

UNITED STATES OF AMERICA
BEFORE THE
OFFICE OF ELECTRICITY DELIVERY AND ENERGY RELIABILITY
DEPARTMENT OF ENERGY

Coordination of Federal Authorizations
for Electric Transmission Facilities:
Proposed 216(h) Regulations

RIN 1901-AB18

**COMMENTS OF
TRANSMISSION ACCESS POLICY STUDY GROUP**

On December 13, 2011, the Department of Energy (“Department”) issued a Notice of Proposed Rulemaking (“NOPR”) concerning the coordination of Federal authorizations for proposed interstate electric transmission facilities.¹ The Transmission Access Policy Study Group (“TAPS”) appreciates the opportunity to respond to the Department’s proposal.

TAPS supports getting needed transmission built and recognizes that prompt resolution of Federal authorization requests is critically important to that objective. We appreciate the Department’s leadership in this regard. In particular, we welcome the Department’s goal of setting a more definite deadline for final decisions on Federal authorization requests. Like the Department, TAPS desires an easily determinable deadline and expedition of the Federal authorization process. However, it is unclear that the Department’s proposal represents the best way to achieve these goals. To help the Department ensure that it selects the most efficient approach, TAPS submits these comments describing an alternative method of determining the commencement of the

¹ Coordination of Federal Authorizations for Electric Transmission Facilities, 76 Fed. Reg. 77,432 (proposed Dec. 13, 2011) (to be codified at 10 C.F.R. pt. 900) (“December 13 NOPR”).

one-year permitting deadline. Specifically, the Department may wish to model its regulations on the framework used by the State of Wisconsin, which features a 30-day completeness process followed by a firm timeline for government authorizations.

I. INTERESTS OF TAPS

TAPS is an association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.² It participates in policy proceedings at the Department, the Federal Energy Regulatory Commission (“FERC”), and other federal agencies that deal with electric transmission and market power issues pertaining to the electric utility industry. Representing entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS has long recognized the need to strengthen the nation’s transmission infrastructure and to develop effective institutional structures that will work to that end. TAPS recognizes the critical importance of structurally competitive markets, transmission adequacy, and access to long-term power supply (with long-term firm transmission rights to mitigate exposure to debilitating congestion charges) to achieving a workably competitive electricity industry and enabling TAPS members to continue to provide reliable service to their customers at a reasonable, predictable cost. At the same time, TAPS members are sensitive to the cost of transmission service, and want to make sure that the right transmission gets built. TAPS members’ experiences with Federal approval make us appreciate the importance of timely coordination of Federal authorizations to the ultimate success of a project.

² Tom Heller, Missouri River Energy Services, chairs the TAPS Board. Cindy Holman, Oklahoma Municipal Power Authority, is TAPS’s Vice Chair. John Twitty is TAPS’s Executive Director.

TAPS has been particularly active in the policy arena concerning transmission infrastructure. In addition to commenting in numerous FERC rulemaking proceedings pertaining to transmission access, planning and cost allocation, and long-term rights, TAPS responded to the Department's July 22, 2004, Notice of Inquiry, "Designation of National Interest Electric Transmission Bottlenecks," 69 Fed. Reg. 43,833 (July 22, 2004), by submitting Comments on September 20, 2004, that attached TAPS's June 2004 White Paper, *Effective Solutions for Getting Needed Transmission Built at Reasonable Cost*. That White Paper described structural changes and regulatory actions that can work to get needed transmission built.³ TAPS also submitted Comments in response to the Department's Notice of Inquiry regarding "Considerations for Transmission Congestion Study and Designation of National Interest Electric Transmission Corridors," 71 Fed. Reg. 5660 (Feb. 2, 2006), and in response to the Department's Notice of the Plan for Conduct of 2012 Electric Transmission Congestion Study, 76 Fed. Reg. 70,122 (Nov. 10, 2011).

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³ The White Paper is available at <http://www.tapsgroup.org/sitebuildercontent/sitebuilderfiles/effectivesolutions.pdf>.

II. DEADLINES FOR FINAL DECISIONS ON FEDERAL AUTHORIZATION REQUESTS

In order for needed transmission to be built in a timely manner, it is crucial that Federal authorization requests be considered promptly and efficiently. “[O]nce an application has been submitted with such data as the Secretary considers necessary,” Section 216(h)(4)(B) of the Federal Power Act requires all Federal permit decisions and related environmental reviews to be completed “within 1 year” or, if an extension is necessitated by another provision of Federal law, “as soon thereafter as is practicable.” 16 U.S.C. § 824p(h)(4)(B). To implement this provision, the Department has proposed a new regulation that would require permit decisions and environmental reviews to be completed within the following timelines:

(1) When a categorical exclusion under NEPA is invoked, or an environmental assessment (EA) finding of no significant impact (FONSI) is determined to be the appropriate level of review under NEPA, within one year of the categorical exclusion determination or the publication of a FONSI; or

(2) When an environmental impact statement (EIS) is required pursuant to NEPA, one year and 30 days after the close of the public comment period for a Draft EIS.

December 13 NOPR, 76 Fed. Reg. at 77,442 (proposed § 900.11(a)).

The December 13 NOPR explains that the Department intends to “establish a deadline that is easily determinable,” and states that the Department is “committed to working with the applicant and the lead and cooperating agencies to expedite the decision process, including final deadlines.” *Id.* at 77,437. TAPS supports these important goals. We identify below ways in which the Department can achieve them without relying on the proposed NEPA milestones.

One alternative the Department should consider is the completeness framework used by the State of Wisconsin. Wisconsin law gives the state Public Service Commission (“PSC”) 30 days to evaluate the completeness of an application for a certificate of public convenience and necessity and to notify the applicant of its determination. Wis. Stat. § 196.491(3)(a)(2). PSC regulations describe in detail what information must be contained in a complete application. Wis. Admin. Code Ch. PSC 111.55. If the PSC determines that an application is incomplete, it must state its reason; the applicant may then supplement and refile its application. Wis. Stat. § 196.491(3)(a)(2). The PSC must take final action within 180 days of determining that an application is complete, unless the circuit court for Dane County grants it a 180-day extension. *Id.* § 196.491(3)(g). If the PSC fails to take action within the allotted time, it is considered to have issued a certificate of public convenience and necessity with respect to the application. *Id.* By setting a clear deadline based on the completeness determination, Wisconsin’s framework provides both determinability and expedition in the permitting process.

The Department’s goal of expediting decisions may also be advanced by following Wisconsin’s provision for conducting environmental review simultaneously with other reviews. Wisconsin enacted legislation in 2003 providing for simultaneous reviews in order to speed the siting and permitting process.⁴ Wisconsin law now requires an applicant to file with the Department of Natural Resources (“DNR”) at the same time that its application for a certificate is filed with the PSC. Wis. Stat. § 30.025(1s)(a). The DNR must grant or deny the application within 30 days of the date on which the PSC

⁴ 2003-2004 Wis. Legis. Serv. Act 89 (West).

issues its decision. *Id.* § 30.025(4). Adopting a similar approach would be consistent with FPA Section 216(h)(4)(B), which expressly contemplates simultaneous coordinated reviews for environmental requirements and permit decisions within one year from the completed application, or as soon as practicable thereafter. In contrast, by starting the one-year clock based on the status of the environmental review, the Department's proposed approach would seem to lock in the delay associated with sequential review, rather than facilitating the simultaneous environmental and permitting review that Congress directed in enacting Section 216(h)(4)(B).

In addition to the Wisconsin example, the Department can look—and indeed, has already looked—to regulations of FERC that implement Section 216. The December 13 NOPR states that the Department's proposed method of determining the commencement of the one-year permitting deadline is consistent with FERC's Order No. 689, which “contemplates a pre-filing period of a year, during which FERC will start its scoping and environmental review, before an application is filed and the FPA section 216(h)(4)(B) one year deadline begins to run.”⁵

The Department should also consider adopting other facilitative aspects of FERC's procedures. For example, like Wisconsin regulations, FERC's regulations provide detailed guidance concerning the contents of an application. 18 C.F.R. §§ 50.6-.7. FERC regulations also provide that an application will either be rejected without prejudice, *id.* § 50.8, or noticed with an issuance that sets “prompt and binding . . .

⁵ 76 Fed. Reg. at 77,437 (citing Establishing Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, Order No. 689, 71 Fed. Reg. 69,440 (Dec. 1, 2006), FERC Stats. & Regs. ¶ 31,234, P 47).

ultimate deadlines,” *id.* § 50.9. In the notice of proposed rulemaking leading up to Order No. 689, FERC explained:

[O]nce the pre-filing process is completed a permit application may be filed. Section 216(h)(4)(B) of the FPA requires that once an application is submitted, all reviews under Federal law for the proposed facilities must be completed within one year, or, if a requirement of another provision of Federal law does not permit compliance within one year, as soon thereafter as practicable. Therefore, it is imperative that a filed application contain all information necessary for the Commission to proceed with an expedited review of the proposal.

Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors, 71 Fed. Reg. 36,258, 36,262 (June 26, 2006). Thus, like Wisconsin’s framework, Order 689 required a thorough application, with determination of the commencement of FERC’s permitting deadline based on the filing of that application.

In short, TAPS shares the Department’s goals of establishing a determinable permit deadline and expediting the Federal authorization process. We hope that the alternatives outlined in these comments will assist the Department in identifying the best possible method of achieving those goals.

Respectfully submitted,

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