



Public Service Commission of Wisconsin

Phil Montgomery, Chairperson
Eric Callisto, Commissioner
Ellen Nowak, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

via e-mail:

congestion09@anl.gov

the.secretary@hq.doe.gov

The Honorable Steven Chu
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

Re: Potential for Comments to the U.S. Department of Energy
regarding a Proposed Delegation of Authority under § 216
of the Federal Power Act to the Federal Energy Regulatory
Commission

Dear Secretary Chu:

The Public Service Commission of Wisconsin (PSCW) appreciates the opportunity to comment on a proposed delegation of certain responsibilities of the Department of Energy (DOE) to the Federal Energy Regulatory Commission (FERC) under § 216 of the Federal Power Act (FPA), 16 U.S.C. § 824p. Section 216 governs the establishment and procedures relating to the identification of national interest electric transmission corridors (NIETC) and the authorization of the FERC to “backstop” state transmission siting processes in certain circumstances. Time to review the proposed delegation has been very short, and the materials made publicly available are few, so our comments are made with the standard reservations associated with such limitations.¹

The clear purpose of § 216, stated broadly, is to promote the build out of transmission in areas of transmission need. To conclude that it has not worked as intended is easy, but that is not to say its purposes have not been achieved through other means. The Wisconsin experience shows that constrained and congested transmission areas can find relief through long-standing authority and concerted action. Ten years ago, Wisconsin was one of the most constrained areas in the Midwest Independent Transmission System Operator, Inc. (MISO). The PSCW understood what that meant for reliability and energy pricing, and resolved to remedy the problem. Since then, Wisconsin has built or approved 1,207 miles of new and rebuilt transmission lines, including 577 miles of 345 kilovolt backbone. These facilities have local, state-wide, and regional value. The cost was substantial. Siting was difficult. But the work got done because Wisconsin understood the short- and long-term importance of strengthening our grid.

¹This submission is not intended in any way to provide *ex parte* comments on the merits of any active dockets pending before FERC.

That history of success is important because it is reflective of a greater push in the Midwest to plan and build for transmission. This effort is a partnership of the federal and state jurisdictions, and the proposed delegation could be seen as contrary to the development of that partnership, especially as that development is expected to be worked out in the next 18 months through the compliance filings expected under *Order 1000*.²

The proposed delegation is based on a belief that somehow not enough transmission is being built because of the split of responsibilities between the DOE, FERC, and states as framed in § 216. This is mistaking a correlation with causation. As noted by the Wisconsin experience, there is no evidence that *needed* transmission construction is not being built, or that the extant § 216 jurisdictional split causes project denials or delays any more than a myriad of other known and real influences, such the national recession or the impact of demand response and energy efficiency programs.

Additionally, the compliance phase of *Order 1000* in which states and other stakeholders are obliged to engage stakeholder processes to improve and open up regional transmission planning has barely begun. These regional stakeholder processes should be allowed to proceed without the implied threat of federal intervention, or an implicit foregone conclusion that the processes are likely to fail. The proposed delegation, in advancing efficiency and simplification as a justification, inherently cuts against FERC's fundamental underlying perspective in *Order 890* that a broad consensus among many stakeholders is a practical necessity in planning transmission projects and related cost allocations without risking years of litigation. Put differently, the proposed delegation implicitly demands "top-down" regional planning, an approach inconsistent with the "bottom-up" stakeholder processes endorsed by FERC in *Order 890*.³

Moreover, the compliance discussions may bring up alternatives that the proposed delegation leaves unexamined. For example, the use of Joint Boards under § 209 of the FPA is a means of fostering federal and state cooperation in transmission development that could well be a part of transmission organization discussions, especially because Joint Boards have the potential to save administrative resources and cut planning time. The proposed delegation also does not consider rulemaking for any approach but FERC assumption of NIETC designation duties. However, Congress has already articulated a specific opening for interstate compacts in § 216(i), a different path that the stakeholder discussions might well embrace, especially from the perspective of state commissions. Those discussions may result in requests to FERC for support for compact arrangements as a substitute for "top-down" control. In light of the foregoing potentials for

² *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Docket No. RM10-23-000, 136 FERC ¶ 61,051 (July 21, 2011) (*Order 1000*).

³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,288 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) (*Order 890*).

election of different paths to more transmission, the proposed delegation is certainly premature, and tends to prejudge too much the potential ways forward.

The discussion above segues to the second problem of whether the delegation is proper under the procedural framework of § 216. Congress clearly had a plan in mind when it passed the legislation, one that included a split of federal responsibility. The PSCW questions whether the DOE Secretary may delegate its authority contrary to the fundamental separation of responsibilities specifically set up in § 216(h)(9).

That provision specifically provides that the DOE Secretary in “exercising the responsibilities under this section [§ 216]” is to consult regularly with FERC, electric reliability organizations, and regional transmission organizations approved by FERC. Section 216(h)(9). The delegation would effectively abolish a statutory duty of the DOE secretary by an improper delegation that merges all decision making regarding NIETC designations in FERC, effectively silencing the consultative roles intended for transmission and electric reliability organizations, framed in parity with FERC input. The proposed delegation would appear to contradict explicit statutory direction regarding administration of § 216 and is not saved by any general delegation powers normally vested in a department secretary.⁴

The PSCW is committed to a fruitful federal and state partnership to advance necessary transmission construction. These comments are submitted with the view of promoting achievement of that joint goal. The PSCW appreciates the opportunity to offer comments on the

⁴ In § 216, the Secretary’s duty to establish NIETC designated corridors is framed in § 216(a) apart from the construction and permitting functions assigned to FERC in § 216(b) and (c). Furthermore, in § 216(h)(9) there is a specific consultation duty imposed on the DOE secretary with respect to FERC, electric reliability organizations and regional transmission organizations. The proposed delegation, would amount to an administrative repeal of a statute. Three entities are specified in apparent equal relationship to advise and influence the DOE Secretary’s determination of NIETCs under § 216(a)(2) and (3). That opportunity to influence a decision is not only removed, but one of the three advisors, the FERC, becomes superior to the other two.

Sections 642 and 402(e) of the Dept. of Energy Organization Act, Pub. L. 95-91, 42 USC §§ 7172 and 7252, respectively, have interesting differences in terminology that suggest the proposed delegation cannot comply with law. Section 7172 states that the DOE Secretary may delegate “any other matter” to FERC after public notice. Section 7252, however, states that the DOE secretary, unless “expressly prohibited,” may delegate any of his functions to “such officers and employees of the Department.” There is a reasonable argument about whether § 7172, dating from 1977, can be interpreted to permit the proposed delegation when § 216 was enacted in 2005 by Congress with specific duties assigned to known different parts of the DOE. Section 7252 suggests that delegations are only to officers and employees of the department, not “components” such as FERC, unless an absurdity is created, such as clear fulfillment of the organization statute. Section 216 of the FPA is not an “express prohibition,” but is the complement, an “express assignment” of duties. Its interpretation should have the same effect on the scope of the DOE Secretary’s powers to delegate as an express prohibition. Notwithstanding § 7172, the most reasonable interpretation is that § 216 defines matters the DOE Secretary “may not assign” because of its later, Congressionally-specified, arrangement of responsibilities between the DOE Secretary and FERC.

The Honorable Steven Chu
Page 4

delegation and asks to be named on any notice service list regarding the delegation. Your consideration of the foregoing comments will be much appreciated.

Dated at Madison, Wisconsin, September 8, 2011

By the Commission:



Sandra J. Paske
Secretary to the Commission

SJP:MSV:hms:G:\FERC\DOE 216 Delegation\Comment Ltr to Secy Chu

cc: John Wellenhoff, Chairman, FERC
Philip D. Moeller, Commissioner, FERC
Marc Spitzer, Commissioner, FERC
John R. Norris, Commissioner, FERC
Cheryl A. LaFleur, Commissioner, FERC
Lauren Azar, Senior Advisor to Secretary, DOE