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Legal Sidebar

No NIETCs: U.S. Department of Energy Suspends Efforts to Designate "National Interest Electricity Transmission Corridors"

September 4, 2026

A decades-old effort to alter the federal role in permitting large-capacity interstate electricity transmission facilities took a new turn this summer, as the Department of Energy (DOE) announced that it would halt its ongoing efforts to designate three areas as "National Interest Electricity Transmission Corridors" (NIETCs) in which the federal government could exercise limited transmission facility permitting authority. This is the latest policy shift in an ongoing struggle over the nature and extent of the federal government's authority to supersede state and local governments and authorize interstate electricity transmission construction and operation. This Legal Sidebar provides an overview of the legal authorities underlying NIETC designation, discusses actions taken by DOE and the Federal Energy Regulatory Commission (FERC), and concludes with considerations for Congress.

The Federal Power Act and NIETCs

Title II of the Federal Power Act (FPA) establishes the federal role in overseeing and regulating electric power in the United States. Since its adoption as Title II of the Public Utility Act of 1935, Title II of the FPA has limited FERC's authority to wholesale sales and interstate transmission pricing and allocation. The physical siting of transmission facilities, as well as authorization of entities to construct and operate those facilities, have traditionally been left to the states except in cases where the facilities are located on federal land.

As the electricity grid expanded and became more interconnected and interdependent, its operation and reliability became a more significant national concern. However, the federal government lacked the authority to direct or authorize new transmission capacity on private lands. In order to accommodate the expansion of the increasingly interdependent electric power grid, Congress sought to carve out a role for the federal government in siting transmission facilities on private lands. Section 1221 of the Energy Policy Act of 2005 (EPAct) enacted a new Section 216 of the FPA, establishing what is commonly called "backstop" siting authority for FERC. It authorized FERC to issue permits for the construction or modification of transmission facilities in certain circumstances in areas designated by the Secretary of Energy as "National Interest Electric Transmission Corridors," or NIETCs. EPAct directed the Secretary of Energy to "conduct a study of electric transmission congestion" and subsequently "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."

Rulemakings to Establish NIETCs

After EPAct's enactment, both FERC and DOE undertook rulemaking proceedings as directed by Section 1221 to establish filing requirements and procedures for entities seeking a permit to construct interstate electric transmission facilities, provide the mandated report on electric transmission congestion, and to designate NIETCs. However, these administrative actions were undone by legal challenges. In *Piedmont Environmental Council v. FERC*, the U.S. Court of Appeals for the Fourth Circuit held in 2009 that FERC had exceeded its statutory authority in its 2006 regulations implementing Section 1221. Section 1221 provided that FERC could exercise its backstop electricity transmission siting authority if "a State commission or other entity that has authority to approve the siting of the facilities has . . . withheld approval for more than 1 year," which FERC interpreted as including instances where the state authority denied the siting request. The Fourth Circuit concluded that the plain meaning of this language indicated congressional intent to make backstop federal siting authority available *only* where the state had not made any decision on proposed facilities, and not in cases where the state authority had denied the application. As a result of this decision, as well as a 2011 decision by the U.S. Court of Appeals for the Ninth Circuit vacating the two DOE NIETC designations, federal transmission siting authority was largely abandoned by the relevant agencies and the process left to the states for the next decade.

In 2021, Congress enacted the Infrastructure Investment and Jobs Act, which in relevant part amended the language in Section 216 of the FPA to explicitly authorize FERC to exercise its backstop transmission siting authority not only when a state authority has not made a determination regarding a proposed project, but also when the state has denied the proposal. This provision effectively authorized the federal government to regulate a matter previously left to the states by codifying the expanded backstop electricity siting authority that FERC asserted in its final rule in 2006 but which was vacated by the Fourth Circuit in *Piedmont*. Following enactment of this amended language, FERC amended its regulations implementing Section 216 of the FPA, detailing the process by which parties could petition FERC to exercise its expanded backstop authority.

Additionally, in December 2024, DOE announced that it was moving forward with establishing three NIETCs, its first effort to do so since the 2011 decision vacating its previous determinations, and published a *Federal Register* notice seeking public input on the potential NIETCs. The proposal was the third phase of a four-phase administrative process that began in December 2023 with DOE's publication of updated guidance on the NIETC designation process and continued in May 2024 with the release of a preliminary list of 10 potential NIETCs for further consideration. Of those, DOE selected the three potential NIETCs: (1) the Tribal Access Corridor through the Dakotas and Nebraska, intended to connect tribal reservations to existing or pending new high-voltage transmission; (2) the Southwestern Grid Connector Corridor through portions of Colorado, New Mexico, and the Oklahoma panhandle, intended to facilitate East-West interregional interconnections; and (3) the Lake Erie-Canada Corridor in Northern Pennsylvania, intended to connect the mid-Atlantic's PJM Interconnection network with the Canadian power network. The final phase would be official designation "[b]ased upon the information and analyses developed in Phase 3."

The comment period for DOE's proposed NIETCs closed in April 2025. In the interim, the Biden Administration ended and the second Trump Administration chose to take a different approach to NIETCs.

DOE's Determination Not to Designate NIETCs

On August 12, the Secretary of Energy announced that DOE would not be moving forward with the three previously proposed NIETC designations. The Secretary declared that the determination was the result of "extensive review, including public feedback and stakeholder input" and that "[t]ransmission policy must serve the American people—not special interests or a climate-alarmist agenda that drives up costs, worsens reliability, and disregards the concerns of local communities." The Secretary also claimed that the determination not to move forward with the NIETC designations aligned with two recently issued executive branch policy documents: Executive Order 14154, which announced the Administration's energy policy and directed agencies to take certain actions in accordance with the policy; and the February 5, 2025, DOE Secretarial Order, which described various actions and DOE priorities to further the Administration's energy policy.

The Secretary appears to have the discretion not to designate NIETCs. Section 216(a) of the FPA mandates studies of electric transmission capacity constraints and congestion every three years but does not require the Secretary to designate NIETCs based on those studies. Section 216(a)(2) provides only that after the study is completed, the Secretary shall issue a report and "may designate as a national interest electric transmission corridor" geographic areas that are experiencing or are expected to experience transmission capacity constraints or congestion and sets forth criteria for that consideration.

Considerations for Congress

The decision to stop progress on the designation of NIETCs will not directly change any aspects of the existing electricity transmission permitting structure. While DOE has had the authority to establish NIETCs for over two decades, it has never done so, and as a result, the federal government has never exercised its "backstop" electricity transmission permitting authority over private or state-owned land. A reversal of policy by DOE would allow the existing designations to proceed, or DOE could initiate a new proceeding to designate other NIETCs.

Congress could also alter the federal-state balance of power related to electricity transmission, including by enacting new legislation to explicitly establish the three NIETCs or any others it deems appropriate, remove the requirement that a proposed transmission facility be in a NIETC to be eligible for backstop federal permitting under Section 216 of the FPA, or alter the balance of authorities between DOE and FERC. For example, H.R. 5600, introduced in 2025, would amend Section 216 to strike the NIETC consideration and designation process entirely and replace it with a broader authority for FERC to issue certificates authorizing the construction and operation of interstate electric transmission facilities based on various determinations. This would remove DOE's role in electricity transmission facility permitting and replace it with broader and more flexible FERC discretion to permit such interstate facilities. By contrast, Congress could also limit the federal role altogether in permitting electricity transmission facilities.

Parties often seek to challenge DOE's reversal of policy under the Administrative Procedure Act (APA), but APA-based litigation may not be available in this instance. Among other things, the APA authorizes legal challenges to final agency actions—including the amendment or repeal of a rule—and directs federal courts to "hold unlawful and set aside" such actions if the court finds them to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Supreme Court has held that an agency that reverses or alters previous policy must "display awareness that it is changing position" and may not "depart from a prior policy sub silentio." An agency must provide a "reasoned analysis" for its change in policy, including where the new action "rests upon factual findings that contradict those which underlay its previous policy." Here, however, DOE never finalized the NIETC designations, and its decision not to move forward with the designations likely does not amount to a rescission of a final agency action. The discretion afforded the Secretary to designate NIETCs or decline to do so could also limit a litigant's ability to compel DOE to take action in accordance with Section 706(1) of the APA.

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