

**BEFORE THE  
UNITED STATES SENATE**

**COMMITTEE ON ENERGY AND NATURAL RESOURCES**

**TESTIMONY OF THE HONORABLE TONY CLARK  
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**ON BEHALF OF THE  
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS  
AND THE  
NORTH DAKOTA PUBLIC SERVICE COMMISSION**

**ON**

**“Transmission”**

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Good morning Chairman Bingaman, Ranking Member Murkowski, and Members of the Committee:

My name is Tony Clark, and I am a member of the North Dakota Public Service Commission (NDPSC). I also serve as Second Vice President of the National Association of Regulatory Utility Commissioners (NARUC). Today I will be testifying on behalf of NARUC and where noted, the NDPSC. I am honored to have the opportunity to appear before you this morning and offer a State perspective on “transmission” in general and specifically on legislative proposals on federal siting and regional transmission planning.

NARUC is a quasi-governmental, non-profit organization founded in 1889. Our membership includes the State public utility commissions serving all States and territories. NARUC’s mission is to serve the public interest by improving the quality and effectiveness of public utility regulation. Our members regulate the retail rates and services of electric, gas, water, and telephone utilities. We are obligated under the laws of our respective States to ensure the establishment and maintenance of such utility services as may be required by the public convenience and necessity and to ensure that such services are provided under rates and subject to terms and conditions of service that are just, reasonable, and non-discriminatory.

There are many challenges to resolve prior to the development of the much-needed growth in the transmission system that is vital to reliable electric service, our economic growth, and our national security. Without increased capacity in the transmission grid, our ability to develop the energy resources necessary to meet current and future demand may be jeopardized, particularly if we embark on a policy that limits greenhouse gas emissions and increases our reliance on renewable generation. In addition, it has been projected that the demand for electric energy in the United States will grow by more than 30 percent over the coming decades. Significant upgrades will be necessary in order to meet this demand. Solutions to the current transmission challenges facing us are not quick, simple, non-contentious, inexpensive, nor, in some cases, obvious. Finding and implementing solutions will require cooperation by, not confrontation among, the various stakeholders.

Currently, NARUC is debating a new policy position on transmission. These difficult discussions are ongoing and I bring this to your attention in an effort to illustrate that the nation's utility regulators are well aware of the issues and complications surrounding the transmission policy. These issues are extremely sensitive within our organization precisely because they do not lend themselves to the simple or even consensus solutions. Siting and cost allocation issues are often controversial because in most situations someone's gain comes at someone else's expense.

## **Background**

The Energy Policy Act of 2005 (EPAAct 2005) required the Department of Energy (DOE) to conduct a study of electric transmission congestion one year after the legislation was enacted, and every three years thereafter (language was included in the recently signed “stimulus” legislation modifying the DOE congestion study process). After considering alternatives and recommendations from interested parties, DOE must issue a report, based on the study, 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 (NIETC).

The first DOE Congestion Study was issued on August 8, 2006. On April 26, 2007, the DOE issued two draft NIETCs: the Mid-Atlantic Area National Corridor (some or all counties in Delaware, Ohio, Maryland, New Jersey, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia); and the Southwest Area National Corridor (seven counties in southern California, three counties in western Arizona, and one county in southern Nevada). On October 2, 2007, DOE finalized the designations of both NIETCs: the Mid-Atlantic Area National Interest Electric Transmission Corridor (Docket No. 2007-OE-01); and the Southwest Area National Interest Electric Transmission Corridor (Docket No. 2007-OE-02). DOE affirmed the NIETC designation orders on March 10, 2008.

EPAct 2005 gave federal backstop siting authority of certain electric transmission facilities, based upon the process outlined above, to the Federal Energy Regulatory Commission (FERC). Upon NIETC designation by DOE, FERC may issue permits to construct or modify electric transmission facilities if FERC finds that:

- (1) A State in which such facilities are located does not have the authority to approve the siting of the facilities or to consider the interstate benefits expected to be achieved by the construction or modification of the facilities;
- (2) The applicant is a transmitting utility but does not qualify to apply for siting approval in the State because the applicant does not serve end-use customers in the State; and
- (3) The State with siting authority takes longer than one year after the application is filed to act, or the State imposes conditions on a proposal such that it will not significantly reduce transmission congestion or it is not economically feasible.

To issue a permit, FERC must find that proposed facilities:

- (1) are used for interstate commerce;
- (2) are consistent with public interest;
- (3) significantly reduce transmission congestion in interstate commerce;
- (4) are consistent with national energy policy; and
- (5) maximize the use of existing towers and structures.

## Siting

A major impediment to siting energy infrastructure, in general, and electric transmission, in particular, is the great difficulty in getting public acceptance for needed facilities. This tells us that no matter where siting responsibility falls – with State government, the Federal government, or both – as prescribed in the EAct 2005, siting energy infrastructure will not be easy and there will be no “quick fix” to this situation.

During the EAct 2005 debate, NARUC opposed the “backstop siting” provision. NARUC’s position prior to passage of EAct 2005 was, and continues to be, that to have the greatest economical and environmental benefits transmission facilities should not be nationalized but encouraged to be regionalized. Just as States have a role in the siting of interstate highways, States need to continue having an active role in transmission decisions.

As Congress considered EAct 2005, NARUC expressed deep concern with the language that eventually became Section 1221. At that time, NARUC opined that the language could in essence overrule legitimate State agency concerns and laws with regard to how a State ruled on a transmission project. The language would then permit FERC to vacate the decision and preempt State law and actions. It appears as though our initial observations and fears were accurate and led to a federal court case. In *Piedmont Environmental Council v. FERC*, the Fourth Circuit overturned FERC’s expansive interpretation of its backstop siting authority in NIETCs. The court followed

Commissioner Kelly’s dissent to Order 689, and held that section 216 of the Federal Power Act (which gives FERC backstop siting authority if a State “withheld approval for more than one year”) clearly does not give FERC siting authority when a State affirmatively denies a siting permit application within the year.

In its comments on the FERC rulemaking which inspired the court action, NARUC said it expected the backstop siting authority to have limited applicability because the majority of the State commissions have the authority to approve or deny proposed transmission projects within their jurisdictions and State commissions are frequently allowed to address the interstate benefits of proposed projects. Furthermore, many State statutes require a petitioner to obtain a certificate of public convenience and necessity, or some other similar certificate, from a State commission before constructing transmission facilities regardless of whether the applicant provides electric service to end-use customers. In its comments, NARUC proposed that:

1. FERC clarify that federal backstop siting authority under FPA Section 216 is only triggered when the State Commission fails to or cannot act in a timely manner;
2. FERC clarify how it will apply the federal backstop criteria;
3. The proposed rule be revised to implement the due process requirements of the statute; and

4. The Final Rule adopted should incorporate a reference and deference to extensive siting records developed at the State level to prevent duplication and confusion.

The Final Order gave the States one full year to consider a transmission line siting application before the federal pre-filing process begins. The intent is to avoid conducting “parallel proceedings” – where a State commission and FERC would be considering a siting application at the same time. If such “parallel proceedings” were allowed, that process would create *ex parte* and prejudgment concerns under State law. Such a situation could potentially result in an applicant “gaming” the siting process by purposefully filing a deficient application to the State with the hopes of starting the one-year federal clock and precluding adequate State consideration of the application. NARUC did not appeal the FERC backstop siting rule and our members have generally been attempting to work within the framework of the EPACT 05 backstop provision.

With this as a backdrop, our membership is troubled, that Congress finds it necessary to begin consideration of changing the siting provision that was just established in EPAct 05. This provision has not been given an appropriate amount of time to ascertain whether or not it can, will or is working. We are pleased, however, to see that members of this body are also concerned with federal government involvement in the siting of electric transmission. For instance, there is currently a proposed transmission project in New York State, which is encountering intense local opposition. In the

February 20, 2009, edition of the *Utica Observer-Dispatch*, Senator Charles Schumer (D-NY), was quoted “We will do everything we can to make sure that New York has final say on routing decisions, which is what the court intended.” We suspect that many federal elected officials will reach a similar conclusion when confronted with angry and vocal constituents whose rates may go up in order to pay for a line which they believe will provide them no benefits while producing financial gain for generators and transmission owners.

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. FERC Commissioner Suedeen Kelly correctly reasoned that it was incomprehensible that Congress intended FERC to override timely State decision. In addition, it only seems fair that the one-year clock for State action needs to be suspended whenever a federal agency is the cause for the State delay in a permitting decision.

## **Planning**

State Commissions are acutely aware of the necessity and process of regionally planning transmission projects. In all sections of the country where there is a regional planning process, State Commissioners and their staffs are participants in the process. For example, the transmission planning effort currently taking place in the Upper

Midwest is being led by the Governors and state commissions in the States of Minnesota, North Dakota, South Dakota, Iowa and Wisconsin. Our five States have formed the Upper Midwest Transmission Development Initiative (UMTDI) to coordinate sub-regional electric transmission planning and related cost allocation issues. I would like to speak to that now in my capacity as a member of the North Dakota PSC.

With a geographically dispersed resource like wind, generation development may be impeded because the large transmission lines needed are not available where the wind resource is best. But, the transmission lines do not get built because there is currently limited generation development there. We are attempting to break this “chicken and egg” cycle that can too often impede renewable projects. Rather, as a region, we believe wind will be a major player in meeting our electricity needs going forward. To encourage wind development, we plan to proactively choose a number of geographic zones for development and then model a transmission and cost allocation system from there. In many ways, it is an attempt to learn from the success of the Texas Competitive Renewable Energy Zones process, but over a region where there are five states, a regional transmission organization (RTO), and FERC, as opposed to just Texas and ERCOT.

Over the last six months, utility regulators, governors’ staff, utilities, transmission owners, non-governmental organizations and the Midwest ISO have been working to identify our States’ optimum renewable energy resource zones and the regional transmission expansion needed to link those resources to load, both in our States and

possibly beyond our region. In addition, we are working to develop a sub-regional cost allocation approach that is vetted among State stakeholders to help ensure that adequate transmission infrastructure gets built. Our plan is to have a sub-regional transmission upgrade plan ready for inclusion in RTO and regional planning processes by October 2009.

We also recognize that modernizing and expanding the transmission system is essential to expanding renewable energy generation and reaching the renewable portfolio goals outlined by President Obama and many congressional leaders. In my region, we are encouraged by FERC openness to ensuring that States – and particularly, multi-state initiatives such as ours – can participate in developing national interest strategies that allow us to move forward with policies that provide equitable benefits to our citizens. We understand the challenges and have moved aggressively to address those that have seemed intractable in the past. Multi-state need and siting review requirements have been incorporated into the UMTDI planning considerations. Through the Organization of MISO States, the five States have reviewed opportunities to coordinate regulatory procedures.

Current expansion efforts by the transmission owners in our sub-region reflect progressive development practices that should facilitate predictable outcomes. In my opinion, the UMTDI effort and its openness in working with all stakeholders is exactly the kind of effort that is needed to develop efficient transmission infrastructure.

## **Cost-Allocation**

State regulators are concerned about transmission reliability, adequacy, and the costs required to support the development of robust competitive wholesale markets. The investment that is needed to upgrade the transmission grid in order to support expanded wholesale power markets will cost billions of dollars. Notwithstanding the general benefit to the wholesale electric marketplace of encouraging the construction of new generating capacity and its interconnection to the grid, it is also important to provide proper price signals to encourage optimal demand response and promote economic and efficient expansion of the grid and siting of generation. The FERC has in the past adopted transmission pricing policies that generally provide for the direct assignment of costs to the parties causing the costs.

FERC Order No. 2000 stated the "[m]arket designs that base prices on the average or socialization of costs may distort consumption, production and investment decisions and ultimately lead to economically inefficient outcomes." FERC has departed, in some instances, from a transmission pricing policy that provides for the assignment of costs to the cost-causative parties. In general, NARUC supports efficient pricing policies that result in the economic use and expansion of the transmission system to support a robust wholesale electricity market. We recognize that investments needed to maintain the reliability of the existing transmission systems should continue to be recovered through rates charged to all transmission users. We advocate that the cost of upgrades and expansions necessary to support incremental new loads or demands on the transmission

system should be borne by those causing the upgrade or expansion to be undertaken, except that FERC should not preclude the assignment of interconnection cost to the general body of ratepayers within a State when that State's regulatory body determines that such allocation is in the public interest.

A robust regional electric transmission system is an essential prerequisite to support both reliability and the market function allowing more generators to reach loads and compete directly for wholesale sales to such loads in order to increase competition among generation suppliers and meet national goals for renewable generation and energy independence. A new rate design is needed that will facilitate the construction of the strong transmission backbone required to support the nation's wholesale electric markets, future increases in renewable generation capacity, and reliability.

### **Majority Leader Reid's Transmission Legislation**

Last week, Majority Leader Reid introduced "The Clean Renewable Energy and Economic Development Act." We want to thank Senate Majority Leader Reid and his staff for reaching out and consulting NARUC as he drafted this proposal. Sen. Reid is to be commended for bringing this issue to Congress' attention, and we are optimistic that our continued dialogue will produce a better outcome for consumers and the environment. However, we are very troubled by a number of the provisions included in this legislation. I would like to outline our concerns and comments here:

- Sec.402—How does the National Renewable Energy Zone Designation relate to the 2009 Renewable Energy Transmission Study required by § 409 of the American Recovery and Reinvestment Act? It seems logical that designation of a Renewable Energy Zone be tied to the study.
- Sec. 403—It is unclear how subsequent National Renewable Energy Zone designations become reflected in the plan. Is the plan expected to be revised every year (as suggested by the requirement that the plan be submitted to the Commission annually §403(e)(8))? How does that fit with the requirement that the plan cover at least 10 years into the future (§403(e)(5))?
- Sec. 403(a)—The selection process for the regional planning entities is somewhat obtuse. We would recommend that the States and other stakeholders that must participate in the planning process have a clearer role in selecting and shaping the planning entity.
- Sec. 403(d)—The one-year time frame from the date of designations is too short for a comprehensive planning process with multiple stakeholders. Although we recognize the importance of immediate action, realistically it seems like at least two years will be necessary for an initial plan.
- Sec. 403(j)((B)(ii)(I) requiring Governor certification that all load-serving entities “offer a fairly priced renewable power purchase option to all the customers of the

entities.”—It is unclear what this section means. It seems that it may begin to mandate consumer choice, and we would suggest striking it. We believe it is inappropriate for Congress to mandate retail rate-design on a one-size-fits-all basis. For example, in North Dakota the Commission rejected a proposed “green tariff” at the urging of many in the environmental community because it treated wind as a boutique fuel as opposed to an integral component of the integrated system.

- NARUC opposes Sec. 404. Further, we think that the section preserving State siting authority Sec (404(n)) creates potential for forum shopping.
- Sec. 404(a)(1)(B) which allows federal siting for a project that is not included in the Interconnection-wide transmission plan (if the developer assumes all of the risk and cost of the proposed facility) may undermine the planning process and cause organizations to circumvent the planning process. This also will allow for siting of a line without ANY State input. We suggest that this section either (a) be removed or (b) require State consultation before the siting of a line outside of the Interconnection wide transmission plan, even if the developer assumes all of the risk.
- Sec 404(c)(2)—This section should include language that would require the Commission to consult with the States in promulgating regulations regarding the permit applications.

- Sec 404(g)—the provisions providing for State consultation allow the States to offer recommendations in only a very limited number of areas and allow the Commission to easily override the State recommendations. These provisions should be changed to strengthen the States’ role in identifying siting constraints and mitigation measures.
- We appreciate Section 406(b) for acknowledging that if the States submit a joint cost allocation plan, the Commission should approve the cost allocation unless the plan violates the conditions of just and reasonableness or unduly inhibits renewable energy.

We look forward to conversations with the Majority Leader’s office and the members and staff of this committee so we can bring about a mutually acceptable outcome.

In conclusion, the electric transmission system must have the capacity to meet the growing energy needs of the nation, regardless of the generation source. The solutions to the challenges will not come quickly or easily. These solutions will require the cooperation of all stakeholders, including State and federal government, and must not require ratepayers to bare the financial burden with the reward allocated to the owners of generation and/or transmission. Thank you and I look forward to your questions.