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# STEP THE FEREC UP: BUILD THE NATIONAL ENERGY GRID

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In February 2021, for multiple days, extreme winter weather caused much of Texas to lose access to the energy grid.[i] The impact, 4.5 million homes losing power, 57 deaths, and an excess of \$10 billion in damage, shined a spotlight on Texas's unique electrical grid.[ii] Unlike any other state in the continental United States, which operate within either the Eastern or Western Interconnection energy grids, Texas's grid is largely unconnected to transmission lines outside its borders.[iii] The reason behind this independence is predictable. When Congress began legislating interstate electrical power in the early 20th century, utilities and policymakers in Texas kept electricity within the state to evade reach of the independent agency overseeing interstate transmission, the Federal Energy Regulatory Commission (FERC).[iv]



For many, the events in Texas justify incorporating the state into the nation's other major grids.[v] Interestingly, though Texas's insular system certainly did not help, blackouts occurred for a number of reasons, including inaccurate forecasting, inadequate winter-preparedness of equipment, generation failures across energy sources, and existing short-term gaps in natural gas supply.[vi] Nonetheless, the need for a single national, or macro, grid consisting of the existing three systems serves the broader public interest of decarbonization.

A macro grid strengthens the reliability of the country's energy system while bolstering decarbonization.[vii] Stated plainly, smaller grids risk greater exposure to disruptions, like that caused by extreme weather, in supply and demand.[viii] Decarbonization necessitates efficient distribution of renewable energy sources, which is best accomplished across the widest area, where, in simple terms, a Texas wind farm could power a New York skyscraper through a winter storm.[ix] The efficiencies produced by a national grid are a significant step toward reducing carbon emissions, and such an enterprise requires expansive build out of high-volume, long-distance transmission lines. [x]

The 2021 Bipartisan Infrastructure Bill committed \$20 billion to grid modernization through enhanced research, expanded financing options, and more intentional transmission planning.[xi] However, state regulatory and permitting authorities are a persistent roadblock limiting FERC's

ability to authorize transmission construction. The 2005 Energy Policy Act (“EPA”) aimed to empower FERC with a backstop authority, via permit-issuance authority, to construct transmission capacity in DOE-designated “national interest electric transmission corridors,” (“corridors”) when a state has “withheld approval.”[xii] In 2009 however, a federal court interpreted the authority to apply when a state fails to act on an application, not when a state rejects one.[xiii] The 2022 Inflation Reduction Act (“IRA”) removed this barrier by authorizing FERC authority to issue permits in corridors when a state has denied an application, but failed to address a second shortfall of the 2005 EPA concerning eminent domain.[xiv] As it stands, states can refuse necessary real estate approvals, effectively crippling FERC’s backstop authority, where any high-voltage, long-distance transmission line inevitably implicates state-owned lands.[xv]

Unlike oil and gas pipelines, FERC lacks jurisdiction over interstate transmission lines.[xvi] As such, Congress should remove the state eminent domain preclusion from FERC’s authority.[xvii] Congress has largely left the allocation of federal to state authority in electric transmission systems untouched over the past century, with a notable 2005 exception of attempting to grant FERC backstop authority.[xviii] Moreover, the federal government’s eminent domain authority concerning natural gas pipelines was affirmed in the U.S. Supreme Court earlier this year.[xix] Indeed, the development of natural gas infrastructure greatly accelerated in 1947, when FERC was granted eminent domain authority, and thus full coordinating capacity, for natural gas pipelines.[xx] With FERC’s backstop authority rendered ineffective since its creation nearly two decades ago, eminent domain authority allows FERC to build the infrastructure necessary for a macro grid.[xxi]



To bolster the IRA, in September 2022, Senator Joe Manchin introduced legislation aimed at accelerating the permitting process for energy projects, including granting FERC eminent domain authority, by shortening the statute of limitations to challenge authorizations and requiring the President to identify sites of national importance for permitting priority.[xxii] Driven in part by his delicate centrist position in a divided Senate, Manchin pulled his proposal within days, facing criticism by leadership of both parties for infringing state authority.[xxiii] Opponents highlighted proposals to grant FERC authority to allocate costs of projects onto residents, who may not benefit from a newly constructed transmission line, as well as Manchin's attempt at expediting construction of a natural gas pipeline through his home state.[xxiv]

A national energy grid insulates the country from supply and demand disruptions while also playing a vital role in emissions-free electrical system. Purposeful legislation, significant research & development, and federal-state cooperation remain necessary into the future, but solving the FERC's eminent domain issue is a preliminary, yet critical, step in building a macro grid. Above all, building a secure, reliable, and efficient national energy grid is vital to the country's decarbonization efforts.

[i] King et al., *The Timeline and Events of the February 2021 Texas Electric Grid Blackouts*, The Univ.of Tex. at Austin Energy Inst., July 2021, at 7.

[ii] Sami Sparber, *At least 57 people died in the Texas winter storm, mostly from hypothermia*, Tex. Trib. (Mar. 15, 2021, 6:00 PM), <https://www.texastribune.org/2021/03/15/texas-winter-storm-deaths/> (<https://www.texastribune.org/2021/03/15/texas-winter-storm-deaths/>) [<https://perma.cc/427E-Y6HC>].

[iii] Kate Galbraith, *Texplainer: Why does Texas have its own power grid?*, Tex. Trib. (Feb. 8, 2021), <https://www.texastribune.org/2011/02/08/texplainer-why-does-texas-have-its-own-power-grid/> (<https://www.texastribune.org/2011/02/08/texplainer-why-does-texas-have-its-own-power-grid/>) [<https://perma.cc/JQR8-AQXN>]; Stacy Rickard, *Report: 500,000+ claims filed after Texas winter storm, \$10.3B estimated total loss*, Spectrum News 1 (Jan. 8, 2022, 5:24 AM), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2022/01/05/february-winter-storm-insurance-claims-at-500k> (<https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2022/01/05/february-winter-storm-insurance-claims-at-500k>) [<https://perma.cc/VK96-6YT3>].

[iv] Galbraith, *supra* note iii; Audrey McGlinchy & Mose Buchele, *Texas exists on an energy island. In the 1970s, one company tried to force a change*, KUT 90.5 (Sep. 8, 2022, 10:05 AM), <https://www.kut.org/energy-environment/2022-09-08/texas-energy-island-the-disconnect-vernon-midnight-connection> (<https://www.kut.org/energy-environment/2022-09-08/texas-energy-island-the-disconnect-vernon-midnight-connection>) [<https://perma.cc/T8SQ-JD82>].

[v] Claire McNerny, *Why Is Texas On Its Own Electric Grid?*, KUT 90.5 (July 22, 2021, 4:01 AM), <https://www.kut.org/energy-environment/2021-07-22/texas-electric-grid-february-blackouts-the-disconnect> (<https://www.kut.org/energy-environment/2021-07-22/texas-electric-grid-february-blackouts-the-disconnect>) [<https://perma.cc/7TPM-KXMR>]; Robin Lloyd, *Massive Power Failure Could Finally Cause Texas to Connect with the Nation's Power Grids*, Scientific American (Feb. 19, 2021),

<https://www.scientificamerican.com/article/massive-power-failure-could-finally-cause-texas-to-connect-with-the-nations-power-grids1/> (<https://www.scientificamerican.com/article/massive-power-failure-could-finally-cause-texas-to-connect-with-the-nations-power-grids1/>) [<https://perma.cc/B7JR-BGHJ>].

[vi] King et al., *supra* note 1, at 8-9.; Camila Domonoske, *No, The Blackouts In Texas Weren't Caused By Renewables. Here's What Really Happened*, NPR (Feb. 18, 2021, 3:11 PM), <https://www.npr.org/sections/live-updates-winter-storms-2021/2021/02/18/968967137/no-the-blackouts-in-texas-werent-caused-by-renewables-heres-what-really-happened> (<https://www.npr.org/sections/live-updates-winter-storms-2021/2021/02/18/968967137/no-the-blackouts-in-texas-werent-caused-by-renewables-heres-what-really-happened>) [<https://perma.cc/V2BU-4LWT>]; *See also* Mandi Cai, Erin Douglas & Mitchell Ferman, *How Texas'*

power grid failed in 2021 — and who's responsible for preventing a repeat, Texas Tribune (Feb. 15, 2022, 5:00 PM), <https://www.texastribune.org/2022/02/15/texas-power-grid-winter-storm-2021/> (<https://www.texastribune.org/2022/02/15/texas-power-grid-winter-storm-2021/>) [<https://perma.cc/8SM9-AGLY>].

[vii] Ali Zevin et al., *Building a New Grid without New Legislation: A Path to Revitalizing Federal Transmission Authorities*, Colum. Univ. SIPA Ctr. on Glob. Energy Pol'y, Dec. 2020, at 7; David Roberts, *We've been talking about a national grid for years. It might be time to do it.*, Vox (Aug. 3, 2018, 7:00 AM), <https://www.vox.com/energy-and-environment/2018/8/3/17638246/national-energy-grid-renewables-transmission> (<https://www.vox.com/energy-and-environment/2018/8/3/17638246/national-energy-grid-renewables-transmission>) [<https://perma.cc/X6X7-LUUE>].

[viii] Megan Ray Nichols, *What Are the Benefits of a National Energy Grid?*, *altenergymag* (Oct. 2, 2018, 7:34 AM), <https://www.altenergymag.com/article/2018/10/what-are-the-benefits-of-a-national-energy-grid/29524> (<https://www.altenergymag.com/article/2018/10/what-are-the-benefits-of-a-national-energy-grid/29524>) [<https://perma.cc/ZQL6-BTDD>].

[ix] David Roberts, *We've been talking about a national grid for years. It might be time to do it.*, Vox (Aug. 3, 2018, 7:00 AM), <https://www.vox.com/energy-and-environment/2018/8/3/17638246/national-energy-grid-renewables-transmission> (<https://www.vox.com/energy-and-environment/2018/8/3/17638246/national-energy-grid-renewables-transmission>) [<https://perma.cc/X6X7-LUUE>].

[x] Zevin et al., *supra* note vii.

[xi] *DOE Launches New Initiative From President Biden's Bipartisan Infrastructure Law To Modernize National Grid*, Dep't of Energy, Off. of Elec. (Jan. 12, 2022), <https://www.energy.gov/oe/articles/doe-launches-new-initiative-president-bidens-bipartisan-infrastructure-law-modernize> [<https://perma.cc/QE5P-LG4Z>].

[xii] *Piedmont v. FERC*, 558 F.3d 304, 315 (4th Cir. 2009).

[xiii] *Id.*

[xiv] Michael Wigmore, Brandon Tuck & Kelly Rondinelli, *Feds May Need Power To Take State Lands For New Grid*, Law360 (Oct. 20, 2021, 4:12 PM), <https://media.velaw.com/wp-content/uploads/2021/10/22104432/Feds-May-Need-Power-To-Take-State-Lands-For-New-Grid.pdf> (<https://media.velaw.com/wp-content/uploads/2021/10/22104432/Feds-May-Need-Power-To-Take-State-Lands-For-New-Grid.pdf>).

[xv] *Id.*

[xvi] Bentham Paulos & Warren Leon, *Cleaning up the power grid requires a federal-state partnership*, utility dive, (Feb. 8, 2021), <https://www.utilitydive.com/news/cleaning-up-the-power-grid-requires-a-federal-state-partnership/594697/> (<https://www.utilitydive.com/news/cleaning-up-the-power-grid-requires-a-federal-state-partnership/594697/>) [<https://perma.cc/NT2B-E95H>].

[xvii] Wigmore et al., *supra* note xiv.

[xviii] Zevin et al., *supra* note vii, at 17.

[xix] *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244, 2253 (2021).

[xx] Zevin et al., *supra* note vii, at 17.

[xxi] Wigmore et al., *supra* note xiv.

[xxii] *Manchin Releases Comprehensive Permitting Reform Text To Be Included in Continuing Resolution*, Senate Comm. on Energy & Nat. Res. (Sept. 21, 2022), <https://www.energy.senate.gov/2022/9/manchin-releases-comprehensive-permitting-reform-text-to-be-included-in-continuing-resolution#:~:text=September%2021%2C%202022%20Washington%2C%20DC%20%E2%80%93%20Today%2C%20U.S.,to%20be%20included%20in%20the%20Continuing%20Resolution%20%28CR%29> (<https://www.energy.senate.gov/2022/9/manchin-releases-comprehensive-permitting-reform-text-to-be-included-in-continuing-resolution#:~:text=September%2021%2C%202022%20Washington%2C%20DC%20%E2%80%93%20Today%2C%20U.S.,to%20be%20included%20in%20the%20Continuing%20Resolution%20%28CR%29>) [<https://perma.cc/T62J-RCP6>]; *See also* Miranda Willson & Christian Vasquez, *FERC meeting: Manchin bill, gas woes and cyber 'candy'*, E&E News (Sept. 23, 2022, 6:56 AM), <https://www.eenews.net/articles/ferc-meeting-manchin-bill-gas-woes-and-cyber-candy/> (<https://www.eenews.net/articles/ferc-meeting-manchin-bill-gas-woes-and-cyber-candy/>) [<https://perma.cc/2BD7-9XWR>].

[xxiii] Burgess Everett, Josh Siegel, & Zack Colman, *Why Manchin backed off on his top priority*, Politico (Sept. 28, 2022, 4:30 AM), <https://www.politico.com/news/2022/09/28/manchin-senate-permitting-reform-00059152> (<https://www.politico.com/news/2022/09/28/manchin-senate-permitting-reform-00059152>) [<https://perma.cc/5GU5-WGWR>].

[xxiv] Maggie Severns, *Why Joe Manchin is obsessed with the Mountain Valley Pipeline, according to the 'dean' of West Virginia media*, Grid (Sept. 27, 2022), <https://www.grid.news/story/politics/2022/09/27/why-joe-manchin-is-obsessed-with-the-mountain->

valley-pipeline-according-to-the-dean-of-west-virginia-media/  
(<https://www.grid.news/story/politics/2022/09/27/why-joe-manchin-is-obsessed-with-the-mountain-valley-pipeline-according-to-the-dean-of-west-virginia-media/>) [<https://perma.cc/D3NR-YYU4>]; Robert Bryce, *Manchin's infrastructure bill includes federal power grab for high-voltage transmission*, The Hill (Sept. 27, 2022, 3:00 PM), <https://thehill.com/opinion/energy-environment/3662249-manchins-infrastructure-bill-includes-federal-power-grab-for-high-voltage-transmission/> (<https://thehill.com/opinion/energy-environment/3662249-manchins-infrastructure-bill-includes-federal-power-grab-for-high-voltage-transmission/>) [<https://perma.cc/RAZ9-7DV9>].

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