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September 9, 2011

By Electronic Mail
(congestion09@anl.gov)

Mr. David H. Meyer
Office of Electricity Delivery and Energy
Reliability (OE-20)
U.S. Department of Energy
1000 Independence Avenue SW
Washington DC 20585

**Re: Comments on Proposed Transfer of DOE Responsibilities Under Section 216
of the Federal Power Act**

Dear Mr. Meyer,

Southern Company Services, Inc., by and on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Southern Power Company (collectively, "Southern Companies"), respectfully submits these comments in response to an informal request for comments by September 9, 2011 on a proposed delegation to the Federal Energy Regulatory Commission ("FERC" or "Commission") of the Department of Energy's responsibility to conduct transmission congestion studies and designate National Interest Electric Transmission Corridors granted to the Department by the Energy Policy Act of 2005. By providing these comments at this stage, Southern Companies do not intend to surrender any legal or equitable rights to challenge any delegations granted by the Department, to provide further comments as merited or as may be sought by the Department, the Commission, or other federal agencies, and hereby reserves all such rights.

Southern Companies believe that when Congress enacted the Energy Policy Act of 2005, it could easily have placed responsibility to conduct the required transmission congestion studies and to designate National Interest Electric Transmission Corridors with the same agency that was given backstop transmission line siting authority. Clearly, Congressional intent at that time was not to concentrate these authorities in a single agency and to recognize a critical distinction between the role of the Department and of FERC under the statute. There has been no record developed to date to suggest that the decision of Congress was wrong, and there has been no analysis presented to us to demonstrate that the Secretary should or could over-ride this decision by Congress. At the very least, it is appropriate and reasonable that the Secretary and Chairman consult with Congress before the proposed delegation of the Secretary's authority is granted.

The avowed purpose and potential effect of the proposed delegation is of national importance, with a possible negative impact on a large number of individuals and businesses. The lack of process through which such a major public policy decision has been proposed and is being considered, therefore, is disconcerting. We are aware of no public, formal notice of this possible action in the Federal Register. Conference calls have been conducted with several groups (such as Edison Electric Institute and the National Association of Regulatory Utility Commissioners), but not all stakeholders (or the public generally) have been notified of this possible action, and many have heard about it only through the trade press or through other groups. Similarly, the documents outlining the proposal only recently (on or about September 6, 2011) were made available on the website of the Department of Energy, simultaneously with the announcement on the website that any comments on the proposal must be received by September 9, 2011. It is hard to rationalize how a proposal with broad regulatory and policy consequences

is being advanced without any formal process to receive comments. This apparent rush under the circumstances justifiably undermines public confidence that the prudence of the proposal, or its policy consequences, have been (or could be) fully explored and considered.

In addition, the legal process and lack of procedures under which the proposed delegation is being evaluated and the incomplete and informal basis upon which any agency delegation might be taken is also a source of serious concern. Although internal delegations of administrative authority are often exempt from the notice and comment provisions of the Administrative Procedure Act, the delegation under consideration is different. The delegation relationship as between the Secretary and the Federal Energy Regulatory Commission requires adherence to certain administrative process principles, including prior formal notice. Such notice has yet to occur. We respectfully direct the Secretary's attention to Section 402(e) of the Department of Energy Organization Act, which expressly provides any delegation by the Secretary to the Federal Energy Regulatory Commission, shall be subject to public notice. Greater formality and deliberate, thoughtful interaction with interested parties is also appropriate under the circumstances because Section 216 specifically contemplates separate and distinct roles as between the Department and FERC. This separation was intentional, is specific, and should not be undone through informal means. It would not be appropriate for the Department to take actions that would set a framework for repurposing of the statute, contrary to its plain meaning. Since Section 216 specifies separate and distinct roles for the Department and FERC under Section 216, at the very last, respect for the legislative branch and prudence would seem to dictate consultation with Congress.

Accordingly, it is here respectfully recommended that the Secretary issue a public notice of the proposed delegation (and the basis for that delegation) in the Federal Register that solicits comment; provide sufficient time for the public to consider and frame comments, and to provide an explanation justifying any resulting delegation order. Moreover, part of the Department's consideration of the proposed delegation should address whether the proposed delegation would constitute a transfer of functions assigned specifically to the Department by statute, and which may only be transferred to the FERC by amending the Department of Energy Organization Act or by other statutory directive.

While Southern Companies have significant concerns regarding the details of what the FERC plans to do once it is delegated the authority sought, we believe a formal process must be established to consider both the potential delegation and the purpose for which the delegation is being pursued. Consideration of the proposed delegation without fully vetting the purpose to which the delegated authority may be directed would not be a reasonable course for the Department to take. It also would not be reasonable for the Department to use any potential delegation as part of an exercise to bypass or challenge appellate decisions concerning Section 216. The *ad hoc* basis by which information about the proposed delegation has been released, together with a wholly insufficient time by which interested parties may become educated on the proposal and its implications, is entirely insufficient to address these and other critical policy and legal issues. Furthermore, Southern Companies are not aware of any (and FERC or others have not identified any) transmission projects that have been delayed or unable to proceed because congestion study and NIETC authority rests with DOE. There is simply no need for a rush to judgment. Before undertaking such a significant policy change, therefore, it should be the

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Secretary's and Chairman's responsibility to explain and justify why the potential repurposing of Section 216 is lawful and appropriate. The Secretary should also fully consult with the states—beyond this informal process—to fully understand their concerns before taking further action.

Sincerely,

/s/ Robert A. Schaffeld
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