327 (2007) (recommending the expansion of federal transmission line siting jurisdiction).

In the Mid-Atlantic region, in particular, there is a need for high-voltage transmission lines that can access inexpensive coal-generated electric power in the Midwest for the Washington-Baltimore-Northern Virginia region. PJM Interconnection, LLC (PJM), a FERC-approved regional transmission organization that operates the transmission facilities owned by public utilities within the Mid-Atlantic region, has identified this need.<sup>26</sup> PJM provides transmission service to fifty-four million people in Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia.<sup>27</sup>

In the past six years, PJM (an acronym for Pennsylvania-Jersey-Maryland), which also manages wholesale bulk power markets in the Mid-Atlantic region and is responsible for transmission expansion planning, has identified three new interstate transmission lines whose construction and operation would address the need for additional high-voltage transmission in the PJM service area. The Trans-Allegheny Interstate Line (TrAIL) traverses Pennsylvania, West Virginia and Virginia. The Potomac-Appalachian Transmission Highline (PATH) would traverse West Virginia, Virginia, and Maryland. And the Mid-Atlantic Power Pathway (MAPP) would traverse Maryland and Delaware.

Each of those Mid-Atlantic states permit and site interstate transmission lines that traverse their boundaries. State statutes require the state to determine that there is a need for the transmission line before issuing a permit. That need may not be apparent if the transmission line provides no local electric service within the state. In the absence of an apparent in-state need, that state may refuse to permit and site the transmission line despite the need for the line in other states.<sup>28</sup>

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<sup>26</sup> See generally Regional Transmission Organizations, 65 Fed. Reg. 8109 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35); Pub. Util. Dist. No. 1 v. Fed. Energy Regulatory Comm'n, 272 F.3d 607 (D.C. Cir. 2001).

<sup>27</sup> PJM INTERCONNECTION, L.L.C., PJM 2010 ANNUAL REPORT 31 (2010), available at <http://www.pjm.com/about-pjm/who-we-are/~media/about-pjm/newsroom/2010-annual-report.ashx>.

<sup>28</sup> See, e.g., Jim Rossi, *The Trojan Horse of Electric Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1048 (2009) [hereinafter Rossi, *Trojan Horse*] (asserting that “[s]tate transmission siting statutes do not provide an adequate legal mechanism to ensure the consideration of regional benefits and, to the extent in-state benefits predominate as the driving factor for siting decisions, will stand as a significant barrier to planning and constructing new high-voltage transmission facilities to transport power from renewable resources”); Jim Rossi, *Transmission Siting in Deregulated Wholesale Power Markets: Re-imagining the Role of Courts in Resolving Federal-State Siting Impasses*, 15 DUKE ENVTL. L. & POL’Y F. 315, 318 (2005) (arguing that “[t]o the extent that transmission remains entirely within the control of local, rather than national, regulators, states have strong incentives to protect their own incumbent firms or citizens, rather than supporting interstate cooperative market norms”).

TrAIL, PATH, and MAPP all have faced or face considerable state and local opposition from environmentalists, historic preservationists, and individuals through whose land the transmission lines would pass. Nonetheless, Virginia, West Virginia, and Pennsylvania issued permits for TrAIL, which has been constructed, and which became operational in May 2011. All three states found that there was a need in the state for the interstate transmission line. Traditional state jurisdiction to permit and site interstate transmission lines, therefore, proved not to be an insurmountable obstacle to interstate transmission line development after all.

This Article reviews current federal initiatives to ensure reliable electric power through high voltage transmission lines. Using the Mid-Atlantic region as an illustration, this Article explores the tension between state jurisdiction over transmission line siting and national interests. Further, this Article argues that under an expanded understanding of state need under state siting statutes, state jurisdiction may not stymie the development of interstate transmission facilities. Part I discusses federal transmission line siting jurisdiction under the Federal Power Act and state siting jurisdiction under the U.S. Constitution.<sup>29</sup> Part I also discusses state siting statutes in the Mid-Atlantic region, specifically in Delaware, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia.<sup>30</sup> Part II of this Article addresses section 216, the FERC regulations that implement the statute, and the judicial review of those regulations.<sup>31</sup> Part II also addresses the implementation of section 216 by the U.S. Department of Energy (DOE), the judicial review of that implementation, and the Congressional review of FERC and DOE implementation of the statute.<sup>32</sup>

Part III of the Article discusses regional transmission expansion planning in the Mid-Atlantic region over a six-year period from 2006 to 2011.<sup>33</sup> Over the course of those six years, PJM identified the need for three new interstate transmission lines—TrAIL, PATH and MAPP. Part IV explores the state proceedings in Virginia, West Virginia, and Pennsylvania to permit and site TrAIL in those states, each of which found a “need” for TrAIL even if the transmission line would provide no local electric service within the state.<sup>34</sup> Finally, Part V discusses the state pro-

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<sup>29</sup> See *infra* notes 37–97 and accompanying text.

<sup>30</sup> See *infra* notes 98–132 and accompanying text.

<sup>31</sup> See *infra* notes 133–164 and accompanying text.

<sup>32</sup> See *infra* notes 165–256 and accompanying text.

<sup>33</sup> See *infra* notes 257–385 and accompanying text.

<sup>34</sup> See *infra* notes 386–508 and accompanying text.

ceedings to permit and site PATH,<sup>35</sup> and Part VI addresses the state proceedings to permit and site MAPP.<sup>36</sup>

## I. THE FEDERAL POWER ACT AND STATE SITING

### A. FERC Jurisdiction Under the Federal Power Act

Enacted in 1920, Part I of the Federal Power Act authorizes FERC to license and site hydroelectric facilities.<sup>37</sup> Enacted in 1935, Part II of the statute authorizes FERC to regulate the rates and terms of wholesale electric power service in interstate commerce.<sup>38</sup> In addition, FERC regulates sales or other dispositions of facilities by public utilities subject to its jurisdiction,<sup>39</sup> corporate acquisitions and consolidations by such utilities,<sup>40</sup> and issuances and sales of securities by such utilities.<sup>41</sup> FERC also exercises jurisdiction over public utilities under, *inter alia*, the Public Utility Regulatory Policies Act of 1978—which amended Part II of the Federal Power Act<sup>42</sup>—and the Public Utility Holding Company Act of 2005.<sup>43</sup>

Section 201(a) of the Federal Power Act states that “Federal regulation of matters relating to . . . the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest.”<sup>44</sup> Federal jurisdiction over interstate transmission and sale of energy, however, is “to extend only to those matters which are not subject to regulation by the States.”<sup>45</sup> Thus the statute includes an express reservation of states’ rights in the regulation of public utilities.<sup>46</sup> This reservation could include the right to permit and site transmission lines under traditional state jurisdiction over land use.<sup>47</sup> The U.S. Supreme Court has not interpreted the statute this way. Instead, the Court has “described the

<sup>35</sup> See *infra* notes 509–622 and accompanying text.

<sup>36</sup> See *infra* notes 623–667 and accompanying text.

<sup>37</sup> See generally Federal Power Act, 16 U.S.C. §§ 791–823d (2006).

<sup>38</sup> See generally *id.* §§ 824–824w.

<sup>39</sup> *Id.* § 824b(a)(1)(A) (2006).

<sup>40</sup> *Id.* § 824b(a)(1)(B).

<sup>41</sup> *Id.* § 824c.

<sup>42</sup> Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 16 U.S.C.).

<sup>43</sup> Pub. L. No. 109-58, §§ 1261–1277, 119 Stat. 594, 972–78 (codified at 16 U.S.C. §§ 16,451–16,463).

<sup>44</sup> 16 U.S.C. § 824(a).

<sup>45</sup> *Id.*

<sup>46</sup> See *id.*

<sup>47</sup> *Piedmont*, 558 F.3d at 310.



precise reserved state powers language in § 201(a) as a mere 'policy declaration' that 'cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.'<sup>48</sup>

Section 201(b) sets forth a specific grant of jurisdiction to FERC.<sup>49</sup> It provides that Part II "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce."<sup>50</sup> It also provides that FERC "shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce."<sup>51</sup> FERC, with limited exceptions,<sup>52</sup> thus has jurisdiction over transmission facilities but not over power plants or distribution facilities.<sup>53</sup>

Although the Federal Power Act grants jurisdiction over transmission facilities to FERC, it does not require a FERC-issued permit before construction of a high-voltage transmission line.<sup>54</sup> In contrast, the construction of a hydropower plant requires a FERC license under Part I of the Federal Power Act.<sup>55</sup> And the construction of an interstate gas pipeline requires a FERC certificate under the Natural Gas Act.<sup>56</sup> The absence of a parallel provision in Part II indicates a congressional intent to subject the construction of interstate transmission lines to state regulation.<sup>57</sup> Indeed, FERC has acknowledged that "Congress left to the States authority to regulate generation and transmission siting."<sup>58</sup>

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<sup>48</sup> *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. 1, 22 (2002) (quoting *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964)); see *Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 527 (1945); see also *United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 311 (1953).

<sup>49</sup> 16 U.S.C. § 824(b).

<sup>50</sup> 16 U.S.C. § 824(b) (2006).

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., *id.* § 824p(a).

<sup>53</sup> *Id.* § 824(b). Given the properties of electric power, all transmission facilities, with the exception of those in Alaska and Hawaii, are used for transmission of electric power in interstate commerce. *New York*, 530 U.S. at 31. Transmission facilities in the continental United States are interconnected. *Id.* at 7. Thus "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce." *Id.*

<sup>54</sup> See Rossi, *Trojan Horse*, *supra* note 28, at 1033.

<sup>55</sup> See 16 U.S.C. §§ 791–823d (2006).

<sup>56</sup> See 15 U.S.C. § 717f (2006).

<sup>57</sup> *New York*, 535 U.S. at 24 (observing that even "FERC has recognized that the States retain significant control over local matters" where transmission lines are concerned); see

### B. State Siting, Federal Preemption, and the Dormant Commerce Clause

Under their traditional prerogative to regulate land use, most states have enacted statutes to exercise this jurisdiction over generation and transmission siting.<sup>59</sup> In particular, over forty states permit and site high-voltage electric transmission lines within their borders.<sup>60</sup> A state permit to construct a transmission line often takes the form of a Certificate of Public Convenience and Necessity (CPCN).<sup>61</sup> In most of those states, the Public Service Commission (PSC)—or Public Utilities Commission or Corporation Commission—permits and sites transmission lines.<sup>62</sup> A few states have dedicated siting agencies that site transmission lines (and, for example, power plants).<sup>63</sup>

The legislatures of all of the Mid-Atlantic states have adopted statutes to exercise jurisdiction over the construction of high-voltage electric transmission lines.<sup>64</sup> In Pennsylvania, the Public Utilities Commission must approve the construction of transmission lines over 100 kilovolts (kV).<sup>65</sup> In New Jersey, the Board of Public Utilities must approve the construction of lines that cross two or more municipalities.<sup>66</sup> The Maryland Public Service Commission issues permits for overhead lines over 69 kV.<sup>67</sup> The Delaware Public Service Commission issues permits for lines that cross service area boundaries of two or more pub-

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Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, 21,626 n.543 (May 10, 1996).

<sup>58</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. at 21,626 n.543.

<sup>59</sup> See generally EDISON ELEC. INST., STATE GENERATION & TRANSMISSION SITING DIRECTORY (2012) (providing summaries of the processes for state siting transmission lines, including a directory with contact and website information), available at [http://www.eei.org/ourissues/ElectricityTransmission/Documents/State\\_Generation\\_Transmission\\_Siting\\_Directory.pdf](http://www.eei.org/ourissues/ElectricityTransmission/Documents/State_Generation_Transmission_Siting_Directory.pdf).

<sup>60</sup> See *id.* Eight states—Alabama, Alaska, Georgia, Indiana, Louisiana, Oklahoma, Tennessee, and Washington—do not under certain circumstances permit and site transmission lines. *Id.* at 1–2, 3–4, 31–32, 43–44, 53–54, 103–04, 121–22, 135–36.

<sup>61</sup> See, e.g., *id.* at 1–2, 7–8, 9–12.

<sup>62</sup> See, e.g., *id.*

<sup>63</sup> *Id.* at 5–6, 15–16, 45–46, 53–54, 73–75, 87–88, 91–93, 97–98. Specific siting agencies include the Arizona Power Plant and Transmission Line Siting Committee, the Connecticut Siting Council, the Kentucky State Board on Electric Transmission and Generation Siting, the Massachusetts Energy Facilities Siting Board, the New Hampshire Site Evaluation Committee, the Ohio Power Siting Board, the Oregon Energy Facility Siting Council, and the Rhode Island Energy Facility Siting Board. *Id.*

<sup>64</sup> *Id.* at 109.

<sup>65</sup> EDISON ELEC. INST., *supra* note 59, at 21, 57, 87, 93, 131, 137.

<sup>66</sup> *Id.* at 87.

<sup>67</sup> *Id.* at 57.

lic utilities.<sup>68</sup> Virginia requires a CPCN from the State Corporation Commission for overhead lines operated at 138 kV or more, and for any underground lines.<sup>69</sup> West Virginia requires a CPCN from the Public Service Commission for lines over 200 kV.<sup>70</sup>

Because Part II of the Federal Power Act, with limited exceptions, does not authorize FERC to permit and site interstate electric power facilities, these state siting statutes do not appear to be preempted under federal law.<sup>71</sup> A federal statute can preempt a state statute “through [the] statute’s express language or through its structure and purpose.”<sup>72</sup> Thus, preemption can be express or implied.<sup>73</sup> “Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.”<sup>74</sup> Implied preemption, therefore, can be “field” preemption or “conflict” preemption.

Field preemption arises if a scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>75</sup> No such inference will be drawn, however, if the federal statute includes a “reliable indicium of congressional intent with respect to state authority.”<sup>76</sup> The text of section 201(a) of the Federal Power Act appears to be such an indicium.<sup>77</sup> In such a case, “there is no need to infer congressional intent to preempt state laws from the substantive provisions” of the federal statute.<sup>78</sup> “Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress’ enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre-empted.”<sup>79</sup>

<sup>68</sup> *Id.* at 21.

<sup>69</sup> *Id.* at 131.

<sup>70</sup> *Id.* at 137.

<sup>71</sup> 16 U.S.C. § 824p(a) (2006).

<sup>72</sup> *Altria Group v. Good*, 555 U.S. 70, 76 (2008); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

<sup>73</sup> *See, e.g., Natural Gas Act*, 15 U.S.C. § 717b(e)(1) (2006) (preempting state authority expressly by stating “[FERC] shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of [a] [liquefied natural gas] terminal”).

<sup>74</sup> *Altria Group*, 555 U.S. at 76–77 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

<sup>75</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>76</sup> *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978).

<sup>77</sup> *See* 16 U.S.C. § 824(a) (2006) (granting FERC jurisdiction “only to matters which are not subject to regulation by the states”).

<sup>78</sup> *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 282 (1987).

<sup>79</sup> *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992).

Conflict preemption arises if “compliance with both federal and state regulations is a physical impossibility.”<sup>80</sup> It also arises if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>81</sup> A state siting statute could arguably stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Federal Power Act. If a PSC under the state statute denied a permit for an interstate transmission line proposed to traverse the state, the objective of the Federal Power Act—as reflected in the Strategic Plan—of promoting the development of new electric transmission facilities could be undermined.<sup>82</sup> There appears never to have been, however, a federal court preemption challenge to a state siting statute under the Federal Power Act.

Federal courts, moreover, are not quick to conclude that a state statute is preempted.<sup>83</sup> The courts begin preemption analyses “with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>84</sup> A preemption analysis requires a federal court to look beyond the professed purpose of a state statute and examine its effect.<sup>85</sup> When a federal court examines a challenged statute’s purpose, it “is not bound by ‘[t]he name, description or characterization given it by the legislature or the courts of the State,’ but will determine for itself the practical impact of the law.”<sup>86</sup>

The state siting statutes also appear not to violate the dormant commerce clause of the U.S. Constitution because they do not impose an undue burden on interstate commerce.<sup>87</sup> A state statute or regulation may violate the Commerce Clause if it differentiates between in-state and out-of-state economic interests and discriminates against the latter.<sup>88</sup> Economic protectionism is “virtually *per se* invalid.”<sup>89</sup> In addition, a state law or regulation may violate the Commerce Clause even if it does not discriminate but nonetheless imposes an undue burden on

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<sup>80</sup> Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

<sup>81</sup> Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

<sup>82</sup> THE STRATEGIC PLAN: FY 2009–2014, *supra* note 2, at 20–33.

<sup>83</sup> *Rice*, 331 U.S. at 230.

<sup>84</sup> *Id.*

<sup>85</sup> *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 105 (1992) (“In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature’s professed purpose and have looked as well to the effects of the law.”).

<sup>86</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (quoting *Lacoste v. La. Dep’t of Conservation*, 263 U.S. 545, 550 (1924)).

<sup>87</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>88</sup> *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

<sup>89</sup> *Id.*

interstate commerce.<sup>90</sup> A state can regulate state aspects of interstate commerce if it “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental.”<sup>91</sup> A state statute will run afoul of the Commerce Clause if the “burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”<sup>92</sup> When a statute is “an exercise of [the state’s] traditional and congressionally recognized power,” and “applied evenhandedly,” however, it may not unconstitutionally burden interstate commerce.<sup>93</sup>

State siting statutes are rooted in traditional state jurisdiction over land use: “Regulation of land use . . . is a quintessential state and local power.”<sup>94</sup> The Supreme Court has stated that “regulation of land use is perhaps the quintessential state activity.”<sup>95</sup> The Supreme Court also has acknowledged “the States’ traditional and primary power over land and water use.”<sup>96</sup> Federal courts are inclined to defer to this traditional jurisdiction and reluctant to question the motives and intents behind its exercise: “States are not required to convince the courts of the correctness of their legislative judgments. Rather, ‘those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.’”<sup>97</sup> Thus, there appears never to have been a successful federal court Commerce Clause challenge to a state siting statute.

### C. *State Siting in the Mid-Atlantic Region*

Under their traditional prerogative to regulate land use, all of the Mid-Atlantic states have adopted statutes to exercise jurisdiction over the construction of high-voltage electric transmission lines within the state.<sup>98</sup>

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<sup>90</sup> *Id.* at 93.

<sup>91</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>92</sup> *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 526 (1988) (quoting *Pike*, 397 U.S. at 142).

<sup>93</sup> *Id.* at 525–26.

<sup>94</sup> *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

<sup>95</sup> *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 768 n.30 (1982).

<sup>96</sup> *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (Stevens, J., dissenting).

<sup>97</sup> *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

<sup>98</sup> See *infra* notes 99–132 and accompanying text.

In Delaware, electric utilities “may use the public roads, highways, streets, avenues and alleys . . . for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures.”<sup>99</sup> The construction of transmission lines along roads and highways within incorporated cities and towns requires the approval of those cities and towns.<sup>100</sup> Outside of this limitation of its jurisdiction, the Delaware PSC has exclusive jurisdiction over public utilities, including their “equipment, facilities, service territories and franchises.”<sup>101</sup> The PSC establishes the boundaries of service territories of electric utilities within the state.<sup>102</sup> The PSC issues certificates—reflecting those boundaries—to authorize electric utilities to do business in the state.<sup>103</sup> Expansions of equipment and facilities also require certificates unless they occur within the existing service territories of the electric utilities that undertake those expansions.<sup>104</sup>

In Maryland, the PSC permits and sites the construction and operation of overhead electric transmission lines with a voltage over 69 kV.<sup>105</sup> Section 7-207 of the Public Utility Companies Article of the Maryland Code sets forth the general certification procedures for power plants and transmission lines, the construction of which require a CPCN.<sup>106</sup> The statute requires a CPCN for the construction of an overhead transmission line over 69 kV and to exercise the right of condemnation for such construction.<sup>107</sup> The CPCN process includes holding a public hearing in each county and municipality in which the transmission line would be located.<sup>108</sup> The Maryland PSC acts on an application for a transmission line after due consideration of (i) the views of affected counties and municipal corporations;<sup>109</sup> (ii) the effect of the transmission line on, *inter alia*, the stability and reliability of the electric system, economics, esthetics, and historic sites;<sup>110</sup> and (iii) the need for the transmission line to meet the existing and future demand for electric service.<sup>111</sup>

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<sup>99</sup> DEL. CODE ANN. tit. 26, § 906(a) (2009).

<sup>100</sup> *Id.*; *see id.* § 901(a).

<sup>101</sup> *Id.* § 201(a).

<sup>102</sup> *Id.* § 203B(a).

<sup>103</sup> *Id.* § 203A(a)(1).

<sup>104</sup> *See id.* § 203A(a)(2).

<sup>105</sup> MD. CODE ANN., PUB. UTIL. COS. § 7-207(b)(3) (LexisNexis 2010).

<sup>106</sup> *Id.* § 7-207.

<sup>107</sup> *Id.* § 7-207(b)(3).

<sup>108</sup> *Id.* § 7-207(d)(1).

<sup>109</sup> *Id.* § 7-207(e)(1).

<sup>110</sup> *Id.* § 7-207(e)(2)(i)-(iv).

<sup>111</sup> MD. CODE ANN., PUB. UTIL. COS. § 7-207(f) (LexisNexis 2010).

In New Jersey, land use is governed by the Municipal Land Use Law, under which New Jersey municipal governments are responsible for land use regulation, development, and zoning.<sup>112</sup> Municipal ordinances and regulations adopted under the Municipal Land Use Law are inapplicable to a proposed transmission line that would traverse two or more municipalities, however, if the New Jersey Board of Public Utilities (BPU) determines, upon petition, that the line “is reasonably necessary for the service, convenience or welfare of the public.”<sup>113</sup> The BPU may authorize a transmission line upon petition and evidentiary hearing regardless of local requirements only when “the present or proposed use by the public utility . . . is necessary for the service, convenience or welfare of the public . . . and . . . no alternative site or sites are reasonably available to achieve an equivalent public benefit.”<sup>114</sup>

The BPU has observed that “the Board’s obligation in making such a decision is to weigh all the interests and [ensure] that . . . the legislative intent is clear that the broad public interest to be served is greater than local considerations.”<sup>115</sup> The BPU must evaluate the proposed transmission line route and alternative routes, and it must address their comparative advantages and disadvantages.<sup>116</sup> In addition, BPU regulations require, *inter alia*, that overhead transmission lines make use of available railroad or other rights of way when practicable and feasible, and that transmission towers be painted “to camouflage their appearance as much as possible and to the extent consistent with the need for protection.”<sup>117</sup>

Under Pennsylvania law, electric utilities must “furnish and maintain adequate, efficient, safe, and reasonable” facilities to provide electric service.<sup>118</sup> The Pennsylvania Public Utilities Commission (PUC) must approve the construction of transmission lines over 100 kV.<sup>119</sup> The Pennsylvania Public Utility Code authorizes the PUC to issue certificates of public convenience,<sup>120</sup> and the PUC has promulgated regulations under the statute for its review of proposed electric transmission

<sup>112</sup> N.J. STAT. ANN. §§ 40:55D-1 to -22 (West 2008).

<sup>113</sup> *Id.* § 40:55D-19.

<sup>114</sup> *Id.*; Decision and Order at 48, Pub. Serv. Elec. & Gas Co., No. EM09010035 (N.J. B.P.U. Apr. 21, 2010) (filed Feb. 11, 2010).

<sup>115</sup> Decision and Order, *supra* note 114; see *In re Monmouth Consol. Water Co.*, 220 A.2d 189, 193 (N.J. 1966); *In re Pub. Serv. Elec. & Gas Co.*, 173 A.2d 233, 243 (N.J. 1961).

<sup>116</sup> *In re Pub. Serv. Elec. & Gas Co.*, 173 A.2d at 243.

<sup>117</sup> N.J. ADMIN. CODE § 14:5-6.1 (2003).

<sup>118</sup> 66 PA. CONS. STAT. ANN. § 1501 (West 2000).

<sup>119</sup> EDISON ELEC. INST., *supra* note 59, at 109.

<sup>120</sup> Tit. 66, § 1102.

lines.<sup>121</sup> Under those regulations, the PUC will authorize the construction of a high-voltage transmission line if (i) there is a need for it; (ii) “it will not create an unreasonable risk of danger to the health and safety of the public”; (iii) it will be in compliance with relevant statutes and regulations protecting natural resources; and (iv) it will have a “minimum adverse environmental impact.”<sup>122</sup>

Virginia statutes require a CPCN from the State Corporation Commission (SCC) for overhead lines over 138 kV and for underground lines.<sup>123</sup> A transmission line requires SCC approval under the Utility Facilities Act of Virginia,<sup>124</sup> which requires a CPCN for the construction of, *inter alia*, electric transmission facilities,<sup>125</sup> and section 56-46.1 of the Code of Virginia, which requires a CPCN for the construction of transmission lines over 138 kV.<sup>126</sup> Enacted in 1999, the Virginia Electric Utility Regulation Act also addresses electric transmission, requiring electric utilities in Virginia that own or operate transmission facilities to join a “regional transmission entity,” such as PJM.<sup>127</sup> The statute provides, however, that the SCC retains “authority over transmission line or facility construction, enlargement or acquisition within [Virginia].”<sup>128</sup>

Finally, West Virginia requires a CPCN from the state PSC for high-voltage transmission lines over 200 kV.<sup>129</sup> The PSC will approve an application for a CPCN if the proposed transmission line satisfies two conditions. First, it must “economically, adequately and reliably contribute to meeting the present and anticipated requirements for electric power of the customers served by the applicant or is necessary and desirable for present and anticipated reliability of service for electric power for [the applicant’s] service area or region.”<sup>130</sup> Second, it must

<sup>121</sup> 52 PA. CODE §§ 57.71–.77 (2002).

<sup>122</sup> *Id.* § 57.76(a).

<sup>123</sup> VA. CODE ANN. § 56-46.1 (2007).

<sup>124</sup> *Id.* §§ 56-265.1–.9.

<sup>125</sup> *See id.* §§ 56-265.2:1(A) (requiring approval for natural gas pipelines), 56-265.4:1 (covering electric public utilities).

<sup>126</sup> *Id.* § 56-46.1(B).

<sup>127</sup> *Id.* § 56-577(A)(1).

<sup>128</sup> *Id.* § 56-579(D)(1).

<sup>129</sup> W. VA. CODE ANN. § 24-2-11a(a) (LexisNexis supp. 2012) (“No public utility, person or corporation may begin construction of a high voltage transmission line of two hundred thousand volts or over, which line is not an ordinary extension of an existing system in the usual course of business as defined by the Public Service Commission, unless and until it or he or she has obtained from the Public Service Commission a certificate of public convenience and necessity approving the construction *and proposed location* of the transmission line.”) (emphasis added); EDISON ELEC. INST., *supra* note 59, at 137.

<sup>130</sup> W. VA. CODE ANN. § 24-2-11a(d)(1).



“result in an acceptable balance between reasonable power needs and reasonable environmental factors.”<sup>131</sup> Under this state statute, the West Virginia PSC is required to issue a decision on an application for a CPCN within four hundred days of submission.<sup>132</sup>

## II. SECTION 216 OF THE FEDERAL POWER ACT

### A. Powers and Limitations of Section 216

In recognition of the potential for state jurisdiction to permit and site transmission facilities to undermine the development of interstate transmission lines, Congress enacted section 216 of the Federal Power Act in 2005.<sup>133</sup> In limited circumstances, the statute preempts state law and authorizes the Federal Energy Regulatory Commission (FERC) to permit and site interstate transmission lines.<sup>134</sup>

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (EPAAct).<sup>135</sup> Title XII of the EPAAct, the Electricity Modernization Act of 2005, is intended to, *inter alia*, facilitate the construction of a modern nationwide transmission system.<sup>136</sup> In particular, Title XII enacted section 216 of the Federal Power Act.<sup>137</sup> When signing the statute, President Bush stated that “[t]o keep local disputes from causing national problems, the bill gives Federal officials the authority to select sites for new powerlines. We have a modern interstate grid for our phone line and our highways. With this bill, America can start building a modern 21st century electricity grid as well.”<sup>138</sup>

Section 216 directs the U.S. Department of Energy (DOE) to perform a nationwide assessment of electric power transmission congestion within one year of enactment and thereafter on a triennial basis.<sup>139</sup> On the basis of the assessment—performed in consultation with af-

<sup>131</sup> *Id.* § 24-2-11a(d)(3).

<sup>132</sup> *Id.* § 24-2-11(f).

<sup>133</sup> Vaheesan, *supra* note 25, at 123.

<sup>134</sup> 16 U.S.C. § 824(b) (2006).

<sup>135</sup> Pub. L. No. 109-58, 119 Stat. 594 (codified at 16 U.S.C. §§ 16,451–16,463). See Statement on Signing the Energy Policy Act of 2005, 41 WEEKLY COMP. PRES. DOC. 1267, 1267 (Aug. 8, 2005).

<sup>136</sup> §§ 1201–1298, 119 Stat. at 941–86; Remarks on Signing the Energy Policy Act of 2005 in Albuquerque, New Mexico, 41 WEEKLY COMP. PRES. DOC. 1263, 1266 (Aug. 15, 2005).

<sup>137</sup> § 1221, 119 Stat. at 946 (codified at and referred to in citations throughout this Article as 16 U.S.C. § 824p (2006)).

<sup>138</sup> Remarks on Signing the Energy Policy Act of 2005 in Albuquerque, New Mexico, *supra* note 136, at 1266.

<sup>139</sup> 16 U.S.C. § 824p(a)(1).

affected states and with input from interested parties on alternatives and recommendations—the DOE is required to issue a report “which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.”<sup>140</sup>

In certain circumstances, FERC may authorize the construction of electric transmission facilities within a designated national interest electric transmission corridor (“National Corridor”).<sup>141</sup> The statute enables FERC authorization if the state in which the facilities would be located is not authorized to approve the facilities, the facilities are not qualified for a permit from the state because the facilities would not serve the residents of the state, or the state has “withheld approval” of the facilities for longer than one year.<sup>142</sup> In addition, FERC cannot authorize the construction of transmission facilities within a National Corridor unless the facilities will transmit electric power in interstate commerce, will be “consistent with the public interest,” will “reduce transmission congestion,” will align with the nation’s energy policy, and will maximize the capabilities of existing transmission facilities.<sup>143</sup>

Section 216 also implicates other rights and agencies. FERC authorized construction of transmission facilities within a National Corridor enables public utilities to acquire the rights of way for facilities through eminent domain.<sup>144</sup> In addition, the construction of transmission facilities within or outside a National Corridor could require approvals and environmental reviews from other federal agencies such as the Departments of Agriculture, Commerce, and the Interior.<sup>145</sup> Section 216 provides that the DOE is responsible for the coordination of these approvals and reviews.<sup>146</sup> In this regard, the statute directs the

<sup>140</sup> *Id.* § 824p(a)(2). A determination to designate a national interest electric transmission corridor may address whether “the economic vitality and development of the corridor . . . may be constrained by a lack of adequate or reasonably priced electricity” and whether the “economic growth in the corridor . . . may be jeopardized by reliance on limited sources of energy.” *Id.* § 824p(a)(4).

<sup>141</sup> *Id.* § 824p(b).

<sup>142</sup> *Id.* § 824p(b)(1). Nothing in the statute, however, prohibits the construction of electric transmission facilities under state law. *Id.* § 824p(g).

<sup>143</sup> 16 U.S.C. § 824p(b)(2)–(6) (2006).

<sup>144</sup> *Id.* § 824p(e)(1). The acquisition of a right of way in this manner would require “just compensation.” *Id.* § 824p(f).

<sup>145</sup> *See id.* § 824p(h).

<sup>146</sup> *See id.* In May 2006, the DOE delegated its responsibilities for the coordination of these approvals and reviews for the construction of transmission facilities within a National Corridor to FERC. Dep’t of Energy, *Department of Energy Delegation Order No. 00-004.00A to the Fed. Energy Regulatory Comm’n*, 4 (May 16, 2006), available at <http://www.ferc.gov/industries/electric/indus-act/siting/doe-delegation.pdf>.

DOE to establish milestones and deadlines for federal approvals and reviews, “prepare a single environmental review document,” and conclude a memorandum of understanding among federal agencies with jurisdiction over the facilities.<sup>147</sup>

Although section 216 preempts traditional state jurisdiction over the construction of transmission lines, the statute limits FERC jurisdiction when three or more contiguous states form an interstate compact to establish a regional transmission siting agency.<sup>148</sup> When created by interstate compact, a regional agency is responsible for the approval of transmission line construction,<sup>149</sup> and FERC has “no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact.”<sup>150</sup>

### B. *Implementation of Section 216: FERC Order No. 689*

To implement section 216 of the Federal Power Act, FERC issued Order No. 689 in November 2006.<sup>151</sup> The order promulgated regulations for applications for FERC-issued permits to construct electric transmission facilities.<sup>152</sup> The regulations allow interested parties, in a proceeding for a permit to construct transmission facilities within a National Corridor, to present their views and recommendations on the need for and impact of the facilities to FERC.<sup>153</sup> To ensure the involvement of interested parties, a permit application must include a

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<sup>147</sup> 16 U.S.C. § 824p(h)(4)(A), (5)(A), (7)(B); Memorandum of Understanding on Early Coordination of Federal Authorizations and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities among the DOE, Dep't of Def., Dep't of Agric., Dep't of the Interior, Dep't of Commerce, FERC, EPA, Council on Env'tl. Quality, and Advisory Council on Historic Pres. (Aug. 8, 2006), *available at* [http://www.fws.gov/habitatconservation/1221\\_MOU\\_FINAL\\_8-8-06.pdf](http://www.fws.gov/habitatconservation/1221_MOU_FINAL_8-8-06.pdf) (superceded by Memorandum of Understanding Regarding Coordination in Federal Agency Review of Electric Transmission Facilities on Federal Land among the U.S. Dep't of Agric, Dep't of Commerce, Dep't of Def., DOE, EPA, Council on Env'tl. Quality, FERC, Advisory Council on Historic Pres., and Dep't of the Interior (Oct. 23, 2009). *available at* <http://www.achp.gov/docs/TransmissionMOU.pdf>).

<sup>148</sup> 16 U.S.C. § 824p(i)(1).

<sup>149</sup> 16 U.S.C. § 824p(i)(3) (2006).

<sup>150</sup> *Id.* § 824p(i)(4). FERC is, however, authorized to issue a permit if the states in the compact are in disagreement and if, for example, the compact has withheld a permit for the facilities for more than one year. *Id.*

<sup>151</sup> Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440 (Dec. 1, 2006) (codified at 18 C.F.R. pts. 50, 380); *see* 16 U.S.C. § 824p(c)(2) (2006).

<sup>152</sup> 18 C.F.R. pt. 50 (2011).

<sup>153</sup> *Id.* § 50.2(a); *see* 16 U.S.C. § 824p(d).

Project Participation Plan.<sup>154</sup> The regulations also provide for “paper” administrative hearings on permit applications.<sup>155</sup>

Before submitting a permit application, an applicant must fulfill several pre-filing requirements: an initial consultation with FERC, an *initial* pre-filing request for a permit, and—upon the issuance of a notification by the FERC Director of Energy Projects—a *subsequent* pre-filing request.<sup>156</sup> The *subsequent* pre-filing request must include, *inter alia*, progress on the requirements of the *initial* pre-filing request.<sup>157</sup> The applicant must serve the FERC notification on all interested persons and file regular status reports with FERC.<sup>158</sup>

After FERC has determined that the applicant has complied with these pre-filing requirements, the applicant may request a permit.<sup>159</sup> The application must include, *inter alia*, a concise description of the proposed transmission facilities, a verification that the route for the proposed facilities lies within a National Corridor, a description of the construction and operation of the proposed facilities, and a description of the manner in which the facilities will be financed.<sup>160</sup> The regulations also detail the exhibits that must be filed with the application.<sup>161</sup>

<sup>154</sup> 18 C.F.R. § 50.4(a). In addition, an applicant for a FERC permit must make the application available to the public throughout the area in which the facilities would be constructed. *Id.* § 50.4(b). An applicant also must advise all landowning residents and other interested parties throughout the area via mail and publication in newspapers of general circulation. *Id.* § 50.4(c)(1). The regulations detail the information to be provided via mail and publication. *Id.* § 50.4(c)(2).

<sup>155</sup> *Id.* § 50.3(e).

<sup>156</sup> *Id.* § 50.5(a)–(e). The consultation will include a discussion of the need for an independent consultant to prepare the environmental documentation for the facilities. *Id.* § 50.5(b)(2). The pre-filing request must include a schedule for the construction of the facilities, a detailed description of the facilities, a list of federal agencies with jurisdiction over the facilities, a list of landowning residents that will be affected by the facilities, a description of work performed to date, and, in some cases, a list of three independent consultants from which FERC can choose to aid in preparing the necessary documentation under the National Environmental Policy Act (NEPA). *Id.* § 50.5(c)(1)–(6). *See generally* 18 C.F.R. pt. 380 (regulations implementing NEPA). The notification is issued upon a determination that the pre-filing request is adequate. 18 C.F.R. § 50.5(d)(1). The notification designates a consultant to prepare the environmental documentation for the facilities. *Id.* § 50.3(d)(1)(i).

<sup>157</sup> 18 C.F.R. § 50.5(e).

<sup>158</sup> 18 C.F.R. § 50.5(e)(3), (8) (2011).

<sup>159</sup> *Id.* § 50.5(f).

<sup>160</sup> 18 C.F.R. § 50.6.

<sup>161</sup> *Id.* § 50.7. The exhibits include: maps, an environmental report, engineering data, system analysis data, a statement of cost, and a statement of construction, operation, and management. *Id.* § 50.7(e)–(j). The engineering data include the location, length, and width of rights of way for the proposed transmission facilities. *Id.* § 50.7(g)(3).

In a permit for construction of interstate electric transmission facilities within a National Corridor, FERC may impose specific conditions on the permittee.<sup>162</sup> In addition, all facilities must be constructed, operated, and maintained in accordance with the general codes and standards applicable to transmission facilities.<sup>163</sup> FERC must authorize the permittee to commence construction of the facilities, and construction must be completed by the deadline specified in the permit.<sup>164</sup>

### C. *Judicial Review of Order No. 689*

Order No. 689 both established procedural regulations and broadly interpreted section 216 of the Federal Power Act. Judicial review of the order, however, reduced the circumstances in which FERC may issue permits. Under section 216, FERC may authorize the construction of electric transmission facilities within a National Corridor if, *inter alia*, the state in which the facilities would be located has “withheld approval” for the facilities for more than one year.<sup>165</sup> In Order No. 689, FERC adopted a broad interpretation of the statute in this regard: “[W]e believe that a reasonable interpretation of the language in the context of the legislation supports a finding that withholding approval includes denial of an application.”<sup>166</sup> Under this interpretation, FERC may authorize the construction of electric transmission facilities if the state fails to issue a decision on an application to construct those facilities within one year *or* if the state affirmatively denies the application.<sup>167</sup>

<sup>162</sup> *Id.* § 50.11(a).

<sup>163</sup> *Id.* § 50.11(c).

<sup>164</sup> 18 C.F.R. § 50.11(d)–(e) (2011).

<sup>165</sup> Federal Power Act, 16 U.S.C. § 824p(b)(1)(C)(i) (2006).

<sup>166</sup> Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,444 ¶ 26 (Dec. 1, 2006) (codified at 18 C.F.R. pts. 50, 380).

<sup>167</sup> *Id.* In June 2006, FERC proposed regulations to implement section 216. See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors, 71 Fed. Reg. 36,258 (proposed June 16, 2006). In comments on the proposed regulations, several parties to the rulemaking proceeding requested a clarification of FERC jurisdiction under the Federal Power Act. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. at 69,444 ¶¶ 24–25. In response to those requests, FERC observed that “[t]he statute does not explicitly define the full range of State actions that are deemed to be withholding approval.” *Id.* at 69,444 ¶ 26. Thus FERC concluded that “withholding approval includes denial of an application.” *Id.* FERC asserted that this conclusion was supported by (i) a comparison of the language of section 216(b)(1)(C)(i) to the language of section 203(a)(5) of the Federal Power Act; (ii) a comparison of the language of section 216(b)(1)(C)(i) to the language of section 216(b)(1)(C)(ii); (iii) the legislative history of the statute; and (iv) the plain definition of “withhold.” *Id.* at 69,444–45 ¶¶ 27–30. “Therefore, the Commission finds that when a State

On rehearing of Order No. 689, FERC upheld this broad interpretation of the statute:<sup>168</sup> “The Commission continues to believe that a reasonable interpretation of the language of the legislation supports a finding that a state’s withholding approval includes a state’s denial of an application.”<sup>169</sup> FERC observed that the interpretation would advance the goals of the statute, and was consistent with a Congressional Budget Office interpretation and EPCRA amendments to section 203 of the Federal Power Act.<sup>170</sup> FERC also rejected the argument that the statute should be interpreted with a “presumption against preemption” of state law.<sup>171</sup>

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fails to act or rejects an application, it has withheld approval and the proposed facility would be subject to the Commission’s jurisdiction.” *Id.* at 69,445 ¶ 31. FERC emphasized, however, that its *consideration* of proposed electric transmission facilities within a National Corridor is no guarantee that it has jurisdiction or will authorize construction of those facilities, even if it does determine that it has jurisdiction. *Id.* at 69,445 ¶ 32.

<sup>168</sup> Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 119 Fed. Energy Reg. Comm’n Rep. (CCH) ¶ 61,154, 3–9 (May 17, 2007) (order denying reh’g). Indeed, “[t]he primary focus of the requests for rehearing is the scope of the Commission’s jurisdiction under new Federal Power Act (FPA) section 216(b)(1)(C)(i).” *Id.* at 1–2.

<sup>169</sup> *Id.* at 4 (citation omitted). FERC rejected the argument that the phrase “withheld approval” must be interpreted within the context of the statute. *Id.* *But see* Wachovia Bank v. United States, 455 F.3d 1261, 1268 (11th Cir. 2006) (“[W]e do not read words or strings of them in isolation. We read them in context.”). FERC concluded that, unless otherwise defined, a word will be given its common meaning. 119 Fed. Energy Reg. Comm’n Rep. (CCH) ¶ 61,154 at 4; *see also* Perrin v. United States, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

<sup>170</sup> H.R. REP. NO. 215, pt. 1 109-215, at 227 (2005) (“Section 1221 would authorize FERC to issue construction permits for electric transmission facilities in ‘interstate congestion areas’ when a state has not acted on or has rejected a permit request.”); *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 119 Fed. Energy Reg. Comm’n Rep. (CCH) at 6–8. Section 203 specifies the consequences if FERC “does not act” on an application for FERC approval of a proposed acquisition of facilities or assets subject to FERC jurisdiction. 16 U.S.C. § 824b(a)(5). “[T]he Commission has an obligation to construe the legislation as a whole in such a manner as to give every word some operative effect. Interpreting the phrase ‘withheld approval’ to mean the same as ‘does not act’ would fail to do this.” *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 119 Fed. Energy Reg. Comm’n Rep. (CCH) at 7.

<sup>171</sup> *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 119 Fed. Energy Reg. Comm’n Rep. (CCH) at 8–9. The “presumption against preemption” provides that a state law, which reflects traditional state jurisdiction, should not be preempted by a federal law “unless that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see* *Metronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). FERC rejected the presumption: “[T]raditionally, authority to site transmission facilities was left in the hands of the states. However, in enacting section 216, Congress affirmatively granted the Commission jurisdiction to site electric transmission facilities in a national corridor . . . clearly preempting the exclusive jurisdiction formerly

The Piedmont Environmental Council (“Piedmont”) filed a petition for review of Order No. 689 with the U.S. Court of Appeals for the Fourth Circuit in 2006.<sup>172</sup> Several additional petitions for review followed and were consolidated.<sup>173</sup> In February 2009, the Fourth Circuit reversed Order No. 689 in part and remanded the Order back to FERC for further consideration.<sup>174</sup>

In its decision, the Fourth Circuit rejected FERC’s broad interpretation of the statute under which FERC could authorize the construction of electric transmission facilities if a state denied an application to construct those facilities: “We conclude that FERC’s interpretation is contrary to the plain meaning of the statute. Simply put, the statute does not give FERC permitting authority when a state has affirmatively denied a permit application within the one-year deadline.”<sup>175</sup> The decision thus reverses Order No. 689 in this regard.<sup>176</sup>

Consistent with Supreme Court precedent, the Fourth Circuit analyzed section 216 for congressional intent.<sup>177</sup> The intent of section 216(b)(1)(C)(i), the court concluded, in isolation and in the context of the statute in general, is clear: “Indeed, if Congress had intended to take the monumental step of preempting state jurisdiction *every time* a

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held by the states.” *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 119 Fed. Energy Reg. Comm’n Rep. (CCH) at 9.

<sup>172</sup> *Piedmont Envtl. Council v. Fed. Energy Regulatory Comm’n*, 558 F.3d 304, 311 (4th Cir. 2009).

<sup>173</sup> *See id.* The Public Service Commission of the State of New York and the Minnesota Public Utilities Commission intervened in support of Piedmont. *Id.* at 304. Intervenors for FERC included: Allegheny Power, the American Public Power Association, the American Wind Energy Association, the Edison Electric Institute, the National Rural Electric Cooperative Association, PPL Electric Utilities Corporation, San Diego Gas & Electric Company, and Southern California Edison Company. *Id.* Arizona, California, Connecticut, Delaware, Illinois, Iowa, Kentucky, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, West Virginia, and Wyoming filed an amici curiae brief in support of Piedmont. *Id.*

<sup>174</sup> *Id.* at 320. The decision reverses in part, affirms in part, vacates in part, dismisses in part, and remands. *Id.*

<sup>175</sup> *Id.* at 313.

<sup>176</sup> *Id.* at 315. In addition, the decision affirmed the FERC determination it was not required to prepare an environmental assessment or environmental impact statement in connection with Order No. 689. *Id.* at 317. The decision vacates Order No. 689’s amendments to FERC’s NEPA regulations to implement section 216 of the Federal Power Act. *Id.* at 319. *See generally* 18 C.F.R. pt. 380 (2011) (regulations implementing NEPA). The Fourth Circuit concluded that FERC had failed to consult with the Council on Environmental Quality (CEQ) before it amended its NEPA regulations and thus had violated CEQ regulations. *Piedmont*, 558 F.3d at 318–19; *see, e.g.*, 40 C.F.R. § 1507.3 (2011). Finally, the decision dismisses without prejudice a challenge to the substantive content of the vacated NEPA regulations. *Piedmont*, 558 F.3d at 319.

<sup>177</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“If the intent of Congress is clear, that is the end of the matter.”).

state commission denies a permit in a national interest corridor, it would surely have said so directly.”<sup>178</sup> Given the clear congressional intent behind the statute, there was no need for additional review.<sup>179</sup>

Although section 216 preempts state law in limited circumstances and authorizes FERC to permit and site interstate transmission lines, the decision of the Fourth Circuit constrained FERC’s authority to permit and site interstate electric power facilities.<sup>180</sup> The Fourth Circuit thus imposed a significant setback to federal efforts “to keep local disputes from causing national problems.”<sup>181</sup> FERC would later observe that “[t]he court’s ruling is a significant constraint on the Commission’s already-limited ability to approve appropriate projects to transmit energy in interstate commerce.”<sup>182</sup>

#### D. *Mid-Atlantic National Corridor and Judicial Review*

Under section 216, before FERC may authorize the construction of any transmission lines, the DOE must designate National Corridors.<sup>183</sup> The DOE designated a National Corridor in the Mid-Atlantic region in October 2007, but in February 2011, the U.S. Court of Appeals for the Ninth Circuit vacated and remanded the designation.<sup>184</sup>

In October 2007, the DOE, following an extensive and exhaustive twenty-month process that included a notice of inquiry,<sup>185</sup> a congestion report,<sup>186</sup> and a draft report and order,<sup>187</sup> issued a final report and or-

<sup>178</sup> *Piedmont*, 558 F.3d at 314.

<sup>179</sup> *Id.* at 317. The decision of the Fourth Circuit was accompanied by a dissent, which argued that FERC’s interpretation of section 216(b)(1)(C)(i) “makes sense in the context in which the language is used and in the context of the statute as a whole.” *Id.* at 326 (Traxler, J., dissenting).

<sup>180</sup> *See id.* at 313.

<sup>181</sup> Remarks on Signing the Energy Policy Act of 2005 in Albuquerque, New Mexico, *supra* note 136.

<sup>182</sup> *Transmission Infrastructure Hearing*, *supra* note 12, at 11 (prepared statement of Jon Wellinghoff, Acting Chairman, FERC).

<sup>183</sup> 16 U.S.C. § 824p(b) (2006).

<sup>184</sup> National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992, 56,992 (Oct. 5, 2007); *Cal. Wilderness Coal., v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1107 (9th Cir. 2011).

<sup>185</sup> Considerations for Transmission Congestion Study and Designation of National Interest Electric Transmission Corridors, 71 Fed. Reg. 5660, 5660 (Feb. 2, 2006). The Notice of Inquiry solicited public views on the development of criteria for the designation of National Corridors. *Id.*

<sup>186</sup> National Electric Transmission Congestion Study, 71 Fed. Reg. 45,047 (Aug. 8, 2006); U.S. DEP’T OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY (2006), available at [http://nietc.anl.gov/documents/docs/Congestion\\_Study\\_2006-9MB.pdf](http://nietc.anl.gov/documents/docs/Congestion_Study_2006-9MB.pdf).



der that designated two National Corridors: the Mid-Atlantic Area National Interest Electric Transmission Corridor ("Mid-Atlantic Corridor") and the Southwest Area National Interest Electric Transmission Corridor ("Southwest Corridor").<sup>188</sup> Under the order, the designations would remain in effect until October 2019.<sup>189</sup>

The draft report and order clarified, in particular, that a National Corridor designation would not itself preempt state jurisdiction to permit and site interstate transmission lines.<sup>190</sup> The final report and order observed that, although section 216 authorizes FERC to permit and site transmission lines in limited circumstances, Congress could have preempted all state jurisdiction in this regard.<sup>191</sup> Instead, it fashioned a federal statute that preserves state jurisdiction to permit and site transmission lines in most circumstances.<sup>192</sup>

In March 2008, the DOE denied rehearing of the final report and order and the two National Corridor designations.<sup>193</sup> Thereafter, states, environmental groups, and other plaintiffs filed numerous appeals of the DOE orders in the U.S. Courts of Appeals for the Ninth Circuit,<sup>194</sup> the D.C. Circuit,<sup>195</sup> the Second Circuit,<sup>196</sup> and the Fourth Circuit.<sup>197</sup>

<sup>187</sup> Office of Electricity Delivery and Energy Reliability; Draft National Interest Electric Transmission Corridor Designations, 72 Fed. Reg. 25,838 (May 7, 2007).

<sup>188</sup> National Electric Transmission Congestion Report, 72 Fed. Reg. at 56,992.

<sup>189</sup> *Id.*

<sup>190</sup> Office of Electricity Delivery and Energy Reliability; Draft National Interest Electric Transmission Corridor Designations, 72 Fed. Reg. at 25,839.

<sup>191</sup> National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992, 56,998 (Oct. 5, 2007). "[G]iven the inherently interstate nature of transmission, Congress could have completely preempted State siting of interstate transmission facilities, as it did almost 70 years ago with regard to siting of interstate natural gas pipelines." *Id.* (citation omitted).

<sup>192</sup> National Electric Transmission Congestion Report, 72 Fed. Reg. at 57,014 n.103 ("[W]hereas Congress could have completely preempted State siting of interstate transmission facilities, allowing for the potential exercise of limited Federal preemption in accordance with FPA section 216(a) does not intrude on any State rights or prerogatives.").

<sup>193</sup> National Electric Transmission Congestion Report, 73 Fed. Reg. 12,959, 12,959 (Mar. 11, 2008). The DOE initially granted a rehearing "for the limited purpose of further consideration." *Id.* at 12,960. See Chris L. Jenkins, *Energy Department to Rethink Its Ruling on Power Lines*, WASH. POST, Dec. 5, 2007, at A9.

<sup>194</sup> *Ariz. Corp. Comm'n v. U.S. Dep't of Energy*, No. 08-71908 (9th Cir. filed May 7, 2008); *Imperial Irrigation Dist. v. U.S. Dep't of Energy*, No. 08-71884 (9th Cir. filed May 5, 2008); *Pennsylvania v. U.S. Dep't of Energy*, No. 08-71870 (9th Cir. filed May 5, 2008); *Pub. Util. Comm'n v. U.S. Dep't of Energy*, No. 08-71872 (9th Cir. filed May 5, 2008); *Piedmont Envtl. Council v. U.S. Dep't of Energy*, No. 08-71845 (9th Cir. filed May 2, 2008); *Wilderness Soc'y v. U.S. Dep't of Energy*, No. 08-71074 (9th Cir. filed Mar. 14, 2008).

<sup>195</sup> *Wilderness Soc'y v. Dep't of Energy*, No. 08-01177 (D.C. Cir. filed May 5, 2008); *N.J. Bd. of Pub. Util. v. Dep't of Energy*, No. 08-01173 (D.C. Cir. filed May 2, 2008); *Toll Bros., Inc. v. U.S. Dep't of Energy*, No. 08-01164 (D.C. Cir. filed Apr. 24, 2008); *Cmtys. Against Reg'l Interconnect v. U.S. Dep't of Energy*, No. 08-01153 (D.C. Cir. filed Apr. 15, 2008).

Similar plaintiffs also filed lawsuits against the DOE to reverse the designation of the Mid-Atlantic Corridor.<sup>198</sup>

Thirteen appeals from four circuit courts were consolidated in the Ninth Circuit in *California Wilderness Coalition v. U.S. Department of Energy*.<sup>199</sup> In February 2011, the court vacated and remanded the designations of the Mid-Atlantic Corridor and the Southwest Corridor.<sup>200</sup> The Ninth Circuit found that the DOE violated section 216(a)(1) by failing to consult with affected states during preparation of the congestion report.<sup>201</sup> The court also found that the DOE violated section 102 of the National Environmental Policy Act (NEPA) by failing to perform an environmental review before designating the Mid-Atlantic and Southwest Corridors.<sup>202</sup>

The DOE had argued that it consulted with affected states when it invited public comment while it prepared the congestion report.<sup>203</sup> Given the prospect that section 216 could preempt traditional state jurisdiction to permit and site transmission lines in limited circumstances, the court held that the DOE needed to do more:

<sup>196</sup> *New York v. U.S. Dep't of Energy*, No. 08-02136 (2d Cir. filed May 9, 2008); *New York v. U.S. Dep't of Energy*, No. 08-01283 (2d Cir. filed Mar. 17, 2008); *Pa. Pub. Util. Comm'n v. U.S. Dep't of Energy*, No. 08-01216 (2d Cir. filed Mar. 14, 2008).

<sup>197</sup> *Virginia v. U.S. Dep't of Energy*, No. 08-01341 (4th Cir. filed Mar. 24, 2008).

<sup>198</sup> *Nat'l Wildlife Fed'n v. U.S. Dep't of Energy*, No. 1:08-cv-00091 (M.D. Pa. filed Jan. 14, 2008); *Piedmont Env'tl. Council v. U.S. Dep't of Energy*, No. 1:08-cv-00093 (M.D. Pa. filed Jan. 14, 2008); *Pa. Pub. Util. Comm'n v. Bodman*, No. 1:07-cv-02002 (M.D. Pa. filed Nov. 1, 2007). In February 2008, the three lawsuits were consolidated by the Middle District of Pennsylvania and dismissed for lack of jurisdiction in August 2008. *Pa. Pub. Util. Comm'n v. Bodman*, Nos. 1:07-cv-02002, 1:08-cv-00091, 1:08-cv-00093 (M.D. Pa. consolidated Feb. 7, 2008, dismissed Aug. 21, 2008). Parties brought appeals of the dismissal to the U.S. Court of Appeals for the Third Circuit, which consolidated them. *Pa. Pub. Util. Comm'n v. Bodman*, No. 08-03982 (3d Cir. filed Sept. 30, 2008, consolidated Oct. 28, 2008). The Third Circuit dismissed the consolidated appeal in May 2011. *Pa. Pub. Util. Comm'n v. Bodman*, No. 08-03982 (3d Cir. dismissed May 24, 2011).

<sup>199</sup> 631 F.3d at 1083 (consolidating *New York*, No. 08-02136; *Ariz. Corp. Comm'n*, No. 08-71908; *Imperial Irrigation Dist.*, No. 08-71884; *Pennsylvania*, No. 08-71870; *Pub. Util. Comm'n*, No. 08-71872; *N.J. Bd. of Pub. Utils.*, No. 08-01173; *Piedmont*, No. 08-71845; *Toll Bros., Inc.*, No. 08-01164; *Cmtys. Against Reg'l Interconnect*, No. 08-01153; *Virginia*, No. 08-01341; *New York*, No. 08-01283; *Pa. Pub. Util. Comm'n*, No. 08-01216; *Wilderness Soc'y*, No. 08-71074).

<sup>200</sup> *Id.* at 1107.

<sup>201</sup> *Id.*; see 16 U.S.C. § 824p(a)(1) (2006).

<sup>202</sup> *Cal. Wilderness Coal.*, 631 F.3d at 1106; see National Environmental Policy Act of 1969 § 102(2)(c), 42 U.S.C. § 4332(2)(C).

<sup>203</sup> *Cal. Wilderness Coal.*, 631 F.3d at 1085–86. The court reasoned, however, that the “DOE’s interpretation of ‘consult’ to mean no more than notice-and-comment would render part of the statute superfluous.” *Id.* at 1087; see also *Knight v. Comm’r*, 552 U.S. 181, 190 (2008); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

Congress sought to give the federal government a greater role in the development of transmission lines and to circumscribe somewhat the States' traditional authority over the placement and construction of power lines. In recognition of this impact on the States' traditional authority, Congress intended that affected States would participate in a study that might ultimately result in some limitation of their traditional powers. Indeed, the Supreme Court has been sensitive to these concerns.<sup>204</sup>

The court thus held that the failure to sufficiently consult with states was not harmless error, and required that the congestion report be vacated and remanded.<sup>205</sup>

The DOE also argued that NEPA did not require environmental review of the National Corridor designations.<sup>206</sup> Section 102 of NEPA requires federal agencies to prepare environmental impact statements (EISs) of "major Federal actions significantly affecting the quality of the human environment."<sup>207</sup> The DOE first argued that, because the designations were not "major" federal actions, it was not required to perform environmental reviews.<sup>208</sup> Additionally, the DOE argued that the designations had no significant environmental impacts and environmental reviews of specific transmission projects should fulfill the NEPA requirement.<sup>209</sup>

The Court rejected those arguments. It determined, for example, that the designations constituted "major" federal actions because the Mid-Atlantic Corridor and the Southwest Corridor "cover over a [sic] 100 million acres in ten States. Moreover, they create new federal rights, including the power of eminent domain, that are intended to, and do, *curtail rights traditionally held by the states and local governments.*"<sup>210</sup> The DOE would need to conduct an EIS before designating National Corridors.<sup>211</sup>

Section 216 of the Federal Power Act directs the DOE to perform a triennial nationwide assessment of electric power transmission con-

<sup>204</sup> *Cal. Wilderness Coal.*, 631 F.3d at 1087; see *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001).

<sup>205</sup> *Cal. Wilderness Coal.*, 631 F.3d at 1087. "The failure to consult was not some technical error, but resulted in a decisionmaking process that was contrary to that mandated by Congress and one that deprived DOE of timely substantive information." *Id.* at 1095.

<sup>206</sup> *Id.* at 1098.

<sup>207</sup> National Environmental Policy Act § 102(2)(c).

<sup>208</sup> *Cal. Wilderness Coal.*, 631 F.3d at 1099.

<sup>209</sup> *Id.* at 1098.

<sup>210</sup> *Id.* at 1101.

<sup>211</sup> *Id.* at 1105.

gestion.<sup>212</sup> While the Ninth Circuit adjudicated *California Wilderness Coalition*, the DOE completed its second congestion assessment in December 2009.<sup>213</sup> The assessment was conducted in accordance with the EAct and section 409 of the American Recovery and Reinvestment Act of 2009, which required the assessment to include an analysis of renewable resources that could be developed with adequate transmission.<sup>214</sup>

The second DOE congestion report concluded, *inter alia*, that the Mid-Atlantic region continued to exhibit significant transmission congestion.<sup>215</sup> On the basis of the congestion report, the DOE identified regions of concern; however, the DOE designated no new National Corridors.<sup>216</sup> In November 2011, the DOE initiated its third nationwide assessment of electric power transmission congestion.<sup>217</sup>

With the designation of the Mid-Atlantic and Southwest Corridors on remand, FERC is unable to exercise its limited jurisdiction under section 216 to permit and site interstate transmission lines.<sup>218</sup> Following the Fourth Circuit's decision regarding Order No. 689, the Ninth Circuit decision is the second significant judicial setback for the statute.<sup>219</sup> Seven years after its enactment, FERC has not invoked the statute to preempt state regulation of transmission lines.<sup>220</sup> The congressional experiment to ensure that traditional state jurisdiction to permit and

<sup>212</sup> 16 U.S.C. § 824p(a)(1) (2006).

<sup>213</sup> U.S. DEP'T OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY, at vii (2009), available at [http://congestion09.anl.gov/documents/docs/congestion\\_study\\_2009.pdf](http://congestion09.anl.gov/documents/docs/congestion_study_2009.pdf). The DOE initiated its second assessment in June 2008. DOE Electric Transmission Congestion Study, 73 Fed. Reg. 31,846, 31,846 (June 4, 2008).

<sup>214</sup> 2009 CONGESTION STUDY, *supra* note 213; see American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 409, 123 Stat. 115, 146 (to be codified in scattered sections of 6, 19, 26, 42, and 47 U.S.C.); 16 U.S.C. § 824p(a)(1).

<sup>215</sup> 2009 CONGESTION STUDY, *supra* note 213, at x. "[L]ittle new transmission has been built in the region in the past three years, although many new backbone and expansion projects are nearing construction; therefore it is likely to be several years before current congestion levels ease." *Id.*

<sup>216</sup> See DOE National Electric Transmission Congestion Study, 75 Fed. Reg. 22,770 (Apr. 30, 2010).

<sup>217</sup> DOE Plan for Conduct of 2012 Electric Transmission Congestion Study, 76 Fed. Reg. 70,122, (Nov. 10, 2011). The DOE intends to issue a study draft in 2013. *2012 National Electric Transmission Congestion Study*, DEP'T OF ENERGY, <http://energy.gov/oe/services/electricity-policy-coordination-and-implementation/transmission-planning/2012-national> (last visited Jan. 30, 2013).

<sup>218</sup> 16 U.S.C. § 824p (2006).

<sup>219</sup> See *supra* notes 165–182 and accompanying text (discussing the Fourth Circuit's decision rejecting FERC's expansive interpretation of "withheld approval for more than 1 year"); *supra* notes 183–218 and accompanying text (discussing the Ninth Circuit's decision rejecting FERC's designation of the Mid-Atlantic and Southwest Corridors).

<sup>220</sup> ADAM VANN & JAMES V. DEBERGH, CONG. RESEARCH SERV., R40657, THE FEDERAL GOVERNMENT'S ROLE IN ELECTRIC TRANSMISSION FACILITY SITING 10 (2011).

site transmission facilities does not stymie the development of interstate transmission lines appears to have failed.

### E. Congressional Review in the 110th and 111th Congresses

In addition to experiencing judicial setbacks, members of Congress have criticized the reach of the experiment to preempt traditional state jurisdiction over the construction of transmission lines. Soon after the EAct's enactment, states' rights advocates from both parties rallied to oppose the statute.<sup>221</sup> In the 110th Congress, legislators in both chambers introduced several bills to amend or repeal the statute.<sup>222</sup>

In April 2007, one month before the DOE issued its draft National Corridor designations, the Subcommittee on Domestic Policy of the House Committee on Oversight and Government Reform ("House Subcommittee") held a congressional hearing on DOE implementation of the statute and on the imminent designation of National Corridors.<sup>223</sup> The hearing provided a forum for critics who believed that section 216 would undermine states' rights.<sup>224</sup>

In opening remarks, House Subcommittee Chairman Dennis J. Kucinich (D-Ohio) and Committee Ranking Member Tom Davis (R-Va.) criticized the statute. Kucinich observed that "energy companies have special rights to bypass a state and seek permits for the project directly from [FERC]."<sup>225</sup> Davis referred to the "flawed decision to grant federal authorities and companies the power to circumvent states' authority and regulatory decisions."<sup>226</sup>

<sup>221</sup> See *infra* notes 222–256 and accompanying text.

<sup>222</sup> See, e.g., S. 1972, 110th Cong. (2007) (amending section 216 of the Federal Power Act); H.R. 3261, 110th Cong. (2007) (amending section 216 of the Federal Power Act); National Interest Electric Transmission Corridor Clarification Act, H.R. 829, 110th Cong. (2007) (amending section 216 of the Federal Power Act); Protecting Communities from Power Line Abuse Act, H.R. 810, 110th Cong. (2007) (amending section 216 of the Federal Power Act); H.R. 809, 110th Cong. (2007) (repealing section 216 of the Federal Power Act); see also Energy for Our Future Act, H.R. 1945, § 403, 110th Cong. (2007) ("Section 216 of the Federal Power Act is repealed.").

<sup>223</sup> *National Interest Electric Transmission Corridors: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 1, 3 (2007) [hereinafter *Hearing on National Corridors*].

<sup>224</sup> See *id.* at 2.

<sup>225</sup> *Id.* at 2 (statement of Rep. Dennis J. Kucinich, Chairman, H. Subcomm. on Domestic Policy).

<sup>226</sup> *Id.* at 12 (statement of Rep. Tom Davis, Ranking Member, H. Comm. on Oversight & Gov't Reform). In addition, Rep. Henry A. Waxman (D-Cal.) opined that "[r]ather than being respectful of the traditional Federal/State relationship, [section 216] trampled on it by creating a legal mechanism for energy companies to end run the States." *Id.* at 13 (statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov't Re-

The House Subcommittee heard from several state representatives, all of whom objected to federal preemption of state jurisdiction over transmission facilities. The Chairman of the Energy Committee of the New York State Assembly sought the repeal of section 216.<sup>227</sup> The Majority Leader of the Pennsylvania House of Representatives lambasted the statute.<sup>228</sup> The Chairman of the Pennsylvania Public Utility Commission was critical of federal intrusion into state and local prerogatives over transmission line construction.<sup>229</sup> Finally, the Chairman of the Maine Public Utilities Commission argued that the DOE had failed to consult with affected states in accordance with section 216.<sup>230</sup>

The House Subcommittee also heard from the Chief Executive Officer of Dominion Energy, who expressed support for section 216 of the Federal Power Act,<sup>231</sup> and the President of Piedmont, who criticized the DOE's implementation of the statute.<sup>232</sup> Finally, the House Sub-

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form). Representative Michael A. Arcuri similarly stated, "I don't understand how some of my colleagues, who speak so eloquently of their strong commitment to states' rights, would go so far as to expand federal jurisdiction in this area and allow companies to condemn the land of private landowners." *Id.* at 46 (statement of Rep. Michael A. Arcuri, D-N.Y.).

<sup>227</sup> *Id.* at 53, 58 (statement of Paul D. Tonko, Chairman, New York State Assembly Energy Committee).

<sup>228</sup> *Id.* at 5, 61 (statement of H. William DeWeese, Majority Leader, Pennsylvania House of Representatives). Representative DeWeese argued that section 216 "sacrifices the traditional power of states to adopt, administer, and manage land use policies and decisions." *Id.* at 67.

<sup>229</sup> *Hearing on National Corridors, supra* note 223, at 70–71 (statement of Wendell Holland, Chairman, Pennsylvania Public Utility Commission). "For the first time in our nation's history, Congress thrust two Federal agencies and the Federal District Courts into the transmission siting arena and has provided for federal administrative review of State siting proceedings." *Id.* at 70.

<sup>230</sup> *Id.* at 74–76 (statement of Kurt Adams, Chairman, Maine Public Utilities Commission). In addition, fifteen public interest organizations, in correspondence submitted for the record, objected that DOE had failed to consult with the states on the implementation of section 216, had failed to assess non-transmission alternatives, and had failed to prepare a programmatic EIS. *Id.* at 20–23. The organizations included: Alliance to Save Energy, American Council for an Energy Efficient Economy, Brandywine Conservancy, Civil War Preservation Trust, Coalition for Smarter Growth, Environmental Defense Fund, Natural Lands Trust, Natural Resources Defense Council, Pennsylvania Land Trust Association, Piedmont, Southern Environmental Law Center, Upper Delaware Preservation Coalition, Virginia Chapter of the Sierra Club, Western Pennsylvania Conservancy, and The Wilderness Society. *Id.* at 22–23. Finally, the Deputy General Counsel of the National Trust for Historic Preservation expressed concern that the implementation of the statute would exclude compliance with NEPA and with the National Historic Preservation Act. *Id.* at 80, 85 (statement of Elizabeth S. Merritt).

<sup>231</sup> *Id.* at 88, 93–94 (statement of Paul D. Koonce).

<sup>232</sup> *Id.* at 99–100 (statement of Christopher G. Miller). Piedmont argued that: (i) the implementation of the statute failed to protect state and federal designated resources; (ii) the DOE failed to prepare a programmatic EIS; (iii) the DOE failed to assess the impact of

committee heard from the Director of the DOE Office of Electricity Delivery and Energy Reliability, who provided a general overview of the DOE's implementation of section 216.<sup>233</sup>

Fifteen months after the House Subcommittee hearing, the Senate Committee on Energy and Natural Resources ("Senate Committee") held a similar hearing.<sup>234</sup> Like the House Subcommittee hearing, the Senate hearing provided a forum for critics of the statute and the designation of National Corridors.

Senator Robert P. Casey, Jr. (D-Pa.) appeared before the Senate Committee.<sup>235</sup> Casey complained that the DOE and FERC implementation of section 216 exceeded the focused and narrow scope of the statute.<sup>236</sup> This implementation would "displace the States and substitute the Federal Government as the ultimate authority responsible for siting, siting [sic] electric transmission lines."<sup>237</sup> FERC Chairman Joseph T. Kelliher asserted, however, that "the primary authority for siting transmission lines" is with individual states and that "federal transmission siting effectively supplements a state siting regime."<sup>238</sup>

The Senate Committee also heard from the DOE Assistant Secretary for Electricity Delivery and Energy Reliability, who discussed DOE implementation of section 216.<sup>239</sup> Marsha H. Smith, President of the

state-mandated demand-response programs on transmission congestion; and (iv) the DOE failed to consult with affected states. *See id.* at 101–06.

<sup>233</sup> *Id.* at 148–49 (statement of Kevin Kolevar). Kolevar discussed the DOE report on national electric transmission congestion and asserted that the DOE had prepared the report in consultation with affected states and the general public. *Id.* at 151.

<sup>234</sup> *Electrical Transmission Grid: Hearing Before the S. Comm. on Energy & Natural Resources*, 110th Cong. I (2008) [hereinafter *Hearing on Transmission Grid*]; *see also Renewable Electricity: Hearing Before the S. Comm. on Energy & Natural Resources*, 110th Cong. I (2008) (examining the challenges and regional solutions to the development of transmission for electric power from renewable resources).

<sup>235</sup> *Hearing on Transmission Grid*, *supra* note 234, at 5, 9 (statement of Sen. Robert P. Casey, Jr.).

<sup>236</sup> *Id.* at 5–6.

<sup>237</sup> *Id.* at 6–7. DOE implementation of the statute, in particular, was unacceptable and "conveyed a level of arrogance on the part of the federal government that undermines confidence in government." *Id.* at 9. For example, the DOE failed to consult with affected states in the preparation of the Congestion Report. *Id.* at 9–10.

<sup>238</sup> *Id.* at 15, 22 (statement of Joseph T. Kelliher).

<sup>239</sup> *Id.* at 26, 28–32 (statement of Kevin M. Kolevar). In particular, Kolevar explained the need for investment in transmission infrastructure, discussed the DOE process for the designation of National Corridors, and reported on DOE implementation of section 368 of the EPAct. *Id.* at 29, 30, 31. That statute requires the designation of "corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal land" in the contiguous eleven western states within two years, and the designation of similar corridors in the other thirty-nine states within four years. 42 U.S.C. § 15,926 (2006). Kolevar also discussed DOE implementation of section 216(h) of the Federal

National Association of Regulatory Utility Commissioners (NARUC), provided the NARUC and western states' perspectives on DOE implementation of the statute.<sup>240</sup> The Senate Committee heard further criticism of DOE and FERC implementation of section 216 from the Working group on Investment in Reliable and Economic Electric Systems (WIRES), an organization that promotes investment in the electric transmission system.<sup>241</sup> PJM Interconnection, LLC suggested several principles for federal and state officials,<sup>242</sup> while AEP Transmission (AEP) recommended enacting a statute similar to section 7 of the Natural Gas Act, which authorizes FERC to certify and site interstate natural gas pipelines.<sup>243</sup> The American Public Power Association (APPA), a trade association of state and municipal public utilities, however, endorsed DOE and FERC implementation of section 216.<sup>244</sup>

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Power Act. *Hearing on Transmission Grid*, *supra* note 234, at 31. The construction of transmission facilities—within or outside a National Corridor—could require approvals and environmental reviews from other federal agencies. *Id.* Section 216(h) provides that the DOE shall be responsible for the coordination of these approvals and reviews. 16 U.S.C. § 824p(h)(2) (2006). In August 2006, the DOE and eight other federal agencies signed a Memorandum of Understanding, committing to coordinate to satisfy their obligations under the EPAct. Memorandum of Understanding on Early Coordination of Federal Authorizations and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities, *supra* note 147. In September 2008, the DOE adopted interim regulations to implement section 216(h). Coordination of Federal Authorizations for Electric Transmission Facilities, 73 Fed. Reg. 54,456, 54,456 (Sept. 19, 2008). See 10 C.F.R. pt. 900 (2012). On the same date, the DOE proposed additional regulations to implement the statute. Coordination of Federal Authorizations for Electric Transmission Facilities 73 Fed. Reg. 54,461, 54,461 (Sept. 19, 2008).

<sup>240</sup> *Hearing on Transmission Grid*, *supra* note 234, at 34–36 (statement of Marsha H. Smith, Comm'r, Idaho Public Utilities Commission). In particular, Smith discussed the DOE's process for designating National Corridors, addressed cost allocation for transmission projects, and mentioned FERC implementation of section 219 of the Federal Power Act. *Id.* at 34, 38.

<sup>241</sup> *Id.* at 57, 60–61 (statement of James J. Hoecker, Counsel to WIRES). WIRES also discussed ten principles for the allocation of costs for transmission projects and emphasized the escalating cost of new transmission. *Id.* at 59, 61.

<sup>242</sup> *Id.* at 63–64 (statement of Terry Boston, President and Chief Executive Officer). Boston also outlined several objectives of transmission system enhancement and described several “tools” for this enhancement. *Id.* at 65–66, 67–68.

<sup>243</sup> *Id.* at 82, 85 (statement of Susan Tomasky, President). The AEP transmission system is a 39,000-mile network that reaches across eleven states. *Id.* at 82. In general, AEP called for: (i) the development of a nationwide extra-high voltage (EHV) transmission system; (ii) a transmission system that would integrate renewable sources of electric power into national power supplies; and (iii) amendments to the EPAct to promote a nationwide EHV transmission system. *Id.* at 83, 84–85. AEP likened the development of a nationwide EHV transmission system to the construction of the interstate highway system. *Id.* at 83.

<sup>244</sup> *Id.* at 71, 73 (statement of Colin Whitley, Director). The APPA represents over two thousand state and municipal public utilities that serve forty-five million Americans. *Id.* at



Following this assault in the 110th Congress against section 216 and against federal preemption of state jurisdiction to permit and site transmission facilities, members of the 111th Congress actually called for expanded federal jurisdiction to site interstate electric transmission lines.<sup>245</sup> For example, in March 2009, the Senate Committee on Energy and Natural Resources held a hearing on proposals to increase the role of FERC in siting transmission that would promote the development of renewable resources.<sup>246</sup> FERC itself testified that it could assume such a role “[b]ased on its decades of experience in siting natural gas pipelines and in siting hydropower projects.”<sup>247</sup> FERC contended that “a single federal agency having the responsibility and the authority to make siting decisions with regard to projects that affect the National interest is clearly the most efficient way to site major energy projects.”<sup>248</sup>

NARUC opposed proposals for expanded federal jurisdiction and argued that “[j]ust as States have a role in the siting of interstate highways, States need to continue having an active role in transmission decisions.”<sup>249</sup> In contrast, AEP faulted a “fragmented regulatory system” that discouraged investment in interstate transmission: “We believe that the best solution is to empower [FERC] to authorize interstate transmission projects.”<sup>250</sup> Further, AEP asserted that many state transmission

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71. The APPA also criticized regional transmission organizations for inattentiveness to transmission expansion and criticized FERC implementation of section 219. *Id.* at 73–76.

<sup>245</sup> See, e.g., Clean Renewable Energy and Economic Development Act, S. 539, 111th Cong. 1–4 (2009) (expanding federal transmission line siting jurisdiction in national renewable energy zones); American Clean Energy Leadership Act of 2009, S. 1462, 111th Cong. 1, 66–67 (2009) (replacing state transmission line siting jurisdiction with regional transmission line siting entities); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. 172 (expanding federal transmission line siting jurisdiction in western states).

<sup>246</sup> *Transmission Infrastructure Hearing*, *supra* note 12 (statement of Jon Wellingshoff, Acting Chairman, FERC).

<sup>247</sup> *Id.* at 11.

<sup>248</sup> *Id.* In addition to federal transmission siting jurisdiction, the development of renewable resources would require regional transmission planning and regional cost allocation for transmission facilities. *Id.* at 12.

<sup>249</sup> *Id.* at 16–17 (statement of Tony Clark, Comm’r, North Dakota Public Service Commission, Second Vice President, NARUC). “If Congress does anything on siting, it should affirm the Fourth Circuit decision by clarifying that if a State turns down a transmission line proposal for good reason and within a reasonable time frame[,], FERC should not be able to second guess the State.” *Id.* at 18.

<sup>250</sup> *Id.* at 43 (statement of Michael G. Morris, Chairman, President, and Chief Executive Officer). “FERC must have the authority to approve and site projects proposed by private companies . . . .” *Id.* at 45.

siting entities fail to address regional transmission needs, and may reject transmission projects that do not directly benefit their state.<sup>251</sup>

At the Senate hearing, Midwest Independent Transmission System Operator, Inc., a FERC-approved regional transmission organization, cautioned against transmission siting that excludes a role for the states.<sup>252</sup> The Energy Future Coalition, a non-partisan public policy group, did not endorse an expanded federal role in transmission siting *per se*, but recommended a “[c]onsolidated certification and siting authority to expedite transmission projects.”<sup>253</sup> Finally, the Large Public Power Council (LPPC), an association of municipal and state-owned utilities, sought an enhanced federal role in transmission siting because “[s]tate authorities are generally restricted to considering the best interests of their jurisdictions in isolation when deciding whether to issue a [CPCN].”<sup>254</sup> The LPPC’s Chief Executive Officer argued that this limited consideration “leav[es] any state in a proposed interstate transmission pathway in a position to exercise an effective veto.”<sup>255</sup> The enhanced federal role, however, should “be respectful, to the maximum extent feasible, of state and local concerns regarding siting options and land use.”<sup>256</sup>

### III. MID-ATLANTIC REGIONAL TRANSMISSION EXPANSION PLAN

Regardless of who permits and sites transmission lines—the Federal Energy Regulatory Commission (FERC) or state public service commissions—transmission must be built to meet increased demand for electric power and capitalize on the recent introduction of competition into wholesale bulk power markets.<sup>257</sup> Transmission lines must be built to bring wind- and solar-generated electric power from remote

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<sup>251</sup> *Id.* at 45; *see also id.* at 47, 51 (statement of Joseph L. Welch, Chairman, President, and Chief Executive Officer, ITC Holdings Corporation) (“[S]iting is regulated by individual states that naturally are focused on benefits to their respective state, not the region or the nation. For this reason, the building of significant regional transmission lines is virtually impossible.”).

<sup>252</sup> *Transmission Infrastructure Hearing*, *supra* note 12, at 55, 57 (statement of Graham Edwards, Acting President and Chief Executive Officer) (“[S]tates have important knowledge that will be valuable to the siting process.”).

<sup>253</sup> *Id.* at 60, 61 (statement of Reid Detchon, Executive Director).

<sup>254</sup> *Id.* at 65, 66 (statement of James A. Dickenson, Managing Director and Chief Executive Officer).

<sup>255</sup> *Id.* at 66.

<sup>256</sup> *Id.* at 67.

<sup>257</sup> FED. ENERGY REGULATORY COMM’N, PERFORMANCE METRICS FOR INDEPENDENT SYSTEM OPERATORS AND REGIONAL TRANSMISSION ORGANIZATIONS 7–8 (2011), *available at* <http://www.ferc.gov/industries/electric/indus-act/rto/metrics/report-to-congress.pdf>.

locations that offer the greatest potential for development.<sup>258</sup> Planning for the expansion of the transmission system in much of the United States takes place at the regional level by FERC-approved regional transmission organizations.<sup>259</sup> Thus, in the Mid-Atlantic region, transmission expansion is planned and supervised by PJM Interconnection, LLC (PJM), which also operates the transmission system and manages bulk power markets.<sup>260</sup>

To plan for the enhancement and expansion of transmission facilities in the Mid-Atlantic region, PJM develops an annual Regional Transmission Expansion Plan (RTEP).<sup>261</sup> Since 1997, PJM has employed a process that utilizes five-year and fifteen-year windows to develop each annual plan.<sup>262</sup> Within those windows, PJM analyzes anticipated increases in demand for electric power,<sup>263</sup> requests to interconnect new power plants to the transmission system,<sup>264</sup> and anticipated retirements of old power plants.<sup>265</sup> PJM also assesses transmission projects proposed by the member public utilities that own the transmission facilities that PJM operates.<sup>266</sup>

The RTEPs address the need for transmission not just to ensure reliable electric power service but also to reduce transmission congestion, which increases the overall cost of electric power.<sup>267</sup> As part of the RTEP process, PJM performs probable risk assessments to estimate the

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<sup>258</sup> *Transmission Infrastructure Hearing*, *supra* note 12 (statement of Jon Wellinghoff, Acting Chairman, FERC).

<sup>259</sup> See FED. ENERGY REGULATORY COMM'N, *supra* note 257, at 4, 6 (listing the six FERC-approved regional transmission organizations: California Independent System Operator Corporation; ISO New England Inc., Midwest Independent Transmission System Operator, Inc., New York Independent System Operator, Inc., PJM Interconnection, LLC, and Southwest Power Pool, Inc.).

<sup>260</sup> PJM INTERCONNECTION, L.L.C., PJM 2006 REGIONAL TRANSMISSION EXPANSION PLAN 7, 27 (2007) [hereinafter 2006 RTEP], available at <http://www.pjm.com/documents/reports/rtep-documents/2006-rtep.aspx>.

<sup>261</sup> *Id.* at 7, 15. "As part of its ongoing responsibilities as a regional transmission organization, PJM annually prepares a plan to address the needs of a region that encompasses more than 164,000 square miles in 13 states and the District of Columbia." *Id.* at 7. The PJM operating agreement requires that the board approve the RTEP in accordance with Schedule 6 of the company's operating agreement. Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. 59, 444-70 (Aug. 28, 2012), available at <http://www.pjm.com/~media/documents/agreements/oa.ashx>.

<sup>262</sup> 2006 RTEP, *supra* note 260, at 15.

<sup>263</sup> *Id.* at 17-21. In 2006, 1270 electric power sources within PJM could generate 165,000 megawatts of electric power. *Id.* at 21.

<sup>264</sup> *Id.* at 22-27.

<sup>265</sup> *Id.* at 28.

<sup>266</sup> See, e.g., *id.* at 140.

<sup>267</sup> *Id.* at 34.

potential failure of aging transmission facilities.<sup>268</sup> Finally, PJM plans for transmission enhancement and expansion in cooperation with neighboring regional transmission organizations.<sup>269</sup> For example, PJM has concluded a Joint Operating Agreement with the Midwest Independent Transmission System Operator, Inc. that provides for joint transmission planning.<sup>270</sup>

#### A. 2006

In June 2006, PJM approved 1.3 billion dollars in construction for the Mid-Atlantic transmission system.<sup>271</sup> The approval was reflected in the 2006 RTEP, which “identifie[d] transmission system upgrades and enhancements to preserve the reliability of the electricity grid, the very foundation for thriving competitive wholesale energy markets.”<sup>272</sup> The 2006 RTEP also included several significant system improvements to ensure reliable transmission of electric power throughout the PJM region.<sup>273</sup>

In particular, PJM approved the construction of the Trans-Allegheny Interstate Line (TrAIL), a 500 kilovolt (kV) transmission line from the 502 Junction substation in southwestern Pennsylvania to the Mt. Storm substation in eastern West Virginia, to the Meadowbrook substation in Northern Virginia, and to the Loudoun substation in Northern Virginia.<sup>274</sup> TrAIL also would include a segment from the 502 Junction substation to the Prexy substation in Pennsylvania.<sup>275</sup>

The 208-mile TrAIL would be built by Allegheny Energy, Inc. (“Allegheny”) and Dominion Virginia Power (“Dominion”).<sup>276</sup> Allegheny

<sup>268</sup> 2006 RTEP, *supra* note 260, at 34.

<sup>269</sup> *Id.* at 37.

<sup>270</sup> *Id.*; Joint Operating Agreement Between the Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, L.L.C. 62, 66–72 (filed with FERC on Dec. 19, 2008), *available at* <http://www.pjm.com/~media/committees-groups/task-forces/rpptf/20121101/20121101-item-04h-pjm-miso-joa-article-ix.ashx>.

<sup>271</sup> *See* News Release, PJM Interconnection, L.L.C., PJM Authorizes Construction of \$1.3 Billion in Transmission Upgrades (June 23, 2006), *available at* <http://www.depsc.delaware.gov/electric/irp/rfpcommmdpaatt.pdf>.

<sup>272</sup> *See* 2006 RTEP, *supra* note 260.

<sup>273</sup> *See id.* at 8–9.

<sup>274</sup> *See id.* at 8–9, 75, 92–93, 102, 140, 149.

<sup>275</sup> *Id.* at 95.

<sup>276</sup> EDISON ELEC. INST., TRANSMISSION PROJECTS: AT A GLANCE 4 (2008), *available at* [http://www.eei.org/ourissues/ElectricityTransmission/Documents/Trans\\_Project\\_Lowres.pdf](http://www.eei.org/ourissues/ElectricityTransmission/Documents/Trans_Project_Lowres.pdf). Allegheny is the corporate parent of Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company, which distribute electric power in Maryland, Pennsylvania, Virginia, and West Virginia. Allegheny Energy, Inc., Annual Report (Form 10-K) 5, 7 (Feb. 27, 2008). Dominion Resources, Inc. conducts its business through an operating seg-

would construct most of the 1.63 billion dollar transmission line, but Dominion and Allegheny would each construct one half of the segment from the Meadowbrook substation to the Loudoun substation.<sup>277</sup> The transmission line would traverse three states, but the largest segment of the line—114 miles—would traverse West Virginia.<sup>278</sup> The smallest segment—28 miles—would traverse Northern Virginia.<sup>279</sup>

The 2006 RTEP observed that “[e]xtensive analysis of various options yielded a recommendation for this new line from western Pennsylvania to feed the Northern Virginia area-Washington, D.C.-Baltimore-Maryland area and other load centers.”<sup>280</sup> The 2006 RTEP concluded that TrAIL “is critical to maintaining reliability in Northern Virginia and the Baltimore/Washington D.C. area.”<sup>281</sup>

The RTEP for 2006 further explained that electric power for the Washington-Baltimore-Northern Virginia region was supplied by local electric generation and by generation located in Ohio, Pennsylvania, and West Virginia.<sup>282</sup> Given the dependence on the Washington-Baltimore-Northern Virginia region on electric generation from western PJM, the 2006 RTEP concluded that “additional transmission capability is essential in [that region] to maintain reliable and economic service.”<sup>283</sup>

PJM concluded, in particular, that Northern Virginia would require additional transmission because “[t]he northern Virginia area of PJM continues to experience significant economic growth, growth that requires access to additional sources of electricity and the transmission infrastructure to provide it.”<sup>284</sup> Overall, the proposed project was a response to the need for “new backbone transmission” that was perceived as essential “to maintaining reliability in Northern Virginia and the Baltimore/Washington D.C. area.”<sup>285</sup>

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ment called Dominion Virginia Power, which generates, transmits, and distributes electric power to Virginia and in northeastern North Carolina. Dominion Resources, Inc., Annual Report (Form 10-K) 1–2, 113 (Feb. 28, 2008).

<sup>277</sup> EDISON ELEC. INST., *supra* note 276.

<sup>278</sup> *Id.* at 5.

<sup>279</sup> *Id.*

<sup>280</sup> 2006 RTEP, *supra* note 260, at 9. “This area of PJM continues to experience significant economic growth, growth that requires access to additional sources of electricity and the transmission infrastructure to provide it.” *Id.*

<sup>281</sup> *Id.* at 140.

<sup>282</sup> *Id.* at 11.

<sup>283</sup> *Id.* at 75.

<sup>284</sup> *Id.* at 102.

<sup>285</sup> *Id.* at 140; *see also id.* at 149. TrAIL evolved from a nascent Allegheny proposal for a 330-mile, 500 kV transmission line. *Id.* at 142.

PJM approved TrAIL to ensure adequate transmission of electric power imports to serve the Washington-Baltimore-Northern Virginia region. The transmission line, however, would traverse Pennsylvania, Virginia, and, in particular, West Virginia. The largest segment of the line—114 miles—would traverse West Virginia, even though TrAIL was intended neither to provide electric power service in the state nor to address a need for electric transmission in West Virginia *per se*.

## B. 2007

In June 2007, PJM approved 2.9 billion dollars in construction for the Mid-Atlantic transmission system.<sup>286</sup> Reflected in the PJM RTEP for 2007,<sup>287</sup> the approval included the construction of the Potomac-Appalachian Transmission Highline (PATH), a 765 kV transmission line from the Amos substation in southwestern West Virginia to the Bedington substation in eastern West Virginia and a twin-circuit 500 kV transmission line from the Bedington substation to a new substation near Kemptown, Maryland.<sup>288</sup> Like TrAIL, PATH would be a “backbone” transmission line that would ensure adequate transmission for electric power imports to serve the Washington-Baltimore-Northern Virginia region.<sup>289</sup>

A 290-mile transmission line, PATH would be constructed by American Electric Power (AEP) and Allegheny.<sup>290</sup> The two companies would form a joint venture, PATH West Virginia Transmission Company, LLC, to own the 765 kV Amos to Bedington segment of the line.<sup>291</sup> PATH Allegheny Transmission Company, LLC would own the 500 kV Bedington to Kemptown segment of the line.<sup>292</sup> The line would cost 1.8 billion dollars to construct.<sup>293</sup> The transmission line would traverse three states, but the largest segment of the line—almost 244 miles—would traverse West Virginia.<sup>294</sup> Like TrAIL, PATH was intended

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<sup>286</sup> See News Release, PJM Interconnection, L.L.C., PJM Authorizes Construction of \$2.9 Billion in Transmission Additions and Upgrades (June 22, 2007), *text available at* <http://www.pjnewswire.com/news-releases/pjm-authorizes-construction-of-29-billion-in-transmission-additions-and-upgrades-58276382.html>.

<sup>287</sup> See PJM INTERCONNECTION, L.L.C., PJM 2007 REGIONAL TRANSMISSION EXPANSION PLAN 64–67 (2008) [hereinafter 2007 RTEP], *available at* <http://www.pjm.org/documents/reports/rtep-documents/2007-rtep.aspx>.

<sup>288</sup> *Id.* at 11, 63, 140.

<sup>289</sup> See *id.* at 66; *supra* note 284 and accompanying text.

<sup>290</sup> EDISON ELEC. INST., *supra* note 276, at 46.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 47.

<sup>294</sup> See *id.* at 46–47 (showing on map that the majority of PATH traverses West Virginia, with only a small segment of the Amos-Bedington segment passing through Virginia).

neither to provide electric service in the state nor to address a need for electric transmission in West Virginia *per se*.<sup>295</sup>

PATH would alleviate overloads on existing 500 kV transmission lines in PJM, supporting reliable electric transmission service.<sup>296</sup> The PJM RTEP for 2007 expected overloads in PJM to occur as early as 2012.<sup>297</sup> PATH also would provide “significant benefits” to the transmission-constrained Washington and Baltimore region.<sup>298</sup>

PATH would join TrAIL in providing backbone transmission to facilitate power transfers from western PJM to Washington, Baltimore, and Northern Virginia.<sup>299</sup> According to the RTEP for 2007, the Washington-Baltimore-Northern Virginia region had increased its dependence on bulk power transfers from western PJM since 2002, when PJM first began its westward expansion.<sup>300</sup> The RTEP observed that the Amos substation was connected to 2100 megawatts (MW) of generation and was interconnected with the AEP 765 kV transmission system.<sup>301</sup> The plan explained that “[f]rom a market efficiency perspective, alternatives that connect back to the AEP 765 kV system provide the greatest opportunity for eastern load centers to access additional economical energy from western generating resources.”<sup>302</sup>

In particular, PATH would provide the Washington-Baltimore-Northern Virginia region with access to electric power generated from coal to the west of the Allegheny Mountains.<sup>303</sup> The RTEP for 2007 observed, for example, that West Virginia has over 14,500 MW of coal-generated electric power; an additional nearly 3000 MW have been proposed.<sup>304</sup> Ten projects for 1350 MW of wind-generated electric power also have been proposed in West Virginia.<sup>305</sup> Without the addition of TrAIL and PATH, transmission congestion costs in PJM could reach three billion dollars by 2016.<sup>306</sup> Significant additional high-

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<sup>295</sup> See 2007 RTEP, *supra* note 287, at 63 (touting PATH as delivering “significant benefits to the constrained Baltimore/Washington area”).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 11.

<sup>298</sup> *Id.*; see also *id.* at 63.

<sup>299</sup> *Id.* at 127 & map 3.26; see *id.* at 113–32.

<sup>300</sup> *Id.* at 288; see *id.* at 287–300.

<sup>301</sup> 2007 RETP, *supra* note 287 at 11, 63.

<sup>302</sup> *Id.* at 128.

<sup>303</sup> *Id.* at 301–02, 303 fig.4.24; see *id.* at 301–13.

<sup>304</sup> *Id.* at 303 fig.4.24; see *id.* at 304 fig.4.55.

<sup>305</sup> *Id.* at 305 fig.4.25, 312 fig.4.59.

<sup>306</sup> *Id.* at 145; see *id.* at 145–46.

voltage transmission would be required “to maintain reliable and economical service to all eastern load centers.”<sup>307</sup>

The RTEP for 2007 explained that the need for backbone facilities for bulk power transfers to the Washington-Baltimore-Northern Virginia region was dictated in part by the anticipated deactivation of two power plants within that area.<sup>308</sup> PJM anticipated that one unit of the Buzzard Point plant, owned by the Potomac Electric Power Company (PEPCO) and located in Southwest Washington, D.C., would be retired in May 2007.<sup>309</sup> The other fifteen units would close by May 2012.<sup>310</sup> PEPCO also scheduled to close the Benning Road plant, located in Northeast Washington, D.C., in May 2012.<sup>311</sup> Over 800 MW of electric power would be retired by PEPCO alone, adding to 101 MW Baltimore Gas and Electric retired in 2003.<sup>312</sup>

The RTEP for 2007 considered non-transmission alternatives to PATH, for example, new generation and demand-side management. PJM concluded, however, that “increasingly contentious local opposition” to electric power plants near Washington, D.C., Baltimore, and Northern Virginia undermined the potential for new generation to eliminate the need for new transmission.<sup>313</sup> Additionally, PJM estimated demand-side management conservatively and concluded these non-transmission alternatives could not substitute for backbone transmission lines.<sup>314</sup>

In October 2007, PJM authorized an additional 2.1 billion dollars in new transmission construction.<sup>315</sup> In the RTEP for 2007, PJM authorized the construction of the Mid-Atlantic Power Pathway (MAPP), a 500 kV transmission line from Possum Point, Virginia through southern

<sup>307</sup> 2007 RTEP, *supra* note 287, at 147; *see id.* at 147–48.

<sup>308</sup> *See id.* at 199–200, 201 tbl.4.18 (linking reduced generation from deactivated stations with need for new facilities), 206; *see id.* 199–215.

<sup>309</sup> *Id.* at 207 tbl.4.20; Press Release, Pepco Holdings, Inc., Pepco Holdings Seeks to Retire D.C. Power Plants Benning Road and Buzzard Point Units to Be Retired by 2012 (Feb. 28, 2007), *available at* <http://www.pepcoholdings.com/about/news/archives/2007/article.aspx?cid=788>.

<sup>310</sup> 2007 RTEP, *supra* note 287, at 207 tbl.4.20.

<sup>311</sup> *Id.*, Press Release, Pepco Holdings, Inc., *supra* note 309.

<sup>312</sup> 2007 RTEP, *supra* note 287, at 206, 207 tbl.4.20.

<sup>313</sup> *Id.* at 66. In addition, “demand side measures similarly cannot be realistically expected to substitute for new bulk transmission capability to serve customers in eastern PJM.” *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> News Release, PJM Interconnection, L.L.C., PJM Board Authorizes \$2.1 in Transmission Additions, Upgrades (Oct. 17, 2007), *available at* [http://conserveland.org/libraries/3/library\\_items/135-Press-Release-PJM-Board-Authorizes-2-1-M-in-Transmission-Additions-Upgrades](http://conserveland.org/libraries/3/library_items/135-Press-Release-PJM-Board-Authorizes-2-1-M-in-Transmission-Additions-Upgrades) (follow “PJM\_20071017.pdf” hyperlink).



Maryland to the Calvert Cliffs nuclear power plant, under the Chesapeake Bay to the Vienna substation on the western shore of Maryland, to the Indian River substation in Delaware, and to the Salem nuclear power plant in New Jersey.<sup>316</sup> MAPP would be a backbone transmission line that would ensure adequate transmission for nuclear power imports from Virginia and Maryland to the Washington-Baltimore region and the Delmarva Peninsula.<sup>317</sup>

A 230-mile transmission line, MAPP would be constructed by PEPSCO and its affiliates, Atlantic City Electric Company and Delmarva Power & Light Company, for an estimated cost of 1.2 billion dollars.<sup>318</sup>

PJM analyzed the need for MAPP in two phases. First, PJM analyzed MAPP I, the segment of the transmission line between Possum Point and the Calvert Cliffs plant.<sup>319</sup> Second, PJM analyzed MAPP II, the segment between the Calvert Cliffs and Salem plants.<sup>320</sup> The analysis of MAPP I focused on need in the Baltimore-Washington region, while the analysis of MAPP II focused on need on the Delmarva Peninsula.<sup>321</sup>

With respect to the Baltimore-Washington region, MAPP would “bring relief” in light of the anticipated retirement in 2012 of the Buzard Point and Benning Road plants, by providing a transmission path for power from two expanded nuclear power plants.<sup>322</sup> In 2007, UniStar Nuclear LLC proposed to add a third unit to the Calvert Cliffs plant.<sup>323</sup>

<sup>316</sup> 2007 RTEP, *supra* note 287, at 69 & map 3.6; *Calvert Cliffs Nuclear Power Plant, Unit 1*, U.S. NUCLEAR REGULATORY COMM’N, <http://www.nrc.gov/info-finder/reactor/calv1.html> (last updated Nov. 16, 2012); *Salem Nuclear Generating Station, Unit 1*, U.S. NUCLEAR REGULATORY COMM’N, <http://www.nrc.gov/info-finder/reactor/salm1.html> (last updated Dec. 27, 2012).

<sup>317</sup> 2007 RTEP, *supra* note 287, at 107. PJM proposed MAPP in the RTEP for 2007 “to provide access to affordable generation from the south and west” for the District of Columbia and the Delmarva Peninsula. EDISON ELEC. INST., *supra* note 276, at 45; *see also* Philip Rucker, *Electricity Plan Advances to Public*, WASH. POST, Oct. 18, 2007, at B1.

<sup>318</sup> Philip Rucker, *Plans for Pepco Power Line Advance*, WASH. POST, Aug. 23, 2007, at B3; EDISON ELEC. INST., *supra* note 276, at 44.

<sup>319</sup> 2007 RTEP, *supra* note 287, at 70.

<sup>320</sup> *Id.*

<sup>321</sup> *See id.* at 70 & map 3.6.

<sup>322</sup> *Id.* at 71, 73.

<sup>323</sup> Unistar Nuclear LLC; Notice of Receipt and Availability of Part of an Application for a Combined License, 72 Fed. Reg. 45,832 (Aug. 15, 2007). In July 2007, UniStar Nuclear LLC (“UniStar”) filed with the U.S. Nuclear Regulatory Commission (NRC) a portion of an application for a combined license to construct and operate Calvert Cliffs Nuclear Power Plant Unit No. 3. *Id.*; *Combined License Applications for New Reactors*, U.S. NUCLEAR REG. COMMISSION, <http://www.nrc.gov/reactors/new-reactors/col.html> (last updated Mar. 29, 2012); *see also* Dan Morse, *Foes of Nuclear Expansion Find Few Allies*, WASH. POST, Aug. 1, 2007, at B6; Dan Morse, *Officials Support 3rd Nuclear Reactor*, WASH. POST, Aug. 15, 2007, at B1; Steven Mufson, *Firm Applies to Expand Nuclear Plant in Maryland*, WASH. POST, July 31, 2007, at A1; Michael

Also in 2007, Dominion proposed to add a third unit to the North Anna nuclear power plant located in central Virginia.<sup>324</sup> This collective 3200 MW of new power also could be exported to the Delmarva Peninsula.<sup>325</sup> MAPP thus would reduce the dependence of the Washington-Baltimore region on imports of coal-generated electric power from Pennsylvania and West Virginia, which began when Allegheny joined PJM in 2002.<sup>326</sup>

The demand for MAPP, like the demand for TrAIL and PATH, was in large part driven by increased power demand in the Washington-Baltimore-Northern Virginia region, the retirement of power plants in the region, and the lack of new power plant construction within the

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Tunison, *County Commissioners Support Expansion at Calvert Cliffs Site*, WASH. POST, Aug. 16, 2007, 2007 WLNR 28545506. UniStar filed the application pursuant to section 103 of the Atomic Energy Act and NRC regulations. See 42 U.S.C. § 2133 (2006); 10 C.F.R. pt. 52 (2012) (Licenses, Certifications, and Approvals for Nuclear Power Plants). UniStar was able to take advantage of tax incentives under the Energy Tax Incentives Act of 2005—Title XIII of the EPAct—by filing the application prior to December 31, 2008. Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1300–1364, 119 Stat. 594, 986–1060 (codified in scattered sections of 26 U.S.C.). Section 1306 of the EPAct added section 45J to the Internal Revenue Code. Energy Policy Act of 2005 § 1306. Section 45J establishes a tax credit for electric power generated from an advanced nuclear power plant. Treas. Reg. § 45J (2005). The tax credit is 1.8 cents per kilowatt hour of power generated over an eight year period. *Id.* § 45J(a). The NRC must allocate part of the national MW capacity limitation to the advanced nuclear power plant; however, the plant's allocation cannot exceed six thousand MW. *Id.* § 45J(b) (1)–(2). In addition, the plant must be placed into service after enactment of the EPAct and before January 1, 2021. *Id.* § 45J(d) (1) (B). In May 2006, before promulgating regulations required by the statute, the U.S. Internal Revenue Service issued interim guidance. I.R.S. Notice 2006-40, 2006-18 I.R.B. 855–57. To qualify for the tax credit, an advanced nuclear power plant must file an application with the NRC for a license to construct and operate the plant prior to December 31, 2008. *Id.* at 856. The Governor of Maryland supported the Calvert Cliffs expansion. Christy Goodman, *'It Is a Moral Imperative': O'Malley Outlines Necessity for New Reactor in Lusby*, WASH. POST, May 2, 2008, at B3. The third reactor at Calvert Cliffs would produce 1600 MW, doubling the output of Calvert Cliffs. Christy Goodman, *Review of Proposed Reactor to Begin*, WASH. POST, June 6, 2008, at B6. UniStar expected to begin construction of Unit No. 3 in late 2009. Christy Goodman, *Hearings Set on Building Reactor*, WASH. POST, Aug. 3, 2008, at SM1; see also Lisa Rein & Christy Goodman, *Little Outcry on Nuclear Reactor Proposal*, WASH. POST, Aug. 4, 2008, at B1–2.

<sup>324</sup> Notice of Receipt and Availability for a Combined License Dominion Virginia Power—North Anna Unit 3, 72 Fed. Reg. 70,619 (Dec. 12, 2007); *North Anna Power Station*, DOMINION, <https://www.dom.com/about/stations/nuclear/north-anna/index.jsp> (last visited Jan. 15, 2013). In July 2007, Dominion filed with the NRC a portion of an application for a combined license to construct and operate North Anna Power Station Unit No. 3. Notice of Receipt and Availability for a Combined License Dominion Virginia Power—North Anna Unit 3, 72 Fed. Reg. at 70,619.

<sup>325</sup> 2007 RTEP, *supra* note 287, at 140.

<sup>326</sup> *Id.* at 108 (“The dependence of the Washington-Baltimore-Northern Virginia area and Eastern PJM on bulk power transfers from western sources has been growing steadily since the integration of western markets into PJM began in 2002 with the integration of [Allegheny].”).

region.<sup>327</sup> These considerations dictated the need for additional high-voltage transmission that would ensure reliable electric power throughout the Mid-Atlantic region.

### C. 2008

The PJM RTEP for 2008, in two “retool” analyses, reassessed TrAIL and PATH and affirmed the need for those transmission lines.<sup>328</sup> The 2008 RTEP also included a reconfiguration for MAPP and predicted that the four backbone transmission projects approved by the PJM board—TrAIL, PATH, MAPP, and a 500 kV Susquehanna Roseland transmission line between northeastern Pennsylvania and northern New Jersey—would “substantially enhance the reliability and economic performance of the transmission system in the Mid-Atlantic region of PJM.”<sup>329</sup>

PJM performed a retool analysis for TrAIL to “ensure the planning process reflects the most current forecasted conditions.”<sup>330</sup> The analysis reflected revised forecasts for power demand, changes in the anticipated in-service dates of new power plants, changes in the anticipated retirement of existing power plants, and trends in demand-side management.<sup>331</sup> A retool analysis for the RTEP for 2008 validated the need for TrAIL by June 1, 2011, in light of anticipated overloads on existing transmission lines.<sup>332</sup>

A second retool analysis confirmed the need for PATH but concluded that the transmission line would not be required to alleviate overloads on existing transmission lines until June 1, 2013.<sup>333</sup> The retool analysis also resulted in a reconfiguration of PATH that eliminated the Bedington substation from the transmission line and replaced the twin-circuit 500 kV transmission line between the Bedington and Kemptown substations with a 765 kV transmission line.<sup>334</sup>

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<sup>327</sup> See *id.* at 139–40.

<sup>328</sup> PJM INTERCONNECTION, L.L.C., PJM 2008 REGIONAL TRANSMISSION EXPANSION PLAN 6 (2009) [hereinafter 2008 RTEP], available at [http://www.pjm.com/documents/reports/rtep-documents/~media/documents/reports/2008-rtep/2008-rtep-report.ashx](http://www.pjm.com/documents/reports/rtep-documents/~/media/documents/reports/2008-rtep/2008-rtep-report.ashx).

<sup>329</sup> *Id.* at 2.

<sup>330</sup> *Id.* at 6 (“Planning is a dynamic process. System conditions change over time, driving the need to adjust modeling assumptions used in planning studies in order to evaluate the efficacy of previously identified expansion plans.”); see *id.* at 47–70.

<sup>331</sup> See *id.*

<sup>332</sup> *Id.* at 53–54.

<sup>333</sup> *Id.* at 67, 93. “[PATH] provides critical support to energy transfers from western PJM into Northern Virginia, the Baltimore/Washington area and eastern PJM.” *Id.* at 122.

<sup>334</sup> 2008 RTEP, *supra* note 328, at 67.

Finally, the RTEP for 2008 reconfigured MAPP to include a direct current (DC) transmission line instead of an alternating current (AC) transmission line under the Chesapeake Bay.<sup>335</sup> The overall cost of a DC line would be 190 million dollars more than that of an AC line, but would pose fewer environmental risks.<sup>336</sup> Thus the estimated cost of MAPP in the 2008 RTEP increased to 1.4 billion dollars.<sup>337</sup> The RTEP for 2008 otherwise validated the need for the Possum Point-Indian River segment of the transmission line, but indicated that additional analysis was required to assess the need for the Indian River-Salem segment of MAPP.<sup>338</sup> The 2008 RTEP also compared MAPP to two alternative transmission upgrades and concluded that MAPP was “the more effective solution” to ensure reliable transmission service in the Mid-Atlantic region.<sup>339</sup>

The retool analyses in the RTEP for 2008 reflected the 2008 economic downturn’s impact on transmission expansion.<sup>340</sup> That downturn resulted in revised forecasts for power demand.<sup>341</sup> The PJM 2008 RTEP nonetheless confirmed the need for TrAIL by June 1, 2011, PATH by June 1, 2013, and at least one segment of MAPP by 2013.<sup>342</sup>

#### D. 2009

The RTEP for 2009 further modified both the PATH and MAPP transmission line proposals. First, PJM reevaluated the need for PATH and concluded that the transmission line would not be required to alleviate overloads until June 1, 2014.<sup>343</sup> The report reconfigured PATH to become a 765 kV transmission line from the Amos substation through a new Welton Spring substation, where it would intersect with TrAIL and continue on to the new Kempton substation.<sup>344</sup> PJM stated, however, that the 2010 RTEP was expected to be more comprehensive and

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<sup>335</sup> *Id.* at 84.

<sup>336</sup> *Id.* at 87.

<sup>337</sup> *Id.* at 83.

<sup>338</sup> *Id.* at 84.

<sup>339</sup> *Id.* at 91.

<sup>340</sup> 2008 RTEP, *supra* note 328, at 301.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 53, 67, 93; *see id.* at 84, 148.

<sup>343</sup> PJM INTERCONNECTION, L.L.C., PJM 2009 REGIONAL TRANSMISSION EXPANSION PLAN 81 (2010) [hereinafter 2009 RTEP]. *available at* <http://pjm.com/documents/reports/rtep-documents/2009-rtep.aspx>.

<sup>344</sup> *Id.* at 7.

“[could] be used to determine and support a definitive assessment as to the future need and in-service date for PATH.”<sup>345</sup>

The reevaluation of PATH in the PJM 2009 RTEP addressed, in particular, the potential for thermal overloads on existing 500 kV transmission lines in the Mid-Atlantic region and the potential for voltage collapses on those lines.<sup>346</sup> The 2009 RTEP emphasized that, “[i]n actual operation, voltage collapse can occur very quickly—within minutes or even fractions of [a] second—and often results in a blackout to a portion of the system.”<sup>347</sup> The potential for thermal overloads and voltage collapses confirmed the need for an operational PATH by 2014.<sup>348</sup>

The 2009 RTEP also discussed two conceptual proposals for PATH.<sup>349</sup> The first proposal would create an above-ground, high-voltage direct current (HVDC) line between Amos and Kemptown, while the second design proposed an underground HVDC line between Welton Spring and Kemptown with an additional AC line connecting the Amos-Welton Spring segment of PATH.<sup>350</sup> PJM rejected the conceptual proposals, however, when a detailed analysis raised cost, construction, and operational issues.<sup>351</sup>

Second, the 2009 RTEP reevaluated the need for MAPP and concluded that the Possum Point-Indian River segment of the transmission line would not be needed until June 1, 2014.<sup>352</sup> PJM also concluded that there would be no need for the Indian River-Salem segment of MAPP and removed it from the RTEP.<sup>353</sup> The MAPP reevaluation also addressed the potential for thermal overloads and voltage collapses on existing 230 kV transmission lines in the Mid-Atlantic region.<sup>354</sup> Finally, the reevaluation reflected revised forecasts for power demand and the decision to include a DC transmission line instead of an AC transmission line under the Chesapeake Bay.<sup>355</sup>

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<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 102–05, 107–11. To prevent potential voltage collapses, PJM would be required to curtail electric power service. *See id.* at 111, 113, 121.

<sup>347</sup> *Id.* at 96–99.

<sup>348</sup> *See id.* at 101, 102–05, 107–11.

<sup>349</sup> 2009 RTEP, *supra* note 343, at 115–16.

<sup>350</sup> *See id.*

<sup>351</sup> *Id.* at 116. For example, an HVDC line between Amos and Kemptown would cost an additional \$644 million; an AC line between Amos and Welton Spring, along with an underground HVDC line between Welton Spring and Kemptown, would cost an additional \$1.828 billion. *Id.*

<sup>352</sup> *Id.* at 7, 83.

<sup>353</sup> *Id.* at 7, 83, 117.

<sup>354</sup> *Id.* at 119–23.

<sup>355</sup> 2009 RTEP, *supra* note 343, at 118.

## E. 2010

The RTEP for 2010 once again revised the projected need for PATH and MAPP, indicating that reduced load growth rates in PJM would delay the need for each backbone transmission line by an additional year.<sup>356</sup> The 2010 RTEP reported, however, that TrAIL was “currently expected to meet a required June 1, 2011 in-service date.”<sup>357</sup>

The 2010 RTEP included an analysis of public policy considerations that informed the need for new interstate electric transmission lines.<sup>358</sup> PJM observed that “[o]ver the past several years, an increasing focus by federal and state governments on climate change, energy independence and other policy areas continues to make clear the critical role of the transmission system.”<sup>359</sup> The plan thus analyzed the impact of federal and state renewable portfolio standards and energy conservation programs on transmission demands.<sup>360</sup> The plan also considered the impact of “at risk” generation such as power plants—some more than forty years old—that may be retired because they are unable to meet new environmental requirements for emissions of nitrogen oxides, sulfur oxides, and carbon dioxide.<sup>361</sup>

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<sup>356</sup> PJM INTERCONNECTION, L.L.C., PJM 2010 REGIONAL TRANSMISSION EXPANSION PLAN 5 (2011) [hereinafter 2010 RTEP], available at [http://www.pjm.com/documents/reports/rtep-documents/~media/documents/reports/2010-rtep/2010-rtep-report.ashx](http://www.pjm.com/documents/reports/rtep-documents/~/media/documents/reports/2010-rtep/2010-rtep-report.ashx).

<sup>357</sup> *Id.* at 9.

<sup>358</sup> *Id.* at 71–78.

<sup>359</sup> *Id.* at 6.

<sup>360</sup> *Id.* at 73–78.

<sup>361</sup> *Id.* at 247. In August 2010, the EPA proposed regulations to limit the interstate transport of emissions of nitrogen oxides and sulfur dioxide. Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45,210 (Aug. 2, 2010). The proposed regulations would revise standards set under the Clean Air Interstate Rule (CAIR), which the EPA promulgated in May 2005. See 70 Fed. Reg. 25,162 (May 12, 2005). On appeal, however, CAIR was vacated and remanded by the U.S. Court of Appeals for the D.C. Circuit. *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008). The EPA promulgated a replacement rule in August 2011. See Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011); see also Federal Implementation Plans for Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin to Reduce Interstate Transport of Ozone, 76 Fed. Reg. 40,662 (July 11, 2011) (supplemental notice of proposed rulemaking); Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone, 76 Fed. Reg. 80,760 (Dec. 27, 2011) (final rule to include six additional states under the Transport Rule); Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 77 Fed. Reg. 10,324, (Feb. 21, 2012) (revisions to the Transport Rule); Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 77 Fed. Reg. 34,830 (June 12, 2012) (revisions to the Transport Rule). In addition, in May 2011, the EPA proposed national emissions standards for hazardous air pollutants from coal- and oil-fired electric

The report observed that “the nation lacks the transmission infrastructure necessary to make widespread use of electricity generated from renewable sources.”<sup>362</sup> Federal tax credits and state renewable portfolio standards promote the development of renewable resources and thus accelerate the need for transmission.<sup>363</sup> In particular, PJM analyzed the potential for offshore wind development and concluded that the development of 30,000 MW of power off the shores of Delaware, Maryland, New Jersey, and Virginia would strain the transmission system and require the MAPP project.<sup>364</sup>

The need assessment for MAPP focused on a voltage analysis, and also included an initial analysis of the impact of MAPP on the development of offshore wind.<sup>365</sup> That initial analysis concluded that “the MAPP project helps to integrate off-shore wind onto and across the Delmarva Peninsula.”<sup>366</sup> The MAPP need assessment projected a reconfigured project from the Possum Point substation in Virginia to the Burches Hill substation in Maryland, and then on to the Chalk Point and Calvert Cliffs plants.<sup>367</sup> From there, the line would run under the Chesapeake Bay to the Vienna substation on the Eastern Shore of Maryland, and on to the Indian River substation in Delaware.<sup>368</sup> The assessment, which included consideration of alternatives, concluded that the MAPP project was “the best alternative” to ensure reliable electric transmission service.<sup>369</sup>

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power plants. *See* National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 24,976 (May 3, 2011). The proposed standards would change those included in the Clean Air Mercury Rule (CAMR), which the EPA promulgated in March 2005. *See* Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005). On appeal, however, CAMR was vacated by the D.C. Circuit. *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008). The EPA promulgated a replacement rule, the Mercury and Air Toxics Standards Rule in December 2011. *See* National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304, 9304, 9377 (Feb. 16, 2012).

<sup>362</sup> 2010 RTEP, *supra* note 356, at 73.

<sup>363</sup> *See id.* at 6, 73.

<sup>364</sup> *See id.* at 153.

<sup>365</sup> *Id.* at 147–52, 153.

<sup>366</sup> *Id.* at 153.

<sup>367</sup> *Id.* at 139.

<sup>368</sup> 2010 RTEP, *supra* note 356, at 139.

<sup>369</sup> *Id.* at 140.

The need assessment for PATH included both thermal and voltage analyses for the PJM transmission system.<sup>370</sup> The voltage analysis revealed an increased potential for voltage collapse relative to a 2009 analysis.<sup>371</sup> The RTEP also included alternatives to the PATH transmission line, but PJM concluded that the PATH project would be “the most effective, robust long-term solution” to ensure a reliable electric transmission service in the PJM region.<sup>372</sup> Although the 2010 RTEP indicated that PATH and MAPP would simply be delayed another year, on February 28, 2011, PJM announced its decision to suspend the PATH project pending completion of the RTEP for 2011.<sup>373</sup>

### E. 2011

Notwithstanding the assessment in the 2010 RTEP that confirmed the need for MAPP, PJM announced its decision to suspend the MAPP project six months later.<sup>374</sup> The 2011 RTEP confirmed that both PATH and MAPP would be held in abeyance.<sup>375</sup> Nonetheless, TrAIL entered into service as planned on May 23, 2011.<sup>376</sup> In addition, on October 5, 2011, the Obama administration expedited the Susquehanna-Roseland transmission line, along with seven other transmission projects, under the administration’s Rapid Response Team for Transmission.<sup>377</sup>

The 2011 RTEP introduced a new five-volume format for the annual report, as well as an enhanced decision-making protocol to address “growing trends” and “emerging factors” with respect to, for ex-

<sup>370</sup> *Id.* at 99–103, 105–19.

<sup>371</sup> *See id.* at 113.

<sup>372</sup> *Id.* at 125.

<sup>373</sup> News Release, PJM Interconnection, L.L.C., PJM Board Directs Delay in PATH Line (Feb. 28, 2011), *available at* <http://www.pjm.com/~media/about-pjm/newsroom/2011-releases/20110228-RTEP-announcement.ashx>.

<sup>374</sup> Press Release, Pepco Holdings, Inc., PHH Announces Delay in MAPP Transmission Project (Aug. 19, 2011), *available at* [http://idc.api.edgar-online.com/efx\\_dll/edgarpro.dll?FetchFilingConvPDF1?SessionID=0tLGfMI5Di6fafS&ID=8109274](http://idc.api.edgar-online.com/efx_dll/edgarpro.dll?FetchFilingConvPDF1?SessionID=0tLGfMI5Di6fafS&ID=8109274). PEPCO made the announcement after PJM advised the company that the need for MAPP had been moved to 2019–2021. Letter from Michael J. Kormos, Senior Vice President of Operations, PJM, to David M. Velazquez, Exec. Vice President of Power Delivery, PEPCO (Aug. 18, 2011) (on file with author). PJM directed PEPCO “to limit further development and to proceed with only those efforts reasonably necessary to allow the MAPP project to be quickly restarted.” *Id.*

<sup>375</sup> PJM INTERCONNECTION, L.L.C., PJM 2011 REGIONAL TRANSMISSION EXPANSION PLAN 13–15 (2012) [hereinafter 2011 RTEP].

<sup>376</sup> *Id.* at 14.

<sup>377</sup> Memorandum on Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review, DAILY COMP. PRES. DOC. 601 (Aug. 31, 2011).



ample, renewable portfolio standards, demand-side management, EPA regulations, and at risk generation.<sup>378</sup> The essential consideration in transmission expansion planning, however, remains electric power demand forecasts, and revised forecasts indicated that the need for PATH and MAPP would not arise when previously anticipated.<sup>379</sup> Thus, PJM “removed the MAPP and PATH lines from RTEP and put the lines into abeyance.”<sup>380</sup>

Over the course of a six-year period and six successive RTEPs, PJM proposed three high-voltage backbone transmission lines that would maintain reliable and economical transmission service in the Mid-Atlantic region.<sup>381</sup> The new lines would provide electric power to the Washington-Baltimore-Northern Virginia region, and, in the case of MAPP, to the Delmarva Peninsula.<sup>382</sup> Those interstate transmission lines would, however, traverse states that were not the intended recipients of that electric power. Those states would nonetheless need to permit and site TrAIL, PATH, and MAPP before power companies could build the lines.

The U.S. economic downturn that began in 2008 resulted in revised forecasts for electric power demand in the Mid-Atlantic region, where the need for transmission expansion diminished along with the economy.<sup>383</sup> Although TrAIL was constructed and entered into service in May 2011, PATH and MAPP were first reconfigured and then suspended.<sup>384</sup> For the immediate future, those transmission projects will be held in abeyance.<sup>385</sup>

#### IV. STATE PERMITTING FOR THE TRANS-ALLEGHENY INTERSTATE LINE

Although PJM Interconnect, LLC (PJM) identified a need in the Mid-Atlantic region for high-voltage transmission lines that can access coal-generated electric power in the Midwest for the Washington-Baltimore-Northern Virginia region and thus approved—in its Regional Transmission Expansion Plan (RTEP)—the construction of the Trans-Allegheny Interstate Line (TrAIL), the Potomac-Appalachian Transmission Highline (PATH), and the Mid-Atlantic Power Pathway (MAPP),

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<sup>378</sup> 2011 RTEP, *supra* note 375, at 3, 91.

<sup>379</sup> *Id.* at 13.

<sup>380</sup> *Id.* at 13–15.

<sup>381</sup> See *supra* notes 257–377 and accompanying text.

<sup>382</sup> See *supra* notes 257–377 and accompanying text.

<sup>383</sup> 2008 RTEP, *supra* note 328, at 301.

<sup>384</sup> 2011 RTEP, *supra* note 375.

<sup>385</sup> *Id.*

the states that those transmission lines would traverse—Maryland, Pennsylvania, Virginia, and West Virginia—have ultimate jurisdiction to permit and site those transmission lines.<sup>386</sup> Part II of the Federal Power Act does not authorize the Federal Energy Regulatory Commission (FERC) to permit and site interstate electric power facilities except under limited circumstances as set forth in section 216.<sup>387</sup>

State jurisdiction to permit and site transmission facilities poses a threat to the development of interstate transmission lines. The threat prompted Congress to enact section 216 of the Federal Power Act, the implementation of which has been frustrated by judicial interpretation of the statute and appeals court decisions.<sup>388</sup> The threat also has precipitated calls in Congress for expanded federal jurisdiction to permit and site interstate transmission facilities.<sup>389</sup> The proponents of such expansion argue that the states are too parochial in their perspective to address the regional need for interstate transmission lines that may not otherwise provide direct benefits to their residents.<sup>390</sup>

Consistent with these concerns, state jurisdiction over transmission lines could have posed an obstacle to the development of TrAIL, PATH, or MAPP. Thus far, however, state proceedings to permit and site those transmission lines rebut the notion that state jurisdiction will stymie the development of interstate transmission facilities.

For example, proceedings in Pennsylvania, Virginia, and West Virginia to determine the need for TrAIL in those states all have taken a broad view and concluded that a regional need for the transmission line meets the requirement under state statute for a need within the state for the line.<sup>391</sup> Although TrAIL would not provide local electric power service in Pennsylvania or West Virginia, the states have justified issuing permits for TrAIL on the basis of regional need.<sup>392</sup>

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<sup>386</sup> See *id.* at 14–15; *supra* notes 98–132 and accompanying text.

<sup>387</sup> See 16 U.S.C. § 824(b) (2006).

<sup>388</sup> See *Piedmont Envtl. Council v. Fed. Energy Regulatory Comm'n*, 558 F.3d 304, 313 (4th Cir. 2009); *Cal. Wilderness Coal., v. U.S. Dep't of Energy*, 631 F.3d 1072, 1107 (9th Cir. 2011); Vaheesan, *supra* note 25, at 123.

<sup>389</sup> See *Transmission Infrastructure Hearing*, *supra* note 12 (statement of Jon Wellingshoff, Acting Chairman, FERC); *supra* notes 245–248 and accompanying text.

<sup>390</sup> See *Transmission Infrastructure Hearing*, *supra* note 12, at 50 (statement of Joseph L. Welch, Chairman, President and Chief Executive Officer, ITC Holdings Corporation).

<sup>391</sup> See, e.g., Order at 3, *Va. Elec. & Power Co./Trans-Allegheny Interstate Line Co.*, 268 Pub. Util. Rep. (PUR) 536 (Nos. PUE-2007-00031, PUE-2007-00033) (Va. S.C.C. Oct. 8, 2008) (filed Jan. 29, 2007) (to access all docket entries for these cases, visit <http://www.scc.virginia.gov/vaproduct/main.asp>; follow “SEARCH CASES” hyperlink; then search “Enter Case Number” for “PUE-2007-00031” or “PUE-2007-00033”; then follow “Search” hyperlink).

<sup>392</sup> See *id.*

TrAIL faced considerable opposition in Pennsylvania, Virginia, and West Virginia from environmentalists, historic preservationists, and landowning state residents.<sup>393</sup> Officials in those states are responsive to local objections to high-voltage transmission lines. Nonetheless, each state ultimately authorized the construction of the transmission line.

### A. Virginia

The Virginia State Corporation Commission (SCC) approved TrAIL, and the Virginia Supreme Court upheld the permit. Before authorization, however, political opposition to TrAIL, under the leadership of the Piedmont Environmental Council (“Piedmont”), became a *cause célèbre*.<sup>394</sup> In response to popular opposition to TrAIL, the Fairfax Chamber of Commerce established the Coalition for Reliable Energy, which was supported by Dominion Virginia Power (Dominion) and by several Northern Virginia power-intensive high-tech companies.<sup>395</sup>

In October 2006, Allegheny Energy, Inc. (Allegheny) incorporated Trans-Allegheny Interstate Line Co., Inc. (TrAILCo) to construct the Allegheny segments of the transmission project.<sup>396</sup> In the following April, after a careful reconsideration of route alternatives for the transmission line,<sup>397</sup> TrAILCo and Dominion filed an application with the Virginia SCC for an authorization to construct the Meadowbrook-

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<sup>393</sup> See, e.g., Sandhya Somashekhar, *Rep. Wolf Opposes Proposed Power Line*, WASH. POST, Sept. 15, 2006, at B2.

<sup>394</sup> See, e.g., *id.* Virginians for Sensible Energy Policy also opposed TrAIL. Sandhya Somashekhar, *Landowners Fear Ruin from Power Line Route*, WASH. POST, Dec. 11, 2006, at B1. In addition, “[Piedmont] has long argued that Virginia land is being sacrificed to Dominion Virginia Power’s (Dominion) real agenda of finding ways to route its cheap energy to lucrative markets in the Northeast. Dominion replies that it wants to prevent rolling blackouts in Northern Virginia by 2011.” Joel Garreau, *High Voltage, High Tension: In Virginia’s Piedmont, Electric Company and Critics Both Draw a Line*, WASH. POST, Mar. 5, 2007, at C1. TrAIL was also opposed in the Virginia Senate. See, e.g., S. 431, 2008 Sess. (Va. 2008) (requiring burial of transmission lines); S. 432, 2008 Sess. (Va. 2008) (requiring compensation for loss of land value due to transmission lines); Sandhya Somashekhar, *Power-Line Bills Downed*, WASH. POST, Jan. 25, 2008, at B2.

<sup>395</sup> Kendra Marr, *Data Centers Caught in Power Play; Electricity Plan Confounds Firms*, WASH. POST, Dec. 11, 2007, at D1.

<sup>396</sup> Allegheny Energy, Inc., *supra* note 276, at 25.

<sup>397</sup> Sandhya Somashekhar & Amy Gardner, *Power Line’s Route Options to Be Revisited*, WASH. POST, Jan. 24, 2007, at B1. Dominion also reconsidered but rejected a proposal for an underground transmission line that Dominion argued would complicate maintenance and increase the price of the transmission line from \$150 million to \$1.7 billion. *Id.*

Loudoun segment of TrAIL.<sup>398</sup> In addition, TrAILCo filed an application for an authorization to construct the Virginia portion of the 502 Junction-Meadowbrook mile segment.<sup>399</sup>

Each application was filed pursuant to Virginia's Utility Facilities Act,<sup>400</sup> applicable to, *inter alia*, electric companies,<sup>401</sup> and section 56-46.1 of the Code of Virginia, which is only applicable to electric companies.<sup>402</sup> The applications were not consolidated, but the SCC ordered a joint evidentiary hearing before an SCC hearing examiner and hearings in which the general public could comment.<sup>403</sup> The SCC also invited submission of legal memoranda regarding whether the SCC should consider the region-wide PJM need for TrAIL under section 56-46.1.<sup>404</sup> In particular, the SCC asked if, under Virginia law, it is "permitted, or required, to consider regional, multi-state need in reviewing an application for a [transmission] line in Virginia."<sup>405</sup>

Numerous local governments, environmental organizations, businesses, and individuals petitioned for participation in the joint hearing before the hearing examiner, including the Boards of Supervisors of Culpeper County, Fauquier County, Loudoun County, Prince William County, and Rappahannock County; Piedmont; the Virginia Outdoors Foundation; Virginia's Commitment; and Virginians for Sensible Energy Policies.<sup>406</sup> The public hearings began in July 2007 and were well-

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<sup>398</sup> Application of Virginia Electric and Power Co. for Approval and Certification of Meadowbrook to Loudoun 500 kV Transmission Line Project at 1, *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) 536 (No. PUE-2007-00031) (filed Apr. 19, 2007).

<sup>399</sup> Application of Trans-Allegheny Interstate Line Company for Approval and Certification of Electric Facilities for Construction of 500 kV Transmission Line at 1, *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) 536 (No. PUE-2007-00033) (filed Apr. 19, 2007).

<sup>400</sup> VA. CODE ANN. §§ 56-265.1 to .9 (2007).

<sup>401</sup> *See id.* §§ 56-265.2:1(A) (requiring approval for natural gas pipelines), 56-265.4:1 (covering electric public utilities).

<sup>402</sup> *Id.* § 56-46.1(B).

<sup>403</sup> Order for Notice and Hearing at 6–9, *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) 536 (Nos. PUE-2007–00031, PUE-2007-00033) (filed June 1, 2007).

<sup>404</sup> *Id.* at 7. The SCC rescheduled the evidentiary hearing for February 2008. Sandhya Somashekhar, *Staff Seeks Delay in Hearing on Proposed Power Line*, WASH. POST, Sept. 21, 2007, at B6.

<sup>405</sup> Order for Notice and Hearing, *supra* note 403, at 7.

<sup>406</sup> *See* Hearing Examiner's Ruling at 2–5, *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) 536 (Nos. PUE-2007-00031, PUE-2007-00033) (filed Aug. 1, 2007). In addition, CPV Warren, Dominion Country Club, the Dominion Valley Owners Association, Madison at Greenfields, Perch Associates, and the Power-Line Landowners Alliance petitioned to participate. *Id.*

attended by vocal opponents of TrAIL.<sup>407</sup> After the public hearings, Piedmont published a report that claimed that Dominion and Allegheny misrepresented data to support their applications for TrAIL.<sup>408</sup> In contrast, in January 2008, an SCC consultant publicly agreed with the need for TrAIL.<sup>409</sup>

In January 2008, the SCC ruled that in its consideration of the TrAIL applications, it could, under section 56-46.1, assess the regional need for TrAIL.<sup>410</sup> The statute requires the SCC, before it approves the construction of a transmission line over 138 kilovolts (kV), to “determine that the line is needed.”<sup>411</sup> The statute does not address, however, if the need for the line must be a state need or can be a multi-state or regional need.

TrAILCo and Dominion had argued that the SCC is both permitted and required to assess the regional and multi-state need for TrAIL under section 56-46.1: “Electricity knows no borders, and improvements in a neighboring state or in a region can have a profound effect on reliability in another state or region. Virginians benefit from transmission facilities both within and without Virginia.”<sup>412</sup> Piedmont agreed that the SCC could evaluate the regional need for TrAIL *as well as* the need

<sup>407</sup> See, e.g., Sandhya Somashekhar, *Hearing on Power Line Draws Vocal Crowd*, WASH. POST, July 27, 2007, at B2; Amy Orndorff, *Critics at Hearing Voice Concerns About Power Line*, WASH. POST, Aug. 12, 2007, at LZ8.

<sup>408</sup> See PIEDMONT ENVTL. COUNCIL, HOW DOMINION AND ALLEGHENY POWER GOT IT WRONG 2 (2007), available at <http://westvirginia.sierraclub.org/EXHIBIT%2006%20%20HowDominionandAlleghenyGotItWrong.pdf> (purporting to “show[] that the sacrifice that Dominion and Allegheny demand of Northern Virginia cannot be justified”). Piedmont alleged that Dominion and Allegheny “[c]laimed falsely that the proposed transmission line will benefit consumers, when. . . studies show that the line is more likely to enrich power generators to the west at the expense of consumers.” *Id.*

<sup>409</sup> Sandhya Somashekhar, *State-Hired Consultant Cites Necessity of New Power Line*, WASH. POST, Jan. 10, 2008, at B1.

<sup>410</sup> Order, *supra* note 391.

<sup>411</sup> VA. CODE ANN. § 56-46.1(B) (2007).

<sup>412</sup> Memorandum of Dominion Virginia Power and Trans-Allegheny Interstate Transmission Line Co. on Authority of the Commission to Consider Transmission Capacity Needs Outside Virginia at 4, *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) 536 (Nos. PUE-2007-00031, PUE-2007-00033) (filed Aug. 13, 2007). TrAILCo and Dominion also argued that the SCC has ruled that “a need *outside* Virginia can serve as the basis for authorizing construction of new transmission facilities *in* Virginia.” *Id.* at 5. See *Citizens for the Preservation of Floyd Cnty., Inc. v. Appalachian Power Co.*, 248 S.E.2d 797, 801 (Va. 1978) (SCC must assess multi-state need for transmission line); *Bd. of Supervisors v. Appalachian Power Co.*, 215 S.E.2d 918, 921 (Va. 1975) (SCC must assess regional need for transmission line).

within Virginia for the transmission line.<sup>413</sup> The SCC must “look to the operations of the integrated [electric power] system and not some political fraction of it that has little, if any, electrical significance.”<sup>414</sup>

In the January 2008 order, the SCC concluded that, under the Utility Facilities Act and section 56-46.1, the Commission “has the authority to consider regional, multi-state need (and benefits) in reviewing an application to construct a transmission line in Virginia.”<sup>415</sup> The weight accorded to evidence on regional need and benefits would increase to the extent they were related to needs and benefits within Virginia.<sup>416</sup>

The joint hearing before the SCC hearing examiner commenced in February<sup>417</sup> and was completed in March. Before an initial decision was issued, however, the hearing examiner re-opened the hearing record and re-convened the joint hearing to receive additional evidence on the need for TrAIL.<sup>418</sup> Finally, in July 2008, the SCC hearing examiner issued a report that recommended the issuance of authorizations for TrAIL.<sup>419</sup> The report determined, pursuant to section 56-46.1,<sup>420</sup> that there was a need for the proposed transmission line.<sup>421</sup> The report also determined that proposed routes for the Meadowbrook-Loudoun segment and Virginia portion of the 502 Junction-Meadowbrook segment of TrAIL would, consistent with the state statute,<sup>422</sup> “reasonably minimize adverse impact on the scenic assets, historic districts, and envi-

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<sup>413</sup> The Piedmont Memorandum on the Commission’s Authority to Consider Transmission Capacity Needs Outside Virginia at 2, *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) 536 (Nos. PUE-2007-00031, PUE-2007-00033) (filed Sept. 4, 2007).

<sup>414</sup> *Id.* at 3.

<sup>415</sup> Order, *supra* note 391, at 2.

<sup>416</sup> *Id.* at 3.

<sup>417</sup> See Sandhya Somashekhar, *Va. Utility Faces Biggest Fight in Plan for 65-Mile Power Line*, WASH. POST, Feb. 24, 2008, at A1.

<sup>418</sup> Hearing Examiner’s Ruling at 2, *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) 536 (Nos. PUE-2007-00031, PUE-2007-00033) (filed June 9, 2008); Sandhya Somashekhar, *State to Hold More Hearings on Dominion Plan*, WASH. POST, June 10, 2008, at B5; see Hearing Examiner’s Ruling at 3, *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) 536 (Nos. PUE-2007-00031, PUE-2007-00033) (filed June 12, 2008) (subsequent motion to re-open the record denied).

<sup>419</sup> Report of Alexander F. Skirpan, Jr., Hearing Examiner at 222–23, *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) 536 (Nos. PUE-2007-00031, PUE-2007-00033) (filed July 28, 2008). The 230-page report recommended the issuance of an SCC authorization for the Meadowbrook-Loudoun segment of TrAIL in Case No. PUE-2007-00031 and an authorization for the Virginia portion of the 502 Junction-Meadowbrook segment of TrAIL in Case No. PUE-2007-00033. *Id.* See Sandhya Somashekhar, *Official Backs Power Line Plan*, WASH. POST, July 29, 2008, at B1.

<sup>420</sup> VA. CODE ANN. § 56-46.1(B) (2007).

<sup>421</sup> See Report of Alexander F. Skirpan, Jr., *supra* note 419, at 167–99.

<sup>422</sup> VA. CODE ANN. § 56-46.1(B).

ronment.”<sup>423</sup> The hearing examiner conditioned the recommendation for issuance of authorizations upon Pennsylvanian and West Virginian approval for TrAIL.<sup>424</sup> The recommendation also advised compliance with numerous recommendations from the Virginia Department of Environmental Quality (DEQ).<sup>425</sup>

In October 2008, the SCC adopted the recommendation of the hearing examiner and issued the authorizations for TrAIL.<sup>426</sup> The SCC affirmed that there was a need for the transmission line in Virginia as well as in the Mid-Atlantic region, and that the route for each segment of TrAIL would minimize adverse environmental impacts.<sup>427</sup> The SCC agreed that the authorizations should be conditioned upon Pennsylvanian and West Virginian approval of TrAIL.<sup>428</sup> Additionally, the SCC conditioned the authorizations for TrAIL on compliance with numerous recommendations of the Virginia DEQ.<sup>429</sup>

With respect to the need for TrAIL, the SCC stated that it was reasonable to determine need on the basis of the thermal and voltage analyses for the PJM transmission system.<sup>430</sup> In addition, because it affirmed that there was a need for the transmission line in Virginia as well as in the Mid-Atlantic region, the SCC observed that it is “not required to determine, in this proceeding, whether need under Virginia law is met solely because of conditions outside Virginia.”<sup>431</sup>

In February 2009, Piedmont filed an appeal of the SCC order with the Supreme Court of Virginia, which, in November 2009, affirmed the SCC order.<sup>432</sup> In the appeal, Piedmont questioned the SCC determina-

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<sup>423</sup> Report of Alexander F. Skirpan, Jr., *supra* note 419, at 199.

<sup>424</sup> *Id.* at 209–16.

<sup>425</sup> *Id.*

<sup>426</sup> *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) at 551; see Nick Miroff, *Va. Panel's Approval of Power Line Stirrs Dismay*, WASH. POST, Oct. 12, 2008, at C1; Sandhya Somashekhar, *State Agency Greenlights Power Line in Rural N. Va.*, WASH. POST, Oct. 8, 2008, at B1. In August 2008, a lawyer that had represented Dominion was appointed to the SCC. Sandhya Somashekhar, *Ex-Dominion Lawyer's Appointment Poses Conflict, Power Line Foes Say*, WASH. POST, Aug. 19, 2008, at B2.

<sup>427</sup> *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) at 541, 543, 548–49.

<sup>428</sup> *Id.* at 547.

<sup>429</sup> *Id.* at 550.

<sup>430</sup> *Id.* at 541, 542 n.13.

<sup>431</sup> *Id.* at 543.

<sup>432</sup> *Piedmont Envtl. Council v. Va. Elec. & Power Co.*, 684 S.E.2d 805, 818 (Va. 2009). Piedmont's appeal was consolidated with appeals by Culpepper County Board of Supervisors, Fauquier County Board of Supervisors, Power-Line Landowners Alliance, and Prince William County Board of Supervisors. *Id.* at 807 n.1; see Sandhya Somashekhar, *Lawmakers Urge State to Appeal Approval*, WASH. POST, Oct. 11, 2008, at B5.

tion that there was a need for TrAIL.<sup>433</sup> The Virginia Supreme Court observed that “the determination of the need for the construction of the entire 500 kV interstate electric transmission line was subject to a federal regulatory process” that involved FERC and PJM.<sup>434</sup> In addition, “[t]he federal determination of need for the new interstate transmission line was the result of a mandatory [RTEP] process.”<sup>435</sup>

The court also held that the SCC, to make a determination of need required by state statute, could utilize the RTEP analysis prepared by PJM, which was incorporated into the applications filed with the SCC.<sup>436</sup> The state statute requires the SCC to “verify” the analysis provided in an application to support the need for a transmission line.<sup>437</sup> There is nothing in the statute to suggest “that to accomplish this verification the Commission is required to obtain new data from an independent source, rather than giving any weight to the data provided by the applicant.”<sup>438</sup> Thus the SCC did not err when it accepted an analysis prepared by PJM on the regional need for TrAIL.<sup>439</sup>

Despite local opposition, the Virginia SCC authorized construction of TrAIL in Virginia. In so doing, the SCC opined that a regional need for the transmission line could be considered under the state statute requiring a need for a transmission line before its construction in the state is approved.<sup>440</sup> In addition, the SCC deferred to PJM on determination of the regional need for TrAIL.<sup>441</sup> The Virginia Supreme Court upheld this deference to PJM.<sup>442</sup>

### B. West Virginia

The Public Service Commission (PSC) of West Virginia regulates public utilities—including electric utilities—in the state.<sup>443</sup> In March 2007, TrAILCo filed an application with the West Virginia PSC for a Certificate of Public Convenience and Necessity (CPCN) to construct

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<sup>433</sup> *Piedmont*, 684 S.E.2d at 810–11.

<sup>434</sup> *Id.* at 808.

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* at 815.

<sup>437</sup> VA. CODE ANN. § 56-46.1(B) (2007).

<sup>438</sup> *Piedmont*, 684 S.E.2d at 814.

<sup>439</sup> *Id.* at 815.

<sup>440</sup> *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) at 543; Order, *supra* note 391, at 2.

<sup>441</sup> *Va. Elec. & Power Co.*, 268 Pub. Util. Rep. (PUR) at 541.

<sup>442</sup> See *Piedmont*, 684 S.E.2d at 818.

<sup>443</sup> *Commission History*, PUB. SERV. COMM'N OF W. VA., <http://www.psc.state.wv.us/hist.htm> (last visited Jan. 15, 2013).



and operate the West Virginia segment of TrAIL.<sup>444</sup> TrAILCo filed the application pursuant to section 24-2-11a of the West Virginia Code.<sup>445</sup> Within two years, the West Virginia PSC issued the CPCN to TrAILCo, and the state appellate court denied judicial review.

In June 2007, the West Virginia PSC ordered TrAILCo to supplement the CPCN application with an analysis of an alternative TrAIL route, which had been proposed by the Consumer Advocate Division (“Advocate”) of the West Virginia PSC.<sup>446</sup> The Commission also ordered public comment and evidentiary hearings,<sup>447</sup> granted several petitions to intervene,<sup>448</sup> and indicated that it intended to issue a final order in the proceeding by March 2008.<sup>449</sup> In subsequent orders, the West Virginia PSC granted several additional petitions to intervene, including a petition filed by the Sierra Club;<sup>450</sup> scheduled public hearings;<sup>451</sup> and scheduled an evidentiary hearing for January 2008.<sup>452</sup>

Following the hearings, in April 2008 TrAILCo, the staff of the West Virginia PSC, the Advocate, and the West Virginia Energy Users

<sup>444</sup> Application for Certificate of Public Convenience and Necessity and for Related Relief at 1, *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) 169 (No. 07-0508-E-CN) (W. Va. P.S.C. Aug. 1, 2008) (filed Mar. 30, 2007) (to access all docket entries for this case, visit <http://www.psc.state.wv.us/orders/default.htm>; follow “search” hyperlink; then search “Case Number” for “07-0508-E-CN”; then follow “Search” hyperlink).

<sup>445</sup> W. VA. CODE § 24-2-11a (2012).

<sup>446</sup> Commission Order at 7–8, *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) 169 (No. 07-0508-E-CN) (filed June 11, 2007). Under section 24-2-11(f) of the West Virginia Code, the PSC was required to issue a decision on the application within four hundred days. W. VA. CODE § 24-2-11(f).

<sup>447</sup> Commission Order, *supra* note 446, at 9–10.

<sup>448</sup> *Id.* at 11. The West Virginia PSC granted the petitions to intervene by the Advocate, the West Virginia Energy Users Group, and the Laurel Run Community Watershed Association. *Id.* Further, it granted petitions to intervene by the Hallack/Triune Community and International Brotherhood of Electrical Workers Local 2357 contingent on each party retaining an attorney to represent it. *Id.*

<sup>449</sup> *Id.* at 10. The West Virginia PSC stated its intention to issue its final order before FERC would be able to preempt state siting authority under the EAct. *Id.*

<sup>450</sup> Commission Order at 6–7, *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) 169 (No. 07-0508-E-CN) (dated Sept. 27, 2007) (granting Sierra Club, Inc. motion to intervene); Commission Order at 3, *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) 169 (No. 07-0508-E-CN) (dated Dec. 4, 2007); Commission Order at 4, *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) 169 (No. 07-0508-E-CN) (dated Dec. 18, 2007).

<sup>451</sup> Sept. 27, 2007 Commission Order, *supra* note 450, at 7–9; Commission Order at 6, *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) 169 (No. 07-0508-E-CN) (dated Oct. 24, 2007).

<sup>452</sup> Sept. 27, 2007 Commission Order, *supra* note 450, at 9; Commission Order at 3–4, 6, *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) 169 (No. 07-0508-E-CN) (dated Nov. 26, 2007).

Group filed a settlement with the West Virginia PSC.<sup>453</sup> The West Virginia PSC held a hearing on the proposed settlement,<sup>454</sup> and granted a CPCN for the West Virginia segment of TrAIL in August 2008.<sup>455</sup> In a seven-part order, the West Virginia PSC (i) determined there was a state—and regional—need for TrAIL;<sup>456</sup> (ii) concluded the transmission line met the criteria of section 24-2-11a;<sup>457</sup> (iii) concluded TrAIL would result in “an acceptable balance” between power needs and environmental considerations;<sup>458</sup> (iv) selected the route for the transmission line;<sup>459</sup> (v) specified conditions upon which the West Virginia PSC granted the CPCN;<sup>460</sup> (vi) described TrAILCo compliance with the order;<sup>461</sup> and (vii) ruled on several outstanding motions.<sup>462</sup>

With respect to the need for TrAIL, section 24-2-11a authorizes the West Virginia PSC to approve an application for a CPCN if the proposed transmission line, *inter alia*, can meet a need for electric power or “is necessary and desirable for present and anticipated reliability of service for electric power for [the] *service area or region*” of the applicant.<sup>463</sup> Thus the state statute explicitly authorized the West Virginia PSC to make a determination of need based on a state need or a regional

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<sup>453</sup> Joint Stipulation and Agreement for Settlement at 4–6, *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) 169 (No. 07-0508-E-CN) (dated Apr. 15, 2008).

<sup>454</sup> Commission Order at 3, *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) 169 (No. 07-0508-E-CN) (dated May 1, 2008) (setting joint stipulation hearing date as May 30, 2008).

<sup>455</sup> *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) at 171.

<sup>456</sup> *Id.* at 197; *see also id.* at 177–97.

<sup>457</sup> *Id.* at 197; *see also id.* at 197–210.

<sup>458</sup> *Id.* at 215; *see also id.* at 209–15. The West Virginia Code authorizes the West Virginia PSC to approve an application for a CPCN if the proposed transmission line, *inter alia*, “[w]ill result in an acceptable balance between reasonable power needs and reasonable environmental factors.” W. VA. CODE § 24-2-11a(d)(3) (2012) (emphasis added).

<sup>459</sup> *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) at 217. *See also id.* at 215–22.

<sup>460</sup> *Id.* at 222–27. The Joint Stipulation and Agreement for Settlement and two additional settlement agreements included the conditions on which the West Virginia PSC granted the CPCN. *Id.* at 222. All of the conditions were adopted by the West Virginia PSC. *Id.* at 222, 261–62. Under the proposed settlement, TrAILCo, along with Monongahela Power Company and the Potomac Edison Company, agreed to increase the financial benefits to West Virginia from the West Virginia segment of TrAIL. *Id.* at 276, 278. Second, the companies agreed to an additional investment in West Virginia of fifty million dollars. *Id.* at 279. Third, the companies agreed to a modification to the proposed route for the transmission line. *Id.* at 283. Finally, the companies agreed to numerous proposals with respect to transmission line routing, engineering, construction, maintenance, and operation. *Id.* at 222–27, 279–82.

<sup>461</sup> *Id.* at 227–28.

<sup>462</sup> *Id.* at 228–31.

<sup>463</sup> W. VA. CODE § 24-2-11a(d)(1) (emphasis added).

need.<sup>464</sup> Here, the West Virginia PSC found both state and regional needs.<sup>465</sup> Construction and operation of TrAIL would mitigate the risk of “load shedding” in the eastern panhandle of West Virginia.<sup>466</sup> Additionally, the West Virginia PSC identified a second state need because West Virginia exports electric power to other Mid-Atlantic states.<sup>467</sup> The West Virginia PSC also considered the PJM-determined regional need in granting the CPCN.<sup>468</sup>

TrAILCo and the Sierra Club filed petitions for rehearing of the August 2008 West Virginia PSC order.<sup>469</sup> In November 2008, the Sierra Club filed a supplemental memorandum in support of its petition for rehearing.<sup>470</sup> In February 2009, the West Virginia PSC granted the TrAILCo petition and denied the Sierra Club petition.<sup>471</sup>

The Sierra Club then filed a petition for review of the West Virginia PSC orders with the West Virginia Supreme Court of Appeals in March 2009.<sup>472</sup> In a one-page order, the court denied the petition in April 2009.<sup>473</sup>

<sup>464</sup> W. VA. CODE § 24-2-11a(d)(1) (2012); *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) at 177.

<sup>465</sup> *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) at 187–88, 195.

<sup>466</sup> *Id.* at 195. “Load shedding” refers to the intentional rolling power outages that electric companies impose to prevent wide-scale blackouts. *Id.* at 195–96.

<sup>467</sup> *Id.* at 253; *see also id.* at 177–78 (quoting Commission Order at 76, Beech Ridge Energy LLC, No. 05-1590-E-CS (W. Va. P.S.C. Aug. 28, 2006) (“The power grid is interconnected, and to safeguard the availability of productive, well-maintained grid resources to our state’s residents, West Virginia must participate in the interconnected grid system.”); W. VA. CODE § 24-2-1e (permitting construction of facilities to transmit electricity from West Virginia generating facilities to “economically marketed” out-of-state areas).

<sup>468</sup> *Trans-Allegheny Interstate Line Co.*, 267 Pub. Util. Rep. (PUR) at 197.

<sup>469</sup> *See Trans-Allegheny Interstate Line Co.*, No. 07-0508-E-CN, 2009 WL 3517729, at \*1 (W. Va. P.S.C. Feb. 13, 2009) (rehearing order).

<sup>470</sup> *Id.* at \*13 (Petition for Continuing Prudence Review and Supplemental Memorandum in Support of Petition for Reconsideration (“Prudence Petition”). The Prudence Petition was filed under a state statute permitting continuing review of the wisdom of a transmission line that would be completed more than one year after the West Virginia PSC issued a CPCN. W. VA. CODE § 24-2-11b (2008).

<sup>471</sup> *Trans-Allegheny Interstate Line Co.*, 2009 WL 3517729, at \*6, \*12. The Sierra Club argued, *inter alia*, that West Virginia would not benefit from TrAIL without a tax on the transmission line and the West Virginia PSC had ignored the environmental impact of the coal-fueled electric power plants that would utilize TrAIL. *Id.* at \*2–3, \*4. The West Virginia PSC also denied the Prudence Petition. *Id.* at \*15. The TrAILCo petition had sought, *inter alia*, reconsideration of the requirement that TrAILCo not commence with the construction of the West Virginia segment of TrAIL until a compliance hearing confirmed that all pre-construction conditions were met. *Id.* at \*10. On reconsideration, the compliance hearing requirement was eliminated. *Id.* at \*11.

<sup>472</sup> Petition of Sierra Club, Inc. for Suspension and Review of Final Orders of the Public Service Commission in Case No. 07-0508-E-CN, *Sierra Club, Inc. v. Pub. Serv. Comm’n*,

### C. Pennsylvania

To complete permitting of the line and construct the Pennsylvania segment of TrAIL, in April 2007 TrAILCo filed five related applications with the Pennsylvania Public Utility Commission (PUC).<sup>474</sup> In December 2008, TrAIL received its third and final state approval. The company filed the applications pursuant to the Pennsylvania Public Utility Code, which authorizes the PUC to issue certificates of public convenience,<sup>475</sup> and the regulations promulgated thereunder for Pennsylvania PUC review of electric transmission lines.<sup>476</sup>

Following a pre-hearing conference, the Pennsylvania PUC consolidated the five applications.<sup>477</sup> The Commission granted several petitions to intervene and observed that over two hundred protests against the applications were filed with the Commission.<sup>478</sup> Like the West Virginia PSC, the Pennsylvania PUC ordered public hearings and an evidentiary hearing.<sup>479</sup> The Commission scheduled the evidentiary hearing for January 2008, and anticipated it would issue a final order in June 2008.<sup>480</sup> In a subsequent pre-hearing order, the Pennsylvania PUC established a schedule to view properties that would be affected by TrAIL's construction.<sup>481</sup> In January 2008, the Commission re-scheduled

No. 09-0379 (W. Va. Apr. 29, 2009) (filed Mar. 13, 2009). The petition for review was filed under W. VA. CODE § 24-5-1 (review of final orders of commission). *Id.* at 3.

<sup>473</sup> *Sierra Club, Inc.*, No. 09-0379.

<sup>474</sup> See Prehearing Order at 1–2, *Trans-Allegheny Interstate Line Co.*, Nos. A-110172, A-110172F0002–A-110172F0004, G-00071229, 2008 WL 5786507 (Pa. P.U.C. Nov. 13, 2008) (dated July 26, 2007) (to access all docket entries for this case, visit [http://www.puc.state.pa.us/about\\_puc/search\\_results.aspx?advanced=true](http://www.puc.state.pa.us/about_puc/search_results.aspx?advanced=true); then search “Docket Number” for “A-110172,” “A-110172F0002,” “A-110172F0003,” “A-110172F0004,” or “G-00071229”; then follow “Search for Documents” hyperlink).

<sup>475</sup> 66 PA. CONS. STAT. §§ 101, 1102(a)(5) (2000).

<sup>476</sup> 52 PA. CODE §§ 57.71–.77 (2001). The Pennsylvania PUC may not issue a certificate of public convenience unless it determines “there is a need” for the proposed high-voltage line. *Id.* § 57.76(a)(1).

<sup>477</sup> Prehearing Order, *supra* note 474.

<sup>478</sup> See *id.* at 2. The Pennsylvania PUC granted the petitions to intervene of Allegheny Electric Cooperative, Pennsylvania Rural Electric Association, Columbia Gas Transmission Corporation, Columbia Gas of Pennsylvania, and West Penn Industrial Intervenors. *Id.*

<sup>479</sup> Nov. 26, 2007 Commission Order, *supra* note 452; Prehearing Order, *supra* note 474, at 6.

<sup>480</sup> Prehearing Order, *supra* note 474, at 6. A “technical evidentiary hearing,” the Pennsylvania PUC convened to hear prepared written testimony and cross-examine witnesses. *Id.* at 4.

<sup>481</sup> Second Prehearing Order at 2–4, *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507 (Nos. A-110172, A-110172F0002–A-110172F0004, G-00071229) (dated Aug. 23, 2007).

the evidentiary hearing for the last week of March and first week of April 2008.<sup>482</sup>

Following the hearing, two administrative law judges for the Pennsylvania PUC issued a Recommended Decision rejecting all five applications for the Pennsylvania segment of TrAIL.<sup>483</sup> In particular, the Recommended Decision found no need for the transmission line *within* Pennsylvania and observed that “the true impetus for [TrAIL] is to transport cheaper coal-fired generation from western PJM to eastern PJM and to encourage the siting of new generation in western PJM where it may be more palatable.”<sup>484</sup>

The Recommended Decision treated TrAIL as two segments: (i) a segment from a proposed substation in Washington County, Pennsylvania to a proposed 502 Junction substation in Greene County, Pennsylvania, and (ii) a segment from the 502 Junction substation to the existing substation in Loudoun County, Virginia.<sup>485</sup> The Pennsylvania portion of the 502 Junction-Loudoun County segment of TrAIL would be just 1.2 miles in length.<sup>486</sup> The Recommended Decision concluded that both the Prexy segment and the Pennsylvania portion of the 502 Junction-Loudoun County segment failed to meet the requirements of Public Utility Code regulations for Pennsylvania PUC approval to construct a high-voltage transmission line.<sup>487</sup> In particular, the recommended decision concluded that there was need for neither the Prexy segment nor the 1.2 mile Pennsylvania portion of the 502 Junction-Loudoun County segment.<sup>488</sup>

<sup>482</sup> Fourth Prehearing Order at 2, *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507 (Nos. A-110172, A-110172F0002–A-110172F0004, G-00071229) (dated Jan. 2, 2008).

<sup>483</sup> Recommended Decision at 4, 237, *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507 (Nos. A-110172, A-110172F0002–A-110172F0004, G-00071229) (dated Aug. 15, 2008); *see id.* at 234–37 (discussing conclusions of law and recommendations); *see also* Sandhya Somashekar, *Power Line Project Dealt Setback*, WASH. POST, Aug. 22, 2008, at B3; Editorial, *Across State Lines*, WASH. POST, Sept. 2, 2008, at A14.

<sup>484</sup> *See* Recommended Decision, *supra* note 483, at 234.

<sup>485</sup> *Id.* at 1–2.

<sup>486</sup> *Id.* at 10.

<sup>487</sup> *Id.* at 234 (defining the question as “whether the proposed projects are needed as defined by Pennsylvania law”); 52 PA. CODE § 57.76(a) (2001) (“The Commission will not grant the application . . . unless it finds and determines . . . (1) [t]hat there is a need for it.”).

<sup>488</sup> Recommended Decision, *supra* note 483, at 78–151 (discussion), 231 ¶¶ 2–3 (conclusion), 234 (reasoning). The recommended decision included additional conclusions. First, the transmission line segments would create an unreasonable risk of danger to public health and safety. *Id.* at 190–203 (discussion), 231 ¶¶ 4–5, 235 (conclusion). Second, the transmission line segments would not be in compliance with applicable statutes and regulations for the protection of natural resources. *Id.* at 177–90 (discussion), 231–32 ¶¶ 6–7

Following issuance of the Recommended Decision, TrAILCo negotiated a settlement agreement with Greene County.<sup>489</sup> Under this September 2008 agreement, TrAILCo sought a stay of the PUC proceeding with respect to the Prexy-502 Junction segment of TRAIL, and Greene County withdrew its opposition to the Pennsylvania portion of the 502 Junction-Loudoun County segment.<sup>490</sup> In December 2008, the PUC, contrary to the Recommended Decision, issued an opinion and order that approved the Greene County settlement agreement and authorized the construction of the Pennsylvania portion of the 502 Junction-Loudoun County segment.<sup>491</sup>

Notwithstanding the finding in the Recommended Decision that there was no need for either the Prexy segment or the Pennsylvania portion of the 502 Junction-Loudoun County segment of TrAIL, the opinion and order concluded that TrAILCo had demonstrated a need for the transmission line.<sup>492</sup> The opinion and order emphasized that the Pennsylvania portion of the 502 Junction-Loudoun County segment would be just 1.2 miles in length,<sup>493</sup> determined that a 1.2 mile transmission line would have a minimal impact of the environment,<sup>494</sup> con-

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(conclusion). Third, the transmission line segments would not have a minimal adverse environmental impact. *Id.* at 177–90 (discussion), 232 ¶¶ 8–9, 235 (conclusion). Overall, the recommended decision stated that “[t]he primary conclusion we have reached after reviewing the entire record of this proceeding is that the present applications are incomplete, and that, in general, TrAILCo has failed to carry its burden of proof.” *Id.* at 234.

<sup>489</sup> Agreement at 1, *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507 (Nos. A-110172, A-110172F0002–A-110172F0004, G-00071229) (dated Sept. 25, 2008). The West Penn Power Company is a party to the settlement agreement. *Id.* at 2.

<sup>490</sup>*Id.* at 3 ¶ 3, 7 ¶ 5, 11; *Allegheny Agrees to Move Line*, WASH. POST, Sept. 23, 2008, at B2. The parties agreed to stay the proceeding with respect to the Prexy-502 Junction segment of TRAIL until the completion of a collaborative assessment of alternatives to the segment such as improvements and enhancements to operating transmission facilities. *Id.* at 4 ¶ 3(b).

<sup>491</sup> *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507, at \*6, \*9; Motion of Chairman Cawley, *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507 (Nos. A-110172, A-110172F0002–A-110172F0004, G-00071229) (dated Nov. 13, 2008) (moving to authorize construction); Motion of Chairman Cawley, *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507 (Nos. A-110172, A-110172F0002–A-110172F0004, G-00071229) (dated Nov. 13, 2008) (moving to approve settlement agreement); see also Sandhya Somashekhar, *Pa. Decision Allows Work to Begin on High-Voltage Power Line*, WASH. POST, Nov. 14, 2008, at B2.

<sup>492</sup> *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507, at \*17–19; Recommended Decision, *supra* note 483, at 231 ¶¶ 2–3. The Pennsylvania PUC agreed “that economics was a consideration of TrAILCo in proposing the Pennsylvania” portion of the 502 Junction-Loudoun County segment, but the transmission line “is needed to address reliability issues and is the best alternative available to achieve that result.” *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507, at \*18.

<sup>493</sup> *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507, at \*22.

<sup>494</sup> *Id.* at \*24.

cluded that the transmission line would pose no health or safety concerns,<sup>495</sup> and imposed several conditions on TrAILCo.<sup>496</sup> The opinion and order also stayed the Pennsylvania PUC proceeding with respect to the Prexy segment of TrAIL.<sup>497</sup>

The need for the transmission line was based in part on the regional need for reliable electric transmission service.<sup>498</sup> The opinion and order explained that “this Commission has an obligation to enhance regional reliability and mitigate transmission constraints in order to reduce congestion for ratepayers in Pennsylvania *and adjacent jurisdictions*.”<sup>499</sup> In support of this statement, the Pennsylvania PUC cited a state statute that requires it to work with the federal government and with “other states in the region . . . to ensure the continued provision of adequate, safe and reliable electric service to the citizens and businesses of this Commonwealth.”<sup>500</sup>

Like the Virginia SCC and West Virginia PSC, the Pennsylvania PUC interpreted its mandate under state law regarding permitting and siting interstate transmission facilities to allow—indeed, require—the consideration of regional need for a proposed transmission line in the state. The 1.2 mile Pennsylvania portion of the 502 Junction-Loudoun County segment of TrAIL would not provide electric power service in Pennsylvania, but the Pennsylvania PUC nonetheless determined that the PJM-determined regional need for TrAIL justified its approval for construction.

An appeal soon followed. In January 2009, the Energy Conservation Council of Pennsylvania (“Council”) appealed the opinion and order to the Commonwealth Court of Pennsylvania.<sup>501</sup> The Council argued that it was error for the Pennsylvania PUC to base its determination on a regional need for reliable electric transmission service.<sup>502</sup> In

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<sup>495</sup> See *id.* at \*25–27.

<sup>496</sup> See, e.g., *id.* at \*24 (conditioning permit on TrAILCo generating a plan to detect water sources in order to minimize impact to them); *id.* at \*26 (conditioning permit on TrAILCo avoiding use of herbicides near water sources and pastures).

<sup>497</sup> *Id.* at \*36.

<sup>498</sup> See *id.* at \*18.

<sup>499</sup> *Trans-Allegheny Interstate Line Co.*, 2008 WL 5786507, at \*18 (emphasis added).

<sup>500</sup> *Id.*; 66 PA. CONS. STAT. § 2805(a) (2000).

<sup>501</sup> Definitive Brief of the Energy Conservation Council at 13, *Energy Conservation Council v. Pa. Pub. Util. Comm'n*, 995 A.2d 465 (Pa. Commw. Ct. 2009) (No. 51 C.D. 2009), 2009 PA CW. Ct. Briefs LEXIS 1908 at \*17. The Sierra Club, Piedmont Environmental Council, and three additional public interest organizations filed an *amicus curiae* brief. Brief Amicus Curiae of Sierra Club, et al., in Support of Appellant, *Energy Conservation Council*, 995 A.2d 465 (No. 51 C.D. 2009), 2009 PA CW. Ct. Briefs LEXIS 1906.

<sup>502</sup> Definitive Brief of the Energy Conservation Council, *supra* note 501, at 32–35.

May 2010, the court rejected that argument and affirmed the Pennsylvania PUC finding of public need for the transmission line.<sup>503</sup> The court explained that while the Code has not defined “need[,] . . . Pennsylvania courts have recognized that there is a need for regional electric service reliability and a reliable regional transmission system.<sup>504</sup> The Pennsylvania PUC should “ensure safe and reliable electric service” in the region.<sup>505</sup> The court also held that the interpretation of the state statute on which the PUC relied to find need was reasonable and not erroneous.<sup>506</sup>

With permits to construct TrAIL from Virginia, West Virginia, and Pennsylvania, TrAILCo commenced construction of TrAIL in 2008.<sup>507</sup> Construction was completed in 2011, and the transmission line became operational on May 23, 2011.<sup>508</sup>

#### V. STATE PERMITTING FOR THE POTOMAC-APPALACHIAN TRANSMISSION HIGHLINE

Although state jurisdiction to permit and site the Trans-Allegheny Interstate Line (TrAIL) could have posed an obstacle to the construction of the interstate power line, state proceedings in Virginia, West Virginia, and Pennsylvania disproved the argument that states, in general, are too parochial in their perspective to address the regional need for interstate transmission lines that do not provide direct benefits to their residents. The other “backbone” transmission projects that would provide electric power to the Washington-Baltimore-Northern Virginia region—the Potomac-Appalachian Transmission Highway (PATH) and the Mid-Atlantic Power Pathway (MAPP)—have been suspended by PJM Interconnection, LLC (PJM) and are being held in abeyance.<sup>509</sup>

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<sup>503</sup> *Energy Conservation Council*, 995 A.2d at 484. In addition, the court held that the applications TrAILCo filed pursuant to the Pennsylvania Public Utility Code sufficed for the Pennsylvania PUC requirements for form and content and that TrAILCo provided sufficient evidence that the 1.2 mile Pennsylvania portion of the 502 Junction-Loudoun County segment would minimize adverse environmental impacts. *Id.* at 479, 482.

<sup>504</sup> *Id.* at 485 (citing *Stone v. Pa. Pub. Util. Comm'n*, 162 A.2d 18, 19–21 (Pa. Super. Ct. 1960); *Dunk v. Pa. Pub. Util. Comm'n*, 232 A.2d 231, 234–35 (Pa. Super. Ct. 1967); see also 66 PA. CONS. STAT. § 2802(12) (2000) (stressing that the safety, health, and welfare of Pennsylvania citizens depends on the reliability of the interconnected electric system); *id.* § 2803 (defining reliability).

<sup>505</sup> *Energy Conservation Council*, 995 A.2d at 485.

<sup>506</sup> *Id.* at 486.

<sup>507</sup> *TrAIL Construction*, TRANS-ALLEGHENY INTERSTATE LINE, [http://www.aptrailinfo.com/images/trail\\_schedule.jpg](http://www.aptrailinfo.com/images/trail_schedule.jpg) (last updated Apr. 2009).

<sup>508</sup> *Id.*; 2011 RTEP, *supra* note 375, at 14.

<sup>509</sup> 2011 RTEP, *supra* note 375.



Prior to their suspensions, however, states had commenced proceedings to permit and site those transmission lines:<sup>510</sup> West Virginia, Virginia, and Maryland for PATH,<sup>511</sup> and Maryland and Virginia for MAPP.<sup>512</sup>

Before PJM suspended PATH and MAPP, none of these five proceedings reached a stage in which a PSC was required to determine if a need for the transmission line could be based on a PJM-determined regional need.<sup>513</sup> In Virginia and West Virginia, however, there is precedent for a determination that a need for those transmission lines could be based on regional need.<sup>514</sup> In Maryland, no such precedent has been established, although both PATH and MAPP would provide electric power to Baltimore and thus would address a state need.<sup>515</sup> Thus, if and when the PATH and MAPP projects proceed, it appears that, again, state jurisdiction over those transmission lines will not pose an obstacle to their construction.

#### A. West Virginia

In West Virginia, proceedings to permit PATH were marked by delays, and PJM suspended the project before the evidentiary hearing. In May 2009, PATH West Virginia Transmission Company, LLC (“PATH West Virginia”) and PATH Allegheny Transmission Company, LLC (“PATH Allegheny”) filed an application with the West Virginia Public Service Commission (PSC) for an authorization to construct the West Virginia segments of PATH.<sup>516</sup> The segments would traverse thirteen counties in West Virginia, enter Virginia, re-enter West Virginia, traverse Jefferson County, and finally re-enter Virginia.<sup>517</sup> The application also sought authorization for the Welton Spring substation and for modifications to the Amos substation.<sup>518</sup>

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<sup>510</sup> See *infra* notes 516–622, 623–667 and accompanying text.

<sup>511</sup> See *infra* notes 516–542, 543–586, 587–622 and accompanying text.

<sup>512</sup> See *infra* notes 623–653, 654–667 and accompanying text.

<sup>513</sup> See *infra* notes 516–667 and accompanying text.

<sup>514</sup> See VA. CODE ANN. § 56-265.2 (2007); W. VA. CODE § 24-2-11a(d)(1) (2012).

<sup>515</sup> See 2007 RTEP, *supra* note 287, at 71; 2008 RTEP, *supra* note 337, at 115.

<sup>516</sup> Application for Certificate of Convenience and Necessity Under W. Va. Code § 24-2-11a, PATH W. Va. Transmission Co., No. 09-0770-E-CN, 2011 WL 1310472 (W. Va. P.S.C. Sept. 7, 2011) (filed May 15, 2009) (to access all docket entries for this case, visit <http://www.psc.state.wv.us/WebDocket/default.htm>; then search “Case Number” for “09-0770-E-CN”; then follow “Search” hyperlink; then follow “Activities” hyperlink).

<sup>517</sup> *Id.* at 1–2.

<sup>518</sup> *Id.* at 1, 13. The application, filed pursuant to West Virginia Code § 24-2-11a, also requested that PATH West Virginia and PATH Allegheny be found to be “public utilities” within the meaning of West Virginia Code § 54-1-1 to enable those companies to exercise

The application explained that PATH West Virginia would construct and own the segment of PATH that traverses thirteen West Virginian counties and that PATH Allegheny would construct and own the segment that traverses Jefferson County.<sup>519</sup> The companies would jointly construct and own the Welton Spring substation.<sup>520</sup> The application argued that there were regional and state needs for PATH, the West Virginia segments of which “are critical components of an effective solution for the long-term reliability issues in the PJM region.” The applicants asserted PATH would “economically, adequately and reliably contribute to meet[] the present and anticipated requirements for electric power . . . in West Virginia.”<sup>521</sup> The application also submitted that the 1.85 billion dollar project would not have a significant environmental impact.<sup>522</sup>

The West Virginia PSC observed that “[t]here is enormous interest in this case, and it appears that there has been a concerted and coordinated effort to encourage persons who may be affected by the PATH project to seek formal intervention in this proceeding.”<sup>523</sup> In response to public notice of the application,<sup>524</sup> petitions to intervene were filed by the county commissions for six West Virginia counties, the Consumer Advocate Division, the Sierra Club, and the West Virginia Nature Conservancy.<sup>525</sup> The West Virginia PSC granted the petitions, organized the individuals and businesses into intervenor groups for twenty one counties, scheduled an evidentiary hearing for February 2010, and tentatively scheduled public hearings for September and October 2009.<sup>526</sup>

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the power of eminent domain. Commission Order, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Aug. 4, 2009).

<sup>519</sup> See Commission Order at 1, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed July 17, 2009).

<sup>520</sup> *Id.*

<sup>521</sup> W. VA. CODE § 24-2-11a(d)(1) (2012).

<sup>522</sup> See Commission Order at 15, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed June 3, 2010).

<sup>523</sup> See July 17, 2009 Commission Order, *supra* note 518, at 3.

<sup>524</sup> Application for Certificate of Convenience and Necessity, *supra* note 516, at 1; Commission Order at 1, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed June 24, 2009).

<sup>525</sup> Commission Order app. B at 1, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Aug. 4, 2009). The City of Charles Town, the West Virginia Energy Users Group, a union, and over 250 individuals and businesses also filed petitions to intervene. *Id.*

<sup>526</sup> *Id.* at 2, 7–9, 17, 21; see *id.* app. B at 1–8.

Following a status hearing in August 2009,<sup>527</sup> the West Virginia PSC scheduled five public hearings on the application throughout the state.<sup>528</sup> In October 2009, the Commission staff filed a motion to dismiss the application without prejudice.<sup>529</sup> The PATH applicants, the staff argued, should re-file the application with an updated analysis of the need for the transmission line.<sup>530</sup> The West Virginia PSC, in response, suspended the procedural schedule for the evidentiary hearing and invited responses to the motion.<sup>531</sup> The Consumer Advocate Division, the Sierra Club, and the West Virginia Highlands Conservancy all supported the motion; however, the Commission ultimately denied the motion.<sup>532</sup> Instead, it amended the procedural schedule to commence the evidentiary hearing in October 2010.<sup>533</sup> The amended schedule would ensure that the applicants could file an updated analysis in the proceeding.<sup>534</sup>

In June 2010, PATH West Virginia and PATH Allegheny proposed that the hearing commence in January 2011 to align the proceeding with separate anticipated hearings in Virginia and Maryland.<sup>535</sup> The West Virginia PSC accepted the proposal.<sup>536</sup> In August, PATH West Virginia and PATH Allegheny again proposed to amend the procedural schedule.<sup>537</sup> The Commission again accepted the proposal and revised the procedural schedule to commence the hearing in January 2011.<sup>538</sup> In January 2011, the West Virginia PSC revised the procedural schedule for the fourth time: the hearing would commence in October 2011.<sup>539</sup>

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<sup>527</sup> See Commission Order at 1–2, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Aug. 21, 2009).

<sup>528</sup> Commission Order at 4–5, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Sept. 4, 2009).

<sup>529</sup> See Commission Order at 2, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Nov. 10, 2009) (referring to an October 28, 2009 motion to dismiss the filing).

<sup>530</sup> *Id.* at 2.

<sup>531</sup> *Id.* at 3.

<sup>532</sup> Commission Order at 1, 3, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Nov. 24, 2009).

<sup>533</sup> *Id.* at 5.

<sup>534</sup> *Id.*

<sup>535</sup> Commission Order at 2, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed June 3, 2010).

<sup>536</sup> *Id.* at 24.

<sup>537</sup> See Commission Order at 4–5, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Aug. 25, 2010).

<sup>538</sup> See Commission Order, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Sept. 10, 2010).

<sup>539</sup> See Commission Order at 9, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Jan. 7, 2011). The Commission also denied a staff motion to dismiss

The following month, PJM announced its decision to suspend the PATH project.<sup>540</sup> On February 28, 2011, PATH West Virginia and PATH Allegheny filed a motion to withdraw their application.<sup>541</sup> The PSC granted the motion on March 1, 2011.<sup>542</sup>

### B. Virginia

In the same month that proceedings began in West Virginia—May 2009—PATH Allegheny Virginia Transmission Corporation (“PATH Virginia”) filed an application for approval and certification to construct the Virginia segments of PATH with the Virginia State Corporation Commission (SCC).<sup>543</sup> And like PATH in West Virginia, PATH Virginia withdrew its application before the Virginia SCC determined whether to grant a Certificate of Public Convenience and Necessity (CPCN).

PATH Allegheny incorporated PATH Virginia to construct, operate, and own the two non-contiguous segments of the transmission line in Virginia.<sup>544</sup> The application requested Virginia SCC approval and certification by May 19, 2010, to ensure that PATH would be available for service by June 1, 2014.<sup>545</sup> Less than one year later, an analysis, which would be expanded and refined for the Regional Transmission Expansion Plan (RTEP) for 2010, concluded that the transmission line would not be required to alleviate transmission line overloads in

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the application without prejudice. *Id.* at 3, 11. The motion argued that the application should be re-filed with an updated analysis of the need for the transmission line. *Id.* at 3. The West Virginia PSC observed that “[t]his case is as ponderous, troublesome, and all encompassing to the Commission as it is to the parties, and it becomes no less so as each request to alter, supplement, amend, or otherwise address the record or otherwise extend or modify the existing procedural schedule, is filed.” *Id.* at 7.

<sup>540</sup> Statement at 2, Terry Boston, Pres. & Chief Exec. Officer, PJM, Planning for Transmission in the 21st Century (Feb. 28, 2011) (attached to Motion to Withdraw Application, PATH Allegheny Va. Transmission Corp., No. PUE-2010-00115, 2011 WL 2095679 (Va. S.C.C. May 24, 2011) (dated Feb. 28, 2011)).

<sup>541</sup> See Commission Order at 2, *PATH W. Va. Transmission Co.*, 2011 WL 1310472 (No. 09-0770-E-CN) (filed Mar. 1, 2011).

<sup>542</sup> *Id.* at 1, 3.

<sup>543</sup> Application of PATH Allegheny Virginia Transmission Corporation for Approval and Certification of Electric Facilities for Construction of a 765 kV Transmission Line, PATH Allegheny Va. Transmission Corp., No. PUE-2009-00043, 2010 WL 338831 (Va. S.C.C. Jan. 27, 2010) (filed May 19, 2009) (to access all docket entries for these cases, visit <http://docket.scc.virginia.gov/vaproduct/main.asp>; then follow “Search Cases” hyperlink; search “Enter Case Number” for “PUE-2009-00043” or “PUE-2010-00115”; then follow “Search” hyperlink; then follow “Documents” hyperlink).

<sup>544</sup> *Id.* at 1, 2. Two non-contiguous segments of PATH in Virginia would total thirty-one miles and cost \$177 million. *Id.* at 2, 9.

<sup>545</sup> *Id.* at 9.

2014.<sup>546</sup> Because of this analysis, PATH Virginia withdrew this application in December 2009.<sup>547</sup> PATH Virginia re-filed its application in September 2010, sixteen months after the company filed its original application,<sup>548</sup> and withdrew its second application in May 2011.<sup>549</sup>

Consistent with section 56-46.1 of the Virginia Code, PATH Virginia's first application addressed the need for PATH and its impact on the environment.<sup>550</sup> PATH Virginia explained that most of the Virginia segments would follow existing easements for transmission facilities.<sup>551</sup> The route, which the company selected after consultation with numerous federal, state, and local agencies, and the public, would cross the Appalachian National Scenic Trail.<sup>552</sup> The application also indicated that the construction or operation of the transmission line would not result in significant health effects.<sup>553</sup>

In June 2009, the Virginia SCC ordered an evidentiary hearing before a hearing examiner and public comment hearings.<sup>554</sup> Numerous parties, including the Piedmont Environmental Council ("Piedmont"), the Sierra Club, and the Boards of Supervisors of Frederick and Loudoun Counties, requested to participate in the public comment hearings, which were held in August 2009 in Winchester and Purcellville, Virginia.<sup>555</sup> Following a pre-evidentiary hearing conference in December 2009, the hearing examiner ordered PATH Virginia to file an updated analysis of the need for PATH.<sup>556</sup> Soon thereafter, PATH

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<sup>546</sup> Report of Alexander F. Skirpan, Jr., Senior Hearing Examiner at 10, *PATH Allegheny Va. Transmission Corp.*, 2010 WL 338831 (No. PUE-2009-00043) (dated Jan. 6, 2010).

<sup>547</sup> Motion to Withdraw Application and Terminate Proceeding, *PATH Allegheny Va. Transmission Corp.*, 2010 WL 338831 (No. PUE-2009-00043) (dated Dec. 21, 2009); Amendment to Motion to Withdraw Application and Terminate Proceeding, *PATH Allegheny Va. Transmission Corp.*, 2010 WL 338831 (No. PUE-2009-00043) (dated Dec. 29, 2009).

<sup>548</sup> Application of PATH Allegheny Virginia Transmission Corporation for Approval and Certification of Electric Facilities for Construction of a 765 kV Transmission Line at 2, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Sept. 20, 2010).

<sup>549</sup> *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115).

<sup>550</sup> Application of PATH Allegheny Virginia Transmission Corporation for Approval and Certification of Electric Facilities for Construction of a 765 kV Transmission Line, *supra* note 548, at 6, 7, 8–9, exh. 3 at 41–62.

<sup>551</sup> *Id.* exh. 3 at 25.

<sup>552</sup> *Id.* exh. 3 at 60.

<sup>553</sup> *Id.* exh. 3 at 67.

<sup>554</sup> Order for Notice and Hearing at 4, *PATH Allegheny Va. Transmission Corp.*, 2010 WL 338831 (No. PUE-2009-00043) (dated June 12, 2009).

<sup>555</sup> Report of Alexander F. Skirpan, Jr., *supra* note 546, at 2–4.

<sup>556</sup> Hearing Examiner's Ruling at 2, *PATH Allegheny Va. Transmission Corp.*, 2010 WL 338831 (No. PUE-2009-00043) (dated Dec. 4, 2009). PATH Virginia had requested that the impact of PATH be addressed when the hearing commenced in January 2010 but that the

Virginia filed a motion to withdraw its application and to terminate the proceeding.<sup>557</sup>

The motion to withdraw indicated that PATH Virginia intended to re-file its application in early 2010 to coordinate with the West Virginia and Maryland PSC proceedings.<sup>558</sup> Later, however, PATH Virginia amended its motion to withdraw, stating that the initial results of the analysis ordered by the hearing examiner indicated that PATH would not be needed to alleviate transmission line overloads in 2014.<sup>559</sup> Following an oral argument on the motion, and one day after PATH Virginia filed an updated analysis of the need for PATH, the hearing examiner issued a report recommending that the Virginia PSC allow PATH Virginia to withdraw its application.<sup>560</sup>

The hearing examiner also recommended that the Virginia SCC require PATH Virginia to re-file an application for PATH based on an updated analysis of the need for PATH as included in the RTEP for 2010.<sup>561</sup> Additionally, the report recommended that PATH Virginia's re-filed application include an analysis of changed circumstances, for example, changes in electric power generation, and information on the proposed route for PATH.<sup>562</sup> In late January 2010, the Commission granted the amended motion to withdraw and adopted the recommended requirements for a re-filed application.<sup>563</sup> The following month, FirstEnergy Corporation announced that it would acquire Allegheny Energy, Inc. in a 4.7 billion dollar stock deal.<sup>564</sup>

In September 2010, PATH Virginia re-filed its application to construct the Virginia segments of PATH.<sup>565</sup> The re-filed application re-

need for PATH not be addressed until September 2010. *See* Hearing Examiner's Ruling at 2, *PATH Allegheny Va. Transmission Corp.*, 2010 WL 338831 (No. PUE-2009-00043) (dated Nov. 24, 2009). The hearing examiner denied the request in November 2009. *Id.* at 6–7.

<sup>557</sup> Motion to Withdraw Application and Terminate Proceeding, *supra* note 547. Piedmont and the Sierra Club opposed the motion to withdraw. Report of Alexander F. Skirpan, Jr., *supra* note 546, at 9.

<sup>558</sup> Motion to Withdraw Application and Terminate Proceeding, *supra* note 547, at 1.

<sup>559</sup> Amendment to Motion to Withdraw Application and Terminate Proceeding, *supra* note 547, at 2.

<sup>560</sup> Report of Alexander F. Skirpan, Jr., *supra* note 546, at 9, 18.

<sup>561</sup> *Id.* at 19.

<sup>562</sup> *Id.*

<sup>563</sup> *PATH Allegheny Va. Transmission Corp.*, 2010 WL 338831, at \*3, *reconsideration denied*, 2010 WL 584096 (Va. S.C.C. Feb. 17, 2010).

<sup>564</sup> *Power Companies to Merge; FirstEnergy to Acquire Allegheny Energy in \$4.7 Billion Stock Deal*, WASH. POST, Feb. 12, 2010, at A22.

<sup>565</sup> Application of PATH Allegheny Virginia Transmission Corporation for Approval and Certification of Electric Facilities for Construction of a 765 kV Transmission Line, *supra* note 548.

requested Virginia SCC approval and certification by September 21, 2011 to ensure that PATH would be available for service by June 1, 2015.<sup>566</sup> Consistent with the Virginia SCC order that granted the amended motion to withdraw the original application, the second application addressed the need for PATH in the context of the PJM RTEP for 2010.<sup>567</sup> The application sought approval for a proposed route and for an alternative route, which would be used if PATH Virginia could not acquire rights of way for the proposed route.<sup>568</sup> The updated cost estimate for PATH was \$2.1 billion, of which \$177 million would be for the Virginia segments.<sup>569</sup>

In October 2010, the Virginia SCC ordered an evidentiary hearing before a hearing examiner and public hearings.<sup>570</sup> The Virginia SCC scheduled the evidentiary hearing to commence in April 2011 and the public hearings for February 2011.<sup>571</sup> Soon thereafter, however, PATH Virginia filed a motion to hold the proceeding in abeyance until it could revise its analysis of the need for PATH based on revised PJM pro-

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<sup>566</sup> *Id.* at 11–12.

<sup>567</sup> *Id.* at 7; Order Granting Withdrawal, *supra* note 563, at 2–3. The application also included an analysis of changed circumstances. Application of PATH Allegheny Virginia Transmission Corporation for Approval and Certification of Electric Facilities for Construction of a 765 kV Transmission Line, *supra* note 548, at exh. 3 at 1–17, 41–62.

<sup>568</sup> See Application of PATH Allegheny Virginia Transmission Corporation for Approval and Certification of Electric Facilities for Construction of a 765 kilovolt Transmission Line at 10. Most of the Virginia segments, *e.g.*, 138 kV transmission lines, would be routed along existing easements, but a 765 kV transmission line would require broadening of the rights of way associated with those easements. *Id.* exh. 3 at 25.

<sup>569</sup> *Id.* at 12.

<sup>570</sup> Order for Notice and Hearing at 5, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Oct. 20, 2010). Four days after the application was re-filed, the Commission staff filed a motion to hold the proceeding in abeyance until PATH Virginia “completed” the application with information on, *inter alia*, the PJM RTEP for 2010. Motion of the Staff of the State Corporation Commission to Hold Proceedings in Abeyance Pending Completion of the Application and for Expedited Waiver of 5 VAC 5-20-160 at 1–2, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Sept. 24, 2010). The staff argued that PATH Virginia could not have based its application on the 2010 RTEP because those efforts remained ongoing. *Id.* at 2. The SCC ruled, however, that the application comported with the filing requirements set forth in the order that granted the amended motion to withdraw the original application. Order at 3, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Oct. 20, 2010).

<sup>571</sup> Order for Notice and Hearing, *supra* note 570; Order Setting Public Hearings at 4, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Dec. 8, 2010). By December 2010, over 150 individuals had filed notices to participate in the public hearings. Hearing Examiner’s Ruling, at attachment, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Jan. 4, 2011).

jections for electric power demand.<sup>572</sup> The motion proposed that the evidentiary hearing commence in November 2011.<sup>573</sup> Following an oral argument, the hearing examiner denied the motion.<sup>574</sup>

The hearing examiner also scheduled a pre-hearing conference to discuss the revised PJM projections for electric power demand.<sup>575</sup> Following the conference, the hearing examiner directed PATH Virginia to update its analysis of the need for PATH with current PJM projections.<sup>576</sup> Consistent with the application schedule, the public hearings commenced in February,<sup>577</sup> but on February 28, 2011, PJM announced its decision to suspend the PATH project.<sup>578</sup> Thus PATH Virginia filed a motion to withdraw its re-filed application without prejudice.<sup>579</sup>

Following an oral argument on the motion, which Piedmont requested,<sup>580</sup> the hearing examiner recommended that the Virginia SCC allow PATH Virginia to withdraw its application.<sup>581</sup> In his report on the motion, the hearing examiner compared the motion with the motion to withdraw the original application filed in May 2009.<sup>582</sup> He stressed that, under current PJM projections, there would be no potential for thermal overloads on existing 500 kilovolt transmission lines in PJM until 2025.<sup>583</sup>

The hearing examiner then recommended that the Virginia SCC allow PATH Virginia to withdraw its application without prejudice because “new facts and circumstances” could enable PATH Virginia to re-

<sup>572</sup> Motion to Hold Proceeding in Abeyance at 1–2, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Dec. 21, 2010).

<sup>573</sup> *Id.* at 2.

<sup>574</sup> Hearing Examiner’s Ruling at 3, 7, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Jan. 10, 2011).

<sup>575</sup> *Id.* at 7.

<sup>576</sup> Hearing Examiner’s Ruling at 1–2, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Jan. 19, 2011).

<sup>577</sup> Report of Alexander F. Skirpan, Jr., Senior Hearing Examiner at 5, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Apr. 12, 2011).

<sup>578</sup> Statement, *supra* note 540. PJM observed that “[r]ecent dramatic swings in economic forecasts and evolving public policies (particularly with respect to renewable energy)” had increased uncertainties in transmission planning. *Id.* at 1. Thus, it directed PATH Virginia to suspend development efforts on PATH but to maintain the project in its current state “while PJM conducts more rigorous analysis of the potential need for PATH.” *Id.* at 2.

<sup>579</sup> Motion to Withdraw Application, *supra* note 540.

<sup>580</sup> Hearing Examiner’s Ruling at 2, *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679 (No. PUE-2010-00115) (dated Mar. 7, 2011).

<sup>581</sup> Report of Alexander F. Skirpan, Jr., *supra* note 577, at 1.

<sup>582</sup> *Id.* at 8–9.

<sup>583</sup> *Id.* at 9, 14.



file an application in the future.<sup>584</sup> Finally, the hearing examiner recommended that, if PATH Virginia re-files the application in the future, it should be based on the analysis included in the RTEP for 2012 (or a subsequent RTEP).<sup>585</sup> The Virginia SCC adopted the recommendations of the hearing examiner, granted the motion to withdraw the application, and dismissed the case without prejudice in May 2011.<sup>586</sup>

### C. Maryland

In May 2009, Potomac Edison Company (“Potomac Edison”) filed the first of two applications for approval and certification to construct the Maryland segment of PATH.<sup>587</sup> For nearly two years, Potomac Edison pursued state approval from the Maryland PSC pursuant to section 7-207 of the Annotated Code of Maryland.<sup>588</sup> After confronting procedural setbacks, Potomac Edison withdrew its application in February 2011.<sup>589</sup>

Potomac Edison filed its first application on behalf of PATH Allegheny.<sup>590</sup> The application sought a CPCN for the segment of PATH that would traverse Frederick County, Maryland.<sup>591</sup> Much of the proposed path for the Maryland segment would be adjacent to existing transmission line rights of way “to minimize, where feasible, the impact of the new transmission line.”<sup>592</sup> The application sought the issuance of the CPCN by May 19, 2010, to ensure that the transmission line could be operational by June 1, 2014.<sup>593</sup> The estimated cost of the Maryland

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<sup>584</sup> *Id.* at 9–11.

<sup>585</sup> *Id.* at 16.

<sup>586</sup> *PATH Allegheny Va. Transmission Corp.*, 2011 WL 2095679.

<sup>587</sup> Application for a Certificate of Public Convenience and Necessity, Potomac Edison Co., No. 9198, 2009 WL 3517701 (Md. P.S.C. Sept. 9, 2009) (filed May 19, 2009) [hereinafter Potomac Edison Co. First Application]; Application for a Certificate of Public Convenience and Necessity, Potomac Edison Company, No. 9223 (Md. P.S.C. withdrawn Feb. 28, 2011) (filed Dec. 21, 2010) [hereinafter Potomac Edison Co. Second Application] (to access all docket entries for these cases, visit <http://webapp.psc.state.md.us/Intranet/home.cfm>; then search “Case Search” for “9198” or “9223”; then follow “Go” hyperlink).

<sup>588</sup> See *infra* notes 590–622 and accompanying text; MD. CODE ANN., PUB. UTIL. COS., § 7-207 (LexisNexis 2010).

<sup>589</sup> See *infra* notes 590–622 and accompanying text; Notice of Withdrawal, *Potomac Edison Co.*, No. 9223 (dated Feb. 28, 2011).

<sup>590</sup> Potomac Edison Co. First Application, *supra* note 587, at 1.

<sup>591</sup> *Id.* at 1–2.

<sup>592</sup> *Id.* at 3.

<sup>593</sup> *Id.* at 8–9.

segment was 310 million dollars.<sup>594</sup> The application stated that there were no alternatives to the construction of the transmission line.<sup>595</sup>

In addition to the application, Potomac Edison, which is an “electric company” under Maryland law,<sup>596</sup> filed a motion for an expedited determination that it could file the application on behalf of PATH Allegheny, which is not an electric company.<sup>597</sup> Section 7-207 of the Maryland code requires an electric company to obtain a CPCN before it can construct a transmission line.<sup>598</sup> Potomac Edison argued that, under Maryland law, Potomac Edison could secure a CPCN for a transmission line that would be constructed by an affiliate.<sup>599</sup> In addition to its legal argument, Potomac Edison opined that PATH Allegheny was in the best position to receive the CPCN because it could finance, construct, own, and operate the Maryland segment of a multi-jurisdictional transmission line in the most economical and efficient manner.<sup>600</sup> The Maryland PSC was not convinced, however, and ordered briefing on the issue.<sup>601</sup>

In September 2009, the Maryland PSC ruled that, under section 7-207, it could not issue a CPCN to Potomac Edison on behalf of an affiliate that does not meet the definition of an electric company under Maryland law.<sup>602</sup> Thus the Commission denied the motion, ruling that the Maryland PSC could not consider the Potomac Edison application for a CPCN because it was not properly filed.<sup>603</sup>

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<sup>594</sup> *Id.* at 13–14.

<sup>595</sup> *Id.* at 22.

<sup>596</sup> Potomac Edison Co. First Application, *supra* note 587, at 4. An “electric company” is “a person who physically transmits or distributes electricity in the State to a retail electric customer.” MD. CODE ANN., PUB. UTIL. COS., § 1-101 (h) (LexisNexis 2010).

<sup>597</sup> Motion for Expedited Decision that the Potomac Edison Company May File for a Certificate of Convenience and Necessity on Behalf of PATH Allegheny Transmission Company, LLC at 1–2, *Potomac Edison Co.*, 2009 WL 3517701 (No. 9198) (dated May 19, 2009).

<sup>598</sup> MD. CODE ANN., PUB. UTIL. COS., § 7-207(b)(3).

<sup>599</sup> Motion for Expedited Decision that the Potomac Edison Company May File for a Certificate of Convenience and Necessity on Behalf of PATH Allegheny Transmission Company, LLC, *supra* note 597, at 8–10.

<sup>600</sup> *Id.* at 4–7.

<sup>601</sup> Order No. 82,729 at 2, *Potomac Edison Co.*, 2009 WL 3517701 (No. 9198) (dated May 19, 2009).

<sup>602</sup> Order No. 82,892 at 1, 4–6, *Potomac Edison Co.*, 2009 WL 3517701 (No. 9198) (dated Sept. 9, 2009). The Maryland PSC also ruled that its jurisdiction over the construction of transmission lines includes the construction of electrical substations associated with those transmission lines. *Id.* at 8.

<sup>603</sup> *Id.* at 13.

The following December, Potomac Edison filed an application for a CPCN on its own behalf.<sup>604</sup> The application indicated that Potomac Edison would construct, maintain, and operate the Maryland segment of PATH, but PATH Allegheny Maryland Transmission Company, LLC (“PATH Maryland”) would finance and own the transmission line.<sup>605</sup> The application requested that the Maryland PSC issue the CPCN by December 2011 to ensure that the transmission line could be operational by June 1, 2014.<sup>606</sup>

The Maryland PSC docketed the application in March 2010.<sup>607</sup> The Commission observed, however, that PATH Virginia had filed a motion with the Virginia SCC to withdraw its application for approval and certification to construct the Virginia segments of PATH.<sup>608</sup> Potomac Edison acknowledged that the company would revise the evidence in its application on the need for PATH to meet the demand for electric service upon the release of the RTEP for 2010.<sup>609</sup> It had requested, however, that the Maryland PSC proceed with a review of non-need issues associated with PATH.<sup>610</sup> The Commission declined to bifurcate its proceeding into need and non-need issues but docketed the application to ascertain if the corporate structure set forth in the application complied with section 7-207.<sup>611</sup>

As the proceeding continued, the Sierra Club and Citizens Against the Kempton Electric Substation intervened in the proceeding on the second application.<sup>612</sup> In July 2010, the Maryland PSC found that Potomac Edison was a “proper applicant” for a CPCN for the Maryland segment of PATH.<sup>613</sup> Because state law requires a CPCN to construct but not to own a transmission line, Potomac Edison—an electric com-

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<sup>604</sup> Potomac Edison Co. Second Application, *supra* note 587, at 4.

<sup>605</sup> *Id.* at 4.

<sup>606</sup> *See id.* at 2–3.

<sup>607</sup> Notice Initiating Proceeding and Setting Procedural Schedule, *Potomac Edison Co.*, No. 9223 (dated Mar. 10, 2010).

<sup>608</sup> *Id.* at 2.

<sup>609</sup> Letter from J. Joseph Curran, III & Mindy L. Herman, Saul Ewing LLP to Terry J. Romine, Exec. Sec’y, Md. Pub. Serv. Comm’n at 2–3 (Jan. 4, 2010) (filed with the Md. P.U.C. in *Potomac Edison Co.*, No. 9223).

<sup>610</sup> *Id.* at 2.

<sup>611</sup> Notice Initiating Proceeding and Setting a Procedural Schedule, *supra* note 607, at 4; *see* MD. CODE ANN., PUB. UTIL. COS. § 7-207(b)(3) (LexisNexis 2010).

<sup>612</sup> Order No. 83,250 at 2, *Potomac Edison Co.*, No. 9223 (dated Apr. 13, 2010). Exelon Corp. also became an intervener in the proceeding. *Id.*

<sup>613</sup> Order No. 83,469 at 1, *Potomac Edison Co.*, No. 9223 (dated July 13, 2010).

pany under Maryland law—could seek a CPCN for PATH even though it would own just five percent of the transmission line.<sup>614</sup>

Within days, Potomac Edison supplemented its application with evidence supporting the need for PATH by June 1, 2015.<sup>615</sup> The Maryland PSC ordered an evidentiary hearing and public hearings on the completed application.<sup>616</sup> A hearing examiner convened a pre-hearing conference in September.<sup>617</sup> In October, the hearing examiner scheduled the evidentiary hearing for May 2011.<sup>618</sup> In February 2011, however, the hearing examiner granted a motion to suspend the procedural schedule.<sup>619</sup>

On February 28, 2011, PJM announced its decision to suspend the PATH project.<sup>620</sup> Correspondingly, Potomac Edison withdrew its application, announcing that “[u]nder the present circumstances . . . withdrawing the Application is in the public interest.”<sup>621</sup> Despite its decision to stop pursuing a CPCN for PATH, Potomac Edison “still believes that underlying system weaknesses eventually will require backbone transmission projects to ensure the future stability of the regional transmission grid.”<sup>622</sup>

## VI. STATE PERMITTING FOR THE MID-ATLANTIC POWER PATHWAY

The Regional Transmission Expansion Plan (RTEP) for 2010, released in February 2011, confirmed the need for the Potomac-Appalachian Transmission Highline (PATH) and the Mid-Atlantic Power Path-

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<sup>614</sup> *Id.* at 4, 5, 8. PATH Allegheny owns 95% of PATH Maryland and Potomac Edison owns 5% of PATH Maryland. *Id.* at 4.

<sup>615</sup> See Order No. 83,501 at 2, *Potomac Edison Co.*, No. 9223 (dated July 28, 2010).

<sup>616</sup> *Id.*

<sup>617</sup> Letter from J. Joseph Curran, III, Saul Ewing LLP to Dennis L. Sober, Hearing Examiner, Md. Pub. Serv. Comm'n at 1 (Sept. 30, 2010) (filed with the Md. P.U.C. in Potomac Edison Co., No. 9223).

<sup>618</sup> Hearing Examiner's Ruling on Open Motions at 3, *Potomac Edison Co.*, No. 9223 (dated Nov. 4, 2010).

<sup>619</sup> Hearing Examiner's Ruling on Open Motions, *Potomac Edison Co.*, No. 9223 (dated Feb. 25, 2011).

<sup>620</sup> Statement at 2, Terry Boston, Pres. & Chief Exec. Officer, PJM, Planning for Transmission in the 21st Century (Feb. 28, 2011) (attached to Notice of Withdrawal, *supra* note 589). PJM observed that “[r]ecent dramatic swings in economic forecasts and evolving public policies (particularly with respect to renewable energy)” had increased uncertainties in transmission planning. *Id.* at 1. Thus it directed Potomac Edison to suspend development efforts on PATH but to maintain the project in its current state “while PJM conducts more rigorous analysis of the potential need for PATH.” *Id.* at 2.

<sup>621</sup> Notice of Withdrawal, *supra* note 589, at 2.

<sup>622</sup> *Id.*

way (MAPP).<sup>623</sup> On August 18, 2011, however, six months after it suspended the PATH project, PJM Interconnection, LLC (PJM) announced its decision to suspend the MAPP project.<sup>624</sup> Released in February 2012, the RTEP for 2011 confirmed that both PATH and MAPP would be held in abeyance.<sup>625</sup> This decision led to the suspension of proceedings with the Maryland Public Service Commission (PSC) and the Virginia State Corporation Commission (SCC), which began three years prior.

### A. Maryland

In February 2009, Potomac Electric Power Company (PEPCO) filed with the Maryland PSC an application for a Certificate of Public Convenience and Necessity (CPCN) for the Maryland segment of MAPP.<sup>626</sup> Filed in accordance with Maryland regulations for the construction of electric power plants and overhead transmission lines,<sup>627</sup> the application requested a determination that MAPP would contribute to a stable and reliable electric power system and that there is a need for MAPP to meet the existing and future demand for electric service.<sup>628</sup> PEPCO stated that it would supplement the application to address the segment of MAPP that would traverse the Chesapeake Bay and the Eastern Shore of Maryland.<sup>629</sup> The application submitted that the construction of the segment of MAPP from the Possum Point substation to the Calvert Cliffs plant must begin in 2009.<sup>630</sup>

Further, the application asserted that MAPP would provide reliable and economical transmission service, renewable generation benefits, and advanced technological benefits.<sup>631</sup> For example, MAPP would allow the interconnection of electric power from renewable resources.<sup>632</sup>

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<sup>623</sup> 2010 RTEP, *supra* note 356.

<sup>624</sup> Press Release, PEPCO Holdings, Inc., *supra* note 374.

<sup>625</sup> 2011 RTEP, *supra* note 375, at 14–15.

<sup>626</sup> Application to Establish the Overall Need for Construction of the Mid-Atlantic Power Pathway (MAPP) Project at 1, *Potomac Elec. Power Co.*, No. 9179 (P.S.C. Md. suspended Sept. 6, 2011) (filed Feb. 25, 2009).

<sup>627</sup> See generally MD. CODE REGS. 20.79.01.01–.04.04 (2011).

<sup>628</sup> Application to Establish the Overall Need for Construction of the Mid-Atlantic Power Pathway (PATH) Project, *supra* note 626.

<sup>629</sup> *Id.* at 1–2. This segment of MAPP would be a high-voltage direct-current transmission line. *Id.*

<sup>630</sup> *Id.* at 5.

<sup>631</sup> *Id.* at 2–5, 9–11, 14–16.

<sup>632</sup> *Id.* at 16–17.

Finally, the application argued that MAPP's design minimizes the environmental impact of the transmission line.<sup>633</sup>

In April 2009, the Maryland PSC held a pre-hearing conference on the application for a CPCN.<sup>634</sup> An evidentiary hearing was scheduled to commence in September 2009,<sup>635</sup> but PEPCO requested a modification to the hearing schedule, which thus was suspended.<sup>636</sup> In the meantime, the County Council of Dorchester County, Dorchester Citizens for Safe Energy, the Eastern Shore Land Conservancy, and several other parties intervened in the hearing.<sup>637</sup> Following a second pre-hearing conference,<sup>638</sup> the hearing was scheduled to commence in March 2010.<sup>639</sup>

In September 2009, Dorchester County filed a motion in opposition to the proposed bifurcation of the Maryland PSC proceeding on MAPP.<sup>640</sup> PEPCO had filed an application for a determination on the "overall" need for MAPP and route-specific information on the segment of MAPP from the Possum Point substation to the Calvert Cliffs plant, which would cross the Potomac River.<sup>641</sup> PEPCO indicated that the company would supplement the application with route-specific information on the Chesapeake Bay and Dorchester County segment on the Eastern Shore of Maryland.<sup>642</sup>

Dorchester County argued that PEPCO's application was incomplete and thus should be dismissed.<sup>643</sup> In its motion, the county also argued that the Maryland PSC was not authorized to bifurcate its proceedings.<sup>644</sup> Dorchester Citizens for Safe Energy, the Eastern Shore

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<sup>633</sup> *Id.* at 17–19.

<sup>634</sup> Hearing Examiner's Notice of Pre-Hearing Conference at 1, *Potomac Elec. Power Co.*, No. 9179 (filed Mar. 16, 2009).

<sup>635</sup> Hearing Examiner's Notice of Procedural Schedule at 1, *Potomac Elec. Power Co.*, No. 9179 (filed Apr. 15, 2009).

<sup>636</sup> Hearing Examiner's Ruling on Motion to Amend the Procedural Schedule at 1, *Potomac Elec. Power Co.*, No. 9179 (filed July 15, 2009).

<sup>637</sup> Hearing Examiner's Ruling on Request to Intervene at 1, *Potomac Elec. Power Co.*, No. 9179 (filed Aug. 3, 2009).

<sup>638</sup> Hearing Examiner's Notice of Pre-Hearing Conference at 1, *Potomac Elec. Power Co.*, No. 9179 (filed Sept. 16, 2009).

<sup>639</sup> Hearing Examiner's Notice of Amended Procedural Schedule at 1, *Potomac Elec. Power Co.*, No. 9179 (filed Nov. 18, 2009).

<sup>640</sup> See Hearing Examiner's Ruling on Dorchester County, Maryland's Motion in Opposition at 2, *Potomac Elec. Power Co.*, No. 9179 (filed Dec. 1, 2009).

<sup>641</sup> Application to Establish the Overall Need for Construction of the Mid-Atlantic Power Pathway (MAPP) Project, *supra* note 626, at 1–2.

<sup>642</sup> *Id.* at 1.

<sup>643</sup> Hearing Examiner's Ruling on Dorchester County, Maryland's Motion in Opposition, *supra* note 640.

<sup>644</sup> *Id.*

Land Conservancy, and the Office of the People's Counsel supported the motion.<sup>645</sup> An administrative law judge, however, denied the motion: "[T]he Commission has authority to conduct proceedings in phases. The Public Utility Statute invests the Commission with broad power, both express and implied, necessary to carry out its functions."<sup>646</sup> The judge ruled that the route for the Dorchester County segment of MAPP could be addressed after a determination on "an overall need for the build-out of a transmission line to improve the *regional* transmission grid and provide enhanced transmission benefit to Maryland's eastern and western shore."<sup>647</sup>

In January 2010, the judge again suspended the procedural schedule for the hearing.<sup>648</sup> Following a third pre-hearing conference, the hearing was scheduled to commence in September 2011.<sup>649</sup> In the interim, several parties, including the County Board of Calvert County, intervened in the hearing.<sup>650</sup> In May, the procedural schedule was modified to commence the hearing in January 2012.<sup>651</sup> Finally, in September 2011, after PEPCO announced a delay in the transmission project,<sup>652</sup> the hearing was suspended "for a period of time not less than one (1) year."<sup>653</sup>

### B. Virginia

In December 2010, PEPCO and Virginia Electric and Power Company filed an application with the Virginia SCC for approval and a CPCN for the Virginia segment of MAPP.<sup>654</sup> That segment, from the Possum Point substation in Prince William County (owned and oper-

<sup>645</sup> *Id.*

<sup>646</sup> *Id.* at 3.

<sup>647</sup> *Id.* at 7 (emphasis added).

<sup>648</sup> Hearing Examiner's Ruling on Applicant's Request to Suspend the Procedural Schedule at 1, *Potomac Elec. Power Co.*, No. 9179 (filed Jan. 12, 2010); see Hearing Examiner's Ruling on Dorchester County's Motion in Opposition to the Suspension of the Procedural Schedule at 1–2, *Potomac Elec. Power Co.*, No. 9179 (filed Feb. 22, 2010).

<sup>649</sup> Hearing Examiner's Notice of Procedural Schedule at 1, *Potomac Elec. Power Co.*, No. 9179 (filed Jan. 11, 2011).

<sup>650</sup> Hearing Examiner's Ruling on Request to Intervene at 1, *Potomac Elec. Power Co.*, No. 9179 (filed Feb. 11, 2011).

<sup>651</sup> Hearing Examiner's Notice of Modified Procedural Schedule at 1–2, *Potomac Elec. Power Co.*, No. 9179 (filed May 10, 2011).

<sup>652</sup> Press Release, PEPCO Holdings, Inc., *supra* note 374; see *supra* notes 374–375 and accompanying text.

<sup>653</sup> Hearing Examiner's Ruling on Request to Delay Procedural Schedule at 1, *Potomac Elec. Power Co.*, No. 9179 (filed Sept. 6, 2011).

<sup>654</sup> Joint Application at 6, *Potomac Elec. Power Co.*, 2011 WL 6318219 (No. PUE-2010-00148) (filed Dec. 16, 2010).

ated by Dominion Virginia Power (“Dominion”) to the Potomac River, would be just 1600 feet.<sup>655</sup> The Virginia segment of MAPP would consist of a 1200-foot transmission line and an interconnection structure, both of which would be constructed, owned, and operated by Dominion, and a 400-foot transmission line, which would be constructed, owned, and operated by PEPCO.<sup>656</sup> The Virginia segment would cost 9.28 million dollars.<sup>657</sup>

Filed pursuant to the Utility Facilities Act of Virginia<sup>658</sup> and section 56-46.1 of the Code of Virginia,<sup>659</sup> the application stated that the need for MAPP was confirmed in the analysis for the RTEP for 2010.<sup>660</sup> The Commission staff, however, called that analysis into question because it was quite similar to the analysis submitted by PATH Allegheny Virginia Transmission Corporation in the commission proceeding on PATH.<sup>661</sup> In that proceeding, PATH Allegheny Virginia Transmission Corporation filed a motion to hold the proceeding in abeyance until it could revise its need analysis based on revised PJM projections for electric power demand less than a week after PEPCO and Dominion had filed their joint application for MAPP.<sup>662</sup>

When PEPCO and Dominion failed to supplement the joint application with revised PJM projections and a revised analysis of the need for MAPP, the Commission staff filed a motion to dismiss the application without prejudice.<sup>663</sup> The SCC denied the motion with the understanding that PEPCO and Dominion would supplement the joint application.<sup>664</sup> Three weeks later, PEPCO requested that the Virginia SCC delay the proceeding for one year or until PJM released its RTEP for 2012.<sup>665</sup> PEPCO explained that it was not able to supplement the joint application with revised projections and analyses until PJM released the RTEP for 2012.<sup>666</sup> The Virginia SCC ruled, however, that a joint appli-

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<sup>655</sup> *Id.* at 2.

<sup>656</sup> *Id.* at 2–3.

<sup>657</sup> *Id.* at 3.

<sup>658</sup> VA. CODE ANN. § 56-265.2:1(A) (2007) (requiring a CPCN for the construction of, *inter alia*, electric transmission facilities).

<sup>659</sup> *Id.* § 56-46.1(B) (applying to applications for approval and certification to construct transmission lines over 138 kilovolts).

<sup>660</sup> Joint Application, *supra* note 654, at 3.

<sup>661</sup> See Order on Motion at 2–3, *Potomac Elec. Power Co.*, 2011 WL 6318219 (No. PUE-2010-00148) (filed July 27, 2011).

<sup>662</sup> See Motion to Hold Proceeding in Abeyance, *supra* note 572.

<sup>663</sup> Order on Motion, *supra* note 661, at 3.

<sup>664</sup> *Id.* at 5–6.

<sup>665</sup> *Potomac Elec. Power Co.*, 2011 WL 6318219.

<sup>666</sup> See *id.*



cation should not be held open for such an extended period of time and thus dismissed the proceeding without prejudice.<sup>667</sup>

### CONCLUSION

Under their traditional jurisdiction over land use, the states permit and site interstate electric power facilities that traverse their boundaries. This jurisdiction may pose an obstacle to the development of new interstate transmission facilities. For that reason, Congress enacted section 216 of the Federal Power Act. There have since been calls in Congress to further expand the federal government's power to permit and site interstate transmission facilities.

The implementation of section 216 has been frustrated by judicial challenges and decisions in the Courts of Appeal for the Fourth and Ninth Circuits. The Fourth Circuit narrowed the circumstances under which section 216 will preempt state law and authorize the Federal Energy Regulatory Commission (FERC) to permit interstate transmission lines. In addition, the Ninth Circuit ruled that Department of Energy implementation of section 216 has run afoul of the statute itself and of the National Environmental Policy Act. Seven years after the enactment of section 216, FERC has yet to successfully exercise jurisdiction under the statute to permit construction of an interstate transmission line.

Seemingly under little threat of federal preemption, state jurisdiction over transmission facilities could pose an obstacle to the development of "backbone" transmission lines in the Mid-Atlantic region—Trans-Allegheny Interstate Line (TrAIL), Potomac-Appalachian Transmission Highline (PATH), and Mid-Atlantic Power Pathway (MAPP)—needed to provide electric power to the Washington-Baltimore-Northern Virginia region. Thus far, however, state proceedings to permit and site TrAIL rebut the notion that state jurisdiction will stymie the development of interstate transmission facilities.

Virginia, West Virginia, and Pennsylvania all issued permits for the construction of TrAIL, which commenced operation in May 2011. In Virginia, a state statute requires the State Corporation Commission, before it approves the construction of a transmission line over 138 kilovolts, to determine that the line is needed. The SCC has interpreted the statute to authorize the assessment of regional and multi-state need in its review of an application to construct a transmission line within Virginia. In addition, the Supreme Court of Virginia has held that the

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<sup>667</sup> *Id.*

SCC, to make a determination of need required by state statute, can utilize an analysis prepared by PJM Interconnection, LLC (PJM) for its regional transmission expansion plan.

In West Virginia, a state statute authorizes the West Virginia Public Service Commission to approve an application for a Certificate of Public Convenience and Necessity for a proposed transmission line if, *inter alia*, it can meet a need for electric power *or* is required and desirable to ensure reliable electric power service for the immediate service area of the applicant or the region. Finally, in Pennsylvania, the Public Utility Commission has held that it has an obligation to promote reliable electric power service in Pennsylvania and adjacent jurisdictions. Further, the Commonwealth Court of Pennsylvania has held that a determination of need for a proposed transmission line under state statute can be based on its contribution to a reliable regional transmission system.

PJM has suspended the development of PATH in West Virginia, Virginia, and Maryland, and of MAPP in Maryland and Virginia. In Virginia and West Virginia, however, there is precedent for a determination that a need for a transmission line can be based on regional need. In addition, in Maryland, there is a need for PATH and MAPP to provide electric power in the Baltimore area. If and when the development of PATH and MAPP resumes, it is likely that the states will exercise their traditional prerogative to permit and site the transmission lines. It is expected, moreover, that these states will ultimately approve the construction of PATH and MAPP.

