



N A R U C  
National Association of Regulatory Utility Commissioners

September 8, 2011

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

Dear Mr. Secretary:

We are writing to respectfully request that you not delegate additional authority to the Federal Energy Regulatory Commission (FERC or Commission) as outlined in its proposal to reinterpret Federal Power Act Section 216.

The National Association of Regulatory Utility Commissioners (NARUC) represents the State Commissions of the fifty States and the District of Columbia that have original siting jurisdiction for transmission lines. We received the proposal shortly before a meeting on August 19, 2011 with FERC Chairman Jon Wellinghoff, Department of Energy (DOE) Senior Advisor Lauren Azar, several State Commissioners, and FERC and NARUC staff.

Before we get into our specific comments, we wanted to register our general frustration with how this process has unfolded. Until our abruptly scheduled August 19th meeting, we were given no formal or informal notice that such a dramatic policy change was even under consideration. Given that our members remain the primary transmission siting authorities, we are disappointed that we were not privy to the details or even informal conversations about this proposal prior to the above-referenced meeting, especially since the proposal has been under discussion since June and was vetted with industry stakeholders long before it was even revealed to us. This approach runs counter to DOE and FERC's traditional means of developing new rulemakings, which rely on greater transparency and due process, and the partnership we thought we had with our federal counterparts. Further, the Department of Energy Organization Act specifies that any delegation to the Commission be subject to public notice.<sup>1</sup> Because there was no such notice, we generated a notice that we circulated to our members alerting them to the proposal and the informal opportunity to comment.

To the extent that this proposal is motivated by a desire to reduce barriers to transmission, it fails. It relies on a tortured reading of the statute that would cause uncertainty, litigation, damage to State and federal relations, and delays in transmission development. Our members understand the importance of timely development of needed transmission as much as FERC and

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<sup>1</sup> DOE Organization Act Sec. 402(e); 42 U.S.C. § 7172(e). The website, posted after business hours on September 6, 2010, does not suffice.

DOE. The proposed delegation and implementation of this proposal runs counter to congressional intent. It will create new forms of legal and regulatory uncertainty and will divert resources from existing processes including the current American Recovery and Reinvestment Act-funded planning efforts, FERC's recently issued Order 1000, and State transmission siting processes. Therefore, we urge you not to move forward with this proposal.

### Delegations

The two suggested delegations—giving FERC authority to perform the congestion study and the corridor designation—run contrary to the structure and intent of the Energy Policy Act, which specifically divided responsibility between DOE and FERC. While DOE may have legal authority to make this delegation, the proposed delegation conflicts with the provisions and spirit of the statute. The FERC proposal would eliminate the statutorily designed division of authority, and give FERC the authority to trigger its own backstop jurisdiction. If Congress had intended this, they would have simply given this authority to FERC in the first place. Rather, the structure of the statute reflects a clear division of authority between the two agencies through which DOE's power to identify both areas of congestion and designate transmission corridors important to the national interest is intended to be exercised independently from the siting process.

### Congestion Studies

In *California Wilderness Coalition v. DOE*, the United States Court of Appeals for the Ninth Circuit found that DOE failed to properly consult with the States while developing the congestion study. The statute did not envision this delegation of authority to FERC, and singles out States as unique stakeholders in this process. And even if it could do so legally, it would be unwise and bad policy for DOE to delegate authority to FERC to conduct the congestion study in the face of State opposition.

The current proposal does not clearly indicate how the congestion study would be done, nor does it indicate why delegation to FERC is necessary or preferred. Whether conducted by DOE or FERC, the States must play a significant role. The consultation should recognize existing regional congestion studies and factor in States' understanding of how useful these studies are to promoting proper transmission development. FERC responds to these concerns by saying that they will be addressed in a forthcoming rulemaking. But without precise limitations on the terms of the delegation, FERC will be free to relegate States to the same status as any other stakeholder, something Congress never envisioned.

### Corridor Designations

The FERC proposal to make project specific national interest electric transmission corridor (NIETC) designations also conflicts with the statute. If DOE delegates authority to FERC to allow developers to identify corridors, DOE would in essence be delegating national interest determinations to transmission developers, who would be free to seek these designations outside of the established (and newly expanded) regional planning processes. Not only does this make no sense, it flouts the intent of the statute.

Project-specific delegations conflict with the clear statutory language that permits the Secretary to designate a *geographic area* as a NIETC. The FERC proposal is unworkable because the statute requires that States have the opportunity to comment on any NIETC designation. If the NIETC applications are initiated at FERC on a project-specific basis, and a State is simultaneously reviewing a siting application for the same line, the relevant State authority will likely be precluded under procedural rules from participating in the NIETC docket. Indeed, it is easy to imagine developers pursuing a FERC corridor designation and running the clock on State siting processes in an attempt to circumvent State siting review. This is especially true given that FERC will assert siting authority if a State denies a siting application despite the United States Court of Appeals for the Fourth Circuit’s determination that FERC does not have authority in the face of a State’s affirmative denial.<sup>2</sup> DOE lacks the authority to preempt the States’ siting role in that fashion, and certainly cannot delegate that sort of preemptive power to FERC. And it is equally easy to imagine projects that obtain corridor designations being delayed by years of litigation, as the courts once again try to settle the boundaries of federal and State jurisdiction.

A federal pre-filing and NIETC designation request that occurs concurrently with the State process would be resource intensive and redundant. Also, it will open up opportunities for developers to attempt to game the system by “forum shopping” until they get the answer they want. It is unclear what authority FERC would have to undertake the pre-filing process at the same time it reviews a NIETC application given that FERC only gains backstop siting authority one year from the application being filed with the State or the NIETC designation, whichever is later. Again, given the opportunity to consolidate the corridor and siting decisions at FERC, developers will have every incentive to avoid State regulatory processes.

The proposal leaves significant questions, including how conflicting NIETC applications that claim to resolve the same congestion or constraint would be handled; and how the NIETC designation relates to the congestion study, Order 1000 regional and interregional plans, or State determinations that new transmission is unneeded given non-wires alternatives. While it would be important to ensure that any project receiving a NIETC designation be vetted through a stakeholder process, mere inclusion in a regional or interregional plan should not lead to a NIETC designation—nor should a project proposed for a corridor be crammed into a regional or interregional plan outside of the established process.

Under any delegation, FERC must respect State authority over generation and non-transmission decisions, and DOE should reiterate this requirement. Project-specific NIETC designations, which were never envisioned in the statute, will undermine State and regional planning authority. This may lead to a “build, build” mentality where FERC grants a NIETC designation no matter whether a State has disapproved the project or decided to pursue non-transmission alternatives to solve constraint or congestion, leading to the construction of unnecessary and expensive transmission projects. If FERC evaluates non-transmission alternatives during a NIETC delegation proceeding, it may use NIETC designations to impermissibly evaluate or override State decisions regarding generation, demand response, energy efficiency, or other non-transmission alternatives that are clearly within State jurisdiction.

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<sup>2</sup> *Piedmont Environmental Council v. F.E.R.C.* 558 F.3d 304 (4<sup>th</sup> Cir. 2009). FERC claims that *Piedmont*, which held that a State’s affirmative denial of an application did not constitute trigger FERC’s backstop siting authority, only applies in the Fourth Circuit.

None of these options will result in sound public policy, and all trample the States' historic and critically important role in resource planning and transmission siting.

### Backstop Siting

As authorized by Congress and interpreted by the courts, FERC's limited siting authority is meant as a backstop to when a State takes more than one year to act on a transmission proposal within a NIETC region. DOE and FERC should support State processes that evaluate and site lines in the first place rather than undertaking a complex and unlawful reinterpretation of the statute in order to reinvigorate the backstop authority that representatives of the Commission have repeatedly said will rarely, if ever, be used. Even prior to the court decisions that limited the applicability of FPA 216, only one developer ever applied for backstop siting, and that application was withdrawn. If DOE and FERC move forward with the delegation and rulemakings necessary to implement the proposal, States (and other stakeholders) would have to dedicate sparse resources to a federal process that does not move the ball forward on original siting efforts.

Siting is inherently a local issue that impacts local environments, local landowners, local businesses and local communities. The best decisions come after complete due process where every interested neighbor, farmer and businessperson has an opportunity to be heard. People who know the landscape must be able to participate in the transmission siting processes to minimize negative environmental and economic impacts. Federal siting authority makes local participation less accessible, more expensive, and therefore less likely. State siting processes that enable local engagement may take time (although often less time than the combined pre-filing and filing processes at FERC), but they do not conflict with regional or national interests. On the contrary, local processes are essential to accomplish those interests, and the federal government should not create a short cut around local engagement.

Rather than reinterpreting the law, DOE and FERC should focus their efforts on strongly supporting the emerging regional and interregional planning processes, including support to States to ensure that all stakeholders can participate and create together the most efficient local, regional and interregional solutions to meet electric system needs. The DOE-supported interconnection-wide planning efforts are a perfect example of constructive transmission study and planning. This proposed delegation exalts backstop siting over planning and analysis, and does so in a time when federal resources should be dedicated to coordinating efforts funded by taxpayers that are already underway and solving the issues that surround transmission lines that must cross federal lands.

### Federal Permits—Coordination of Federal Agencies

FERC and DOE should focus on improving their own processes regarding federal permitting. It is no secret that obtaining the requisite federal permits can delay transmission projects. To be sure, due diligence and environmental review are paramount in any process, but there is room for improvement in federal coordination and permitting. FERC has asserted federal agency coordination as a primary justification for this proposal, but the federal coordination can and must happen separate from any delegations made under this proposal. If anything, the proposal would make the current federal coordination efforts more complex.

The Energy Policy Act of 2005 directs DOE to coordinate federal agencies to streamline necessary authorizations and environmental reviews for transmission projects that will cross federal lands regardless of NIETC designation.<sup>3</sup> DOE has delegated the authority to coordinate federal agency processes for lines within NIETCs to FERC. Dividing responsibility for coordinating federal agencies depending on the location of the line does not make sense, and project-specific NIETC designations would make this bifurcation of authority even more irrational. Under the proposal, a line pending before a State siting board would coordinate federal agency authorizations through DOE, but if the line becomes a NIETC, then FERC would take over as the coordinating agency for the very same line going through the very same siting process. Nothing in that proposal streamlines federal agency review.

We understand that DOE is developing, with the Department of Interior, Department of Agriculture and other agencies, a Rapid Response Transmission Team (RRTT) to promote increased federal coordination. This is a good idea, and we support the idea when it is applied to lines already approved by State siting authorities. The DOE should focus its energy on establishing the RRTT and solving the problem of federal agencies coordination rather than undertaking a controversial reinterpretation and expansion of FERC's backstop siting authority.

#### Suggested Limits to Delegation

If DOE decides, counter to congressional intent and over our objection, to proceed with a delegation to FERC to conduct the congestion study and designate NIETCs, the delegation should be limited and conditioned in a way that is revocable upon violation of these conditions. Any delegation should make clear that:

- FERC must consult extensively with the States on the congestion study and defer to State and Regional studies that have been completed; and
- In reviewing a NIETC designation application, FERC must extensively engage with the State where the project is proposed to be built. This must go beyond the opportunity to comment in a rulemaking proceeding, and should include deference to State regulatory decisions or processes; and
- NIETC designations should not be granted to lines that are built entirely within a single State; and
- Any NIETC designation must be consistent with a regional transmission plan developed in coordination with affected State commissions or other designated State siting authorities, and other regional planning groups. That plan should cover the entire route of the proposed project. But inclusion on such a plan may not be the only factor in determining NIETC designations, nor should it guarantee NIETC designation; and
- Project-specific NIETC delegations should only be granted to lines where an agreement governing how the project will be financed and paid exists either through (1) a cost-allocation agreement among all the States through which the proposed project will pass or (2) a FERC-approved cost-allocation rule or methodology that covers the entire route of the proposed project; and
- FERC must not in any way use these delegations to preempt State authority over

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<sup>3</sup> Energy Policy Act 2005 Section 1221(h); Federal Power Act Sec. 216(h).

- retail ratemaking, the mitigation of local environmental impacts under State authority, the interconnection to distribution facilities, the siting of generation, non-transmission alternatives, or the participation by affected stakeholders in State and/or regional planning processes; and
- FERC should provide deference to State processes and adopt State records; and
  - NIETC designations should be tied to the congestion study and not based exclusively on responses to developer indications that there is a “constraint.”<sup>4</sup>

Although we remain concerned at the fast-track this drastic policy change appears to be on, we appreciate your consideration of our concerns. Respectfully, we urge you not to delegate any additional authority to FERC as such a delegation is not necessary. We also encourage you to allow existing initiatives such as the RRTT, the Order 1000 planning processes and the ARRA-funded interconnection transmission studies to take hold before moving forward with any effort to reinterpret the backstop siting provisions of FPA section 216. If you do delegate authority to FERC, we would appreciate a specific articulation of the problem the delegation intends to solve and how the delegation will solve the problem identified. We would also encourage the delegation to be conditioned based on our recommendations above and revocable upon the violation of any of these conditions.

Sincerely,



Charles D. Gray  
Executive Director

cc: Chairman Jon Wellinghoff  
Commissioner Cheryl LaFleur  
Commissioner Phillip Moeller  
Commissioner John Norris  
Commissioner Marc Spitzer  
Lauren Azar, Senior Advisor to the Secretary of Energy

**Resolution Regarding Possible Federal Legislation Amending the  
Federal Power Act Addressing Expansion of Transmission Facilities**

**WHEREAS**, the siting of electric transmission facilities has historically been subject to the exclusive jurisdiction of the States; and

**WHEREAS**, it is in the States' interests to ensure that adequate electric transmission facilities are constructed to meet the needs for economic and reliable utility service; and

**WHEREAS**, it continues to be the long-standing position of the National Association of Regulatory Utility Commissioners (NARUC) that Congress should not expand Federal authority over transmission siting either through amendments to the Federal Power Act or through other Federal legislation; and

**WHEREAS**, Section 216 to the Federal Power Act, enacted as part of the Energy Policy Act of 2005, provided the Federal Energy Regulatory Commission (FERC) with limited "backstop" transmission siting authority; and

**WHEREAS**, it is anticipated that within the next few months, Congress will be considering possible amendments to the Federal Power Act that will provide FERC with expanded authority over the siting and construction of new interstate transmission lines; be it therefore

**RESOLVED**, that in connection with any proposed legislation introduced in the current session of Congress that would expand FERC's current authority over the siting and construction of new interstate transmission lines, the Association and its Washington staff recommend that Congress incorporate the following principles into such legislation:

- That any such additional authority granted to FERC by the legislation allow for primary siting jurisdiction by the States, and provide that FERC's "backstop" siting authority be as limited in scope as possible;
- That, in no event should FERC be granted any additional authority over the siting or construction of new intrastate transmission lines;
- That, in no event should FERC be granted any additional authority to approve or to issue a certificate for a new interstate transmission line that is not consistent with a regional transmission plan developed, in coordination with affected State commissions or other designated State siting authorities, and other regional planning groups, that covers the entire route of the proposed project;
- That, in no event should FERC be granted any additional authority to approve or to issue a certificate for a new interstate transmission line unless there is already in place either (1) a cost-allocation agreement among all the States through which the proposed project will pass that governs how the project will be financed and paid for; or (2) a FERC-approved cost-allocation rule or methodology that covers the entire route of the proposed project;

- That, in no event should any such legislation allow FERC to preempt State authority over retail ratemaking, the mitigation of local environmental impacts under State authority, the interconnection to distribution facilities, the siting of generation, or the participation by affected stakeholders in State and/or regional planning processes; and
- That, in no event should any such legislation preempt existing State authority to regulate bundled retail transmission services.

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Sponsored by the Committee on Electricity  
Adopted by the NARUC Executive Committee  
March 10, 2009