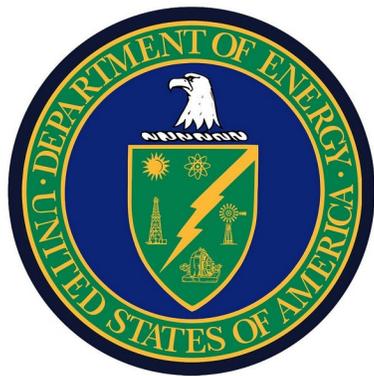


THE
NATIONAL LAW REVIEW

DOE Participation in Plains & Eastern Clean Line Could Open Doors for Other Transmission Projects

Wednesday, March 30, 2016

On March 25, 2016, the U.S. Department of Energy (“DOE”) announced that it will participate in the Plains & Eastern Clean Line transmission project (the “Project”) proposed by Clean Line Energy Partners LLC (“Clean Line”). DOE’s decision is based on its evaluation of the Project under the authority granted in Section 1222 of the Energy Policy Act of 2005 (“EPAAct 2005”). While there are many hurdles that remain to be overcome before the Project becomes a reality, DOE’s decision may offer other interstate electric transmission project proponents reason to be optimistic.



Energy Policy Act of 2005, Section 1222

At over 1,000 pages in length, EPAAct 2005 represented a comprehensive attempt to address a number of energy challenges facing the nation. From tax credits to energy efficiency to the start and end dates for daylight savings time, EPAAct 2005 addressed numerous aspects of overall U.S. energy policy, including the nation’s electric transmission system. Section 1221 of the Act authorized the designation of national interest electric transmission corridors, a step that was originally perceived as a means to advance transmission projects encountering state regulatory obstacles but which has

proved problematic and largely ineffectual; Section 1223 encouraged the development and deployment of advanced transmission system technologies; and Section 1222 authorized DOE to participate directly in transmission projects under certain circumstances.

Section 1222 authorizes the Secretary of Energy, acting through the Western Area Power Administration (“WAPA”) or the Southwestern Power Administration (“SWPA”), to “design, develop, construct, operate, maintain, or own, or participate with other entities in designing, developing, constructing, operating, maintaining, or owning, an electric power transmission facility and related facilities” needed to upgrade existing transmission facilities owned by SWPA or WAPA or in connection with new facilities located in any state in which SWPA or WAPA operates.

The exercise of such authority requires a finding that the project meets certain statutorily prescribed conditions. In the case of new facilities, the findings include: the project is necessary to accommodate a projected increase in demand for electric transmission capacity; the project is consistent with transmission needs identified by the appropriate regional transmission organization and with the efficient and reliable operation of the transmission grid; the project will be operated in conformance with prudent utility practice and with the rules of the relevant transmission organization; and the project will not duplicate the functions of existing or proposed facilities.

If these findings are made, “the Secretary may accept and use funds contributed by another entity for the purpose of carrying out the [p]roject.” Accordingly, Section 1222 provides a funding mechanism and comprehensive authority for DOE participation in or ownership of qualifying transmission projects.

Plains & Eastern Clean Line

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In June, 2010, DOE issued a request for proposals for qualifying projects under Section 1222. In July, 2010, Clean Line submitted a proposal, which was subsequently amended in December, 2014, for what is now known as the Plains & Eastern Clean Line transmission project. The Project includes a single 720 mile long, 600 kV, overhead, high voltage direct current (“HVDC”) transmission line and related facilities extending from western Oklahoma and the northern Texas panhandle, through Arkansas, to a substation in Tennessee, with a capacity of 4,000 MW.

In addition to finding that the Section 1222 conditions were satisfied and completing a Final Environmental Impact Statement, DOE also found that the Project is in the public interest, will facilitate the reliable delivery of renewable energy, the benefits of the Project outweigh the impacts in each of the states in which it will be located, and the Project is technically and financially viable. A detailed discussion of the Project and its evaluation under Section 1222 is contained in [DOE’s Summary of Findings](#).

DOE’s and Clean Line’s respective roles and responsibilities in the Project are detailed in their [March 25, 2016 Participation Agreement](#). Clean Line has primary responsibility for acquisition of all Project real property interests and, subject to oversight by a joint Coordinating Committee, is responsible for all Project development, construction, and operations and maintenance activities. DOE, acting through SWPA, will be conditionally responsible for certain Project tasks, including acquisition of rights-of-way, provided that the Project meets certain commercial and technical milestones such as execution of transmission service agreements, confirmed interconnection rights, and financing commitments. SWPA will also oversee the Project’s conformance with environmental and cultural resource obligations as well as FERC and NERC regulatory compliance. Other key provisions of the Agreement include DOE ownership of all Project facilities located in Arkansas, and a mandate that Clean Line use commercially reasonable efforts to use at least 75% of the Project’s capacity for the transmission of renewable energy resources. The Participation Agreement is structured to ensure that Clean Line is responsible for all Project costs and the federal government is indemnified and held harmless from all liabilities associated with the Project.

Opportunities for Other Transmission Projects?

While the Plains & Eastern transmission project remains a long way from actual operation, DOE’s decision to participate in the Project suggests possible cause for optimism on the part of other interstate transmission project developers. Part of the motivation for Clean Line’s proposal to obtain DOE participation under Section 1222 was to address difficulties encountered obtaining state regulatory approvals, notably in Arkansas where Clean Line could not obtain a Certificate of Convenience and Necessity because it did not qualify as a “public utility” in that state. Given that “public utility” status may also be a prerequisite to condemnation authority under state law, the possible exercise of DOE’s eminent domain authority to obtain needed property rights is a potential additional benefit. DOE’s Findings in connection with the Project also make clear that it “need not obtain a certificate from a public utility commission for a transmission project under section 1222 before taking an action, such as construction, that if done by a private party would require a certificate under state law.” These and other aspects of DOE’s Findings and the Participation Agreement suggest opportunities for public-private collaboration to advance other interstate transmission projects.

It is unclear whether DOE will be open to participation in other Section 1222 transmission projects. (Section 1222 contains a limitation on the funds DOE may accept for fiscal years 2006 through 2015.) However, as explained in DOE’s Findings, the authority contained in Section 1222 is similar to Congress’s 1984 authorization for DOE’s participation in the Path 15 Upgrade Project in the Pacific Northwest and California. Taken together, these two examples of DOE participation in transmission projects, indicate that there may be opportunities for future collaboration on interstate transmission projects intended to increase transmission capacity and to facilitate interregional delivery of renewable resources. This may be of particular interest to project developers located in wind and solar resource rich regions of the upper Great Plains, the Rocky Mountains, and the desert southwest where WAPA operates.

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