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September 8, 2011

SUBMITTED ELECTRONICALLY

Dr. Steven Chu
Secretary of the Department of Energy

Mr. Jon Wellinghoff
Chairman, Federal Energy Regulatory
Commission

**Re: Proposal for DOE to Delegate Certain Federal Power Act § 216 Powers to
FERC**

Secretary Chu and Commissioner Wellinghoff:

The Georgia Public Service Commission ("GPSC") appreciates this opportunity to file these comments in response to the informal proposal for the Department of Energy ("DOE") to delegate certain of its authorities under Section 216 of the Federal Power Act to the Federal Energy Regulatory Commission ("FERC"). As discussed herein, the GPSC is very concerned by this proposal, as such a delegation would likely only serve to undermine the States' existing authorities over transmission planning and expansion. By merging functions separately identified by Congress into a single agency, the delegation seems to be an overt attempt to evade the checks and balances that Congress expressly placed upon FERC's potential exercise of its "backstop" transmission siting authority under Section 216. Those limitations were enacted so as to protect and respect the existing State processes. Accordingly, the GPSC urges DOE to refrain from delegating its Section 216 authorities over congestion studies and designations of National Interest Electric Transmission Corridors ("NIETCs") to FERC.

With regard to Section 216(a)'s required congestion studies, the GPSC actively supported DOE's development of its 2009 National Electric Transmission Congestion Study ("2009 Congestion Study"). In this regard, Commissioner Stan Wise of the GPSC participated in DOE's workshop that was held in Atlanta, Georgia on July 29, 2008 to further the performance of that study. Having participated in DOE's development of the 2009 Congestion study, it is the GPSC's position that at least as applied to the State of Georgia and the Southeast, DOE has done a commendable job of seeking regional input and producing a congestion study that fairly and

accurately describes this region's transmission systems and transmission planning and expansion processes. With DOE having established this proven record of producing comprehensive, fair, and accurate congestion studies (at least as applied to the Southeast), the GPSC is concerned that DOE is now considering having another agency exercise that authority. The GPSC would have this general concern irrespective of the agency to whom such authority might be transferred and without regard to the other legal and policy issues raised by the informal proposal.

Unfortunately, the proposal at issue raises numerous other legal and policy concerns. From a legal perspective, the proposed delegation is contrary to specific, targeted investment of authority in DOE, as codified in Section 216(a)-(b). As recognized in the legislative history, FERC has only been granted, "**very limited backstop transmission siting authority**. This authority extends only to helping site transmission lines in 'interstate congestion areas' **designated by the Department of Energy...**"¹ Congress intentionally limited the grant of backstop siting authority to FERC in subsection (b) of Section 216 by, among other things, specifying that a separate agency (*i.e.*, DOE) must first perform the congestion studies and NIETC designations required by subsection (a). In creating such a bifurcated structure, Congress obviously intended to separate decision making between the agency who is to make the general "need" determination (*i.e.*, DOE through the congestion study and NIETC processes) and who is to determine the merits of a specific transmission siting/permitting request (*i.e.*, FERC through the subsection (b) process). And while DOE may be authorized to generally make delegations to FERC, such delegations are not appropriate where there is "affirmative evidence of a contrary congressional intent."² Congress' clear bifurcation of authorities and responsibilities between DOE in Section 216(a) and FERC in Section 216(b) constitutes such clear evidence of a contrary congressional intent.

From a policy perspective, this bifurcation was done for the purpose of respecting existing State authority over transmission expansion. In this regard, the documentation associated with the informal proposal indicates that the existing FPA Section 216 processes have been ineffective because no construction permits have been issued thereunder. Such a presumptive finding is not responsible or justified by facts. This lack of permits does not mean that the structure established by Congress is a failure. After all, the siting authority provided to FERC under Section 216 is only backstop in nature. It is only to be triggered (among other things) if there has essentially been a failure in the State transmission expansion processes as described in Section 216(b)(1). The evidence establishes that there has been no such failure either in the State of Georgia or nationally, as the 2009 Congestion Study found no significant congestion in Georgia and FERC's recently issued Order No. 1000 establishes that there has recently been a significant increase in the rate of transmission investment. Since the primary transmission expansion processes are working, there is little need to resort to FERC's backstop siting authority under Section 216(b).

Rather than facilitating transmission planning and expansion, the informal delegation proposal would lead to controversy, inefficiencies, and otherwise undermine existing

¹ U.S. House -- Energy Committee Hearings on EPAAct 2005, at p. 133 (February 10 & 16, 2005) (Serial No. 109-1) (Prepared Statement of Thomas R. Kuhn on behalf of the Edison Electric Institute) (emphasis added).

² See *United States Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004).

transmission planning and expansion processes. As previously indicated, such a delegation would likely only lead to further legal challenges to DOE's exercise of its Section 216 responsibilities since Congress clearly intended for a bifurcation of authorities between DOE and FERC so as to ensure that the grant of backstop siting authority to FERC remains limited. Should the delegation occur and the aggressive "unified" implementing proposals be pursued, then the integrity of current State-regulated transmission planning and expansion processes would face the increased likelihood of preemption. Rather than being potentially subject to only the Congressionally intended, limited backstop siting authority actually provided to FERC under FPA Section 216, the States would instead be confronted with the unified, project-specific FERC-regulated processes presented by the proposal. Furthermore, the proposal's intent to run the more "efficient" FERC processes concurrently with State processes would marginalize and potentially nullify the State-regulated processes. Among other things, it would seem difficult for the States to concurrently participate in a FERC process as a stakeholder/interested party while at the same time being the decision-maker in their own parallel adjudicatory process (that may involve the same, or alternative proposals). In addition, the proposal indicates that FERC would consider allowing merchant transmission developers to by-pass existing transmission planning processes. Such an approach would not create efficiencies but would create the potential to undermine the transmission planning processes that are a key means used (at least in Georgia) to render reliable and economic service to consumers.

The aggressiveness of this proposal indicates an almost cavalier disregard concerning the United States Court of Appeals for the Fourth Circuit's holding in *Piedmont*.³ The *Piedmont* decision reinforces the primary role to be performed by State transmission expansion processes, and one hopes that neither DOE nor FERC intends to ignore that decision outside of the Fourth Circuit, as might be construed from the proposal's statement that the decision is limited to the Fourth Circuit. This statement is somewhat dubious because the decision: set aside an aspect of a rulemaking having national applicability, involved the consolidated appeal from several circuits, and is binding on FERC due to its *res judicata* effect. Moreover, one is not generally presented with a proposal by agencies to largely ignore governing precedent. If FERC is interested in pursuing a collateral attack to *Piedmont* in an exercise to create a jurisdictional split between circuits and an eventual Supreme Court decision – even assuming it is lawful for it to do so – this strategy will surely result in more litigation and delay, rather than achieving the objectives of Section 216.

Another troubling aspect of the proposal is its intent to tie DOE's authority and responsibilities under Section 216 to FERC's controversial Order No. 1000. That order was subject to over sixty (60) requests for rehearing, including by NARUC and many States. Indeed, the GPSC filed its own challenge to that Order due its negative impacts on State-regulated transmission and integrated resource planning processes and State-regulation over the transmission costs included in bundled retail rates. Furthermore, the legal basis asserted to justify Order No. 1000's intrusions into State-authority is exceptionally thin, with FERC providing no factual basis for the Order but only a theoretical concern. Accordingly, the Order No. 1000 process is enmeshed in controversy and likely legal challenge, and DOE would seem

³ *Piedmont Environmental Council v FERC*, 558 F.3d 304 (4th Cir. 2009).

well-served to keep its Section 216(a) authorities and responsibilities bifurcated (as clearly intended by Congress) from FERC's processes and programs.

In conclusion, the GPSC again appreciates and commends DOE for its work in the 2009 Congestion Study. At least as applied to the Southeast, in preparing that study, DOE appropriately reached-out to the States and respected their input, with the result that the 2009 Congestion Study provides an accurate assessment of the transmission system in this region. The GPSC hopefully will be provided the opportunity to again support DOE's efforts in preparing its statutorily required 2012 congestion study. Accordingly, for this and the other legal and policy reasons discussed above, the GPSC respectfully urges DOE to refrain from making the proposed delegation to FERC.

Sincerely,

A handwritten signature in black ink, appearing to read "Stan Wise". The signature is fluid and cursive, with a large initial "S" and "W".

Stan Wise
Chairman, Georgia Public Service Commission

CC: Lauren Azar, Senior Assistant to the Secretary
Commissioners Spitzer, Moeller, Norris, and LaFleur