Fact Sheet on IIJA and RM22-7-000

I. Background

On November 15, 2021, the Infrastructure Investment and Jobs Act (IIJA) became law. The IIJA, among other things, amended section 216 of the Federal Power Act (FPA), which provides for Federal siting of electric transmission facilities under certain circumstances. In RM22-7-000, FERC issued a Notice of Proposed Rulemaking (NOPR) seeking public comment on its proposal to amend its regulations governing applications for permits to site electric transmission facilities to: (1) ensure consistency with the IIJA's amendments to FPA section 216; (2) modernize certain regulatory requirements; and, (3) incorporate other updates and clarifications to provide for the efficient and timely review of permit applications.

· In general, the new approach proposed by FERC offers project developers enhanced opportunities to ensure that electric transmission infrastructure projects actually get built, whether through State or Federal authorities.

· The expanded criteria that DOE may now consider when designating an energy corridor should greatly increase the number of projects likely eligible for Federal siting. Namely, DOE can now consider whether such projects would "enhance the abilities of facilities that generate or transmit firm or intermittent energy to connect to the electric grid", or if such projects may be needed for "energy security". This is a broad brush approach that would allow

projects that help with grid reliability, or provide emerging wind, solar or hydrogen generation, to be a basis for an energy corridor. Similarly, the inclusion of projects in geographic areas that are expected to experience constraints or congestion gives DOE the ability to consider future electric power needs when designating energy corridors.

II. Revisions to IIJA and the NOPR

IIJA

The IIJA revised several portions of the FPA that would impact getting interstate electric transmission facilities sited.

The key revisions that I believe would have a positive result on new electric transmission infrastructure are related to the IIJA amending section 216(a)(2) of the FPA to expand the circumstances under which DOE may designate a National Corridor. In addition to geographic areas currently experiencing transmission capacity constraints or congestion that adversely affects consumers, DOE may designate National Corridors in geographic areas **expected to experience such constraints or congestion** [emphasis added]. The IIJA also amended section 216(a)(4) to expand the factors that DOE may consider in determining whether to designate a National Corridor, including new justification criteria when making such a designation. Namely, such a designation can also be based on the

need for "energy security", and to "enhance the abilities of facilities that generate or transmit firm or intermittent energy to connect to the electric grid".

One revised provision may result in an extra step for the permit holders. Currently, under section 216(a), the permit holder is granted the right to acquire the necessary right-of-way (with the exception of Federal or State-owned land) to site such infrastructure project by *eminent domain*. As revised by the IIJA, section 216(e)(1) now requires the Commission to determine, as a precondition to such *eminent domain* authority, that a permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process.

NOPR

In response to the IIJA revisions, and by actions on its own motion, FERC is modifying certain methodologies, procedures, and informational requirements (such as resource- and other reports) to be utilized under this enhanced approach when reviewing proposals to site electric transmission infrastructure.

First, in accordance with the IIJA, the NOPR clarifies the Commission's siting authority by expressly stating that the Commission may issue a permit for the construction or modification of electric transmission facilities in DOE-designated national corridors if a State has denied an application to site transmission facilities.

Second, the NOPR announces a proposed change in Commission policy that would eliminate the one-year delay following the submittal of a State application before the Commission's mandatory pre-filing process may commence. Instead, the Commission proposes to allow the simultaneous processing of State applications and Commission pre-filing proceedings. This change will allow applicants to simultaneously pursue approval before a state and the Commission if they so choose. However, out of respect for State siting processes, the NOPR proposes to provide an additional opportunity for State input before the Commission determines that the pre-filing process is complete and that an application may be filed. Specifically, one year after the commencement of the Commission's pre-filing process, if a State has not made a determination on an application, the NOPR proposes to establish a 90-day window for the State to provide comments on any aspect of the pre-filing process, including any information submitted by the applicant.

Third, the IIJA added a new clause requiring the Commission to determine that a permit holder "has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process" as a precondition to the permit holder acquiring the necessary right-of-way by eminent domain. The draft NOPR proposes that one way for an applicant to demonstrate that it has met the "good faith efforts" standard is to elect to comply with an Applicant Code of Conduct in its communications with

affected landowners. The Applicant Code of Conduct includes particular recordkeeping and information-sharing requirements for engagement with affected landowners, as well as more general prohibitions against certain misconduct in such engagement. Although a commitment to the Applicant Code of Conduct is voluntary, an applicant that chooses not to comply with the Applicant Code of Conduct must specify its alternative method of demonstrating that it meets the good faith efforts standard. The NOPR also proposes to require prospective applicants to provide additional information, including a Landowner Bill of Rights, to affected landowners in the pre-filing participation notice to ensure affected landowners are informed of their rights in their dealings with the applicant, in Commission proceedings, and in eminent domain proceedings.

Fourth, the draft NOPR proposes to add three resource reports to the application including an Environmental Justice (EJ) Resource Report, a Tribal Resources Report, and an Air Quality and Environmental Noise Resource Report:

- The E J Resource Report would require information that identifies environmental justice communities affected by the project and discusses project impacts. To help ensure that applicants actually consider impacts to EJ communities, applicants must describe any proposed mitigation measures intended to avoid or minimize impacts on environmental justice communities. In addition to the EJ Resource Report, the Commission is also proposing to require an applicant to develop and

file an E J Public Engagement Plan early in the pre-filing process to describe the applicant's completed and planned outreach activities.

- The Tribal Resources Report would consolidate existing requirements that an applicant submit information describing the project's effects on Tribes, Tribal lands, and Tribal resources. In addition, the NOPR proposes to require an applicant to identify potentially-affected Tribes and to describe the impacts of project construction, operation, and maintenance on Tribes and Tribal interests.

- The Air Quality and Environmental Noise Resource Report would require the applicant to estimate emissions from the proposed project and the corresponding impacts on air quality and the environment, estimate the impact of the proposed project on the noise environment, and describe proposed measures to mitigate the impacts. The NOPR also proposes to establish a noise limit for proposed substations and appurtenant facilities at pre-existing noise-sensitive areas, such as schools, hospitals, or residences.

Finally, the Commission seeks comment on the definitions of the terms "affected landowner" and "environmental justice community," and what methods of notice beyond mail and newspaper publication might be utilized effectively, and on the Commission's

NEPA regulations pertaining to siting electric transmission facilities, with comments on the NOPR being due 90 days after publication in the Federal Register.

III. Observations

In general, the new approach proposed by FERC offers project developers enhanced opportunities to ensure that electric transmission infrastructure projects actually get built, whether through State or Federal authorities.

The expanded criteria that DOE may now consider when designating an energy corridor should greatly increase the number of projects likely eligible for Federal siting. Namely, DOE can now consider whether such projects would "enhance the abilities of facilities that generate or transmit firm or intermittent energy to connect to the electric grid", or if such projects may be needed for "energy security". This is a broad brush approach that would allow projects that help with grid reliability, or provide emerging wind, solar or hydrogen generation, to be a basis for an energy corridor. Similarly, the inclusion of projects in geographic areas that are expected to experience constraints or congestion gives DOE the ability to consider future electric power needs when designating energy corridors.

FERC's approach in the NOPR seems to properly reflect the goals of the IIJA regarding electric transmission siting. And while new, additional burdens are being placed on

prospective applicants seeking Federal siting permits, the purpose of adding these is consistent with the current Commission approach of expanding public participation, and considering the potential impact of projects on EJ communities, as well as on Tribes, Tribal lands, and Tribal resources.

One aspect of the revised approach that probably has a substantial impact on increasing the likelihood of new electric transmission projects being sited is the decision to allow an applicant to simultaneously engage in FERC mandatory pre-filing process, while a concurrent application with the State authorities is pending. Essentially, this alleviates the situation of a project developer having to start anew with FERC if a project is denied on the State level. And, while this is greatly beneficial from a timing perspective, there is another hidden benefit that may not be particularly obvious at first. Namely, by having concurrent applications being processed by "competing" regulatory bodies, the project developer has a great deal of leverage in the State proceeding by knowing that if the State denies the project, it can proceed with furthering its application on the Federal level (subject to a 90-day State comment period before a formal application may be submitted to FERC).

In other words, and to use layman's terms, under the concurrent, dual-path application processing approach now allowed, the State would surely realize that if it doesn't "play nicely", the project developer can "take its ball and go home', or at least go to FERC.