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**HERDING CATS: WHAT TO DO WHEN STATES GET IN THE WAY  
OF NATIONAL ENERGY POLICY**

*John Noor*<sup>1</sup>

*Shifting the United States' primary source of electricity from non-renewable energy to renewable energy requires expanded capacity to facilitate long-range transmission from regions where it can be efficiently produced to large population centers where it will be used. In *Piedmont Environmental Council v. FERC* the Fourth Circuit Court of Appeals recently held that the Federal Energy Regulatory Commission could not site new interstate transmission lines if a state had already denied approval. Denying FERC's authority to site new transmission lines within National Corridors will significantly influence the growth of renewable energy. This Recent Development explores the impact of the court's ruling on the spread of renewable energy and offers a legislative solution to potential problems.*

**I. INTRODUCTION**

World energy consumption is projected to increase by 26% annually within the next twenty years.<sup>2</sup> To put this number into perspective, a 26% yearly increase is roughly equal to all of the energy used by the United States, Canada, Mexico, Japan, South Korea, and Australia in 2006.<sup>3</sup> This increase in demand for energy

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<sup>2</sup> Energy Information Administration, International Energy Outlook 2009, 121 (2009) (identifying the projected total world primary energy consumption from 2010 to 2030), available at [http://www.eia.doe.gov/oiaf/ieo/pdf/0484\(2009\).pdf](http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf).

<sup>3</sup> *Id.* (adding OECD North America with OECD Asia). OECD is the designation given to members of the Organization of Economic Cooperation and Development. *Id.* at ix.

is expected to come primarily from Asia,<sup>4</sup> and will result in increased emissions of greenhouse gases.<sup>5</sup> In order to avoid increased costs in energy like those experienced in mid-2000 and reduce the emission of greenhouse gases, the United States has identified increasing domestic renewable energy production as a highly attractive opportunity.<sup>6</sup> However, the United States' effort to expand renewable energy has unearthed serious problems within the country's electricity transmission system.<sup>7</sup> Currently, a significant limitation on the spread of renewable energy is the lack of capacity to link renewable energy producers with large population centers in electrically congested areas around the country.<sup>8</sup>

To address this problem, Congress included in the Energy Policy Act of 2005<sup>9</sup> ("Act") a provision giving the Federal Energy Regulatory Commission ("FERC") the authority to site projects<sup>10</sup> for the "construction or modification of electric transmission facilities in a national interest electric transmission corridor" ("National Corridor"),<sup>11</sup> when States had "withheld approval [to site a facility] for more than 1 year."<sup>12</sup> One of the major concerns

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<sup>4</sup> *Id.* (looking at Non-OECD Asia Countries).

<sup>5</sup> *Id.* at 111 (showing projected world carbon dioxide emissions).

<sup>6</sup> "The rapid increase in world energy prices from 2003 to 2008, combined with concerns about the environmental consequences of greenhouse gas emissions, has led to renewed interest in the development of alternatives to fossil fuels." *Id.* at 3.

<sup>7</sup> Darrell Blakeway & Carol Brotman White, *Tapping The Power of Wind: FERC Initiatives to Facilitate Transmission of Wind Power*, 26 ENERGY L.J. 393, 393 (2005) (suggesting that the most significant challenge to the expansion of wind energy is "the lack of a robust transmission grid.").

<sup>8</sup> *Id.*

<sup>9</sup> The Energy Policy Act of 2005, 16 U.S.C. § 824p(b) (2006).

<sup>10</sup> See BLACKS LAW DICTIONARY 1513 (9th ed. 2009) (defining "site" as "a piece of property set aside for a specific use.").

<sup>11</sup> 16 U.S.C. § 824p(b).

<sup>12</sup> *Id.* § 824p(b)(C)(i). There are a number of other circumstances that will trigger FERC's authority to site interstate transmission lines. Those circumstances are listed at 16 U.S.C. § 824p(b). National interest electricity transmission corridors are "any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers." 16 U.S.C. § 824p(a)(2). Currently, national interest electricity transmission corridors are comprised of parts of: Delaware, Ohio, Maryland,

that states had with this legislation was how FERC would interpret the word “withheld.”<sup>13</sup> These concerns were intensified when FERC finalized its rule making process and equated denying a permit with withholding approval.<sup>14</sup> States and citizen groups challenged FERC’s rule in *Piedmont Environmental Council v. FERC*.<sup>15</sup> The United States Fourth Circuit Court held that FERC was incorrect in its interpretation that a State’s denial of a siting permit is within the meaning of “withheld.”<sup>16</sup> Critics claim that the decision disregards Congress’s intent and will slow the spread of renewable energy.<sup>17</sup> However, supporters claim that the court

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New Jersey, New York, Pennsylvania, Virginia, West Virginia, California, and Arizona are part of a national interest electricity transmission corridor. See Pamela A. MacLean, *Utilities Battle States Over Power Lines*, NAT’L L. J., Apr. 14, 2008 at 1. Transmission facility is not defined in the statute or in the subsequent regulations. The only guidance that was given by the Department of Energy was in the final rule establishing the regulations for filing applications for permits to site interstate electric transmission facilities “The only projects that the commission will be issuing permits to are those that will fall under . . . [16 U.S.C. § 824p(b)].” Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,463 (Dec. 1, 2006).

<sup>13</sup> 16 U.S.C. § 824p(b)(C)(i).

<sup>14</sup> 71 Fed. Reg. 69,440, 69,476 (Dec. 1, 2006) (The lone dissenter in the hearing was Commissioner Suede Kelly who took the position that Congress had not intended for FERC to have backstop siting authority when states denied a siting permit. “There is no evidence to counter this presumption against pre-emption. To the contrary, I find it inconceivable that Congress would have specifically listed in section 216(b)(1) a number of circumstances that will trigger Commission jurisdiction, yet fail to include on that list denial of a permit. If Congress had intended to take away the States’ authority to lawfully deny a permit, surely it would have said so in unmistakable terms.” (internal quotation marks omitted)).

<sup>15</sup> *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 309 (4th Cir. 2009), petition for cert. filed, (Sep. 17, 2009) (No. 09-343).

<sup>16</sup> See *id.* at 313 (“We conclude that FERC’s interpretation is contrary to the plain meaning of the statute. Simply put, the statute does not give FERC permitting authority when a state has affirmatively denied a permit application within the one-year deadline.”).

<sup>17</sup> Steven Greenwald & Jeffrey Gray, *Transmission Superhighway or Interconnected Patchwork?*, POWER, Apr. 1, 2009, [http://www.powermag.com/commentary/Transmission-Superhighway-or-Interconnected-Patchwork\\_1800\\_p2.html](http://www.powermag.com/commentary/Transmission-Superhighway-or-Interconnected-Patchwork_1800_p2.html) (“The lack of such a national interstate focus has produced a suboptimal patchwork of transmission facilities; preservation of the traditional state-focused

ruled correctly because, had FERC been allowed to maintain its self-defined authority, utilities would have been able to sidestep the state approval process, resulting in the expansion of coal based energy.<sup>18</sup>

This Recent Development argues that the court's holding will slow the spread of renewable energy in National Corridors unless a legislative solution is adopted. It also argues that had FERC been allowed to site facilities after a state denied a permit it would have led to the spread of non-renewable energy. Lastly, this Recent Development offers a legislative solution that maintains the States' role in siting transmission facilities, while promoting regional interests to expand transmission capacity for renewable energy producers. Part II discusses the United States' electricity transmission system, the Energy Policy Act of 2005 that authorizes FERC to site transmission lines, FERC's interpretation of that authority, and the resulting challenge in *Piedmont*. Part III identifies the two main viewpoints on how *Piedmont* will affect the spread of renewable energy. Finally, Part IV offers an alternative assessment of the case's impact, discusses the solutions proposed by Congress, and offers an alternative proposal that will speed up the siting of new interstate transmission facilities, while limiting access by non-renewable energy producers and maintaining state involvement in the decision making process.

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paradigm will subject renewable resources available in the windy plains and sunny desserts to electronic isolation.”) (internal quotations omitted) (last visited Sept. 18, 2009) (discussing the impacts of the *Piedmont* decision on the interstate transmission of energy) (on file with the North Carolina Journal of Law & Technology).

<sup>18</sup> See generally Mark Clayton, America's Future Wind Web?, Feb. 18, 2009, <http://features.csmonitor.com/innovation/2009/02/18/americas-future-wind-web/> (last visited Oct. 25, 2009) (discussing the potential for growth in wind energy as well as the opposition to transmission lines by environmental groups who think the lines will also carry coal based energy) (on file with the North Carolina Journal of Law & Technology).

## II. THE ELECTRICITY TRANSMISSION SYSTEM: AMERICA'S ELECTRON SUPERHIGHWAY

### A. *The Current Transmission System*

The United States' electricity transmission system ("System") is the super highway that moves electricity from producers into communities.<sup>19</sup> The System is composed of three separate electricity transmission systems:<sup>20</sup> the Eastern Interconnection, Western Interconnection, and Texas Interconnection.<sup>21</sup> These systems contain over 150,000 miles of high voltage transmission lines that transmit over \$247 billion worth of energy annually.<sup>22</sup> These transmission systems are valued at roughly \$80 billion,<sup>23</sup> making energy transmission "one of the largest and most capital-intensive sectors of the economy."<sup>24</sup>

The System, like a highway, is limited by its finite amount of capacity at any given time.<sup>25</sup> Energy congestion takes place when

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<sup>19</sup> See generally Energy Information Administration, *Electricity Transmission Fact Sheet*, [http://www.eia.doe.gov/cneaf/electricity/page/fact\\_sheets/transmission.html](http://www.eia.doe.gov/cneaf/electricity/page/fact_sheets/transmission.html) (last visited Sept. 11, 2009) (explaining the basic characteristics of the U.S. electricity transmission system) (on file with the North Carolina Journal of Law & Technology).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> U.S. Dep't of Energy, Office of Electricity Delivery & Energy Reliability, National Electric Transmission Congestion Study 4 (2006) *available at* [http://nietc.anl.gov/documents/docs/Congestion\\_Study\\_2006-9MB.pdf](http://nietc.anl.gov/documents/docs/Congestion_Study_2006-9MB.pdf).

<sup>23</sup> See U.S. Dep't Of Energy, Office Of Electricity Delivery & Energy Reliability, *Overview Of The Electric Grid*, <http://www.energetics.com/gridworks/grid.html> (last visited Sept. 11, 2009) (providing a general overview of the U.S. electric grid) (on file with the North Carolina Journal of Law & Technology).

<sup>24</sup> *Id.* ("Total asset value is estimated at \$800 billion with approximately 60% invested in power plants, 30% in distribution facilities, and 10% in transmission facilities.").

<sup>25</sup> See generally Alberta Electric System Operator, *AESO Long-term Transmission System Plan Brochure: Energy to grow Alberta's Economy*, 2 (2009) [hereinafter *Brochure*], *available at* [http://www.aeso.ca/downloads/Long\\_Term\\_Brochure\\_FINAL.pdf](http://www.aeso.ca/downloads/Long_Term_Brochure_FINAL.pdf) (An electricity transmission system "is like a highway. It moves power from where it is produced to where it is used . . . just like a highway moves traffic . . . . If the transmission highway is too small to handle the needed flow of electricity, then it can become congested . . .").

“flows of electricity on a transmission line . . . are restricted below the desired level . . . by the physical or electrical capacity of the line.”<sup>26</sup> To use a familiar analogy, traffic congestion can occur when lanes on a highway narrow, causing a bottleneck and resulting in a reduced flow of traffic. Similarly, electricity congestion occurs when there is a “transmission constraint”<sup>27</sup> at a certain point in a system that limits the amount of electricity flowing to consumers. The problem for electricity, unlike annoyed motorists, is that electricity cannot get off at the next exit and take an alternative route.<sup>28</sup> This limitation can result in increased costs for consumers and blackouts.<sup>29</sup>

#### B. *The Energy Policy Act of 2005*

To alleviate electricity congestion, Congress gave FERC the authority to site<sup>30</sup> interstate transmission facility projects when states failed to do so within a timely manner.<sup>31</sup> However, Congress

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<sup>26</sup> U.S. Dep’t of Energy, *supra* note 22, at 6. (The Department of Energy (DOE) was required by the Energy Policy Act of 2005 to do a national congestion study that would identify areas where congestion was particularly acute and designate them as National Electricity Transition Corridors (National Corridors). These National Corridors would then serve as the areas where FERC could exercise its back stop authority to site transmission lines if states withheld approval for more than one year.)

<sup>27</sup> *Id.* at vii (“The term *transmission constraint* may refer either to a piece of equipment that limits electricity flows in physical terms or to an operational limit imposed to protect reliability.”).

<sup>28</sup> See Erich W. Struble, Comment, *National Electric Transmission Corridors: Will State Regulators Remain Relevant?*, 113 PENN ST. L. REV. 575, 585 (2008) (“When a [transmission] constraint prevents the delivery of electricity across a line, several events often occur. First, electricity generation may be redispatched, i.e., output from a generator on the consumer's side of the constraint is increased while electricity generation on the other side of the constraint is reduced. Second, previously planned wholesale purchases of electricity, intended to meet demand at lower cost, may be cancelled. Third, deliveries of electricity to consumers may have to be reduced.”).

<sup>29</sup> *Id.* (“[These] events increase consumers' electricity costs because the ad hoc purchasing of demand-side generation is typically more expensive than consumption of energy purchased wholesale in advance. Of course, [reducing the electricity sent to consumers] . . . directly concerns energy reliability.”).

<sup>30</sup> See BLACKS LAW DICTIONARY, *supra* note 10, at 3.

<sup>31</sup> 16 U.S.C. § 824p(b)(C)(i) (2006).

did not give FERC unlimited authority to issue permits for new line construction.<sup>32</sup> FERC is only authorized to site facilities in areas that the Department of Energy (DOE) has identified as National Energy Interest Corridors.<sup>33</sup> FERC's authority to act is also limited within the National Corridors, and can only be used when certain conditions are met.<sup>34</sup> Specifically, FERC can issue permits when:

[a] State commission or other entity that has authority to approve the siting of the facilities has . . . (i) *withheld approval for more than 1 year* after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later.<sup>35</sup>

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<sup>32</sup> See 16 U.S.C. § 824p(a)–(b) (laying out a number of conditions that must be met in order for FERC to exercise its authority to site new transmission lines).

<sup>33</sup> *Id.* § 824p(b) (limiting the authority of FERC to only national energy interest corridors). These corridors were identified in a study that was required by the Act. See generally National Electric Transmission Congestion Report, 72 Fed. Reg. 56992 (Oct. 5, 2007) (identifying two national energy interest corridors). The purpose for creating these corridors was to identify areas where significant electrical congestion was affecting “economic vitality,” and also to determine whether the designation of “National Corridors . . . would promote energy independence, national energy policy, or national defense and homeland security.” *Id.* at 56994. Throughout the process the DOE was required to consult with states that would be impacted by a corridor designation, as well as any “appropriate Regional Entit[ies].” *Id.* at 56993.

<sup>34</sup> See 16 U.S.C. § 824p(b) (identifying the conditions for FERC's authority to be triggered).

<sup>35</sup> *Id.* § 824p(b)(C)(i)–(ii) (emphasis added); see 16 U.S.C. § 824p(b)(2)–(6) (There are a number of other conditions that have to be met in order for FERC to site new transmission lines. FERC's authority is triggered when “[f]acilities . . . [would] be used . . . in interstate commerce, . . . the . . . proposed construction or modification [would be] consistent with the public interest, . . . construction or modification [would] significantly reduce transmission congestion . . . and protect[ ] or benefit[ ] consumers, . . . construction or modification [would be] consistent with sound national energy policy and [would] enhance energy independence, [and] . . . the proposed modification [would] maximize, . . . the transmission capabilities of existing towers or structure.”); see 16 U.S.C. § 824p(b)(A–B) (listing conditions that must exist for FERC's siting authority to be triggered).



C. *FERC's Interpretation of Their Authority*

FERC gave notice of its proposed rulemaking process for the applicable provisions of the Act in mid-2006.<sup>36</sup> During that process, FERC was asked to “clarify [whether] a State’s timely and lawful denial of a transmission project”<sup>37</sup> would be interpreted within the meaning of “withheld approval,” as used in 16 U.S.C. 824p(b)(C)(i).<sup>38</sup> Those who requested the clarification advocated that including denial within the meaning would “allow an applicant to sidestep an adverse State ruling by subsequently requesting Federal jurisdiction.”<sup>39</sup> Others suggested that a denial was not the type of action Congress was trying to discourage when they gave FERC limited authority. A state denying a project permit “would

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<sup>36</sup> See generally Regulations for Filing Applications for Permits To Site Interstate Electric Transmission Corridors, 71 Fed. Reg. 36,258 (June 26, 2006) (giving notice of proposed rulemaking); CRAIG N. JOHNSTON ET. AL., LEGAL PROTECTION OF THE ENVIRONMENT 79–80 (2nd ed. 2007) (Rulemaking is the process where executive branch agencies pass regulations that are used to administer the laws passed by Congress. “[T]he normal procedure required for rulemaking is that: An agency must provide . . . public notice in the Federal Register of its intent to engage in rulemaking; the Federal Register is a daily publication of the federal government, but today notice is additionally provided through publication on the internet. The agency must [then] provide the public an opportunity to comment on the agency’s proposed rulemaking; the opportunity to comment in writing is always provided; often the public is also given the opportunity to comment orally at a hearing before agency officials. The agency must [also] provide the public with adequate information about the proposed rulemaking to allow for the public comment to be meaningful; normally this means that the agency publishes an actual proposed rule as well as information explaining what the rule does and why; in addition, factual information that is the basis for the rule must be made available to the public. The agency must consider the public comments, and when it issues its final rule, it must respond to the significant comments made.”).

<sup>37</sup> See 71 Fed. Reg. 69,440, 69,444 (Dec. 1, 2006).

<sup>38</sup> See *id.* at 69,442 n.15 (discussing questions posed to FERC during their rulemaking process); see also 71 Fed. Reg. 69,440, 69,444 n. 15 (listing the “Department of Interior, Iowa Utility Board, Massachusetts Energy Board, National Parks, National Regulatory Commissioners, Pennsylvania PUC, PJM, Washington Council, Wisconsin PSC, [and] Western Energy Board” as having requested the clarification on the part of FERC).

<sup>39</sup> 71 Fed. Reg. 69,440, 69,444 (asked by the Iowa Utility Board during the rulemaking process).

be a situation where a state agency acted properly and is not guilty of regulatory failure.”<sup>40</sup>

Despite strong opposition to the inclusion of “denial” within the definition of “withheld,” FERC, in the adoption of its final rule, said, “a reasonable interpretation of the language in the context of the legislation supports a finding that withholding approval included denial of an application.”<sup>41</sup> In response, states and concerned citizens groups requested that FERC reconsider its final rule.<sup>42</sup> FERC denied the motion for rehearing.<sup>43</sup>

#### D. *Piedmont Env'tl. Council v. FERC*

Unsatisfied with the final rule adopted by FERC and their refusal to reconsider their final rule, two states, New York and Minnesota, and two citizens’ groups, Piedmont Environmental Council (“PEC”) and Communities Against Regional Interconnect (“CARI”), filed actions claiming that FERC was incorrect in its interpretation of 16 U.S.C. § 824p(b)(C)(i).<sup>44</sup> Petitioners argued that “FERC . . . had erred in holding that § 216(b)(1)(C)(i)’s phrase ‘withheld approval’ [of an application] for more than 1 year includes a denial.”<sup>45</sup>

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<sup>40</sup> *Id.* (asked by the Wisconsin PSC during the rulemaking process).

<sup>41</sup> *Id.*

<sup>42</sup> 119 FERC ¶ 61,154, 61,978 n. 2 (2007). New York and Minnesota were the only states to join the request for a new hearing based on a disagreement over the definition of “withheld.” See 119 FERC at ¶ 61,978 n. 5.

<sup>43</sup> See generally 119 FERC ¶ 61,154, at 61,978 (order denying rehearing).

<sup>44</sup> See *Piedmont*, 558 F.3d at 309. This suit was a consolidation of three different suits, all of which were brought to challenge determinations made by FERC during their rule making process. “[P]etitions for review of the final rule and order were filed by the NYPSC in the Second Circuit, by the Minnesota PUC in the D.C. Circuit, and by CARI in the D.C. Circuit. The petitions filed in the Second and D.C. Circuits were transferred to the Fourth Circuit and thereafter consolidated with the *Piedmont* petition.” *Id.* at 312. Petitioner CARI made other challenges to FERC’s rulemaking that are also discussed in the case. *Id.* at 315–20.

<sup>45</sup> *Piedmont Env'tl. Council v. FERC*, 558 F.3d 304, at 309 (4th Cir. 2009) (internal quotations omitted).

In its review of FERC final rule, the court said it had to determine whether Congress had been clear about its “intent.”<sup>46</sup> If Congress was clear, then “that is the end of the matter,”<sup>47</sup> and FERC’s determination will be reversed. The court found that Congress was clear and that FERC’s decision to include deny within the definition of withhold was “contrary to the plain meaning of the statute.”<sup>48</sup> The court rejected FERC’s reliance on “[a] thesaurus paragraph . . . list[ing] deny and withhold as synonyms,”<sup>49</sup> pointing out that this was a “backward approach to its desired result.”<sup>50</sup> The court added:

FERC[’s] substitut[ion of] “denied” for “withheld,” ignores the context in which “withheld” is used . . . . The substitution renders the entire phrase nonsensical because, in the context of dealing with a permit application, the final nature of “denied” conflicts with the continuing nature of “for more than 1 year.”<sup>51</sup>

The court also ruled that FERC’s interpretation was incorrect when looking at 16 U.S.C. § 824p(b) in its entirety.<sup>52</sup> The court stated that Congress “provides a carefully drawn list of . . . circumstances when FERC may preempt a state . . . . These are limited grants of

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<sup>46</sup> *Id.* at 312. The court used a *Chevron* analysis to determine if the agency’s interpretation of the word “withhold” as used in 16 U.S.C. § 824p(b)(C)(i) was reasonable. *See Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (Under *Chevron*, “[w]hen a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

<sup>47</sup> *Piedmont*, 558 F.3d at 311.

<sup>48</sup> *Id.* at 313.

<sup>49</sup> *Id.* at 315. (internal quotation marks omitted).

<sup>50</sup> *Id.* at 313.

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 313–15 (discussing the significance of the rest of the section on the interpretation of the word “withheld”).

jurisdiction to FERC, and they indicate that Congress meant for the ‘withheld permit approval’ circumstance to be limited as well.”<sup>53</sup> After making other brief points, the court reiterated that Congress had been “clear” as to its intent on the issue and therefore the court’s “review . . . proceeds no further. [W]e reverse FERC’s interpretation.”<sup>54</sup>

### III. THE IMPACT OF *PIEDMONT ENVTL. COUNCIL v. FERC* ON THE SPREAD OF RENEWABLE ENERGY IN THE MID-ATLANTIC NATIONAL CORRIDOR

Not surprisingly, after the court issued its opinion, groups advocating for and against the decision began to make their voices heard.<sup>55</sup> While the court’s ruling affects both of the country’s National Corridors,<sup>56</sup> this Recent Development will focus on the ruling’s effects on the Mid-Atlantic National Corridor (Corridor).<sup>57</sup>

Critics claim the court’s decision “should not be celebrated as a victory for states’ rights . . . but as an impediment to . . . the development of renewable energy.”<sup>58</sup> However, these claims ignore the reality that the ruling was a tremendous win for states and will only affect the spread of renewable energy in the short term. Supporters counter, that had FERC’s interpretation been adopted it would have left “[state regulators] with little option, but

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<sup>53</sup> *Piedmont*, 558 F.3d at 313–14.

<sup>54</sup> *Id.* at 315.

<sup>55</sup> See generally Pamela A. MacLean, *Utilities Battle States over Power Lines*, NAT’L L. J., Apr. 14, 2008.

<sup>56</sup> See 16 U.S.C. § 824p(b)(C)(i) (2006).

<sup>57</sup> The Mid-Atlantic Corridor is a group of states in the Northeast part of the country that were identified by the DOE as a National Interest Energy Corridor in their 2006 study that was required by Congress in the Act. The states within the Corridor include parts of Delaware, Maryland, New Jersey, New York, Ohio, Pennsylvania, Virginia and West Virginia. The District of Columbia is also within the Corridor. The other corridor is the Southwest Area National Corridor and includes parts of California and Arizona. See generally National Electric Transmission Congestion Report, 72 Fed. Reg. 56992 (Oct. 5, 2007) (describing the process for establishing the corridors).

<sup>58</sup> William A. Mogel, *William Mogel of Piedmont Env’tl. Council v. FERC*, 2009 EMERGING ISSUES 3473 (2009).

to say yes or have FERC do it for them.”<sup>59</sup> They contend it would also have allowed “dirty coal power from West Virginia and Ohio to [move] east, severely threatening the viability of . . . wind power . . . .”<sup>60</sup>

Electricity producers of both renewable energy and non-renewable energy claim that a centralized siting authority in the Federal government is vitally important,<sup>61</sup> while state regulators and small environmental groups oppose FERC’s broad authority.<sup>62</sup> The interesting part about how the battle lines were drawn over the *Piedmont* decision is that on both sides, one finds, supporters of renewable energy.<sup>63</sup> Instead of being divided into different camps based on support for renewable energy, the key characteristic determining whether a group supported FERC in the litigation was whether they were part of the energy industry.<sup>64</sup>

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<sup>59</sup> MacLean, *supra* note 55, at 1.

<sup>60</sup> *Id.* The argument that coal energy from the western portion of the Corridor would make it harder for more expensive renewable energy to compete in markets like New York is discussed *infra* in Part III.B.

<sup>61</sup> See *id.* at 1 (“[I]nvestor-owned utilities think the role is critical.”); see also AMERICAN WIND ENERGY ASSOCIATION & AMERICAN SOLAR INDUSTRIES ASSOCIATION, GREEN POWER SUPERHIGHWAYS: BUILDING A PATH TO AMERICA’S CLEAN ENERGY FUTURE 2 (2009), [hereinafter Green Superhighway Study] <http://www.awea.org/GreenPowerSuperhighways.pdf> (last visited Oct. 29, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>62</sup> See generally Steve Gelsi, *National Grid Plan Presents Super-Sized Headache*, MARKET WATCH, July 9, 2009, <http://www.marketwatch.com/story/power-showdown-looms-over-new-utility-lines> (last visited Oct. 29, 2009) (detailing opinions given at hearing held by the House Committee on Energy and Commerce) (on file with the North Carolina Journal of Law & Technology).

<sup>63</sup> See generally Green Superhighway Study, *supra* note 61; see also *The Future of the Grid: Proposals For Reforming National Transmission Policy Before the H. Subcomm. on Energy and the Environment*, 111th Cong. 142–46 (2009) (statement of Christopher Miller, President, Piedmont Environmental Council).

<sup>64</sup> See *Piedmont*, 558 F.3d at 304. All of the intervenors in support of the respondent, FERC, were part of the energy industry. “Southern California Edison Company; Allegheny Power; Trans-Allegheny Interstate Line Company; Edison Electric Institute; American Public Power Association; National Rural Electric Cooperative Association; American Wind Energy Association; San Diego Gas & Electric Company; PPL Electric Utilities Corporation.” In contrast, the intervenors in support of *Piedmont* included the states of California, New

A. *Critics: The Courts Decision Will Slow the Spread of Renewable Energy*

Critics of the *Piedmont* ruling base their objections on the theory that the spread of renewable energy will be severely limited if there is not a strong centralized authority to take a national perspective when considering proposals of new interstate transmission facility construction projects.<sup>65</sup> The basis for this theory appears to come from years of waiting for approval of new transmission line projects when control has been vested in the states.<sup>66</sup>

Utility companies also want FERC approval of lines because they have encountered problems with state approval after proposing plans that needed regional coordination to link energy producers in one state with customers in another.<sup>67</sup> State opposition has been particularly acute when the project would cross through states that would not be serviced by the new lines.<sup>68</sup> States that will not be serviced by proposed transmission line projects are hesitant to approve proposals that would require the use of eminent domain powers to acquire land from residents while “heap[ing] environmental and aesthetic insult upon . . . localities . . . [that will not receive] any benefit.”<sup>69</sup> Because of each state’s permitting power in the siting process, failure by any one state to

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York, Arizona, Connecticut, Delaware, Illinois, Iowa, Kentucky, New Hampshire, Ohio, Pennsylvania, Rhode Island, West Virginia, and Wyoming. *Id.*

<sup>65</sup> See Green Superhighway Study, *supra* note 61.

<sup>66</sup> Gelsi, *supra* note 62 (“One 90-mile line took 16 years to get all the necessary sign-offs.”).

<sup>67</sup> See generally Denise L. Desautels, *Who Should Regulate the Siting of Electric Transmission Lines Anyway? A Jurisdictional Study*, THE ELECTRICITY J., May 2005 (discussing the challenges to siting interstate transmission lines).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 13; see also Green Superhighway Study, *supra* note 61, at 2 (“State regulators, who in many areas have primary jurisdiction over what transmission gets built and who pays for it, are often required to weigh only the benefits that will accrue to residents of that state. . . . Under this regulatory structure, it is almost impossible to build an interstate transmission network. Most state regulators have little authority or incentive to require ratepayers in their state to help pay for an interstate network.”).

approve of the interstate transmission line proposal results in a veto of the entire multi-state transmission project.<sup>70</sup>

Lastly, critics argue, federal siting may be preferable because of changes in the energy market itself. Historically, states have held the authority to site new transmission lines.<sup>71</sup> This authority was appropriate through most of the twentieth century because markets for electricity were “highly balkanized, and locally based.”<sup>72</sup> Accordingly, states used an analysis to determine whether there was a need by state residents for new infrastructure before issuing permits for new transmission lines.<sup>73</sup> The reality is that energy markets have changed from “local command-and-control electric production and distribution to regional market-controlled production and distribution.”<sup>74</sup> The increased national demand for renewable energy has also added new pressures on states with limited interstate connectivity to build new interstate transmission lines.<sup>75</sup> The support for FERC to be given siting authority vocalizes a fear that plans for new transmission lines will continue

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<sup>70</sup> See Desautels, *supra* note 67, at 13.

<sup>71</sup> See Jim Rossi, *Transmission Siting In Deregulated Wholesale Power Markets: Re-Imagining The Role Of Courts In Resolving Federal-State Siting Impasses*, 15 DUKE ENVTL. L. & POL’Y. F. 315, 315 (2005) (“During most of the twentieth century, state and local regulatory bodies coordinated the siting of power plants and transmission lines.”).

<sup>72</sup> See generally Desautels, *supra* note 67, at 11–12 (In this context the term “highly balkanized” refers to the small units that the markets had been broken into).

<sup>73</sup> *Id.* at 13 (“For the most part, state siting proceedings involve a determination of need.” (citing A. Brown and D. Danials, *Vision Without Site: Site Without Vision*, Harvard Electricity Policy Group)).

<sup>74</sup> Steven J. Eagle, *Securing A Reliable Electricity Grid: A New Era In Transmission Siting Regulation?*, 73 TENN. L. REV. 1, 1–2 (2005) (discussing the Energy Policy Act of 2005 and its potential impacts on interstate energy transmission).

<sup>75</sup> See EDISON ELECTRIC INSTITUTE, TRANSMISSION PROJECTS: SUPPORTING RENEWABLE RESOURCES REPORT 6 (2006) [hereinafter *Transmission Projects Report*] (“Wisconsin has only limited transmission line connections to other states compared to its neighboring states which limit[s] the ability of electric utilities to access wind energy.”), available at [http://www.eei.org/ourissues/ElectricityTransmission/Documents/TransprojRenew\\_web.pdf](http://www.eei.org/ourissues/ElectricityTransmission/Documents/TransprojRenew_web.pdf).

to face difficult and prolonged battles if authority remains with the States.<sup>76</sup>

*B. Supporters: The Courts Decision Limits the Spread of Non-Renewable Energy*

Supporters of the court's decision claim that if FERC's interpretation of "withheld" had been approved, it would have resulted in an explosion of new transmission line approvals that would transmit coal-powered energy from Ohio and West Virginia into the Northeast portion of the Mid-Atlantic National Corridor.<sup>77</sup>

Expanded capacity to transmit electricity would likely mean an even greater near-term flow of coal-fired electricity . . . . Lower congestion costs would make coal-fueled power plants in the west even more competitive, while power producers in eastern . . . states [would] continue to face higher fuel costs because of their greater dependence on natural gas. This trend could spur even more proposals for new coal plants and new transmission capacity, as electricity production moved away from higher-priced states.<sup>78</sup>

The average price of electricity for residential consumers in June of 2009 was 19.54 cents per kilowatt-hour in New York, while the average cost of residential electricity during the same time in West Virginia and Ohio was 7.95 cents and 11.38 cents, respectively.<sup>79</sup> If energy producers in West Virginia were connected with customers in New York, the difference in electricity costs would create an economic incentive to sell as much energy in New York as possible. If West Virginia producers sell more electricity to New York then the price of electricity in New York would fall due to the increased supply of electricity and the lower cost of production in West Virginia. The transmission of cheaper coal-

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<sup>76</sup> See generally Gelsi, *supra* note 62, at 2.

<sup>77</sup> UNION OF CONCERNED SCIENTISTS, IMPORTING POLLUTION: COALS THREAT TO CLIMATE POLICY IN THE U.S NORTHEAST REPORT 17–18 (2008) available at [http://www.ucsusa.org/assets/documents/clean\\_energy/importing-pollution\\_report.pdf](http://www.ucsusa.org/assets/documents/clean_energy/importing-pollution_report.pdf) [hereinafter Importing Pollution Study].

<sup>78</sup> *Id.* at 18; see also Clayton, *supra* note 18.

<sup>79</sup> Energy Information Administration, *Average Retail Price of Electricity to Ultimate Customers: Total by End-Use Sector, 1995 Through June 2009*, ELECTRIC POWER MONTHLY, Sept. 2009, at 102, available at [http://www.eia.doe.gov/cneaf/electricity/epm/table5\\_3.html](http://www.eia.doe.gov/cneaf/electricity/epm/table5_3.html) (showing the average retail price of electricity by end user).



based electricity in eastern States in the Corridor would result in lower priced electricity from non-renewable sources and thus make renewable energy less competitive.<sup>80</sup>

Supporters also have doubts about the ability to limit the spread of non-renewable energy once it is linked into new transmission lines.<sup>81</sup> The reality of electricity transmission is that transmission lines cannot be structured so that only renewable energy will be sent to customers.<sup>82</sup> Supporters believe that an expansion of new transmission lines without adequate controls to restrict access by non-renewable energy producers will incentivize investment in existing coal power plants thereby further delaying their eventual shutdown.<sup>83</sup> For support of their position, supporters point to statements made by non-renewable energy interest groups like the West Virginia Coal Association:

Enhanced transmission capacity helps increase the amount of low-cost, coal fired generation dispatched into the regional grid. This helps preserve the future of existing power plants already on line, justifies additional investment in these plants and increases the likelihood that new, clean-coal electric fired generation will be constructed . . . .<sup>84</sup>

Supporters of the court's decision have an earnest desire to encourage the spread of renewable energy; however, their

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<sup>80</sup> Matthew L. Wald, *Cost Works Against Alternative Energy and Renewable Energy Sources in Time of Recession*, N.Y. TIMES, Mar. 29, 2009, at A18, available at <http://www.nytimes.com/2009/03/29/business/energy-environment/29renew.html> ("A modern coal plant of conventional design, without technology to capture carbon dioxide before it reaches the air, produces at about 7.8 cents a kilowatt-hour; a high-efficiency natural gas plant, 10.6 cents; and a new nuclear reactor, 10.8 cents. A wind plant in a favorable location would cost 9.9 cents per kilowatt hour. But if a utility relied on a great many wind machines, it would need to back them up with conventional generators in places where demand tends to peak on hot summer days with no breeze. That pushes the price up to just over 12 cents, making it more than 50 percent more expensive than a kilowatt-hour for coal.").

<sup>81</sup> See generally H. Subcomm. on Energy and the Environment, *supra* note 63.

<sup>82</sup> *Id.*

<sup>83</sup> See generally Letter from Bill Raney, President of the W. Va. Coal Association, to W. Va. Pub. Serv. Comm'n (May 18, 2009), available at <http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=268168>.

<sup>84</sup> *Id.*

apprehension towards Federal control stems from a fear that current regulation would not limit access by non-renewable electricity producers to new transmission lines.<sup>85</sup>

#### IV. AN ALTERNATIVE VIEW ON THE EFFECTS OF *PIEDMONT* ON RENEWABLE ENERGY IN THE MID-ATLANTIC CORRIDOR, PROPOSED CONGRESSIONAL SOLUTIONS, AND AN ALTERNATIVE COURSE OF ACTION

##### A. *An Alternative View*

The positions taken by both supporters and critics of the *Piedmont* case articulate a consistent reality. The Mid-Atlantic Corridor's transmission capacity limitations are legitimate obstacles to expanding renewable energy, and liberal access to new capacity poses the threat of perpetuating the use of inexpensive coal as a competitor to more expensive renewable options.<sup>86</sup>

The divide separating critics and supporters however, is not about who is right or wrong about the impact that *Piedmont* will have on renewable energy. Both camps are correct in their assessment of what would likely have resulted had FERC been granted broad siting authority and what will result without a federally coordinated transmission siting authority.<sup>87</sup> The truly divisive issue splitting renewable energy supporters is over who

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<sup>85</sup> See H. Subcomm. on Energy and the Environment, *supra* note 63, at 143 (“[The proposed interstate transmission line] was originally overlaid over wind resources, but in fact, the correspondence with coal resources is actually higher when you actually go see where those lines are laid out. That is one of the causes of concern that in fact what you would be doing by doing . . . is in fact encouraging greater transmission of coal-fired generation than . . . renewables.”).

<sup>86</sup> See Letter from Bill Raney, *supra* note 83.

<sup>87</sup> As explained *supra* in Part III, experience has shown critics of the *Piedmont* holding that lack of centralized authority to site new interstate transmission lines can lead to long approval processes and uncertainty in the final result because of the veto power that a state has on a project that would travel through its borders. Supporters of the ruling are also correct that the lack of restrictions preventing renewable energy producers from accessing the new interstate lines would prolong the life of coal plants and spread cheap non-renewable energy to new markets where it would make renewable energy less competitive.

should control the siting of new interstate transmission lines and how access to those lines should be managed. Critics felt that the need to expand interstate transmission capacity to accommodate renewable energy was more important than worrying about who would have access to new transmission lines. Supporters believed that limiting the access of non-renewable energy producers was imperative in order to promote more efficient conservation efforts occurring locally and avoid the Pandora's box of problems that would have resulted from unfettered access to the grid.<sup>88</sup>

### B. *Proposed Congressional Solutions*

After the court handed down its decision in *Piedmont*, Congress conducted a series of congressional hearings in order to determine if new legislation is needed in light of the limit placed on FERC's siting authority.<sup>89</sup> These hearings led to three bills submitted by members of both the House and Senate that propose to expand FERC's siting authority in varying degrees. Each plan is briefly discussed below and is identified by its respective legislative sponsor.

#### 1. *The Waxman Plan*

The Waxman Plan was included in the *American Clean Energy and Security Act of 2009*, sponsored by Representative Henry Waxman, and passed by the House in June 2009.<sup>90</sup> The Waxman Plan gives FERC the authority to issue a "certificate of public convenience and necessity for the construction or modification of a transmission facility"<sup>91</sup> when a State entity that has authority to

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<sup>88</sup> See *H. Subcomm. on Energy and the Environment*, *supra* note 63, at 51 (statement of Paul Hibbard, Chairman of the Massachusetts Department of Public Utilities, "Under these proposals, FERC's traditional authority is expanded to where it becomes a de facto central planning authority . . . potentially diminishing the development of the abundant level of demand reduction and renewable resources that are available at the local level . . .").

<sup>89</sup> See generally *Transmission Infrastructure Before the S. Comm. on Energy and Natural Resources*, 111th Cong. (2009); *H. Subcomm. on Energy and the Environment*, *supra* note 63.

<sup>90</sup> See H.R. 2454, 111th Cong. § 151 (2009) (As of October 14, 2009 the bill was placed on the Senate legislative calendar under general orders calendar No. 97).

<sup>91</sup> *Id.* § 216B(b). A certificate of public convenience and necessity is given by

grant approval for the siting fails to issue a decision within one year or denies approval for a new transmission facility.<sup>92</sup> This legislation would maintain State authority for siting new transmission facilities in the eastern part of the country but allows FERC to site new transmission facilities under certain conditions in the Western Interconnection.<sup>93</sup> Representative Waxman represents California which is within the Western Interconnection and appears to be more comfortable with FERC siting authority.<sup>94</sup> While the Waxman Plan offers a solution for western States, it fails to deal with the challenges of expanding transmission capacity in the Mid-Atlantic Corridor. The absence of planning and siting solutions for the eastern portion of the country makes the Waxman Plan an incomplete attempt at fixing a problem that is present in multiple areas across the country.

## 2. *The Reid Plan*

The Reid Plan, submitted by Senator Harry Reid of Nevada, uses language that focuses on promoting the spread of renewable energy across the entire country.<sup>95</sup> In the Reid Plan, “national renewable energy zones”<sup>96</sup> would be identified in both the Eastern and Western Interconnections.<sup>97</sup> These designations would be

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a state regulatory body to public utilities so that they can build transmission and other electricity infrastructure. *Id.*

<sup>92</sup> *Id.* § 216B(b)(7)(A)–(B).

<sup>93</sup> The Western Interconnection is the part of the national electricity grid system that is located within the states of New Mexico, Arizona, California, Washington, Oregon, Idaho, Nevada, Colorado, Utah, Wyoming, Alaska, and Montana.

<sup>94</sup> *Id.* § 216B(a); *see also H. Subcomm. on Energy and the Environment, supra* note 63, at 58 (statement of Richard Halvey, Representative of the Western Governors, referring to assistance with transmission planning. “[T]he Western State Governors recognize that we need help from the Congress.”).

<sup>95</sup> *See generally* S. 539, 111th Cong. § 402(a)(1) (2009).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; *see also* Energy Information Administration, Electric Power Industry Overview 2007 (2007) [hereinafter Power Industry Overview], <http://www.eia.doe.gov/cneaf/electricity/page/prim2/toc2.html> (last visited Nov. 1, 2009) (“The U.S. bulk power system has evolved into three major interconnected systems . . . [interconnections], within which regional transmission organizations . . . exist to operate transmission systems in a non-discriminatory manner. . . . The major . . . [interconnections] consist of extra-high-voltage

similar to the Mid-Atlantic and Southwest Area Corridors in that they identify areas that are currently lacking adequate transmission capacity.<sup>98</sup> FERC would also select a “regional planning entity”<sup>99</sup> for each interconnection that would be responsible for developing an “Interconnection—Wide Green Transmission Grid Project Plan”<sup>100</sup> (“Grid Project Plan”). These plans are intended to “enhance transmission access for electricity from renewable energy in renewable energy zones.”<sup>101</sup>

The Reid Plan would also change FERC’s current siting authority by allowing FERC to site new transmission projects that are designated as part of a Grid Project Plan, or would connect “renewable energy resources from renewable energy zones or . . . integrate renewable resources from other geographic areas.”<sup>102</sup> When exercising its siting authority, FERC is required to consult with States by allowing them to “identify siting constraints and mitigation measures, based on habitat protection, environmental considerations, or cultural site protection.”<sup>103</sup> FERC must then incorporate those suggestions unless the State suggestion would be “inconsistent . . . infeasible, or not cost effective” with the plan.<sup>104</sup>

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connections between individual utilities designed to permit the transfer of electrical energy from one part of the . . . [interconnection] to another. These transfers are restricted, on occasion, because of a lack of contractual arrangements or because of limited transmission capability.”) (on file with the North Carolina Journal of Law & Technology).

<sup>98</sup> S. 539 § 402(a)(1)(B).

<sup>99</sup> *Id.* § 401(13) (Regional planning entity “means an entity certified by the Commission to coordinate regional planning for an Interconnection.”).

<sup>100</sup> *Id.* § 403(a) (The plans would be designed to “achieve Interconnection-wide coordination of planning to integrate renewable energy resources from renewable energy zones into the interstate electric transmission grid and make the renewable energy resources fully deliverable to electricity consuming areas.”); *see id.* § 403(e)(1)–(8) (listing the requirements of a green transmission grid project plan).

<sup>101</sup> *Id.* § 403(e)(1).

<sup>102</sup> *Id.* § 404(a)(1)(B) (The resource referenced in this quote could, for example, be an area on which the developer would put a wind farm, solar farm or other renewable energy facility. The zone is the area that would be designated as a national renewable energy zone under § 402(a)(1).).

<sup>103</sup> *Id.* § 404(g)(1)(A).

<sup>104</sup> S. 539 § 404(g)(1)(B)(ii)(II).

The Reid Plan is more complete compared to the Waxman Plan because it changes the siting process for the Eastern and Western Interconnection.<sup>105</sup> It also prevents non-renewable energy producers from benefiting from FERC's siting authority unless their project is included in a grid project plan.<sup>106</sup> However, the Reid Plan still strips States of their ability to plan independently from the federal government, which is why states opposed FERC in *Piedmont*. The plan also fails to prevent States from approving intrastate transmission lines that would connect non-renewable energy producers in their state with new interstate transmission lines.<sup>107</sup> Lastly, the regional planning entities may not accurately design appropriate grid plans for all of the regions within a particular interconnection.

### 3. *The Bingaman Plan*

The plan proposed by Senator Jeff Bingaman is similar to the Reid Plan.<sup>108</sup> It would allow FERC to have siting authority if States had not acted within one year or had denied a plan within that time.<sup>109</sup> The Bingaman Plan would also require the development of an "[i]nterconnection-wide transmission plan"<sup>110</sup> to be used to coordinate the planning for "high-priority national

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<sup>105</sup> *Id.* § 402(a)(1).

<sup>106</sup> *Id.* § 404(a)(1)(A).

<sup>107</sup> There is a requirement that the "transmission provider" for a transmission project approved under this process certify on an annual basis that "75 percent of the transmission capacity of the project is available to renewable resources." *Id.* § 404(k)(1). However, the legislation allows the Commission to override this requirement in order to meet its reliability requirements, "the Commission may reduce the minimum percentage specified in paragraph (1) in any case in which the Commission determines that it is necessary . . . to maintain compliance with Commission approved reliability standards." *Id.* § 404(k)(3)(A).

<sup>108</sup> See S. 1462, 111th Cong. (2009) (Bingaman Plan); see S. 539, 111th Cong. (2009) (Reid Plan).

<sup>109</sup> S. 1462 § 216(d)(3)(B) (2009).

<sup>110</sup> *Id.* § 216(c)(1); see *id.* § 216(c)(2)(B)(i)–(iv) (addressing a number of issues including how utilities, States, Indian tribes and others "incorporate consideration of the need for high-priority national transmission projects[,] . . . identify needed additions . . . to high-priority national transmission projects[,] . . . [and] address alternatives to . . . national transmission projects.").

transmission projects.”<sup>111</sup> One of the positive things the Bingaman Plan incorporates into the planning process is an evaluation of how “existing and potential demand side management”<sup>112</sup> could mitigate the need for new transmission lines.<sup>113</sup> The Bingaman Plan does not, however, limit FERC’s authority to permit new transmission lines that would link non-renewable energy producers into the grid. Under the Bingaman Plan if a “regional plan,”<sup>114</sup> submitted during the planning phase, included a transmission project to link in a non-renewable energy facility, it will have satisfied all of the Bill’s requirements to trigger FERC’s siting authority if a State fails to subsequently approve the project.<sup>115</sup> The effect of this Plan is similar to what would have occurred if FERC’s interpretation of “withheld” had been approved in *Piedmont*.

### C. *An Alternative Course of Action*

The structure that was put in place under the Energy Policy Act of 2005 is not an irreparably flawed way of centralizing the planning and siting process for new transmission facilities. It provides for periodic studies to identify congested electrical areas

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<sup>111</sup> S. 1462 § 216(c)(2)(B)(i); *see also id.* § 216(b)(1) (“[H]igh-priority national transmission project means an overhead or underground transmission facility, consisting of conductors or cables, towers, manhole duct systems, phase shifting transformers, reactors, capacitors, and any ancillary facilities and equipment necessary for the proper operation of a facility.”) (internal quotes omitted).

<sup>112</sup> *Id.* § 216(c)(2)(C)(iii).

<sup>113</sup> Demand side management is also referred to as energy conservation and efficiency measures. If the amount of electricity needed can be reduced through conservation, then the saved electricity can be used to meet new electricity demand instead of constructing costly new transmission lines.

<sup>114</sup> S. 1462 § 216(c)(3)(A)(ii) (stating that these regional plans could be created by “[a]ny public utility” and would allow them to develop a regional plan “relating to any high priority national transmission project[ ] planned for the system.” These regional plans could include a transmission project that would link in a non-renewable electricity facility).

<sup>115</sup> *Id.* § 216(d)(3)(B)(i)–(iii) (authorizing FERC to site when a state fails to approve a “high-priority national transmission project.”). If a utility includes a transmission line project that would operate at above 345 kilovolts AC power in the regional plan it submits to FERC pursuant to § 216(c)(3)(A)(ii), it will have met the requirements to be considered a Project. *See id.* § 216(b)(1)(A)(i)(I).

in the country,<sup>116</sup> empowers a federal agency with limited authority to step in when impasses among the States prevent the expansion of necessary transmission lines,<sup>117</sup> and places limits on FERC's authority.<sup>118</sup> Making small changes to the Act, such as adding stricter limits on FERC's siting authority and incentivizing the creation of compacts that bring interstate perspective to the siting process, would remedy concerns of both critics and supporters of the *Piedmont* case. Adoption of any one of the congressional plans above would unnecessarily throw out much of the work that the Department of Energy and FERC have done in creating the National Corridors under the Energy Policy Act. The following changes to the existing structure will be adequate to fix the current system.

1. *FERC Should Develop Capacity Plans Within the National Corridors*

FERC should help States within National Corridors develop Capacity Plans that will map out the expansion of electricity transmission capacity within the Corridor. FERC would serve as the national perspective that is needed to remedy regional congestion problems,<sup>119</sup> while allowing States to maintain their authority to site lines. This planning process should include existing regional planning entities, utilities, state utility agencies, and other stakeholders in hopes of achieving broad participation and consensus on a common plan to ease congestion.

This level of coordination on the issue of renewable energy is not unprecedented among States; it was done by many of the States in the Corridor when they adopted their Renewable Portfolio Standards (RPS).<sup>120</sup> Seven of the eight States within the Corridor

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<sup>116</sup> 16 U.S.C. § 824p(a)(1).

<sup>117</sup> *Id.* § 824p(b)(1)(C).

<sup>118</sup> *See generally id.* § 824p(a)–(b) (laying out a number of conditions that must be met in order for FERC to exercise its authority to site new transmission lines).

<sup>119</sup> *See supra* Part III.A.

<sup>120</sup> A Renewable Portfolio Standard is “a state policy that requires electricity providers to obtain a minimum percentage of their power from renewable energy resources by a certain date.” U.S. Department of Energy, Information Resources, [http://apps1.eere.energy.gov/states/maps/renewable\\_portfolio\\_states](http://apps1.eere.energy.gov/states/maps/renewable_portfolio_states).



and the District of Columbia have RPS that allow for utilities to meet their renewable energy requirements with energy produced in another state located in the PJM region,<sup>121</sup> or brought into the PJM region from States outside the region.<sup>122</sup> The use of similar language by the states within the region when they authorized the

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cfm (last visited on Sept. 21, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>121</sup> See generally PJM—Who We Are, <http://www.pjm.com/about-pjm/who-we-are.aspx> (last visited on Sept. 25, 2009) (“PJM Interconnection is a regional transmission organization (RTO) that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.”) (on file with the North Carolina Journal of Law & Technology).

<sup>122</sup> See 26 Del. C. § 352(6) (2009) (“‘Eligible energy resources’ include . . . energy sources located within or imported into the PJM region.”); MD. PUB. UTIL. COS. CODE ANN. § 7-701(i) (2009) (“‘Renewable energy credit’ . . . means a credit . . . that is located . . . in the PJM region or in a state that is adjacent to the PJM region; or outside the area described in item (1) of this part but in a control area that is adjacent to the PJM region, if the electricity is delivered into the PJM region.”); 73 P.S. § 1648.4 (2009) (“For purposes of compliance with this act, alternative energy sources located in the PJM Interconnection, L.L.C. regional transmission organization (PJM) or its successor service territory shall be eligible to fulfill compliance obligations of all Pennsylvania electric distribution companies and electric generation suppliers.”); N.J.A.C. § 14:8-2.7(b) (2009) (“To qualify as class I or class II renewable energy for the purposes of this subchapter, energy shall be generated within or delivered into the PJM region . . . .”); 2004 N.Y. PUC LEXIS 529, 95 (“[F]or energy generated outside of New York State to be eligible under the New York RPS program, it must be delivered into the New York Control Area.”); ORC Ann. 4928.64(B)(3) (2009) (“At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state.”); D.C. CODE § 34-1431(10) (2009) (“‘Renewable energy credit’ . . . means a credit . . . [from a] renewable source that is located: In the PJM Interconnection region or in a state that is adjacent to the PJM Interconnection region; or . . . is adjacent to the PJM Interconnection region, if the electricity is delivered into the PJM Interconnection region.”); H.B. 103, W.V. 2009, 1st Spec. Sess., (W.V. 2009) (enacted June 2, 2009) (“An electric utility shall be awarded . . . credits . . . from a renewable energy resource facility located within the geographical boundaries of this state or located outside of the geographical boundaries of this state but within the service territory of a regional transmission organization.”).

use of renewable energy from other states indicates a clear understanding by the corridor states that meeting their renewable energy needs will require regional cooperation.

Interstate compacts could serve as good examples of a vehicle that would coordinate regional planning and cooperation for the siting of interstate transmission lines.<sup>123</sup> Compacts have served as a useful tool for the management of natural resources since the creation of our nation<sup>124</sup> and have been the preferred method of the U.S. Supreme Court when states have had disagreements over water rights.<sup>125</sup>

Compacts bring state participants, and in some cases federal authorities, together to accomplish any number of regional and interstate priorities.<sup>126</sup> Examples of existing compact responsibilities include: studying issues that affect multiple States,<sup>127</sup> ensuring access for “mental health services . . . regardless of . . . state residency,”<sup>128</sup> and determining the allocation of water within a particular lake basin.<sup>129</sup> Creating strong interstate compacts could provide an effective vehicle for the development of Capacity Plans.

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<sup>123</sup> See CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS A PRACTITIONER’S GUIDE* 3 (2006) (“[C]ompacts are singularly important because through a compact, the states can create a state-based solution to regional or national problems and effectively retain policy control for the future.”).

<sup>124</sup> *Id.* at 262 (“[I]nterstate compacts in the natural resource area are as old as the nation. One of the earliest environmental compacts addressed disputes of the use and allocation of waters of the Potomac River.”).

<sup>125</sup> *Id.* at 264 (“Indeed, the Supreme Court has expressly encouraged states to resolve water disputes through interstate compacts rather than by equitable apportionment adjudication.”).

<sup>126</sup> See *id.* at 66 (explaining federal participation in interstate compacts).

<sup>127</sup> See JOSEPH F. ZIMMERMAN, *INTERSTATE COOPERATION COMPACTS AND ADMINISTRATIVE AGREEMENTS* 209 (2002) (“Compacts tend to be very successful if they establish commissions to conduct studies”).

<sup>128</sup> BROUN ET AL., *supra* note 123, at 255.

<sup>129</sup> See *id.* at 278–79 (“In December 2005, the governors of the eight Great Lake states and the Premiers of Ontario and Quebec signed the . . . Great Lakes-St. Lawrence River Basin Sustainable Water Resources Compact . . . . [This] agreement[ ] ban[s] new diversions of water outside the Basin.”).

2. *Strengthen the Interstate Compact Provisions of the Energy Policy Act of 2005*

The Energy Policy Act of 2005 provided a potentially powerful tool for states that wanted to prevent FERC from taking their authority to site transmission lines. The Act authorized States to form interstate compacts<sup>130</sup> that would create “regional transmission siting agencies.”<sup>131</sup> These agencies would be responsible for conducting the siting of new transmission lines within the compact states,<sup>132</sup> and FERC would have no authority to site lines within those states so long as the compact was not in disagreement over a proposal.<sup>133</sup> If states within the compact ran into a disagreement about the siting of a project, FERC would still be allowed to step in and site the project if approval had been withheld for more than one year.<sup>134</sup>

States have increasingly utilized interstate compacts over the past seventy-five years, and today there are over “200 interstate compacts on the books.”<sup>135</sup> Compacts are preferred over federal legislation or regulation in many situations because they have the ability to facilitate regional cooperation among states while allowing states to preserve traditionally held powers.<sup>136</sup> Compacts also force the decision making process to consider state interests

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<sup>130</sup> See U.S. CONST. art. I, § 10, cl. 3 (restricting the use of interstate compacts unless consent is given by Congress); see generally Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution a Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925) (discussing the underutilization of interstate compacts and their promising potential in the future).

<sup>131</sup> 16 U.S.C. § 824p(i) (2006).

<sup>132</sup> *Id.* at (i)(1)–(2).

<sup>133</sup> *Id.* at (i)(4).

<sup>134</sup> *Id.*

<sup>135</sup> BROUN ET AL., *supra* note 123, at 178. Interstate compacts have not always been a popular tool among states for addressing interstate needs or problems. “Through roughly the first 140 years of the nation’s existence, fewer than 40 interstate compacts were enacted.” *Id.*

<sup>136</sup> *Id.* at 26 (“[C]ompacts provide an effective solution that respects fundamental principles of federalism, recognizing the supremacy of the federal government regarding national issues while allowing the states to take appropriate collective action in addressing supra-state problems.”).

that are typically marginalized at the federal level<sup>137</sup> and tend to provide “a high level of responsiveness to local and state needs.”<sup>138</sup> Lastly, compacts are effective at incorporating the federal government’s interests on a particular issue because Congress has to consent to the compacts formation.<sup>139</sup>

The Pacific Northwest Electric Power and Conservation Planning Council (“Council”) is an example of a compact that deals with energy/resource planning issues and could serve as a model for States within the Corridor. Approved in 1980,<sup>140</sup> the compact is responsible for “facilitating the orderly planning of the region’s power system,”<sup>141</sup> “assur[ing] the Pacific Northwest of an adequate, efficient, economical, and reliable power supply,”<sup>142</sup> and “encourag[ing] . . . conservation and efficiency in the use of electric power, and the development of renewable resources within the Pacific Northwest.”<sup>143</sup> The Council was created to handle interstate issues surrounding the use of electricity and water from the Columbia River Basin,<sup>144</sup> and manages interstate concerns through the development and periodic update of a “regional

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<sup>137</sup> *Id.* at 27 (“Because federal government agencies are generally politically removed from state interests, federal administrators tend not to emphasize regional concerns, thus portraying some insensitivity toward important state interests. The interstate compact provides states with the opportunity to offset this federal insensitivity.”).

<sup>138</sup> *Id.* at 27 (“[S]tates in a specific region or involved with a specific issue are generally more familiar with the circumstances surrounding such problems than federal officials, who are generally more . . . geographically and politically removed.”).

<sup>139</sup> *See id.* at 28 (“To a large extent the Compact Clause requirement of congressional consent to those compacts impacting federal interests ensures that federal concerns are at the forefront of compact design.”).

<sup>140</sup> *See* Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. 839 (2009)) (The compact is formed by the states of Idaho, Montana, Oregon, and Washington.); *see also* Seattle Master Builders Ass’n v. Pac. N.W. Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1363 (9th Cir. 1986) (holding the Pacific Northwest Electric Power and Conservation Planning Council was a compact agency).

<sup>141</sup> 16 U.S.C. § 839(3)(B) (2006).

<sup>142</sup> *Id.* § 839(2).

<sup>143</sup> *Id.* § 839(1).

<sup>144</sup> *Id.* § 839.

conservation and electric power plan ("Plan")."<sup>145</sup> The Plan serves as the blueprint for the Bonneville Power Administration ("Administration") that is responsible for the operation of the Federal Columbia River Power System and requires that the Administration act "consistent with the plan."<sup>146</sup> While the Council does not have authority to site transmission lines, it does include an assessment of the need for increased transmission capacity in its Plan,<sup>147</sup> and in its most recent draft of the proposed new version of the Plan has called for "regional transmission planning efforts . . . to bring in new renewable resources."<sup>148</sup> This type of compact is one of many across the country that has been developed to manage resources and, if given additional authority to site interstate transmission lines, stands to serve as a model for compacts that might be created in National Corridors.<sup>149</sup>

In order to encourage the creation of new interstate compacts within the corridor, Congress should strengthen the current incentives for participation within the compact provisions of the Energy Policy Act of 2005. First, Congress should maintain the requirement that the compacts create regional transmission siting

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<sup>145</sup> *Id.* § 839b(a)(1)(A).

<sup>146</sup> *Id.* § 839b(d)(2).

<sup>147</sup> *See* Pac. N.W. ELEC. POWER AND CONSERVATION PLANNING COUNCIL, THE FIFTH NORTHWEST ELECTRIC POWER AND CONSERVATION PLAN, 9-1 (2005), [http://www.nwcouncil.org/energy/powerplan/5/\(09\)%20Transmission.pdf](http://www.nwcouncil.org/energy/powerplan/5/(09)%20Transmission.pdf) (last visited Oct. 11, 2009) (discussing the transmission needs of the region) (on file with the North Carolina Journal of Law & Technology).

<sup>148</sup> PAC. N. W. ELEC. POWER AND CONSERVATION PLANNING COUNCIL, DRAFT SIXTH NORTHWEST ELECTRIC POWER AND CONSERVATION PLAN 6a-10 (2009) [http://www.nwcouncil.org/energy/powerplan/6/Ch6a\\_090309.pdf](http://www.nwcouncil.org/energy/powerplan/6/Ch6a_090309.pdf) (last visited Oct. 11, 2009) (discussing the need for regional planning in meeting electricity transmission needs) (on file with the North Carolina Journal of Law & Technology).

<sup>149</sup> *See* BROUN ET AL., *supra* note 123, at 177 ("[G]rowing concerns in recent years about the reliability and security of the nation's electric power grid might best be addressed through interstates administrative compacts of regional or national scope. Such agreements could facilitate the cooperative siting and maintenance of transmission lines . . . ."); *see generally* BROUN ET AL., *supra* note 123, at 261–362 (identifying current environmental and natural resource compacts).

agencies.<sup>150</sup> These agencies should identify current and future energy needs within the compact and greater geographical region, as well as develop the capacity plans to meet both. The agency should also be empowered to site new *interstate* transmission projects within states participating in the compact and control access to those interstate transmission lines. Giving the agency siting authority for interstate transmission facilities is necessary so that the siting process is simplified and expedited. Moving the siting process from a multi-state process that requires each individual state to approve a transmission project to a centralized regional process that only requires the agency's approval will reduce the time and resources needed for approval. It will also broaden the focus of the approval process from a parochial intrastate analysis to an interstate analysis that will evaluate transmission project proposals with the compact's needs in mind rather than the needs of just a single state.<sup>151</sup>

Second, Congress should limit FERC's authority to site interstate transmission facilities within states party to a compact. FERC should only be allowed to exercise their siting authority when a regional transmission siting agency denies, or withholds for more than one year, approval of a permit to construct an interstate transmission facility linking in *renewable energy*. Limiting FERC's ability to site within States party to a compact provides a strong incentive to create compacts because the siting agency created by the compact will be able to maintain siting authority for all projects that do not involve siting transmission facilities linking in renewable energy and are not approve within a year.

Controlling access to interstate transmission lines is critical to preventing states from undermining the compact process. If states are allowed to connect energy production facilities within their own state to a transmission line approved by the siting agency without the agencies approval, it might result in the spread of non-renewable energy as was predicted by petitioners in the *Piedmont*

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<sup>150</sup> 16 U.S.C. § 824p(i) (2006) (stating that the agencies would be responsible for conducting the siting of new transmission lines within the compact States).

<sup>151</sup> BROUN ET AL., *supra* note 123, at 28 (“[I]nterstate compacts can broaden parochial focus by allowing states to act collectively and jointly in addressing regional and national problems.”).

case. A compact that creates a siting agency and empowers it to site interstate transmission projects will take away a state's ability to reject an interstate transmission line proposal. If the compacts fail to establish a mechanism that would control access to new interstate transmission lines, it will leave states helpless to stop other states within the compact from linking in non-renewable energy.

States would also no longer be able to hold up critical interstate transmission line projects intended to connect renewable energy producers because FERC would be able to step in when compacts and siting agencies cannot reach agreement or deny a project. The proposed limits on FERC's authority would also prevent non-renewable energy producers from sidestepping a compact's authority because FERC's siting authority would not extend to proposals that connect in non-renewable energy. Lastly, compacts make it harder for cheap non-renewable energy to flood into markets unless the siting agency approves the project. This type of regional approval ensures that projects to link in non-renewable energy are in the interest of the states participating in the compact.

### 3. *Change FERC's Siting Authority in Response to Piedmont*

Congress should narrow FERC's siting authority by only allowing FERC to site when a state or compact agency denies, or withholds for more than one year, siting approval for an interstate transmission facility that would connect renewable energy producers. As highlighted above, Corridors need additional capacity in order to accommodate new renewable energy suppliers. Allowing a state or compact to veto a regional or national plan to link in renewable energy would severely limit the spread of renewable energy within the nation and leave the corridors in effectively the same place that they were prior to *Piedmont*. Additionally, expanding FERC's siting authority in these situations will strengthen investors' willingness to provide capital to renewable energy start up projects. Up until now aspiring renewable energy producers have been unable to provide reasonable assurances to investors that new projects will not be limited in operation by existing transmission capacity

restrictions.<sup>152</sup> The assurance that a new project would be able to link into the grid and operate at levels sufficient to meet an investor's required return on investment is critical for attracting new investment in renewable energy.<sup>153</sup>

Granting FERC siting authority for transmission projects that link in renewable energy will instill greater confidence in investors that proposals to expand transmission capacity for renewable energy can ultimately be evaluated by the federal government rather than in a decentralized state-by-state process. FERC's evaluation of a plan will bring a national perspective to a proposal's evaluation and ensure that denials at the state level are in the best interest of national energy policy. While this new authority may strip states and compact agencies of their right to site new lines in certain situations, it still allows them to maintain authority over plans that would not deal with non-renewable energy and also incentivizes them to work with other states and compacts on projects to expand the use of renewable energy.

## V. CONCLUSION

This Recent Development highlights the areas of true conflict between supporters and critics of the *Piedmont* decision and provides an alternative solution to the problem of expanding

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<sup>152</sup> As discussed earlier, transmission constraints can be "operational limit[s] imposed to protect reliability." (*quoting* U.S. Dep't of Energy, *supra* note 22, at vii) These operational limits sometimes take the form of requirements that utilities shutdown production of electricity so that the grid does not exceed capacity and break down. During these mandatory shutdowns, energy producers are not able to sell energy and, accordingly, lose revenues that could have been paid back to investors. Concerns over return on investment arise and reduce an investor's willingness to invest when they know that transmission capacity limitations within a region may cause renewable energy projects to shut down in order to protect grid integrity. *See generally* Matthew L. Wald, *Wind Energy Bumps Into Power Grid's Limits*, N.Y. TIMES, Aug. 27, 2008 at A1 & A15, available at <http://www.nytimes.com/2008/08/27/business/27grid.html>, (describing the challenges to investment in wind farms due to congestion and the absence of transmission lines that can link regions with large renewable energy potential with large populations centers) (last visited on Sept. 25, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>153</sup> *See generally id.* (discussing the effects of grid capacity on investment in renewable energy).



interstate transmission lines. This solution will still require states and interest groups to make substantial compromises that may result in disagreements that will require FERC to intervene. But the proposal also suggests a course of action that will empower states and interests groups to make these compromises and be involved in the process from the beginning. The solution carves out a middle ground that will expedite the approval process for transmission line facilities, bring regional and national priorities into the evaluation of transmission proposals, maintain limited state authority to choose how facilities will be sited, and protect community interests by limiting the access of non-renewable energy to new interstate transmission lines.