

New England States Committee on Electricity

September 9, 2011

The Honorable Steven Chu
Secretary of Energy
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

Dear Secretary Chu:

The New England States Committee on Electricity¹ (“NESCOE”) appreciates the opportunity to convey the New England states’ views on the proposal of the Department of Energy (“DOE” or “the Department”) to delegate certain authorities granted to DOE in the Energy Policy Act of 2005 (the “Act”) to the Federal Energy Regulatory Commission (“FERC”). The States share DOE’s and FERC’s interest in effective siting processes and in eliminating barriers to transmission development.² A properly focused and expressly limited delegation may advance certain aspects of transmission planning while avoiding unnecessary conflicts with traditional State siting jurisdiction. To that end, NESCOE offers the following general comments, discussed further in the body of this letter:

- 1. FERC may have appropriately transparent processes and substantive expertise to conduct congestion studies, however, any DOE delegation to FERC to conduct congestion studies must expressly provide for the primacy of state siting processes if such study ultimately triggers backstop siting authority.**
- 2. The New England states have reservations regarding the efficacy and wisdom of delegating NIETC designations to FERC. The New England states believe any delegation to FERC should direct FERC to adhere to the FPA’s carefully crafted balance between federal and state authority over transmission siting, including recognition of the states’ primacy in siting and the narrowly drawn circumstances where federal backstop authority is allowed. Moreover, any delegation should direct FERC to withhold judgment on the process and substance of its actions under any**

¹ NESCOE is New England’s Regional State Committee and represents the collective views of the six New England states.

² The New England States express no opinion on DOE’s legal authority to make such delegations.

delegation – including changing NIETC designation to project specific corridors - until FERC has obtained, through a fully transparent rulemaking process, the views of the states and other affected entities. In addition, any DOE delegation to FERC should clearly limit FERC from expanding its scope of authority to allow for NIETC designations to project-specific corridors until there is evidence that Congestion Studies routinely fail to identify Congestion Areas of Concern and until there is an opportunity to confirm the legal basis for FERC to create a new right for transmission developers to initiate project-specific NIETC designations.

3. The New England states supports DOE’s goal of better coordinating federal agency action on transmission project permits.

As you know, the time allowed for comment since the States were made aware of this proposal was very short. Our comments are therefore necessarily limited to some initial reactions and do not include a range of proposed modifications to elements of the proposal that could make it more effective. The short time frame also precluded legal analysis that would allow us to offer opinions about DOE authority and other elements of the proposal; any lack of objection on statutory grounds does not reflect consent.

I. FERC MAY HAVE APPROPRIATELY TRANSPARENT PROCESSES AND SUBSTANTIVE EXPERTISE TO CONDUCT CONGESTION STUDIES.

FERC may have appropriately transparent processes and substantive expertise to conduct congestion studies, however, any DOE delegation to FERC to conduct congestion studies must expressly provide for the primacy of state siting processes if such study ultimately triggers backstop siting authority. FERC may also be well suited to examine and report on the issue of whether any identified congestion adversely affects consumers. NESCOE reserves judgment concerning DOE’s authority to make such delegation as DOE’s authority to do so is not clear.

II. ANY DELEGATION TO FERC SHOULD DIRECT FERC TO ADHERE TO THE FPA’S CAREFULLY CRAFTED BALANCE BETWEEN FEDERAL AND STATE AUTHORITY OVER TRANSMISSION SITING. MOREOVER, ANY DELEGATION SHOULD DIRECT FERC TO WITHHOLD JUDGMENT ON THE PROCESS AND SUBSTANCE OF ITS ACTIONS UNDER ANY DELEGATION UNTIL FERC HAS OBTAINED, THROUGH A FULLY TRANSPARENT RULEMAKING PROCESS, THE VIEWS OF THE STATES AND OTHER AFFECTED ENTITIES. FURTHER, IN ANY DELEGATION, DOE SHOULD DIRECT FERC TO CONDUCT A TRANSPARENT AND COMPREHENSIVE RULEMAKING TO PROVIDE THE OPPORTUNITY FOR STATES AND OTHER AFFECTED ENTITIES TO PRESENT THEIR VIEWS AND GUIDANCE TO FERC’S EXECUTION OF ITS DUTIES UNDER THE DELEGATION.

If DOE decides to proceed with the proposal to delegate responsibility for NIETC determinations to FERC, the Department should clearly prescribe the limits of such delegation.

A. FERC MUST RECOGNIZE NEW ENGLAND’S STATUS

One reason for narrow delegation is to ensure that any delegation does no harm in areas where there is no problem to be solved. New England has permitted more than \$4.6 Billion in transmission facilities since 2002. Another \$6 Billion in transmission facilities is in process through 2015. DOE itself found in its 2009 Congestion Study that New England “... has shown that it can permit, site, finance, cost-allocate and build new generation and transmission, while encouraging new demand-side resources as well. New England faces some near-term reliability challenges, but is working aggressively to address them. For these reasons, the Department no longer identifies New England as a Congestion Area of Concern.”

Particularly in regions that have effectively sited transmission, the delegation proposal creates the very problems that FERC says it intends to solve. Despite FERC’s assertion that its proposal would “overcome some of the judicial and procedural hurdles to effective use of existing backstop siting authority...”, the opposite is more likely – costly, prolonged litigation over jurisdictional and/or procedural matters concerning national interest “corridor/project(s)”, during which no transmission projects move forward. These problems arise because the proposal would allow a transmission developer to initiate a project-specific NIETC determination regardless of the State’s or the region’s actual experience with addressing congestion and other transmission drivers.

Thus, to avoid applying disruptive remedies where there is no problem, FERC must recognize the findings of the Department’s prior Congestion Studies. DOE should not, for instance, allow FERC’s siting process to re-open, at a developer’s request, the Department’s conclusion in 2009 that New England is not an area of concern. Until there is evidence that emerges in the context of the congestion studies as contemplated by Congress that New England is failing to address regional transmission needs, FERC should not exercise federal siting authority following developer-initiated project-specific NIETC designations.

B. CERTAIN ELEMENTS OF THE PROPOSAL, MOST NOTABLY THE PROPOSAL TO CREATE NEW RIGHTS FOR TRANSMISSION PROJECT DEVELOPERS TO INITIATE A DESIGNATION IN A REGION NOT CONSIDERED A CONGESTION AREA OF CONCERN, ARE PARTICULARLY PROBLEMATIC.

Certain elements of the proposal extend well beyond FERC exercising prospectively the authority previously exercised by DOE. As noted, of particular concern is the proposal to create a new right for transmission developers to file for NIETC designation in areas not determined by the federal government to be a Congestion Area of Concern. This proposal would enable a transmission developer looking to advance a project in New England – a region DOE has determined is not a Congestion Area of Concern – to move for NIETC designation for that specific project wholly apart from any government determination based on studies as contemplated by the Act, that such a designation is warranted or in the public interest. At this point, any DOE designation to FERC should clearly limit FERC from expanding the scope of authority it receives from DOE in this regard until, at the very least, there is evidence that Congestion Studies routinely fail to identify Congestion Areas of Concern and until there is an

opportunity to confirm the legal basis for FERC to create a new right for transmission developers to initiate project specific NIETC designations.

C. FERC MUST GIVE WEIGHT TO REGIONAL AND STATE ENERGY PLANS

Second, FERC must give weight to regional plans and to state energy plans. For example, in areas where regional studies of congestion are already part of an ISO or RTO planning process, the Department should conclude that there is no reason for FERC to take on the process of designating an NIETC. The Department should recognize and support progress that those regions have made in identifying and addressing the issues targeted by the Act. Further, any delegation must give weight to state energy plans because regional energy plans are not necessarily reflective of state policies and plans.

D. DOE AND FERC MUST ENSURE THE PRIMACY OF STATE SITING PROCESSES

Finally, if DOE makes such delegation of responsibility to designate NIETCs to FERC, it should explicitly preserve the primacy of state siting processes to avoid the procedural complexities discussed above and the serious risk of stalling facility siting.

The delegation proposal may, if not properly coordinated and implemented, create unnecessary conflict between state and FERC processes. The proposal creates further uncertainties by neglecting to consider applicable state law in several important areas, as described further below.

In New England, state siting authorities make the determination of need in connection with proposed transmission facilities. Even where a project is in ISO-NE's regional plan, the project cannot be constructed absent a state approval and finding of need; such projects are provisionally in the regional plan pending state action. Accordingly, in New England, until the state siting process is complete and a state decision is issued, a proposed regulated backstop transmission project is not "needed" as a matter of law. Despite the primacy of the States' role, FERC's proposed process would allow a transmission project that has not concluded a state siting process - and not yet been determined to be needed - to initiate a federal siting process. The proposal thus creates the potential for parallel federal and state siting proceedings, for interference with state siting primacy and potentially conflicting determinations.

It is not clear what the outcome would be in the case of a conflict such as if a state siting authority does not find a need for all or some part of a proposed transmission project (i.e., the state siting authority finds that energy efficiency measures would better meet a portion of the identified need) and FERC issues a permit for the project or parts of it that the state siting authority ultimately finds would be better met by alternative resources. Litigation over federal and state jurisdictional issues would likely result, with consequent delay and cost to the project sponsor. Because of the significant ambiguity and the risks involved, the proposal would slow rather than expedite transmission facility siting.

FERC's proposal states that "[i]n making a public interest finding, FERC would consider, among other things, appropriate alternatives, the extent to which environmental impacts could be

eliminated or mitigated....”. It is not clear whether FERC is suggesting that FERC would evaluate whether and the extent to which energy efficiency or generation alternatives could satisfy the need and order it to be implemented in a state. In New England, state siting authorities generally must consider alternatives to proposed regulated backstop transmission proposals during state siting proceedings and must base siting approvals, in whole or in part, on the state’s judgment about the viability of alternatives to meet identified needs in a more effective way. It is not clear from FERC’s proposal whether or how FERC would evaluate, order constructed, or fund non-transmission resources that would best meet an identified need. Assuming FERC identified jurisdictional authority to make such a decision and effectively conducted integrated resource planning in a region³, it is also not clear whose decision would prevail if the state siting authority and FERC found different resources would be preferable to substitute for different parts of the transmission project.

FERC’s proposal also indicates it would invite state participation in FERC proceedings on individual, project-specific corridor applications thereby consulting with them in the performance of congestion studies and in NIETC designations. FERC further states that its staff would “conduct regional meetings and workshops to collect input from affected stakeholders, such as states, environmental groups, renewable energy developers, utilities, and independent generators, regarding the study approach.” As threshold matter, it is inadequate for FERC to assign the New England states “participant” status in matters related to siting. As a legal matter, with respect to siting, the states are not equivalent to issue advocates or shareholder representatives and FERC should not categorize states in the same way in connection with standing in siting matters. There is also significant risk that developers/transmission owners will devote resources to the federal process, giving less attention to the state process if the proceedings are in parallel.

State participation in a FERC siting proceeding would also be resource intense and costly. Most states do not have the staffing or financial resources to dedicate to FERC counsel to represent the state in FERC siting proceedings in parallel to their own processes.

Finally, FERC states “[t]here may be significant benefits to concurrent state and federal proceedings, including the exchange of information between federal and state agencies, the ability to jointly examine environmental issues, savings in time and money, and general efficiencies of process.” FERC’s assumption about the workability or benefits of parallel federal and state siting process ignores state laws that would restrict such communications. Most New England state siting authorities are precluded by state law from talking about the issues associated with a pending siting application. Some states are also precluded from discussing procedural issues associated with pending petitions. The concept of a state siting authority discussing issues associated with a proposed project during the state proceeding is not viable as a legal matter in most states.

³ Of course, FERC would need to be mindful of the effect of identifying alternative resources on New England’s competitive market, which generally identifies what resources get built where and by whom.

III. NEW ENGLAND SUPPORTS THE FEDERAL GOVERNMENT’S INTEREST IN BETTER COORDINATING FEDERAL AGENCY ACTION ON TRANSMISSION PROJECT PERMITS

FERC and DOE should better define the federal agency cooperation problem to be solved and develop practical, efficient solutions tailored to achieve the objective. Where the objective involves transmission siting matters, the federal government should work with the States. If DOE and FERC’s objective is to streamline federal agency review of transmission projects and ensure the federal government acts in a timely way on proposed projects, and tailors a proposal to that end, New England would be supportive.

As transmission facility permitting information was collected from the states by DOE in the Eastern Interstate Siting Collaborative process, there appeared to be many circumstances in other areas of the country where slow federal action and lack of federal agency coordination impeded transmission projects. In addition, some New England states have previously sought assistance from the federal government to expedite siting processes for off-shore wind resources. The New England states encourage DOE and FERC and other federal agencies to implement improvements to their processes that have been identified as impediments to transmission development without first creating additional sources of jurisdictional confusion and without first creating new rights for project developers in areas that have not been previously identified by government in tri-annual congestion studies to be problematic.

NESCOE would be pleased to have an opportunity to work with DOE and FERC to address shortcomings in the current Congestion Study, NIETC, and siting processes that DOE and FERC perceive to be impeding transmission. Particularly in the area of siting, federal agencies and the states should collaborate to remedy any real impediments to project permitting. NESCOE offers assistance in constructing viable remedies to siting impediments whether DOE delegates authority to FERC as set forth in the proposal or retains it. NESCOE looks forward to working with DOE and FERC to facilitate the enhancement of the Nation’s transmission infrastructure.

Respectfully,

/s/

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