



September 9, 2011

VIA WEBSITE SUBMISSION

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

Re: Proposed Delegation of Authorities under Section 216 of the Federal Power Act from the Department of Energy to the Federal Energy Regulatory Commission

Dear Secretary Chu:

In response to the request for comments posted on the Department of Energy's ("DOE" or "Department") website, the American Public Power Association ("APPA")¹ submits its comments on the proposal of the Federal Energy Regulatory Commission ("Commission") to have DOE delegate certain authorities granted to DOE by Congress under Section 216 of the Federal Power Act ("FPA") to the Commission.

APPA has long been active in the debates before the Commission and in Congress regarding electric transmission policy. Because of the difficulties the electric utility industry had experienced with the permitting and siting of new transmission facilities, APPA supported the "backstop" siting provisions of the Energy Policy Act of 2005 ("EPAct 2005") that were incorporated into the FPA in new Section 216. Moreover, APPA participated actively in the subsequent Commission rulemaking docket implementing its backstop siting authority. It also filed comments with DOE regarding its corridor designation process. It went on to participate as an intervenor in the two appellate cases interpreting the provisions of Section 216, *Piedmont Environmental Council, et al. v. FERC*, (4th Cir. No. 07-1651) and *California Wilderness Coalition, et al. v. DOE* (9th Cir. No. 08-71074). In both cases, APPA participated on the side of the government, in the hopes of preserving the backstop siting provision as a viable vehicle to get needed transmission facilities sited and constructed. In the wake of the United States Court of Appeals for the Fourth Circuit's adverse decision in *Piedmont*, APPA, along with other industry trade associations, sought Supreme Court review of the *Piedmont* decision. Unfortunately, the Commission (acting through

¹ APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power utilities provide over 15 percent of all kilowatt-hour ("kWh") sales to ultimate customers, and do business in every state except Hawaii. All APPA utility members are Load-Serving Entities ("LSEs"), with the primary goal of providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities. Collectively, public power systems serve over 46 million Americans.

the Solicitor General) opposed such review, and the trade associations' efforts to obtain review were unsuccessful.²

APPA would continue to support efforts to implement a backstop siting mechanism that is designed to facilitate the construction of new transmission facilities needed to provide transmission and power supply services to LSEs and the consumers they serve. APPA also would strongly support efforts to coordinate and streamline necessary reviews and approvals by involved federal agencies and departments of proposed transmission facilities that would impact federal lands. APPA members, especially those in the West, have long reported to APPA that obtaining the myriad federal approvals required to site transmission facilities on federal lands can be a very difficult and protracted process.

However, much has changed since FPA Section 216 was passed. Most relevant here, the Commission on July 21, 2011, issued in Docket No. RM10-23-000 its Order No. 1000, 76 Fed. Reg. 49,842 (August 11, 2011). In that Order, the Commission is requiring the electric utility industry to expend very considerable resources to develop more rigorous and comprehensive regional transmission planning processes, in an attempt to ensure that the most economical and efficient set of regional transmission facilities is developed and constructed. APPA supports these Commission goals.

In two material respects, however, APPA believes that the Commission erred in Order No. 1000. APPA therefore filed an application for rehearing of that order with the Commission on August 21, 2011. Because APPA has these same two concerns with the instant delegation proposal, APPA is laying them out in these comments.

First, the Commission erred in Order No. 1000 in not requiring merchant transmission providers to participate fully in the regional transmission planning processes that are going to be developed pursuant to the order. Rather, the Commission merely required merchant transmission developers to "provide adequate information and data" to regional transmission planning processes:

We therefore conclude that it is necessary for a merchant transmission developer to provide adequate information and data to allow public utility transmission providers in the transmission planning region to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region. We will allow public utility transmission providers in each transmission planning region, in consultation with stakeholders, in the first instance to propose what information would be required. Public utility transmission providers should include these requirements in their filings to comply with this Final Rule.

Order No. 1000 at P 164. As APPA explained to the Commission in its rehearing application, the mere provision of information does nothing to determine whether a proposed merchant transmission project is the best solution for an actual or perceived transmission need, or whether it is in fact needed by the region at all. Translated into layman's terms, it takes a village to plan a regional transmission system. All of the

² Even though APPA strongly disagrees with the reasoning and result of the *Piedmont* decision, it does not support the Commission's contention that it is simply free to disregard the holding in that case in any other Circuit, because "the effect of the *Piedmont* case is limited to the Fourth Circuit." Commission Proposal at 3. If such a practice were to become routine, it would be very difficult for entities in the electric utility industry to understand and abide by one national electric policy, given the patchwork of different applicable cases and policies in different Circuits. Very few cases affecting the industry are accepted for review by the Supreme Court; hence, it would be difficult to resolve conflicts among circuits.

villagers must participate fully if the plan is to maximize regional benefits and minimize the associated costs and adverse impacts on land and other resources. If certain entities proposing transmission projects are effectively able to ignore the negative impacts of their projects on existing transmission facilities and others' proposed transmission projects, and need not show that their transmission projects will fit into a regional plan that maximizes benefits to the region, then the resulting regional plan will very likely be suboptimal.

This shortcoming in Order No. 1000 must be considered when evaluating the delegation proposal now before you. If merchant transmission developers can avoid participation in regional transmission planning processes (processes in which the states and LSEs, such as APPA's members, participate) and can also effectively avoid state siting and permitting processes by resorting to the Commission's proposed revised backstop siting procedures, then they are effectively freed of the obligation to justify their transmission projects side-by-side with other proposed projects, and to show their projects are the most efficient and optimal transmission solutions for a region's transmission needs. Allowing such projects to "leap frog" transmission planning and siting procedures could therefore undermine the very regional transmission planning regimes that the Commission is requiring public utility transmission providers and stakeholders to develop.

APPA therefore believes that any delegation by DOE of its authorities under FPA Section 216 to the Commission should be expressly limited, such that the Commission would only consider under such delegated authorities proposed transmission facilities and projects that have been fully evaluated in a regional transmission planning process under Order No. 1000 and found in that process to be needed to meet regional transmission requirements. Any delegation that DOE makes of its authorities to the Commission under FPA Section 216 should be so conditioned.

Second, APPA believes that the Commission in Order No. 1000 erred by failing to carry out its statutory obligations under the FPA. There is a specific federal policy requirement regarding transmission planning set out in the FPA itself—Section 217(b)(4). This section of the FPA was also added by EPCA 2005. It states:

The Commission shall exercise the authority of the Commission under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

[Emphasis supplied.]

Section 217(b)(4) is quite clear. It uses the term "shall," the language of command. It instructs the Commission to use its FPA authorities to facilitate the planning and expansion of transmission facilities to meet LSEs' reasonable resource needs and to enable them to secure the long-term transmission rights they require to meet their service obligations.

APPA explained to the Commission in its rulemaking comments in Docket No. RM10-23-000 that state-driven resource procurement policies (such as renewable portfolio standards and increased reliance on energy efficiency measures and distributed generation) are inextricably intertwined with the FPA's federal policy requiring the Commission to support the long-term resource needs of LSEs with service obligations in transmission planning. Renewable generation and demand response are needed not as ends

in themselves, but as resources to meet loads. LSEs' energy efficiency goals and plans to develop distributed generation will likewise be incorporated in their individual integrated resource plans. By concentrating on the planning of transmission facilities that are in fact required to support the planned resource needs of LSEs, the transmission facilities actually needed to support *market-selected* renewable resources would be necessarily included. Reductions in reliance on transmission facilities due to increased reliance on energy efficiency and distributed generation would likewise be taken into account.

APPA further explained to the Commission that the chances would be greater that the right transmission facilities in the right regions would be planned and constructed under a transmission planning paradigm that concentrated on LSE resource plans. LSEs' integrated resource plans consider the respective costs and benefits of demand and supply-side resources, different fuel types, distributed generation, and energy efficiency, as well as the costs and benefits of the transmission facilities needed (or not needed) to support these resource choices. By concentrating on the planning and construction of transmission facilities to support the resource needs of LSEs, transmission planners could accommodate LSEs' changing resource choices over time, including the renewable resources that they will increasingly need to meet state (and perhaps federal) resource portfolio standards and increasingly strict environmental regulations. Because LSE integrated resource planning would of necessity take into account relevant state and federal public policy requirements, APPA advocated that the Commission in its final order should concentrate on its existing, explicit federal statutory obligation to "facilitate[] the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities."

The Commission, however, chose instead in Order No. 1000 to relegate FPA Section 217(b)(4) to just another "Public Policy Requirement" that public utility transmission providers are free to consider (or reject) in their regional transmission planning processes. Order No. 1000 at P 215. This ruling misses the point. FPA Section 217(b)(4) is not "any other federal law or regulation that drives transmission needs." *Id.* It is a specific legal directive regarding transmission planning enacted by Congress and imposed on the Commission. APPA has therefore sought rehearing of this aspect of Order No. 1000.

Section 217(b)(4) would also come into play if the Secretary were to delegate the authorities currently allocated to DOE under Section 216 to the Commission. Since Section 217(b)(4) commands the Commission to use its FPA authorities to "facilitate[] the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities," it should exercise any new authorities under the FPA delegated to it by DOE consistent with this mandate. Yet the proposal the Commission has placed before the Secretary nowhere mentions Section 217(b)(4) or the Commission's responsibilities under it. For example, the listing of possible "non-environmental factors" that might be considered in a "preliminary suitability determination order" does not even list as a potential factor whether the proposed project would meet the reasonable needs of LSEs to satisfy their service obligations. Commission Proposal at 4-5.

The Commission's failure to comply with the statutory mandate of FPA Section 217(b)(4) in Order No. 1000 and its subsequent failure even to mention this section in its proposal to the Secretary are both very troubling to APPA. While APPA supported the backstop siting provisions of EPAct 2005 that resulted in FPA Section 216, it did so as part of a package of statutory provisions that also included FPA Section 217(b)(4). APPA assumed that the Commission would exercise its FPA Section 216 authorities in accordance with the mandate set out in Section 217(b)(4), and it supported the Commission's interpretation of Section 216 in the *Piedmont* case based in part on that assumption. APPA cannot support delegation of further authorities to the Commission under FPA Section 216 without the express assurance

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that the Commission would exercise those authorities to benefit LSEs and the consumers they serve, as Congress clearly intended.

For these reasons, APPA requests the Secretary expressly to condition any delegation of authorities set out in FPA 216 from DOE to the Commission on the Commission's compliance with the mandate of FPA Section 217(b)(4) in exercising such delegated authorities.

As the Secretary knows, siting transmission facilities, especially higher voltage facilities covering long distances, is not an easy task under the best of circumstances. Landowner opposition is virtually certain, and environmental concerns have to be carefully balanced with economic considerations. It will be very important to build the optimal set of regional transmission facilities that will best serve the needs of ultimate consumers at the lowest reasonable cost consistent with good environmental stewardship, rather than the set of facilities that might best serve the business plans of particular transmission developers or generation providers. The Secretary can ensure this result by conditioning any delegation of authorities under FPA Section 216 to the Commission to require that the Commission: (1) only consider proposed transmission facilities and projects pursuant to that delegated authority that have been fully evaluated in a regional transmission planning process under Order No. 1000 and found in that process to be needed to meet regional transmission requirements; and (2) comply fully with the mandate of FPA Section 217(b)(4) in exercising such delegated authorities.

Thank you very much for the opportunity to provide these comments to you as you consider the delegation proposal that the Commission has provided. If you have any questions, please feel free to contact me at skelly@publicpower.org or 202-467-2933.

Very Truly Yours,

/s/

Susan N. Kelly

Senior Vice President of Policy Analysis and General Counsel

cc (via e-mail): Ms. Lauren Azar
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