



## SUMMARY

The proposed revisions to the language of FPA section 216 adequately address Congressional directives to establish transmission permitting backstop authority to FERC when transmission projects are deemed in the national interest. ELCON suggests that community outreach is crucial in understanding the need for the project balanced with the needs of a particular community and thus outreach methods need to be modernized to reflect current technological communication tools. However, the Commission must recognize that different communities have differing levels of technological capabilities so that project developers must remain sensitive to access to these technologies.

ELCON is supportive of limited backstop authority in situations where political maneuvering and delay of much needed transmission development can be circumvented and supports the simultaneous establishment of a record at FERC to prevent any further delays should backstop authority be invoked.

However, ELCON cautions the Commission from incorporating new resource report requirements that go well beyond the authority provided by Congress. While engagement with environmental justice communities should not be overlooked by transmission developers, requiring study and mitigation measures for a particular community that has not been well defined or specifically invoked by Congress risks remand by appellate courts thus endangering backstop authority once again. Exceeding the authority provided by Congress may also have the effect of thwarting any future initiatives to address specific disadvantaged communities in the future. Therefore, ELCON suggests adhering to the specific authorities granted by Congress to implement backstop permitting authority.

## I. THE COMMISSION'S PROPOSED LANGUAGE SUCCESSFULLY CAPTURES CONGRESS' INTENT

### A. The Proposed Revisions to Section 50.6 of the Commission's Regulations Clarifies its Backstop Permitting Authority.

The history of the Commission's transmission permitting backstop authority granted under the Energy Policy Act of 2005 (EPAct 2005) is well documented in the NOPR. Although Congress provided this authority over 15 years ago, FERC's interpretation of this authority has been challenged and eroded by the Courts. Ambiguous language in EPAct 2005 left FERC's backstop permitting authority open to numerous stakeholder challenges and was eventually left ineffective. In the 2021 IIJA, Congress attempted to remedy its ambiguous language by articulating the exact scope of FERC's authority in an effort to stimulate transmission deployment needed for the energy transition and avoid future litigation.

The proposed revisions to the Commission's regulations in the NOPR effectively mirror the language in the IIJA to avoid risk of alternate interpretations and challenges to the scope of FERC's authority. Further, the Commission's proposed pre-filing process, to occur simultaneously with the application process at the relevant state/states, provides the opportunity to establish a record at FERC so that if backstop permitting is requested, there is not a year-long delay for the Commission to conduct its own permit application process. Instead, FERC has the established application record to begin consideration as soon as its backstop authority is invoked and the proposed 90-day state response period expires<sup>2</sup>. Simultaneous information gathering and public outreach also avoids potential duplication of these efforts as when in the past, FERC's information gathering and review could only be conducted after the year-long consideration of the application by the state/states.<sup>3</sup>

The notice provisions proposed by the Commission ensure that affected

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<sup>2</sup> NOPR at P 23.

<sup>3</sup> NOPR at P 22.

landowners receive proper notification of the land use and potential disruptions of the project's development. This is especially important to ensure that the community is informed about the impacts and potential mitigation measures. By engaging with the impacted community, developers have a better chance of addressing community concern with the project and establishing rapport and good will within the community.

Separately, the Commission asks whether additional notice formats beyond newspapers and mailings could be effective in reaching wider audiences.<sup>4</sup> In the digital age, more individuals consume news and engage with their communities over the internet; whereas printed newspapers have dwindled significantly over the last ten years and mailings are often disregarded as junk mail. Limiting these communications to newspapers and mailings risks reaching only a fraction of impacted landowners, communities, and businesses. At no extra expense, developers can provide notice in neighborhood listserves and community webpages, Twitter and other social media, local digital newspapers, and utility webpages. However, newspaper notices, mailings, and door hangings remain necessary as many disadvantaged communities lack broadband access.

**B. Backstop Permitting Authority May Enable Necessary Transmission Expansion Despite Political Division.**

Although ELCON is generally not in favor of federal regulations usurping state decisions, protracted transmission project review and litigation are costly and extremely inefficient. However, project approvals have at times become politicized and intentionally delayed through litigation or thwarted entirely despite the proposed benefits to their constituents.

Whether objecting to projects based on the proposed interconnecting resource characteristics or for political retaliation, the project is held hostage costing consumers millions of dollars. In instances of political logjam, federal intervention may become

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<sup>4</sup> NOPR at P 39.

necessary. If indeed these projects are deemed to be in the national interest, these costs for delay are passed on to customers at no fault of their own or the actions of their particular state. If such projects are necessary for reliability reasons, permit delays or permit denials can cause actual harm.

In these instances, a developer should have recourse at FERC to ultimately assess the need for the project in a timely manner and determine whether the benefits outweigh the costs. FERC, as an independent agency, can review the project on its actual merits and not in the mire of political divide. FERC would provide focus on an already established record at the Commission to move cost-effective projects as efficiently as possible to protect consumers from unjust and unreasonable costs and reduced reliability.

## **II. THE PROPOSED REVISIONS TO THE NEPA APPLICATION REQUIREMENTS EXCEED THE SCOPE GRANTED BY CONGRESS**

### **A. Proposed Resource Reports Go Beyond FERC's Authority Granted by Congress**

The proposed revisions to Commission regulations referenced above to incorporate Congress' intent are well within the confines of the plain language of Congress's FPA revisions through the IIJA. However, the Commission's proposal to require certain resource reports in the pre-filing process and National Environmental Policy Act (NEPA) review regulations may risk the types of Court challenges that plagued FERC's backstop authority under EAct 2005. Congress clarified the Commission's backstop permitting authority scope in an effort to avoid additional challenges to what FERC can and cannot do when a state or states fail to issue a permit for a transmission project of national interest. To open new provisions to challenge, backstop authority will, once again, become ineffective.

By requiring additional resource reports beyond current Commission regulations and what was clarified and directed by Congress, the Commission opens its interpretation of the law to question. The Commission notes,

Notwithstanding the Fourth Circuit's vacature, the NEPA amendments set forth in Order No. 689 are still reflected in 18 CFR Part 380. We seek comment *on the whole* of the Commission's NEPA regulations pertaining to electric transmission facilities... [and] will consult with [the Council on Environmental Quality (CEQ)] on the proposed changes to its NEPA regulations... as well as those *originally implemented* by Order No. 689.<sup>5</sup>

This language could imply that the inclusion of the NEPA resource reports was never fully approved in the first place and was never challenged because the backstop authority application process was mostly void. This interpretation appears to be supported by the U.S. Court of Appeals for the Fourth Circuit's opinion stating,

The petition for review... is granted insofar as it challenges FERC's failure to consult with the CEQ before issuing amendments to its (FERC's) regulations implementing NEPA. With respect to this challenge, we hold that consultation was required, and, we therefore vacate the amendments to FERC's NEPA regulations.<sup>6</sup>

While the Commission does have the discretion to develop its processes and procedures, there are additional proposed resource reports and revisions that do not normally fall under Commission jurisdiction and have been challenged in other contexts. Here again, challenges may arise as to the scope of the Commission's interpretation, further delaying its Congressionally mandated backstop authority and risking another Court vacating and remanding such matter to FERC.

As much of Order No. 689<sup>7</sup> was vacated by the Fourth Circuit in 2009, it has taken Congress over a decade to clarify the scope of the Commission's authority. Introducing even newer requirements under its interpretations of its authorities, the Commission exposes the rule to the same scrutiny and challenges. Commissioner Christie, in his concurrence, notes:

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<sup>5</sup> NOPR at P 62 (emphasis added).

<sup>6</sup> *Piedmont Environmental Council v. FERC*, 558 F.3d 304, 320 (4<sup>th</sup> Cir. 2009), *cert. denied*, 558 U.S. 1147 (2010) (*Piedmont*).

<sup>7</sup> *Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities*, Order No. 689, 117 FERC ¶ 61,202 (2006), *reh'g denied*, 119 FERC ¶ 61,154 (2007).

While, of course, we must implement the change made by Congress, a simple update to our existing regulation would have been sufficient. This order, however, goes beyond merely implementing the required conforming changes to our existing regulation.<sup>8</sup>

Transmission projects in the national interest that cost-effectively increase reliability and resilience cannot be delayed for another 10 years. If these projects are truly beneficial, it is the customer who is impacted by these delays through increased cost and decreased reliability.

**B. Authority for Proposed Resource Report 7 Relies Solely on Executive Orders**

Even if it is determined that the Commission was within its rights to have implemented the resource report requirements under Order No. 689, the introduction of an entirely new resource report furthers the risk of challenge. Resource Report 7 – *Environmental justice* requires an applicant to:

identify environmental justice communities within the project’s area of potential impacts...; describe the impacts of project construction, operation, and maintenance on environmental justice communities, including whether any impacts would be disproportionately high and adverse..., discuss cumulative impacts on environmental justice communities, including whether any cumulative impacts would be disproportionately high and adverse...; and describe any mitigation measures intended to avoid or minimize impacts on environmental justice communities... .<sup>9</sup>

Properly addressing environmental justice concerns is important to achieving a level of equity in burden and benefit.<sup>10</sup> However, adding this to legal scrutiny in this manner under the context of statutory authority, could risk both the effectiveness of the order as well as the opportunity to address environmental justice concerns in the future.

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<sup>8</sup> NOPR, 181 FERC ¶ 61,205 (Christie, Comm’r, concurring at P 1).

<sup>9</sup> NOPR at P 65.

<sup>10</sup> See, e.g., Federal Energy Regulatory Commission, Roundtable on Environmental Justice and Equity in Infrastructure Permitting, Docket AD23-5-000 (Mar. 29, 2023), available at: <https://www.ferc.gov/news-events/events/roundtable-environmental-justice-and-equity-infrastructure-permitting>.

Commissioner Danly raises several areas in the proposal that present legal challenge such as lack of statutory authority to impose the environmental justice report requirement and define “overburdened by pollution.”<sup>11</sup> As with *Piedmont*, the Commission asserts authority in areas where it has no expertise or authority and does so without providing statutory references.

Another potential objection is highlighting environmental justice communities as a stakeholder with stricter identification and mediation measures separate from other similarly situated stakeholders. While the proposal to require a separate *Tribal resources* report reiterates consideration for tribal lands originally contained in sections 380.14 and 380.16(f) under Order No. 689 and cites the National Historic Preservation Act as justification, the proposed *Environmental justice* report cites to no laws or statutes that bestow such authority but rather to Executive Orders that generally require federal entities to consider environmental justice recommendations. In fact, the Commission acknowledges that the Courts had vacated Order No. 689 because it had not consulted with the CEQ who has the authority to set standards under NEPA.<sup>12</sup>

To reduce the potential for additional challenge, ELCON recommends the Commission reconsider establishing a requirement for a separate resource report and instead add “environmental justice communities” to Resource Report 5 – *Socioeconomics* to the covered impact areas. Although this does not guarantee that the addition of environmental justice communities will not be challenged, it hopefully reduces the likelihood of challenge posed by a fully separate report.

**C. The Commission’s Requirements Under Proposed Resource Report 10 are Vague and Exceed Commission Authority**

The NOPR references section 380.16(l)(7) under Order No. 689 as requiring “applicants, as part of the existing Reliability and safety resource report, to indicate the

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<sup>11</sup> See NOPR, 181 FERC ¶ 61,205 (Danly, Comm’r, concurring at P 4) (Danly Concurrence).

<sup>12</sup> NOPR at P 11.



noise level generated by the proposed transmission line and compare the noise level to any known noise ordinances for the zoning districts through which the line will pass.”<sup>13</sup> Again citing NEPA, the Commission proposes to include additional information on emissions and air quality including,

reasonably foreseeable emissions from construction, operation, and maintenance of the project facilities; [ ] a comparison of emissions with applicable General Conformity thresholds (40 CFR part 93) for each designated nonattainment or maintenance area; identif[ication of] the corresponding impacts on communities and the environment in the project area; and descri[ption of] any proposed mitigation measures to control emissions.<sup>14</sup>

Commissioner Danly again points to the vagueness of the requirement’s language and questions FERC’s authority to require remediation.<sup>15</sup> Although members of the previous Commission have defended requirements to measure and control emissions for natural gas projects as directed by the D.C. Circuit,<sup>16</sup> Congress has sternly reprimanded the Commission for exceeding its authority.<sup>17</sup> Separately, Commissioner’s opposing FERC’s consideration of emissions detail how FERC does not have the authority of expertise in determining what “significant impact” may mean in the context of greenhouse gas emissions and any required remediation. Whereas noise levels are measurable and are subject to certain standards, greenhouse gas emission measurements and impacts continue to be litigated. Therefore, there is a reduced risk of challenge from including additional noise requirements as opposed to the murky legality of greenhouse gas emission requirements.

ELCON recommends omitting the emissions reporting and remediation

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<sup>13</sup> NOPR at P 68.

<sup>14</sup> NOPR at P 69.

<sup>15</sup> Danly Concurrence at P 6.

<sup>16</sup> See, e.g., *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (Glick, dissenting in part) (2020).

<sup>17</sup> Ethan Howland, “Sens. Manchin, Barrasso slam FERC’s ‘political agenda’ on natural gas, say it will stifle development,” *Utility Dive* (Mar. 4, 2022); available at: <https://www.utilitydive.com/news/manchin-barrasso-ferc-gas-infrastructure-pipeline-review/619816/>.

requirements and instead revise Resource Report 10 – *Reliability and safety* to include enhanced noise level measurement and mitigation measures.

## CONCLUSION

ELCON appreciates the Commission’s efforts to revise its rules and regulations to reflect Congressional intent for transmission backstop authority under the IIJA. However, as discussed above, ELCON cautions the Commission to stay within the scope of authority granted by Congress or else expose any subsequent order to challenge and possible revocation, increasing costs and reducing reliability for consumers despite being in the national interest.

Respectfully submitted,

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