EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

September 9, 2011

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

The Honorable Jon Wellinghoff
Chairman
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Via electronic mail: congestion09@anl.gov; david.meyer@hq.doe.gov; the.secretary@hq.doe.gov; jon.wellinghoff@ferc.gov

Re: Delegation of Authority to Conduct Studies of Electric Transmission Congestion and to Designate National Interest Electric Transmission Corridors Under Section 1221 of the Energy Policy Act of 2005

Dear Secretary Chu and Chairman Wellinghoff:

Thank you for considering these comments from Earthjustice regarding the proposed delegation of authority to conduct congestion studies and to designate national interest electric transmission corridors ("NIETCs") from the Department of Energy ("DOE") to the Federal Energy Regulatory Commission ("FERC"). We want to express our strong support and appreciation of FERC's concerted efforts to facilitate the delivery of renewable energy across the country. We understand this proposal to be animated in large part by that critically important need, and we agree with many of FERC's stated objectives in advancing it. However, based on the staff paper and outline presented, it is not clear that a delegation is necessary to achieve these objectives. If a delegation is genuinely warranted, there are significant concerns that must be addressed, likely in the form of conditions on the delegation.

I. FERC Outlines Key Objectives in the Delegation Proposal

FERC's has suggested several important reforms, and we urge DOE to undertake these reforms regardless of its ultimate decision on delegation. Specifically, we support:

156 WILLIAM STREET SUITE 800 NEW YORK, NY 10038
T: 212.791.1881 F: 212.918.1556 E: neoffice@earthjustice.org W: www.earthjustice.org

- Designation of practical, tailored NIETCs rather than sweeping corridors;

- Meaningful environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231, *et. seq.*;

- Required consideration of our fast-evolving energy "resource mixes"[1] (including renewable energy, energy efficiency, and demand response resources) in the designation of NIETCs and the issuance of construction permits; and

- Integration of regional planning that accounts for public policy mandates under Order 1000 into the process for designating NIETCs.

II. It Is Unclear that the Delegation, as Proposed, Is Necessary

FERC's Staff paper does not explain why implementation of its delegation proposal is necessary either to achieve the above reforms or to spur construction of needed grid infrastructure. While we support the use of FERC's backstop authority to overcome siting hurdles for projects that would deliver clean energy, it is not clear that this authority will be required as routinely as the delegation proposal appears to contemplate — especially given the new planning and cost allocation provisions of Order 1000.

The Staff paper states:

> To date, no construction permits for projects in NIETCs have been issued. Only one applicant proposing to site a project within a NIETC began the pre-filing process at FERC, and the applicant subsequently withdrew from the process. Clearly, the backstop transmission procedure established by Congress has not yet been effective.[2]

The fact that FERC's backstop authority has not yet been invoked is not necessarily evidence of a problem. Rather, the existence of FERC's backstop authority may be working successfully in most instances to spur timely state siting decisions. As national and regional priorities emerge from Order 1000 and interconnection-wide planning processes, state commissions should have a reasonable opportunity to exercise their siting authority to reflect those priorities and at the same time account for the local interests that they are uniquely positioned to vet.

---

[1] *FERC Staff Preliminary and Conceptual Transmission Siting Proposal* ("Staff Proposal") at 3.

[2] Staff Proposal at 3.

FERC is essentially proposing delegation as a means to merge the designation of NIETCs with the siting of individual projects at the request of project developers. On its face, the Energy Policy Act of 2005 contemplates a system in which: (1) key transmission needs are identified by an independent federal agency based on technical studies; (2) national interest corridors are designated — again by an independent federal agency; and (3) FERC retains the authority to ensure that projects vindicating that national interest are not hamstrung by state regulation. Allowing project developers to trigger the designation of NIETCs (perhaps outside of regional planning processes) is a significant departure from this model, and FERC has not explained why it is justified.

III. DOE Should Impose Conditions on Any Delegation

We are not necessarily opposed to a DOE delegation of authority to FERC to conduct congestion studies and designate NIETCs, so long as appropriate conditions are imposed on the delegation. Further, in the event that DOE does not choose to delegate its authorities, we would urge DOE itself to adopt the following recommendations.

A. Full Compliance with NEPA Is Essential as a Matter of Law and Policy

In designating NIETCs and exercising fallback siting authority, it is essential not to short cut the NEPA process. Undertaking transparent, comprehensive environmental analysis that analyzes alternatives, including non-wires alternatives, and fully discloses environmental impacts, including cumulative impacts, will result in better decision-making and avoid adverse court judgments that could derail important projects.

FERC suggests that its delegation proposal is necessary to avoid duplicative NEPA processes or NEPA-related delays. However, we are not aware of cases where there has been duplicative environmental review for a transmission project. In contrast, we are aware of several cases where the scope of NEPA review has been unduly narrow and where analysis of alternatives other than re-routing alternatives has been entirely absent. We are also aware of high-profile cases where applicants have initiated the NEPA process late in the state siting process or even after a state certificate of public convenience and need ("CPCN") has been granted. FERC and DOE should not short-change required environmental review under NEPA in order to address unsubstantiated concerns about duplication of effort and avoidable delays.

We agree with FERC staff that state processes could benefit from timely NEPA review that is undertaken in advance of or concurrently with state CPCN proceedings.

1. Meaningful Analysis of Alternatives

Regardless of how FERC (or DOE) chooses to designate NIETCs and site projects within those corridors, NEPA's requirement to consider alternatives must be met. In an environmental impact statement ("EIS"), federal agencies are obligated to disclose not only the nature of

environmental impacts but also the means of avoiding or mitigating environmental harms. For this reason, the alternatives analysis "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14; *see also Natural Res. Def. Council v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) ("It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement . . . characterized as the linchpin of the entire impact statement.") (citation and internal quotation marks omitted).

In the context of NIETC designation and project siting, required analysis of alternatives includes consideration of non-wires alternatives, alternative technologies, alternative siting, and alternative projects. This big-picture analysis may be undertaken for each "individual, project-specific corridor application"[3] as FERC proposes, or alternatively, FERC (or DOE) could prepare programmatic EISs to which project-specific EISs could tier. Either way, this analysis must be undertaken and presented in an EIS that is subject to public comment. It would make sense to draw on analysis from Order 1000 planning processes, interconnection-wide planning processes, and congestion studies to prepare this alternatives analysis. However, it will not be sufficient under NEPA to identify a given proposal that is deemed suitable for NIETC designation based on "non-environmental factors" and then prepare an EIS that focuses exclusively on that proposal without analyzing alternatives (in addition to minor re-routing alternatives).

2. Effective Collaboration among Federal Agencies

We agree that FERC could play a very useful coordinating role in the NEPA process. Public lands and wildlife agencies often do not have the expertise "in house" to analyze complex issues surrounding energy policy or to identify and assess alternatives to a given transmission proposal. Drawing on FERC's resources and expertise could significantly improve the NEPA process. However, there is no reason why these agencies should not be granted the right of first refusal to act as co-lead agencies in the NEPA process. In addition, FERC must ensure effective consultation with the relevant state agencies to ensure that impacts to sensitive lands and wildlife are fully accounted for in the NEPA process.

In setting the schedule for NEPA review, as FERC proposes to do, FERC must not be allowed to impose time constraints that preclude meaningful public participation and thorough analysis by other agencies and FERC itself. Further, FERC must ensure that federal land managers can play an effective role in the siting process. The Staff proposal maintains that, "[a]s with gas pipelines, no transmission project construction on federal lands would begin until the project proponent obtained authorization from the relevant federal land managers and

---

[3] Staff Proposal at 4.

complied with all required terms specified by each federal agency."[4] However, if FERC grants a construction permit before the federal land managers have been able to complete their environmental review, construction on non-federal lands may foreclose alternatives to avoid or mitigate adverse environmental impacts on federal lands, and as a practical matter, agencies may be pressured into granting authorizations such as right-of-ways, incidental take permits, and wetlands fill (Clean Water Act § 404) permits that may be undesirable and legally vulnerable as well.

More broadly, to effectively lead the environmental review process for major transmission infrastructure siting, which implicates profound and enduring environmental impacts including climate impacts, FERC must reexamine its approach to implementing NEPA. Based on our own experience and the experience of many of our client groups, the pipeline model for NEPA implementation is problematic. In particular, FERC has been inclined to prepare summary environmental assessments as opposed to EISs for major projects; FERC often defers uncritically to environmental analyses presented by applicants without undertaking analysis of its own; FERC is not seemingly committed to avoiding or mitigating adverse environmental impacts that are disclosed in the NEPA process; and, as discussed below, public participation in the FERC NEPA process can be unduly burdensome.

3. Robust Public Participation

Robust public participation is mandated under NEPA, and as a matter of public policy, it is crucial both to informed decision-making and to building support for the innovative solutions that are needed to secure a sustainable energy future.

In order for citizens to participate effectively in the NEPA process, they must be able to comment, request rehearing, and ultimately challenge deficient analyses without having to intervene formally in FERC dockets. Under Section 313 of the Federal Power Act, a "party" must make application for rehearing in order to challenge a FERC order, and in order to become a party, intervention is required under current FERC regulations. *See* 18 CFR 385.214(a)(3); *see also Public Service Comm'n of NY v. Fed. Power Comm'n*, 284 F.2d 200 (D.C. Cir. 1960) (Where commission denied intervention, petitioner was not a party and could not challenge the Commission's order in federal court). DOE elected to grant "party" status to everyone who filed timely comments on NIETC designations, and upon delegation, FERC should be required to revise its regulations to provide similarly that all timely submitted NEPA comments confer "party" status under the Federal Power Act.

---

[4] Staff Proposal at 7.

B. Congestion Studies and Designation of NIETCs Must Be Coordinated with Order 1000 Planning and Interconnection-Wide Planning

We agree with FERC's proposal to consider the outcome of Order 1000 planning processes in making NIETC suitability determinations and would urge FERC and DOE to clarify further how Order 1000 and other ongoing interconnection-wide planning (for instance by the Eastern Interconnection Planning Collaborative ("EIPC")) will be integrated into the process. If FERC's proposal is adopted, applicants should not be permitted to bypass planning under Order 1000, which specifically requires consideration of public policy mandates that are directly relevant to NIETC siting, and NIETCs should not be designated without reference to the results of other collaborative stakeholder processes.

C. Accounting for Environmental Benefits Is Crucial

As FERC's proposal makes clear, to issue a construction permit, FERC must determine that a given project is "consistent with the public interest" and that it would "protect or benefit consumers."[5] In evaluating the public interest and what constitutes a "benefit" to consumers, FERC (or DOE) must account for the environmental benefits associated with any given NIETC proposal, including integration of renewable energy, advancement of clean energy technologies, reduced emissions of carbon dioxide, air toxics, and Clean Air Act "criteria" pollutants, and preservation of sensitive lands and wildlife.

Thank you for considering these comments. We are grateful for your earnest commitment to providing broad access to renewable energy.

Sincerely,

Abigail Dillen
Earthjustice
Coal Program Director
150 William Street, Suite 800
New York, NY 10038
adillen@earthjustice.org

[5] Staff Proposal at 8.