

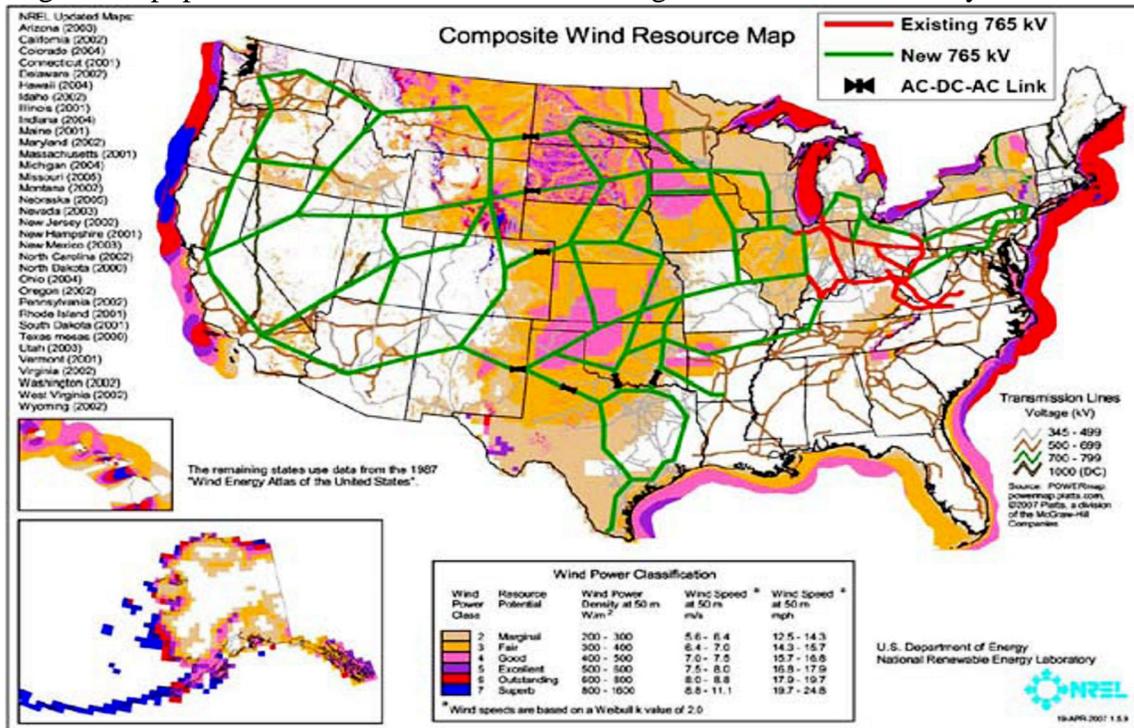
# New Approaches to Consensus Building and Speeding up Large-Scale Energy Infrastructure Projects

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## I. Introduction and Problem Statement

Germany and the United States are currently experiencing similar challenges related to the development of large-scale renewable energy projects and conveying energy from those projects along new transmission lines to population centers. In Germany, a major current challenge is to develop large off-shore wind projects in the North and Baltic Seas and bring the power south, potentially hundreds of kilometers. In the U.S. (see Figure 1), most of the terrestrial wind resources are in the mid-West and Canadian Rockies with population centers on both coasts—literally thousands of kilometers away. The best solar energy resources in the U.S. are similarly located in the less populated Southwestern states. In the Northeast, there is also extensive debate about whether to build new transmission lines to bring renewable energy from Eastern Canada and Northern New England to population centers in Southern New England and New York City.



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Large scale renewable energy generation projects and new transmission lines are often controversial. The controversy usually starts with a question about whether a particular project is needed. Building large scale facilities in one geographic area and wheeling power to another section of the country raises questions about whether it would make more sense to develop distributed resources closer to existing population centers.<sup>2</sup> Residents facing large scale renewable energy facilities (especially when the goal is to satisfy a global concern like climate protection), are often upset about the visual impacts and the potential loss of property values that fall entirely on them. NIMBYism (Not in My Backyard) is just as likely whether large scale energy facilities or transmission lines are involved. But high voltage transmission lines face the additional challenge of spanning hundreds of kilometers, cutting across multiple jurisdictions (and thousands of separately owned properties). Issues about cost allocation are particularly acute with respect to the funding of new transmission lines. Also, unique to transmission line siting are debates about the desirability of under-grounding cables (which can multiply costs per kilometer by a factor of ten or more) and lingering concerns about health impacts of electro-magnetic fields. Given the complexity of such projects and the debates that surround them, it's not surprising it can take a decade or more to win the necessary license permits to site and then construct them.

## **II. U.S. Federal Transmission Siting Laws and Policies**

In President Obama's first speech to Congress and the American people, on February 24, 2009, he called for a doubling of the amount of renewable energy produced and consumed in the U.S. in three years. The U.S. Department of Energy (U.S. DOE) has concluded that establishing a reliable interstate electricity-transmission superhighway is critical to achieving a 20% wind power goal, and could require 9,000 miles of new or upgraded power lines in the Western U.S. alone.<sup>3</sup> The U.S. Federal Energy Regulatory Commission's (FERC) Chair Jon Wellinghoff estimates that backbone transmission projects capable of moving renewable energy from remote locations to population centers will cost more than \$200 billion. On February 19, FERC issued an order laying out a new method for allocating the cost of transmission, which Chair Wellinghoff called the most significant transmission related order ever issued by FERC.<sup>4</sup>

But even if disagreements over cost allocation can be resolved, the permitting and siting of transmission lines will remain a major challenge in the U.S. and elsewhere. In the United States, permitting and siting decisions are left to the states, except where the Secretary of the Department of Energy deems a particular area of the country to be a "National Interest Transmission Corridor" (under section 216 of the Federal Power Act). To earn such a designation, the geographic area must be experiencing electric energy

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<sup>2</sup> In the U.S. off-shore wind is also located closer to the coastal population centers than the mid-western wind resources, and is another option.

<sup>3</sup> Tierney, Sue (2008) "A 21<sup>st</sup> Century Interstate Electric Highway System: Connecting Consumers and Domestic Clean Power Supplies," Analysis Group: Boston. October, p.24.

<sup>4</sup> FERC Docket Nos.: ER09-432-000 and ER09-433-000 on Chinook Power Transmission, LLC and Zephyr Power Transmission, LLC

transmission capacity constraints or congestion. Once an area is deemed a "National Interest Transmission Corridor," FERC still only intervenes when states either cannot or will not act to approve new transmission lines; hence, the notion that they serve only as the "back-stop" regulator. To date the U.S. DOE has designated only two areas as "National Interest Transmission Corridors" – one covering parts of five Mid-Atlantic states and the District of Columbia and a second spanning Southern California and parts of Arizona (see Appendix A for maps).<sup>5</sup>

Within these two corridors, only one case so far has been reviewed by FERC – a proposal by Southern California Edison to construct a 267 mile 500 KV line between Arizona and California. On February 18<sup>th</sup>, 2009 the 4th U.S. Circuit Court of Appeals ruled against FERC's interpretation of the 2005 Energy Policy Act "backstop" siting authority and said that the agency had overstepped its congressional mandate in asserting federal authority over transmission line siting.<sup>6</sup> Meanwhile, U.S. Senate Majority Leader Harry Reid is getting ready to release a new bill that will give FERC clearer authority to override states when electric grid placement decisions have to be made. "We cannot let 231 state [utility] regulators hold up progress," Reid said. He argued that states should be given every opportunity to participate, but "there may come a time when the federal government will have to step in."<sup>7</sup> Senator Reid and others in Congress contemplate clarifying and expanding FERC's authority over major new lines that could be built not just for reliability purposes but for economic reasons, and would cover wheeling renewable electricity from production sites to population centers. On March 10, the states through their National Association of Regulatory Utility Commissions (representing all 50 states' Public Utility Commissions) adopted a resolution urging Congress to keep FERC's backstop authority for transmission lines "as limited as possible" (See Appendix B for complete NARUC resolution).

### **III. FERC's Current Stakeholder Involvement Processes for Large Scale Energy Infrastructure**

Where FERC does have authority over transmission, it plans to use virtually the same stakeholder involvement process it currently uses to certify natural gas pipelines. The gas pipeline certification process (see Appendix C) includes a "pre-filing environmental review process" that is required for liquified natural gas (LNG) facilities and strongly encouraged for natural gas pipelines.<sup>8</sup> FERC's translation of that process for transmission is shown below in Figure 2 and is delineated in FERC's June 16, 2006 Notice of Proposed Rulemaking "Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors."<sup>9</sup> The purpose of the pre-filing process is to "facilitate maximum participation from all interested entities and individuals and to assist

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<sup>5</sup> Federal Register/Vol. 72, No.193 10/5/07.

<sup>6</sup> Case relates to proposal by Southern California Edison to construct a 267 miles 500 KV line between Arizona and California with the southwestern national interest transmission corridor.

<sup>7</sup> Hebert, Josef, "Placement of Power Grid is Debated" in *Boston Globe*, 2/24/09, p. A9

<sup>8</sup> According to Vern Mosley, Director Division of Pipeline Certificates March 2009 virtually all the pipeline applicants now use this process.

<sup>9</sup> 18 CFR parts 50 and 380 (Docket No. RM06-12-000) June 16, 2006. with final rules adopted November 16, 2006.

an applicant in compiling the information needed to file a complete application.<sup>10</sup> FERC's goal is to allow the Commission to "process the ultimate application expeditiously" (i.e., within one year after the application is formally filed following the pre-filing process).<sup>11</sup> FERC expects the pre-application process to take at least a year for "extensive" projects and somewhat less for "Greenfield" facilities built mainly in existing rights-of-way.

Applicants are required to reach out and seek input from stakeholders which FERC defines as "a Federal, State, or multistate, Tribal, or local agency, any affected non-governmental organization, or other interested person (including citizens along the likely transmission line path)".<sup>12</sup> The applicant must provide stakeholders with information about the proposed project as well as "a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit application."<sup>13</sup> This has typically been handled in the gas pipeline pre-filing processes by holding a series of "open houses" at strategic geographic locations along the proposed route. There are no firm rules explaining how these open houses ought to be structured, but the goal is to foster two-way communication between the applicant and all relevant stakeholders. In the past, they involved informal workshops, formal transcribed testimonials or simply information booths offering descriptions of various aspects of the proposed projects.<sup>14</sup> Applicants are also expected to coordinate with any separate permitting and environmental reviews by other federal, state, or local agencies. At the beginning of the pre-filing process, each applicant must file a "Participation Plan" and develop a project specific website.

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<sup>10</sup> Ibid

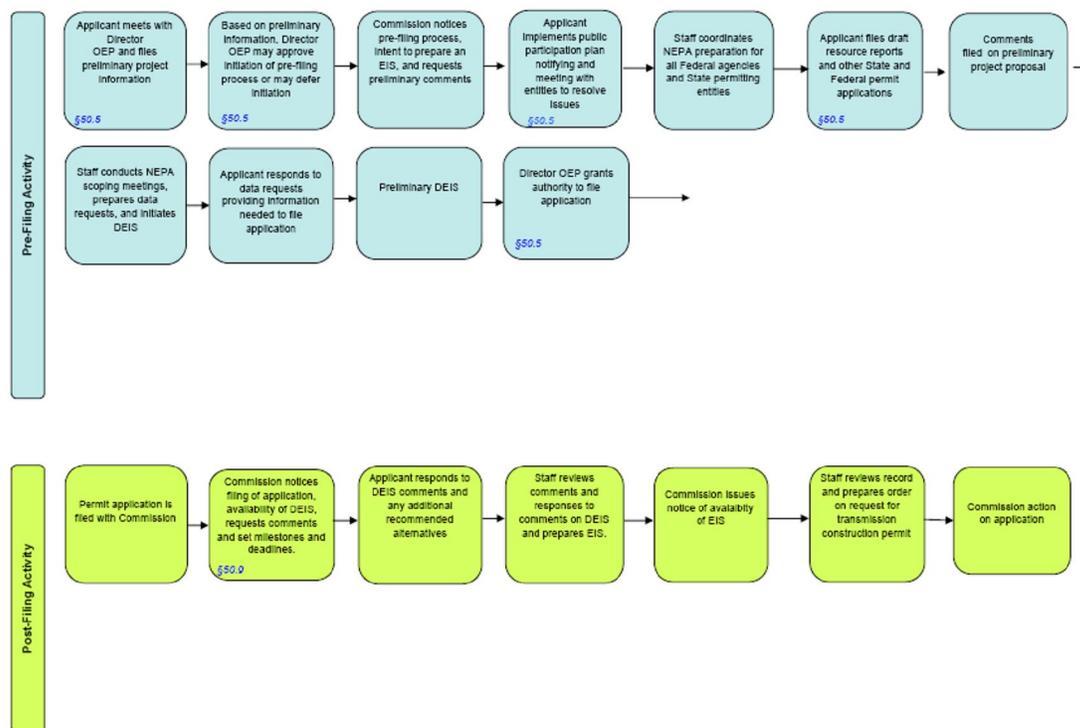
<sup>11</sup> Ibid

<sup>12</sup> Affected landowners are defined as those (1) directly affected, crossed, or used by the proposed project;, or (2) abuts either side of an existing right-of-way of a proposed facility or within ¼ mile from the edge of the construction right-of-way. Sec. 50.1

<sup>13</sup> Ibid

<sup>14</sup> Phone interview with Lauren O'Donnell, FERC who pointed out that Google Earth has become a regular feature of these Open Houses so landowners can see how the project might impact their property.

## Electric Transmission Construction Permit Process Order No. 689



When an applicant files a formal notice following the pre-filing process, it must include a summary of the points made by stakeholders during the pre-filing process and indicate how, if at all, it has addressed them. It is important to note, however, that while the gas pipeline and now transmission siting processes are structured to both inform stakeholders about the proposed project and to garner their input, they are not designed as formal consensus-seeking efforts. This does not preclude an applicant from modifying its initial plan in response to concerns raised during the pre-filing process. Nor are applicants forbidden from commencing negotiations on their own with local landowners and communities about land easements and any other matters, at any time they prefer. Once a formal application has been filed, FERC begins its legally-mandated process and stakeholders that want to continue to be involved must formally intervene (by filing a motion) in the case. The case before the 4<sup>th</sup> Court, for example, was filed by the State of Arizona after its petition to intervene in the pre-filing process was denied by FERC which claimed that the process was informal and Arizona's intervention was neither necessary nor allowed.

According to FERC staff, the pre-filing process for LNG and gas pipelines has allowed applications to move through the NEPA process (which requires federal agencies to develop Environmental Impact Statements) in only 10 months rather than 6-18 months. According to Vern Mosley of FERC, the pre-filing process has also reduced the number

of "surprises" that arise after formal filing. Both the issues and stakeholders have already been well vetted.<sup>15</sup> As a result, FERC claims that the number of conditions placed on new license is far fewer than it was in the past, allowing applicants to move much more expeditiously to construction.<sup>16</sup>

The other prominent area in which FERC regularly uses a pre-filing stakeholder process is for the relicensing of hydro-electric dams. FERC's Integrated Licensing Process (ILP) diagramed in Appendix D has been in use since 2005. It is similar to the natural gas permitting process, and serves as a conduit for early issue identification and broad stakeholder involvement. FERC staff is encouraged to participate. The focus of the ILP process, however, is not settlement. Although most new projects go through the ILP process, FERC also offers an Alternative License Process (ALP) for applicants who want to try to settle disagreements with stakeholders. Based on concerns that FERC had with several hydropower licensing settlements filed under the ALP, FERC issued a policy statement on hydropower licensing settlements in 2006.<sup>17</sup> The policy statement does recognize the various potential benefits of settlements in licensing cases:

1 the Commission looks with great favor on settlements in licensing cases. When parties are able to reach settlements, it can save time and money, avoid the need for protracted litigation, promote the development of positive relationships among entities who may be working together during the course of a license term, and give the Commission, as it acts on license and exemption applications, a clear sense as to the parties' views on the issues presented in each settled case.

However, it goes on to point out, that FERC cannot automatically accept the terms of such settlements and must make sure they are in the public interest, supported by substantial evidence, and enforceable by FERC. FERC maintains that in these regards it actually has much less flexibility with respect to settlements on licensing applications than in other areas such as rate settlements. It advises parties in licensing cases to follow four steps:

1. Use existing information and pre-license studies to determine the environmental effects of a proposed project.
2. Based on the record, develop appropriate environmental measures to address projected effects.
3. Craft settlement provisions based on the record and the proposed measures, taking into account recent Commission precedent.
4. Prepare an explanation of the settlement that will enable the Commission to understand the parties' intent and what in the record they believe supports their proposal.

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<sup>15</sup> Mr. Mosley added that, "previously FERC sat there fat, dumb, and happy until they got the formal application. This often led to changes in the applicant's route or application at great cost and frustration to the applicant. "Under the pre-filing, where ex parte rules are not in effect, FERC staff can participate earlier.

<sup>16</sup> Phone interview with Lauren O'Donnell, FERC March 2009. Ms. O'Donnell also pointed out that unlike the gas certification process, the new transmission rules don't allow the applicant to file until FERC staff deems their application complete.

<sup>17</sup> FERC Docket No. PL06-5-000. Policy Statement on Hydropower FERC Licensing Settlements (9/21/06)

These four steps impose a much higher burden of proof on settling parties than is typical in utility rate case and other legal settlements. Recognizing this, FERC offers a great deal of detail in its policy statement about how settling parties can satisfy FERC's requirements. It also offers to have its staff directly participate in an advisory role during settlement discussions or to review proposed settlements prior to filing them at the Commission.

FERC Chairman John Wellinghoff in testimony to the U.S. Congress on March 12, 2009, summed up his perception of FERC's various stakeholder involvement processes as follows:

Based on its decades of experience in siting natural gas pipelines and in siting hydropower projects and associated transmission line, the Commission has developed comprehensive, efficient processes that provide for public notice and extensive public participation, including participation of affected states. These processes ensure that early identification of issues (and where possible, consensual resolution of them), development of a thorough environmental analysis, and decisions based on a complete record and consideration of the public interest.<sup>18</sup>

#### **IV. Toward an Improved Model of Consensus Building in Large Scale Energy Infrastructure Development**

Regardless of whether and how federal agencies decide to handle licensing or siting, major energy-related infrastructure projects will remain controversial. Better practices for engaging stakeholders including federal, state, and local governments, as well as other interested stakeholders such as utilities and power generators, transmission owners, businesses, NGOs, and citizens are required.

In the rest of this paper we present what we believe is a better way to engage stakeholders -- based on both the theory of stakeholder engagement as well as real-life experience with major energy and non-energy related projects. Our approach builds on two significant pieces of work that we have published independently in the past.

In 1990, Professor Susskind developed "The Facility Siting Credo: Guidelines for an Effective Facility Siting Process"<sup>19</sup> based on a national workshop he organized with Professor Howard Kunreuther to explore the application of consensus building techniques

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<sup>18</sup> Wellinghoff, Jon, (2009). Testimony of FERC Chair Jon Wellinghoff before the Committee on Energy and Natural Resources, U.S. Senate Hearing on Legislation Regarding the Electric Transmission Lines, March 12.

<sup>19</sup> Susskind, Lawrence (1990). "A Negotiation Credo for Controversial Siting Disputes" in *Negotiation Journal*, October. p.309-314, and Kunreuther, Howard and Susskind, Lawrence (1991) "The Facility Siting Credo: Guidelines for an Effective Facility Siting Process," in *Environmental Impact Assessment Review*. Publication Services, University of Pennsylvania

to the siting of controversial facilities. The Credo summarized the results of an extensive literature review and interviews with leading professional planners.

According to the Credo, when planning and building Locally Unwanted Land Uses (LULUs), every effort ought to be made to meet the following objectives:

1. Institute a broad based participatory process
2. Achieve agreement that the status quo is unacceptable
3. Seek consensus
4. Work to develop trust
5. Choose the solution that best addresses the problem
6. Guarantee that stringent safety standards will be met
7. Fully address negative aspects of the facility
8. Make the host community better off
9. Use contingent agreements
10. Seek acceptable sites through a volunteer process
11. Consider a competitive siting process
12. Work for geographic fairness
13. Set realistic timetables
14. Keep multiple options open at all times

In 1994, Dr. Raab published a book explaining how consensus building techniques could be applied to utility regulation. It was entitled Using Consensus Building to Improve Utility Regulation.<sup>20</sup> Dr. Raab concludes with eight principles for applying consensus building to both adjudicatory and regulatory issues covering the gamut from upstream issues such as the formation of broad energy policy to downstream issues such as approving and siting specific projects.

#### Eight Principles for Consensus Building in Electric Utility Regulation

1. Initiate consensus building as early as possible
2. Include all stakeholders
3. Secure direct involvement of the PUC [regulators] whenever possible
4. Provide adequate resources
5. Do not exclude contentious issues from consensus building efforts
6. Consider assisted negotiation
7. Structure consensus building processes to supplement traditional adjudicator and rulemaking procedures
8. Modify traditional procedures to better accommodate consensus building opportunities

There are many similarities between the two lists, and we have wed them to produce a summary of the best ways of applying consensus building principles to large-scale energy projects. The Facility Siting Credo was tested in a detailed analysis of 29 waste facility

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<sup>20</sup> Dr. Raab's book, which was published by the American Council for an Energy Efficient Economy (ACEEE), grew out of his dissertation at MIT. His Ph.D. Committee Chair was Professor Susskind.

siting cases (both successful and unsuccessful) in 1993. The more successful cases closely mirrored the Credo's principles.<sup>21</sup> Dr. Raab has successfully applied the principles in facilitating/mediating dozens of ground-breaking, energy related multi-stakeholder processes in the U.S. including the Regional Greenhouse Gas Initiative (RGGI)<sup>22</sup>, state Renewable Portfolio Standards (RPS), comprehensive Greenhouse Gas Plans and energy plans, as well as the development of a comprehensive transmission planning process for at least one state, and for the siting of the largest proposed off-shore wind project in the world near Cape Cod.

We feel strongly that government should engage stakeholders in a consensus-building process to develop the "up-stream" regulatory framework or "rules of the road" ahead of applying those rules to specific "down-stream" projects. In the case of building major new transmission lines for the primary purpose of linking new renewable energy generation to load centers, the government should bring key stakeholders together to develop cost allocation and siting rules and procedures before addressing formal proposals to build specific lines. Once these negotiated procedures are in place, dealing with specific cases should be easier, but certainly not guaranteed or "non-controversial." Each proposed project should trigger its own separate stakeholder involvement process aimed at reaching agreement on project specifications within the parameters of previously adopted "rules of the road."

For both the "upstream" regulatory framework and "down-stream" specific project proposal negotiations, we see the following 6 principles as crucial:

<b>Six Principles for Using Consensus Building to Improve the Licensing and Siting of Large-Scale Energy Infrastructure</b>
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| <ol style="list-style-type: none"> <li>1) Initiate stakeholder involvement process as early as possible and set realistic but firm timetables</li> <li>2) Include broad representation of legitimate stakeholder groups (including government agencies, and for site-specific projects--citizen groups)</li> <li>3) Seek consensus, and consider using professional neutrals to facilitate collaborative decision-making</li> <li>4) Do not exclude contentious issues, instead seek ways to address negative aspects of any proposal (including compensation, contingent agreements)<sup>23</sup></li> <li>5) Consider incorporating alternative siting processes (such as voluntary processes, pre-approval, competitive solicitations)</li> <li>6) Structure stakeholder involvement processes to supplement but not supplant formal back-stop process, while modifying formal processes to better accommodate consensus building opportunities</li> </ol> |
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<sup>21</sup> See Kunreuther, Fitzgerald, and Aarts (1993) "Siting Noxious Facilities: A Test of the Facility Siting Credo." In *Risk Analysis*, Vol. 13, No. 3.

<sup>22</sup> RGGI established the first and presently only U.S. carbon cap and trade system for electricity generators in 10 Northeastern states.

<sup>23</sup> A key option for transmission lines to reduce visual impact concerns near large population centers is to use underground transmission lines.

***Principle #1: Initiate stakeholder involvement as early as possible and set realistic but firm timetables***

Most public participation efforts are merely for show. That is, public officials rarely believe that projects or policies will be improved by tapping local knowledge. The only reason opportunities for public comment are offered is because they are required by law. So, public involvement only occurs after the most important decisions have already been made. The rationale that project proponents or public officials give for this "Decide-Announce-Defend" approach is that there would be nothing for the public to react to if a first round of decisions had not already been made. On the other hand, agencies or project proponents don't really like to engage in any kind of public dialogue after they have made decisions because they know they will be attacked. By the time a hearing is held or some other form of public consultation is initiated, the only way for concerned groups to have an impact is to attack whatever is being proposed with as much force or vitriol as possible. At the very least, the public needs to undermine whatever evidence was used to justify the need for and design of the project or policy they oppose.

While the Decide-Announce-Defend approach is commonplace worldwide, there are exceptions. The notion that stakeholders and concerned citizens ought to participate in the first round of decisions about what to build, where to build, and how to build is the rule in some situations. And when it is pursued, something surprising often happens. Proponents don't find themselves under attack (i.e. there's nothing to attack since decisions have not been made). Conversations often take the form of joint problem-solving. Reasoned conversation replaces the circus-like atmosphere of the typical public hearing. Collaboration can be confined to clearly delineated time periods. However, the key is to initiate stakeholder involvement as early as possible.

***Principle #2: Include broad representation of legitimate stakeholder groups (including government agencies, and for site-specific projects--citizen groups)***

Most public hearings and traditional forms of public engagement assume that interested parties will let their views be known. That is, public officials need only announce that a new facility is being planned and concerned citizens will step forward to express their views. In some situations, government agencies appoint "blue ribbon" advisory groups of hand-picked community representatives and experts to ensure that there is a "balanced" presentation of local concerns. Rarely, however, are such groups sufficient to keep other stakeholder groups from coming forward. Moreover, blue ribbon or expert advisory groups often become a focus of criticism since they are, by their very nature, representative of only those stakeholders the government deems appropriate.

The broader the support for a negotiated solution the less likely it will be challenged before the regulators and courts. Also, when legitimate stakeholders are excluded, the possibility increases that practical improvements may be overlooked that would have resulted in better (fairer, more efficient and ultimately more implementable) solutions.

One way to help identify and engage stakeholders is to hire a professional neutral (a mediator or facilitator) to conduct a conflict assessment. This process should include (1) identifying the various categories of potential stakeholders; (2) meeting with possible groups or individuals who might caucus to select spokespeople for each category of stakeholders; (3) engaging all the relevant stakeholders in framing an agenda, timetable, budget, and ground rules for to guide collaborative fact-finding and project design; and (4) managing the conversation if the relevant agencies decide to accept the neutral's advice and proceed with a collaborative effort.<sup>24</sup> In this way, appropriate representation can be assured and all stakeholding groups can participate in specifying a reasonable way to proceed given time, legal and budgetary constraints.

### **Principle #3: *Seek consensus, and consider using a third-party neutral***

The objective of most public engagement or public participation efforts is to give community members a say. Yet, most officials presume that the average citizen does not have the knowledge, skill or interest to participate as a full partner in considering the need for a proposed facility, the choice of an appropriate technology, reviewing the likely environmental, social and fiscal impacts; and ways of mitigating unavoidable impacts. Moreover, they have no expectation that stakeholder groups opposed to a new facility could be drawn into a collaborative decision-making process that could actually produce a technically sophisticated consensus--balancing science, public policy objectives and political interests. That is usually because they have never seen anything like that happen. And, of course, they haven't seen it because they haven't tried it. Collaborative facility siting processes do not substitute for agency decision-making authority; rather, they supplement and usually precede the formal regulatory processes. Most agencies find that they are quite willing to go along with recommendations of collaborative groups (that include agency staff at least as active observers and sometimes full participants) when they offer a way to proceed that all (or almost all) stakeholders will support.

Collaborative processes generate informed consensus. That is, they seek unanimity among a broadly representative set of stakeholders, where all or an overwhelming majority can at least "live with" the agreement that emerges from the process. Because stakeholders' interests can only have an impact if they reach agreement, they set their minds on generating a "package" that is supported by the facts, fits within the relevant legal and administrative constraints, and uses whatever "gains" might be generated by the population-at-large to compensate those who stand to suffer disproportionate losses.

Most facility siting processes are managed by public participation specialists (or media spokespeople) who work full-time for the regulatory agencies involved or who are

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<sup>24</sup> For more details, see Susskind, Lawrence, McKernan, Sarah et al. (1999). *The Consensus Building Handbook*. Sage Publications: Thousand Oaks, CA and Susskind, Lawrence (2005). Susskind, Lawrence and Cruikshank, Jeffrey (2006) *Breaking Robert's Rules: The New Way To Run Your Meeting, Build Consensus, and Get Results*. Oxford University Press

contracted by the project developer on a project-by-project basis. Because they are employed by proponents or regulators, they are often viewed with suspicion by some stakeholders (especially if decisions have already been made before the process of public consultation has begun). Professional neutrals, often selected with the approval of relevant stakeholder groups (after a conflict assessment has been prepared but before a joint fact-finding effort has begun), are more likely to be accepted by the groups most opposed to whatever project is being considered. There are a great many environmental mediators who have been trained (worldwide) over the past several decades, so it is not hard to find people to do this work.

**Principle #4: *Do not exclude contentious issues, instead seek ways to address negative aspects of the proposals (including compensation, contingent agreements)***

Collaborative agreements don't mean much (and probably will be hard to implement) if the parties don't address the most contentious issues. Often, when new facilities are proposed, landowners are concerned about a loss of their property rights, possible loss of property value, potential environmental or health risks, adverse impacts on long-standing patterns of community life and more. Arguing that a new (regional facility) is required to meet a very real need, for more electricity, for example, doesn't address all these concerns. So, a collaborative process needs to begin with forecasts that provide a shared basis for understanding what impacts are likely to occur and then move to figure out how best to minimize these "costs." Some costs can be compensated financially. Others can only be addressed through trades of equivalent environmental value (like agreeing to protect more endangered habitat off the project site in exchange for giving up a modest loss of habitat on the project site).

In some instances, contingent agreements can be used to deal with radically different assumptions about the future. If two "sides" disagree on what the effects of building a new facility are likely to be, they can still agree on how impacts should be monitored, who can be trusted to monitor them and what actions should be taken in mid-stream if one side's negative predictions turn out to be correct. Proponents who insist that a project will not have a certain adverse effect ought to be willing to have that project shut down or modified if their promises turn out to be wrong. In this way, it is possible to generate agreement, even from staunch opponents of a project. The opponents are sure that if the project advocates are wrong, the project will have to be dismantled. Proponents are confident that what they are promising is correct, so they are not worried about proceeding. They disagree about the future, but they can agree to proceed.<sup>25</sup>

**Principle #5: *Consider incorporating alternative siting processes (such as voluntary processes, pre-approval, and competitive solicitations)***

Once siting agencies agree to move away from the decide-announce-defend approach, there are many ways to proceed. For example, in some parts of the world, government

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<sup>25</sup> Susskind, Lawrence and Cruikshank, Jeff (1987). *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*. Basic Books: New York

agencies designate certain areas or portions of larger areas in which particular kinds of projects are pre-approved. In off-shore areas, for example, states or provinces can designate specific areas where off-shore wind energy facilities are allowed (and other areas where they are not allowed) ó well before any such facilities are proposed. Such designations can take account of environmental and practical considerations of all kinds. In this way, disagreements over the need for the project or scientific disputes over the broader questions of technology impacts can be dealt with BEFORE site specific controversies erupt. Once all such areas are mapped, a request for proposals (RFP process) can be initiated seeking project proposals from various private interests. A collaborative public engagement procedure can be used to help the permitting authority select among the bidders (and set specific terms for projects that meet the basic locational and other requirements specified in the RFP).

In one instance, a state solicited bids from private facility proponents with a proviso that only proposals that could win 60% support in a local referendum would be considered by the state. This pushed proponents to work very hard to formulate õdealsö with specific localities. The bidding process created a competition among vendors to see who could do a better job of meeting local demands!<sup>26</sup>

***Principle #6: Structure stakeholder involvement processes to supplement but not supplant formal back-stop process, while modifying formal processes to better accommodate consensus building opportunities***

Most facility siting takes place within the context of formal administrative procedures stipulated in law. Responsible agencies must consider a long list of factors before they can award a license or a permit, or build a facility on their own. Rarely, though, is the weight that ought to be attached to each of these factors specified in an unequivocal fashion in legislation, regulations or agency guidance documents. Some degree of judgment is always required. Only those with the statutory authority are in a position to make these judgments in the name of the õpublic interest.ö On the other hand, there is no reason that more input into such decisions cannot be garnered in an efficient way. When that happens, the legitimacy of the final decision is enhanced. In the United States, this often means that costly and timely consuming litigation can be avoided. In less litigious parts of the world, this means that delicate political coalitions can be strengthened rather than blown apart when public controversies arise.

Consensus building processes need to be structured to supplementô not supplant traditional adjudicatory and rulemaking processes. Regulators cannot delegate their final decision-making authority. This can be achieved by making sure that any products of consensus building processes (such as a settlement) receive full regulatory scrutiny and that outside stakeholders are provided the opportunity to review and comment.<sup>27</sup> At the

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<sup>26</sup> Susskind, Lawrence and Laws, David (1994) õSiting Solid Waste Management Facilities in the U.S.ö, in *Handbook of Solid Waste Management*, Edited by F. Kreith, McGraw-Hill: New York.

<sup>27</sup> Raab, Jonathan (1994). *Using Consensus Building to Improve Utility Regulation*. ACEEE: Washington, D.C.

same time traditional adjudicatory and rulemaking processes should be modified to provide a more conducive environment for consensus building. This should include regulatory agencies adopting guidelines or rules on settlement and other consensus-based options that provide adequate time for consensus building, protect participants' rights, and generally encourage consensus building activities.<sup>28</sup>

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<sup>28</sup> Ibid.

## **V. Comparing Our Model Process to FERC’s Current Processes for Licensing Gas Pipelines and Transmission Lines**

To better understand our 6 principles described above, in this section we apply our framework to U.S. FERC’s current innovative gas pipeline and transmission licensing processes.

### ***Principle #1: Initiate stakeholder involvement as early as possible and set realistic but firm timetables***

FERC has clearly recognized the value of engaging stakeholders early through its pre-filing processes. Moreover, FERC has set firm but not unreasonable timeframes both for its pre-filing process and the subsequent formal licensure process before the Commission.

### ***Principle #2: Include broad representation of legitimate stakeholder groups (including government agencies, and for site-specific projects--citizen groups)***

FERC requires that applicants contact all federal, state, and local agencies who may have some jurisdiction over permitting and siting. It also requires them to reach out to all potentially impacted landowners (in rights of way, and abutters). Workshops are held geographically to provide stakeholder access all along proposed corridors. It is not clear, however, that FERC pushes applicants to reach beyond abutters to community groups and other NGOs, but does not preclude the applicant from doing so. In some cases failure to include a broader net of stakeholder groups, can cause problems down the road if these groups are not included early-on and intervene later.

### ***Principle #3: Seek consensus, and consider using a third-party neutral***

FERC’s pre-licensing process takes the first couple of important consensus building steps (education, and understanding different stakeholders’ perspectives). It also expects that applicant will address issues raised during pre-filing process in the formal filing process. However, FERC does not require or really push for applicants to reach consensus and settle issues with stakeholders. In fact it actually requires that settlements related to licensure proceedings must meet much higher standards than say in a rate case. Even with these higher review standards necessary to meet other environmental and other statutory obligations, we believe that settlements can still be accomplished and beneficial. Applicants should consider and FERC could more actively support applicants trying to reach consensus with stakeholders regarding various aspects of proposed projects including the best routes, mitigation, and compensation.

The norm in FERC licensure cases is for the applicant to hire outside firms to help them manage the public involvement process. These firms are generally highly skilled in communications and public relations. If applicants decide to strive for reaching consensus with stakeholders, then they will need third-party neutrals skilled in mediation, and acceptable to not only the applicant, but to stakeholders. FERC could facilitate this

process by maintaining a list of qualified neutrals, offering their own dispute resolution staff, or both.

***Principle #4: Do not exclude contentious issues; instead seek ways to address negative aspects of the proposals (including compensation, contingent agreements)***

To its credit, FERC is very clear that it wants to surface all potentially contentious issues in pre-filing processes so that applicants can attempt to address them early. FERC also prefers that siting be done through negotiated easements rather than through contentious eminent domain proceedings. However, FERC does not see compensation to landowners and other impacted stakeholders as part of their jurisdiction, and hence does not encourage creative compensation approaches. Since settlements are generally more effective as package deals that do not exclude contentious issues, FERC should consider ways to review licensure settlements that include components that maybe outside its jurisdiction as long as the parts squarely within its jurisdiction are acceptable.

***Principle #5: Consider incorporating alternative siting processes (such as voluntary processes, pre-approval, and competitive solicitations)***

FERC does not preclude applicants from exploring alternative siting processes from the pre-licensing process or even pre pre-licensing. However, it does not encourage alternative siting processes. FERC should consider holding technical sessions, workshops, or potentially a formal proceeding with potential applicants and other stakeholder groups to seek ways to improve the siting process. During these forum alternative approaches used successfully in other facility siting such as voluntary processes, pre-approval, and competitive solicitations can be fully explored.

***Principle #6: Structure stakeholder involvement processes to supplement but not supplant formal back-stop process, while modifying formal processes to better accommodate consensus building opportunities***

Generally FERC has taken a significant step in this direction with the establishment of pre-filing processes for natural gas pipelines and now for transmission. However, in the case of hydro-relicensing, FERC actually took a big step back from its alternative licensing process (ALP) (which was more of a collaborative settlement process) in favor of an integrated licensing process ILP that looks more like the gas pipeline pre-filing process. We believe that FERC can do even more here to foster consensus building and spur settlements on the licensing and siting of major energy infrastructures, without compromising its authority. Promulgating settlement guidelines for gas pipelines and transmission lines as it's done for hydro-relicensing would be a good starting place. These should be formulated in a way that supplements FERCs formal processes. It should also look for ways to refine its formal processes to foster even more consensus building and settlement.

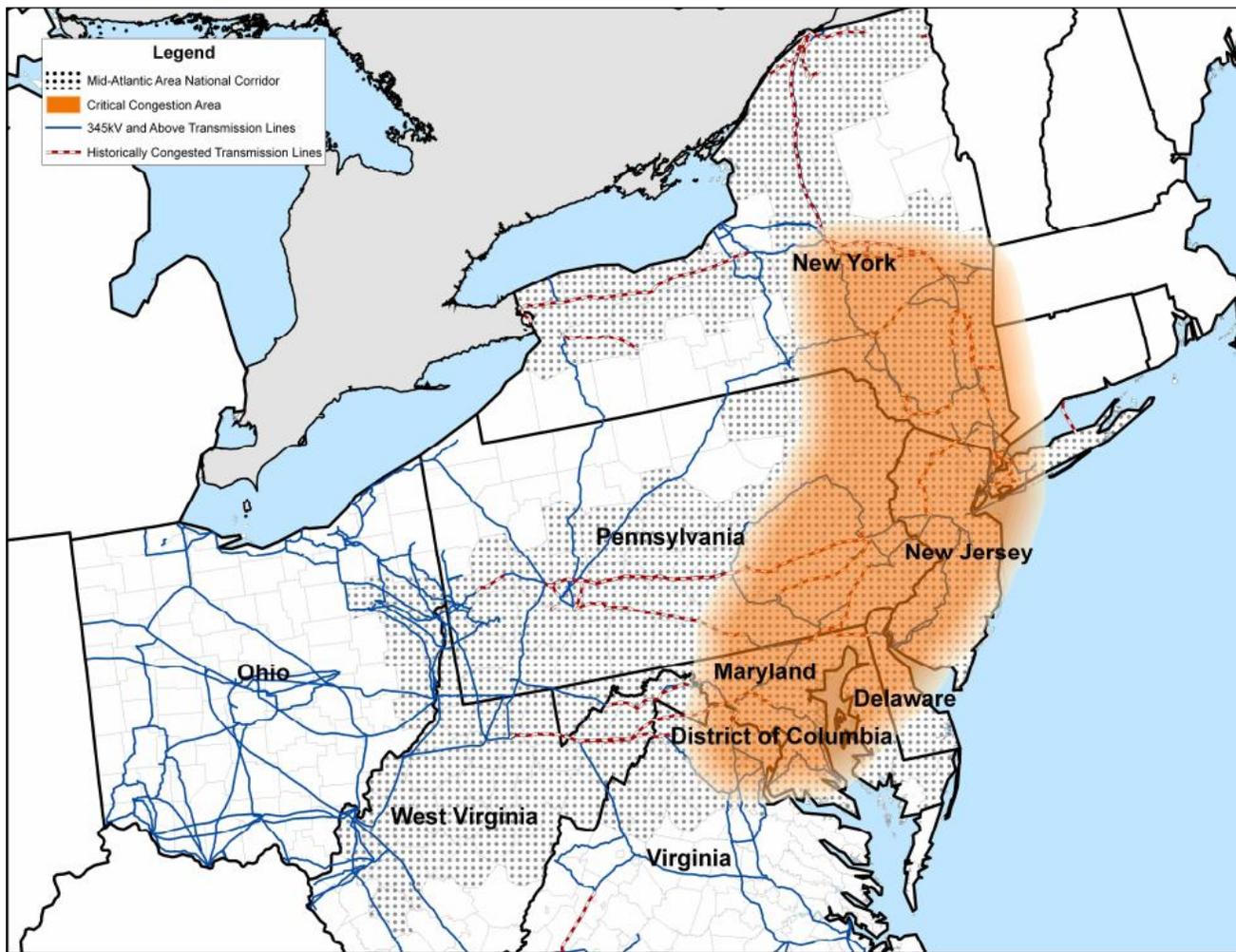
## **VI. Conclusions**

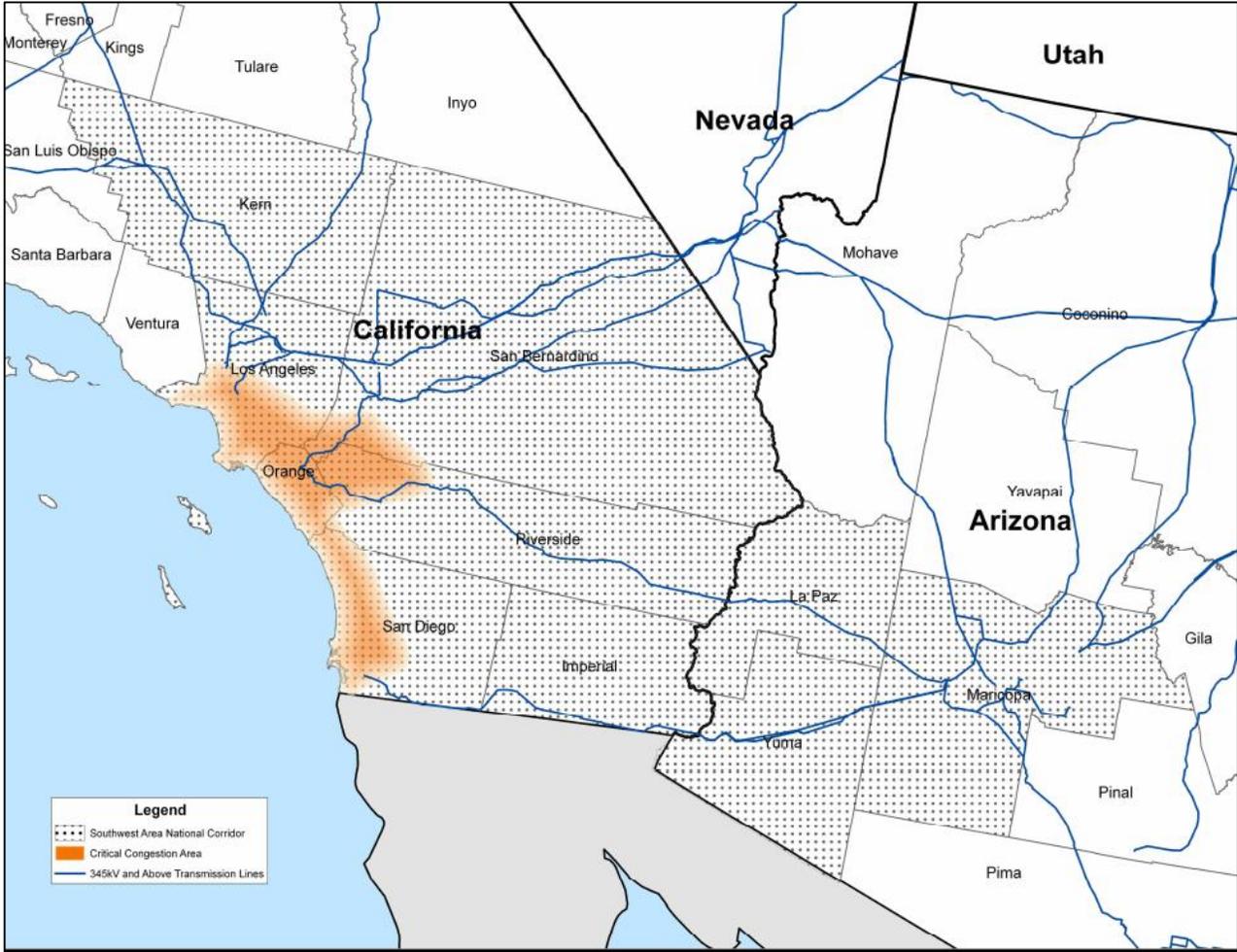
Throughout the world, we have seen the continued growth of public engagement in government decision-making; partly in response to demands for "more democracy" and partly as a pragmatic step aimed at building public support for the actions of elected and appointed officials. Unfortunately, too many government agencies fail to pursue these requirements in an effective manner. They go through the motions, hunkering down to defend decisions rather than engaging stakeholders in a timely and meaningful way. This breeds even greater public cynicism. It is easy to do better

Yet, we understand the political and legal realities in each country differ and require careful interpretation and translation of our recommendations. We find, however, that the key principles of consensus building we recommend here offer a good starting point in almost any democracy. Lawmakers, scholars and activists still must figure out how to apply them in their case. If a government creates the demand for such consensus building efforts, the supply of trained mediators will quickly follow -- as it has in many other countries. We want to further emphasize that our advocacy of a consensus building approach does not seek to diminish or undermine the workings of representative democracy. The product of all consensus building efforts in the regulatory and policy-making world are still merely proposals to be acted upon by those with the formal statutory authority to make such decisions. However, in the same way that settlement is a perfectly normal step in almost all civil litigation, we think that the addition of a consensus building step to licensing, permitting and rule-making will produce fairer, more efficient, more stable and wiser decisions.

# APPENDIX A

## U.S. National Interest Transmission Corridors





## APPENDIX B

### **Resolution Regarding Possible Federal Legislation Amending the Federal Power Act Addressing Expansion of Transmission Facilities**

**WHEREAS**, the siting of electric transmission facilities has historically been subject to the exclusive jurisdiction of the States; and

**WHEREAS**, it is in the States' interests to ensure that adequate electric transmission facilities are constructed to meet the needs for economic and reliable utility service; and

**WHEREAS**, it continues to be the long-standing position of the National Association of Regulatory Utility Commissioners (NARUC) that Congress should not expand Federal authority over transmission siting either through amendments to the Federal Power Act or through other Federal legislation; and

**WHEREAS**, Section 216 to the Federal Power Act, enacted as part of the Energy Policy Act of 2005, provided the Federal Energy Regulatory Commission (FERC) with limited "backstop" transmission siting authority; and

**WHEREAS**, it is anticipated that within the next few months, Congress will be considering possible amendments to the Federal Power Act that will provide FERC with expanded authority over the siting and construction of new interstate transmission lines; be it therefore

**RESOLVED**, that in connection with any proposed legislation introduced in the current session of Congress that would expand FERC's current authority over the siting and construction of new interstate transmission lines, the Association and its Washington staff recommend that Congress incorporate the following principles into such legislation:

- É That any such additional authority granted to FERC by the legislation allow for primary siting jurisdiction by the States, and provide that FERC's "backstop" siting authority be as limited in scope as possible;
- É That, in no event should FERC be granted any additional authority over the siting or construction of new intrastate transmission lines;
- É That, in no event should FERC be granted any additional authority to approve or to issue a certificate for a new interstate transmission line that is not consistent with a regional transmission plan developed, in coordination with affected State commissions or other designated State siting authorities, and other regional planning groups, that covers the entire route of the proposed project;
- É That, in no event should FERC be granted any additional authority to approve or to issue a certificate for a new interstate transmission line unless there is already in place either (1) a cost-allocation agreement among all the states through which the proposed project will pass that governs how the project will be financed and paid for; or (2) a FERC-approved cost-allocation rule or methodology that covers the entire route of the proposed project;

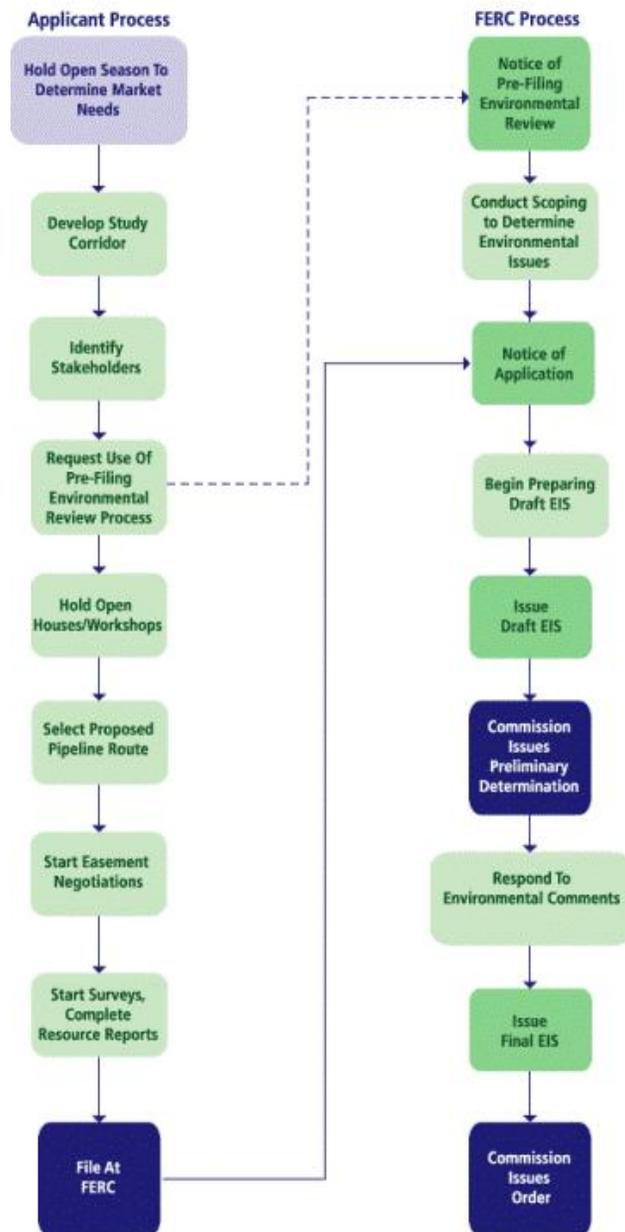
- É That, in no event should any such legislation allow FERC to preempt State authority over retail ratemaking, the mitigation of local environmental impacts under State authority, the interconnection to distribution facilities, the siting of generation, or the participation by affected stakeholders in state and/or regional planning processes; and
- É That, in no event should any such legislation preempt existing State authority to regulate bundled retail transmission services.

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Sponsored by the Committee on Electricity  
Adopted by the NARUC Executive Committee  
March 10, 2009

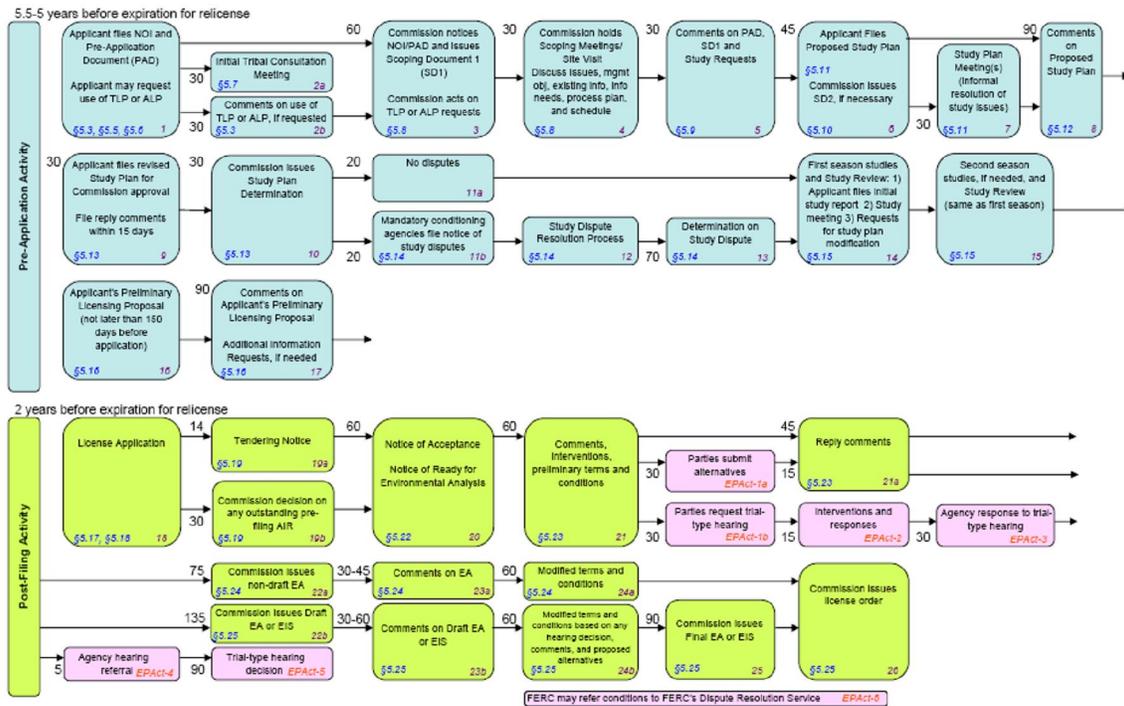
# APPENDIX C

## PROCESSES FOR NATURAL GAS CERTIFICATES Environmental Pre-Filing Process



# APPENDIX D

## Integrated Licensing Process (Section 241 of the Energy Policy Act of 2005)



\*Section 241 of the Energy Policy Act of 2005 in pink.

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