



STATE OF MINNESOTA PUBLIC UTILITIES COMMISSION

September 9, 2011

The Honorable Steven Chu
Secretary of Energy
Forrestal Building
1000 Independence Ave., S.W.
Washington, DC 20585-1000

Dear Secretary Chu:

On behalf of the Minnesota Public Utilities Commission (MN PUC) I am submitting this response to a recently received request by the Federal Energy Regulatory Commission (FERC) for comments on a proposal to delegate Department of Energy (DOE) authority over transmission congestion study processes and corridor designations to FERC. Although the MN PUC acknowledges that it is appropriate for federal agencies to take measures to achieve coordinated grid planning across broad geographical areas and to pursue transmission development that serves the public interest, the MN PUC also shares the concerns expressed by the National Association of Regulatory Utility Commissioners (NARUC) about the manner in which this proposal has unfolded as well as broader implications of the proposal.

The issues involved in grid planning and development have very deep roots at the state level, and it is critical that DOE limit its use of federal backstop authority to only situations with broad regional or national public interest implications and where state siting authorities have failed to exercise their jurisdictional responsibilities within a reasonable period. In most cases, these would be expected to be complex projects with large, multi-state lines. It is critical that the circumstances under which backstop authority will be used, regardless of who implements it, be made very clear and that the authority only be used surgically and sparingly.

Being clear about intent is important because the history of the backstop authority leaves some doubt. *Piedmont Environmental Council v. Federal Energy Regulatory Commission*, 558 F.3d 304 (4th Cir. 2009) focused on FERC's stated intention to regard denial of a project by a state authority as constituting "withholding approval", which is prohibited by the statute and, thereby, invokes federal siting backstop authority. The Court of Appeals for the Fourth Circuit explicitly reversed what it termed FERC's "expansive" interpretation of this statutory provision. The Court ruled that, despite FERC's contention, the authority of FERC to act when state action on a permit application has been held back continuously for more than one year does not equate to where a state has affirmatively denied the application within the one-year deadline. The Court based its decision on a plain reading of the provision and an examination of Section 216 (b) (1) as a whole in a broader context. To quote the Court:

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“[FERC’s] reading would mean that Congress has told state commissions that they will lose jurisdiction unless they approve every permit application in a national interest corridor. Under such a reading it would be futile for a state commission to deny a permit based on traditional considerations like cost and benefit, land use and environmental impacts, and health and safety. It would be futile, in other words, for a commission to do its normal work.” [at 314]

Given the obvious conflict with state jurisdiction, the MN PUC cannot see how a ruling like that of the 4th Circuit’s would not be adopted anywhere that FERC unwisely attempted to invoke federal siting authority despite deliberate action taken by a state. As a participant in *Piedmont*, the MN PUC believes the 4th Circuit decision accurately defines the limits of federal authority.

FERC claims the proposed delegation of authority is primarily intended to afford a “more efficient, directed process” and is not an attempt to expand federal authority or to undercut state authority regarding transmission siting. However, it is somewhat troubling that a quite different intent is implied by FERC’s assertion that “the *Piedmont* case is limited to the Fourth Circuit, and that other courts might reach a different result.” It does not take a broad leap of logic to conclude from this statement that FERC believes it has clear authority to invoke federal authority to countermand state actions with which it might disagree. Again, to quote from the reasoning of the *Piedmont* decision:

“In providing for this measured transfer of jurisdiction, Congress simply makes sure that there is a utility commission available – if not a state commission, then FERC – to make a timely and straightforward decision on every permit application in a national interest corridor. In short, Section 216 (b) (1), read as a whole, does not indicate that Congress intended to bring about the sweeping transfer of jurisdiction suggested by FERC. Indeed, if Congress had intended to take the monumental step of preempting state jurisdiction *every time* a state commission denies a permit in a national interest corridor, it would surely have said so directly.” [at 314]

FERC’s view on the withholding approval issue is difficult to reconcile with other FERC public statements claiming intent to assure active state involvement and respect for state decision-making authority. DOE must be clear about its view on this issue if states are to be assured their involvement is expected to be meaningful and their authority respected.

With regard to implementation of backstop authority, there are a couple of issues of importance to states like Minnesota that relate to the proposed sequence of federal and state permitting decisions. Under FERC’s proposal, FERC staff would, in coordination with affected agencies, establish a schedule for the completion of agency actions to permit projects. If the intention is to operate federal and state permitting processes in parallel, e.g., in the interest of shortening approval time, states will be put at an extreme disadvantage. Having to participate in federal proceedings while also managing their own state proceedings would overtax already limited state resources. Moreover, meaningful state involvement in federal proceedings should not be expected if state proceedings have not fully run their course. Overall, the entire permitting process would not be as orderly as it should be and risks poorly informed decisions. The MN PUC recognizes that important efficiencies might be gained through parallel proceedings in the environmental assessment phases. However, that is very unlikely to be the case in

the permitting phase for the kinds of projects this backstop authority ostensibly is intended to address. DOE should confirm that federal permitting decisions would not occur until states have acted within a reasonable period.

The MN PUC also has a concern dealing with period of time within which FERC believes it must act. During a September 1, 2011 conference call with the Eastern Interconnection State Planning Council (EISPC), FERC Chairman Wellinghoff indicated that, although federal permits are to be issued within one year of application, FERC would forestall from deliberate federal action on a permit if the state was making "a good faith effort" in working toward resolution and the developer did not otherwise raise objections. FERC seems to envision a process where the developer has leverage at the federal level that they can bring to bear on states that are not progressing in the way they like; i.e., a developer driven process. This is troubling since it creates a new dimension of pressure on states to act in a certain way and creates uncertainty. What will FERC do if the developer is not happy? What will FERC do if states are not happy? The MN PUC believes the answer to these questions is that the public interest must carry the day. DOE must ensure any possible confusion on these points is addressed in favor of the public interest if it expects the states to be willing participants in the implementation of any backstop authority. For example, if FERC is serious about adopting a "good faith effort" standard as mentioned by Chairman Wellinghoff, then "good faith effort" should be explicitly included and defined in rule language.

If DOE determines that it will go ahead with the delegation to FERC, it must impose clear and carefully crafted standards and conditions on how that authority is to be used. As noted, the MN PUC strongly believes any such authority must be used surgically and sparingly and in concert with state approval processes as well as regional transmission planning initiatives, not in a way that countermands or dominates these proceedings. The MN PUC believes the suggested limits to delegation set forth in NARUC's letter to you provide important boundaries that DOE should seriously consider.

On behalf of the MN PUC, your consideration of these comments is very much appreciated.

Respectfully,



Burl W. Haar, Executive Director
Minnesota Public Utilities Commission

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