

September 9, 2011

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
congestion09@anl.gov

Re: Proposed Delegation of Federal Power Act § 216 Authority

Mr. Meyer:

The undersigned Indicated Southeastern Utilities (the “Utilities”)¹ are providing this letter in joint response to an informal request for input regarding the possible delegation by the Department of Energy (“DOE”) of authority it holds under Section 216 of the Federal Power Act (“FPA”) to the Federal Energy Regulatory Commission (“FERC”). The Utilities appreciate the opportunity to convey their substantial concerns with the proposal. Chief among these concerns is the fact that the proposed delegation would undermine and further marginalize the traditional role of the States over transmission siting, permitting and construction within their sovereign borders. Through the architecture and language of Section 216, Congress deferred to this State authority and established only a limited federal “backstop” program, with defined checks and balances that ensure the program operates deliberately and with deference to State prerogatives. If “FERC and others”² wish to change this statute so that more federal permits can be issued or certain restrictions imposed by recent court decisions can be lifted, their redress is with Congress. Neither DOE nor FERC has the authority to “repurpose” the statute to effect such a change. For these reasons, as elaborated more fully below, the Utilities urge DOE to reject this proposal and retain its authority under Section 216, as Congress intended.

¹ The Indicated Southeastern Utilities include: Central Electric Power Cooperative, Inc., Dalton Utilities, JEA, MEAG Power, Orlando Utilities Commission, Progress Energy Service Company, LLC, South Carolina Electric & Gas Company, South Carolina Public Service Authority (“Santee Cooper”), and Southern Company Services, Inc., on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Southern Power Company.

² The recent announcement regarding the proposed delegation, which was first posted on DOE’s website on or about September 6, 2011, indicates that the idea for delegation arose not with DOE, but with “FERC and others.” <http://www.congestion09.anl.gov/>.

1. Respect for traditional State authority should remain DOE's paramount objective.

It is longstanding policy and well established under the law that transmission siting, permitting and construction functions are the prerogative of the States. For States like those in the Southeast, this authority likewise extends to the oversight of integrated resource planning, by which retail electric service remains reliable and cost-effective. Significant transmission congestion and constraints are avoided through the joint study of generation and transmission needs, along with distribution and demand side management. State authorities regulate the implementation of these plans, and in so doing carry out their respective charges under State law to ensure that the interests of consumers and the interests of utilities remain balanced and rates are just and reasonable.

Congress reaffirmed this traditional paradigm through Section 216, but took action to address limited authority of some States to address interstate issues raised in some transmission siting and construction situations. In so doing, it neither preempted nor impeded State authority. Rather, Congress established a backstop to State authority: to address those situations where a State regulatory body had a proposal for the construction or modification of a transmission facility and it (a) lacked the ability to act on the proposal; (b) failed to act on the proposal within a defined period; or (c) acted arbitrarily or capriciously with regard to the proposal, by conditioning approval in such a way as to make the proposal ineffective or uneconomic. In essence, Congress addressed potential gaps in transmission development.

Congress acted with restraint, however, and did not make backstop permit authority available everywhere. Rather, backstop permits could only be sought in areas that had been designated by DOE to be a national interest electric transmission corridor ("NIETC"). And DOE could only designate a NIETC based on a study of electric congestion conducted in consultation with affected States and after considering alternatives and recommendations from interested parties, including an opportunity for comment from affected States.

The proposed delegation under consideration now, and FERC's plans for implementation of such a delegation, would upset the careful balance struck by Section 216 and it necessarily would disrespect and impede State authority. As explained informally by FERC, the existing two-tiered, bifurcated program would be concentrated under one agency, FERC. The associated checks and balances would disappear, as FERC would be responsible both for NIETC designations (and the congestion study) and permitting decisions. Even more problematic, FERC apparently would expand the backstop program to include:

- 1) The designation of project-specific NIETCs;
- 2) The consideration of "non-environmental" factors that are beyond the scope of DOE's existing Section 216(a) authority;
- 3) The ability of developers to propose NIETC designations simultaneously with an application for permitting authority (including in circumstances where the

developer's proposal was not identified by the Order No. 1000³ regional planning process for cost allocation); and

- 4) The involvement of congestion studies and NIETC designations in the Order No. 1000 regional planning processes.

Each of these proposals represents an incremental increase in the scope of the backstop program, and a corresponding decrease in the authority of States over the development of infrastructure within their borders. Taken together these plans would be incredibly disruptive. Should DOE make the proposed delegation and allow FERC to include the delegated authority in its Order No. 1000 processes (an idea that rulemaking arguably disavowed), FERC will further frustrate the bottom-up planning approach successfully utilized across the Southeast and, contrary to the will of Congress in Section 216 and elsewhere in the FPA, will effectively create a federal top-down model.

Moreover, when FERC promulgated its implementing regulations for the backstop permitting process, it recognized the importance of respecting, and not impeding, State authority. To that end, the regulations declined to establish a parallel federal permitting system. In FERC's view, an unadulterated State process would be one that could run its course, without undue pressure or influence, and potentially reach a solution that obviated the need for a federal permit.⁴ In FERC's view, this approach was one "that is more fully respectful of State jurisdiction."⁵ Under the new FERC proposal, however, State and federal proceedings would run along a parallel track. While such a process might expedite matters from an applicant's (or FERC's) point of view, it would inhibit many State authorities from fully participating in the federal proceedings, as numerous local jurisdictions are prevented as a matter of law and/or policy from commenting on pending proceedings. Thus, a parallel federal track not only could disrupt State proceedings, it also could effectively disqualify State authorities from participating in the federal proceedings. Such an outcome is a clear departure from the respect for State jurisdiction the current process affords.

2. Illegality of proposed delegation, given Congressional design and the lack of formal notice.

The Utilities also are troubled by the proposed delegation from a legal perspective. As discussed, Section 216 represents a decision by Congress to allow federal authorities, in discrete circumstances, to intrude into an area that had been left to longstanding State authority: siting, permitting and construction of transmission facilities. Appreciating the significance of its action, Congress established a very deliberate system of checks and balances to ensure that the exercise of this federal authority would happen only after due consideration had been given of the

³ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 (2011) ("Order No. 1000").

⁴ *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 117 FERC ¶ 61,202, PP 19-21 (Nov. 16, 2006).

⁵ *See id.* P 20.

consequences and impacts, including the fact that any federal construction permit awarded carried with it the right of eminent domain authority.⁶ To this end, the prerequisites for the exercise of any such federal authority were divided between two different agencies, DOE (politically accountable) and FERC (independent).

The proposed delegation would concentrate all of DOE's Section 216(a) responsibilities (*i.e.*, congestion studies and NIETC designation) within FERC. And FERC would continue to retain its authority to award construction permits. No longer would the separation established by Congress exist. The body overseeing the award of permits would be the same body performing congestion studies and potentially designating NIETCs. The designed political accountability would be forfeited. Such a result would be contrary to the will of Congress as prescribed by the statute. The proposed delegation necessarily then is beyond the powers of the DOE.

The Utilities recognize that DOE has general authority to delegate matters to FERC, albeit after public notice.⁷ In Section 216, however, Congress made certain explicit decisions as to which agency would be performing which tasks. When those tasks are performed, and when all conditions are satisfied, only then might a State's authority be circumscribed and a federal construction permit (carrying eminent domain authority) be issued. The Utilities believe this very specific design cannot, as a matter of law, be delegated away through a separate, earlier grant of general delegation authority.

The language of the statute also compels the Utilities to question some of FERC's implementation plans (insofar as such plans have been revealed). For example, allowing project-specific NIETCs would collapse the two-tiered structure Congress established, whereby a NIETC is first designated by the Secretary of DOE, and then a permit within the NIETC is awarded, after hearing and provided certain conditions are satisfied. The plan to consider "non-environmental" factors, given the illustrative list FERC set forth in its plan, appears to be an expansion of items enumerated by Congress in Section 216(a)(4). To be sure, however, Congress set forth an exclusive list there, and did not specify that the Secretary could consider other matters in his discretion. Also, the notion that a developer could propose a NIETC designation at the same time as it applies for a permit conflicts with the provision in Section 216(b) that authorizes FERC to issue a permit (after hearing) in a designated NIETC. As discussed earlier, Section 216 reflects a deliberate, and measured, effort by Congress to authorize very limited intrusions into an area traditionally left to the States. Not surprisingly, Congress placed one of the more sensitive portions of the related responsibilities in the hand of the Secretary of DOE, a position directly answerable to the President. The idea that a private entity could accomplish the same end, but without the same degree of oversight, goes far beyond what Congress contemplated in its careful crafting of Section 216.

Finally, given the significance of the issues at hand, the Utilities question the legality of, let alone the need for, advancing this matter along so hastily, and without any formal notice and

⁶ Notably, Section 216 was debated and enacted contemporaneously with the United States Supreme Court's determination in the high profile eminent domain case *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁷ 42 U.S.C. § 7172; *see also* 42 U.S.C. § 7191.

comment proceedings.⁸ Throughout Section 216, Congress provided opportunities for State and public involvement. If DOE and FERC are determined to embark down a path that on its face defies Congressional intent, it would seem appropriate that States, the public and indeed Congress be given a more fulsome opportunity to vet the issue. The fact that plans need to be made for the 2012 Congestion Study does not, in the Utilities' view, justify truncated consideration. Indeed, the proximity of the 2012 Congestion Study supports the abandonment of this initiative by DOE.

3. Delegation would not increase efficiency in the administration of Section 216.

In the materials that have been circulated on the proposed delegation and FERC's apparent plan for implementation, the desire for more efficiency in the utilization of Section 216 is cited as the primary impetus for delegation to FERC. The Utilities believe the delegation would have the opposite effect and would create inefficiencies in the process. The linkage of Section 216 authority to FERC's recent Order No. 1000 is a prime example. Dozens upon dozens of entities in both the private and public sector have called the legality of that order into question. Given the cloud hanging over Order No. 1000, prudence and efficiency would counsel DOE to proceed with the 2012 Congestion Study, rather than to place any accomplishments to be had in the next congestion study cycle at risk of being overturned or called into question by the courts.

The Utilities likewise do not share the view of FERC that a delegation will allow it to efficiently navigate the requirements of the Ninth Circuit Court of Appeals' 2011 decision⁹ or the Fourth Circuit's 2009 decision.¹⁰ The Ninth Circuit was clear that as part of a NIETC designation, DOE had to prepare an environmental impact statement or an environmental assessment in accordance with the National Environmental Protection Act ("NEPA"). This requirement will remain and FERC's discussion papers seem to contemplate the performance of two NEPA analyses as well, one at the NIETC stage and one at the permit stage. As to the Fourth Circuit decision that FERC could not issue a construction permit in situations where a State regulatory authority affirmatively denied an application, regardless of how other courts construe that decision, FERC is bound fully by that decision, as it reflects the disposition of FERC's rulemaking on the backstop siting permitting regulations.¹¹ In any case, any dissatisfaction with the decision of the Fourth Circuit should be pursued through legislation, as discussed above, not through federal administrative maneuvers.

⁸ The Utilities first became aware of this proposal less than three weeks ago, when aspects of the proposal surfaced in certain informal, written materials circulated by FERC and in ensuing media accounts. The broad call for informal feedback was only announced by the Chairman during his participation in industry teleconferences, including conferences with Edison Electric Institute and Eastern Interconnection States Planning Council, on September 1.

⁹ *California Wilderness Coalition v. DOE*, 631 F.3d 1072 (9th Cir. 2011);

¹⁰ *Piedmont Env'tl Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

¹¹ It is worth noting that several petitions for review had been consolidated in that case, specifically petitions from the Second, Fourth and D.C. Circuits. See *Piedmont*, 558 F.3d at 309, 312.

In sum, given the statutory issues, existing case law and longstanding policy, the Utilities believe that any effort by FERC to implement a delegation of authority from DOE will be subject to challenge, vigorous court scrutiny and, inevitably, invalidation. In the view of the Utilities, if one of the hurdles to the program is the coordination of federal agency permits, resources would seem better focused on that discrete aspect of the program, rather than jettisoning the proverbial baby with the bath water, and starting from a much more legally suspect footing. That being said (and leaving aside the legal problems raised by the prospect of delegation), it should be emphasized that the purpose of Section 216 was the establishment of backstop authority. Thus, even under the most optimal and efficient set of circumstances, federal construction permits should in any case remain the exception; *i.e.*, the “backstop” created by Section 216.

Conclusion

The Utilities again extend their appreciation for the opportunity to submit this informal feedback to the proposal under consideration. As the above reflects, the Utilities cannot support and must oppose the proposed delegation, as it would effect an unlawful infringement on longstanding State authority over the siting, permitting and construction of transmission facilities. Accordingly, the Utilities urge DOE not to undertake the proposed delegation.

Sincerely,

For Southern Company Services, Inc.:

s/ Robert A. Schaffeld
Robert A. Schaffeld
Vice President, SCS Transmission
Southern Company Services, Inc.
600 North 18th St.
Birmingham, Alabama 35291
Tel: 205-586-6310
raschaff@southernco.com

For South Carolina Public Service Authority:

s/ Stephen R. Pelcher
Stephen R. Pelcher
Associate General Counsel
South Carolina Public Service Authority
One Riverwood Drive
Moncks Corner, SC 29461-2901
srpelche@santeecooper.com

Mr. David H. Meyer
September 9, 2011
Page 7

For South Carolina Electric & Gas Company: For Progress Energy Service Company, LLC:

s/ Catherine D. Taylor
Catherine D. Taylor
Associate General Counsel
SCANA Corporation
220 Operation Way
MC C222
Cayce, South Carolina 29033-3701
(803) 217 9356
cdtaylor@scana.com

s/ Danielle T. Bennett
Danielle T. Bennett
Associate General Counsel
Progress Energy Service Company, LLC
410 S. Wilmington Street, PEB 17B2
Raleigh, NC 27601-1849
Phone: (919) 546-5941
Fax: (919) 546-3805
Dani.Bennett@pgnmail.com

For MEAG Power:

s/ Gary Schaeff
Gary Schaeff
MEAG Power
1470 Riveredge Parkway, NW
Atlanta, GA 30328-4686
Tel. (770) 563-0566
gschaeff@meagpower.org

For JEA:

s/ Ted E. Hobson
Ted E. Hobson
VP, Fuels, Purchased Power and Compliance
JEA 21 West Church Street
Jacksonville, FL 32202
Tel. (904) 665-7775
HobsTE@jea.com

For Central Electric Power Cooperative, Inc.: For Dalton Utilities:

s/Arthur G. Fusco
Arthur G. Fusco
Senior Vice President
Property and Corporate Counsel
Central Electric Power Cooperative, Inc.
P.O. Box 1455
121 Greystone Blvd.
Columbia, SC 29202 (29210)
afusco@cepci.org

s/Don Cope
Don Cope
President and CEO
Dalton Utilities
P.O. Box 869
Dalton, GA 30722
dcope@dutil.com

For Orlando Utilities Commission:

s/ Clint P. Bullock
Clint P. Bullock
Vice President - Energy Delivery
Business Unit
Orlando Utilities Commission
6003 Pershing Avenue
Orlando, Florida 32822
CBullock@ouc.com