



State of North Carolina

Utilities Commission

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September 8, 2011

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The Honorable Steven Chu
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue S.W.
Washington, D.C. 20585

Re: Proposal to Delegate the DOE's Obligation to Designate National Interest Electric Transmission Corridors to the FERC

Dear Secretary Chu,

The North Carolina Utilities Commission offers the following comments regarding the proposal entitled "Delegation by the Department of Energy to the Federal Energy Regulatory Commission of Authority to Conduct Congestion Studies and Designate Corridors for Interstate Electric Transmission Projects."

We do not believe it is good policy for DOE to delegate the National Interest Electric Transmission Corridor (NIETC) functions to the FERC. The responsibility for designating NIETCs was given to the DOE at the same time that backstop siting authority was given to the FERC (both via the Energy Policy Act of 2005). If Congress had intended both of these functions to reside at the FERC, it would have assigned both of them to the FERC in the first instance. Instead, Congress created a legislative paradigm of divided (not shared) authority. We believe the delegation proposal is a major departure from the division of authority that Congress established as part of a compromise to allow the FERC to engage in a minimal level of transmission siting—something it had no authority to do prior to the 2005 Act.

In addition, the proposal departs from current law in ways that stand to negatively impact state authority and obligation. The Energy Policy Act of 2005 requires the DOE to designate NIETCs based on geographic areas experiencing electric transmission congestion, while the proposed delegation would allow the FERC to consider specific projects for NIETC designation.

Under the proposal, the FERC would develop a "general approach to identifying congestion, e.g., using historical congestion indicators ... and production cost studies to

develop a forward-looking analysis.” With this approach, any electric generation scenario that results in an electricity price differential in one area versus another could lead to a NIETC designation and issuance of a federal permit to build a transmission line to connect the two areas. Further, under the proposal, “applicants could request a corridor designation ... concurrently with filing a state siting application.” This represents another significant departure from current law. Currently, the FERC may consider issuing a construction permit for a transmission line in a NIETC only if “a State commission ... has withheld approval for more than 1 year after the filing of an application” [Emphasis added.]

We are also concerned that the proposal has been put forward as a workaround to the Fourth Circuit’s decision in *Piedmont*. (*Piedmont Environmental Council v. FERC*, No. 07-1651, 4th Circuit, Feb. 8, 2009.) That Court held that the Energy Policy Act of 2005 does not allow the FERC to overturn a State’s denial of a transmission construction license. The Supreme Court refused to review the Fourth Circuit’s decision in *Piedmont*, leaving intact the Fourth Circuit’s decision. Despite this clear standing precedent from the U.S. Court of Appeals, DOE’s delegation proposal appears to presume that the FERC has the authority to license transmission lines rejected by states, even where such rejection has occurred within the one-year period for decision mandated by the Energy Policy Act. The proposal brushes aside the *Piedmont* decision, stating that “other courts might reach a different result.” In our view this is an improper disregard of the only existing precedential authority. Moreover, for actions affecting states in the Fourth Circuit, including North Carolina, the decision in *Piedmont* is controlling law and FERC is bound by it.

In addition, the delegation proposal says that states could participate in transmission construction applications before the FERC, as a party or a stakeholder. Such a suggestion ignores our State’s responsibility to remain unbiased as we weigh the evidence regarding such projects, simultaneously, in our own proceedings. In North Carolina, the Utilities Commission acts as a quasi-judicial body and cannot take positions and make public statements pertaining to pending matters. Thus, the State of North Carolina’s ability to participate in federal proceedings while related State proceedings are pending would be limited from the outset. Taken as a whole, we conclude that the proposal would expand greatly the FERC’s ability to undermine State authority to determine whether and where new transmission infrastructure is needed.

The FERC was granted backstop siting authority primarily to deal with situations in which state agencies had no authority or will to act on transmission projects. When applied to the State of North Carolina, it is apparent that the proposed delegation would increase FERC’s role beyond these situations. North Carolina has a renewable energy portfolio standard, an integrated resource planning process, and a regional transmission planning process. New transmission lines and generators must be licensed by the Utilities Commission. Our State laws require rigorous efforts to address and balance the economic costs and environmental impacts of assuring electricity supplies for our citizens. Contrary to what might have occurred in other parts of the country, we have not

hesitated to license the infrastructure needed to assure adequate and reasonably priced power. North Carolina consciously retained vertical integration of electricity suppliers for its citizens. Our electric utilities continue to have an "obligation to serve" our citizens, which includes planning and building infrastructure to serve them into the future. While North Carolina acknowledges its interstate commerce responsibilities, the electricity produced by our electric utilities is paid for and must appropriately benefit North Carolina citizens. We reject federal regulatory constructs that could impose transmission projects upon North Carolina that would bring costs, and possibly little if any benefits, to our State, while potentially providing great benefits to electricity producers or customers elsewhere. We believe the proposal would thwart our ability to be responsible stewards for our citizens by minimizing the role we play in deciding whether and where new transmission is needed.

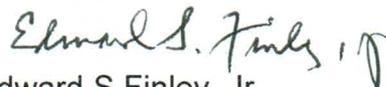
In good faith, North Carolina has participated in the Eastern Interconnection States Planning Council (EISPC). It now appears that the DOE or the FERC might use study results from that effort to designate NIETCs. We understand that potential was not envisioned at the outset, and it could have a chilling effect on our State's continued EISPC involvement.

It is not clear what problem the delegation proposal is attempting to address. Most states are acting on transmission license requests within a year. It is our understanding that securing land rights from federal agencies can sometimes delay projects considerably, and we support the DOE's efforts to speed those approvals.

The delegation proposal was distributed somewhat informally and comments were solicited with a short deadline. Such a proposal, with the potential to expand the FERC's role over transmission planning and licensing and to reduce State jurisdiction over transmission matters, likely in contravention of the division of authority between the DOE and the FERC established by Congress, should be given careful consideration. Interested parties should have ample time to weigh in on the ramifications of the proposal, especially given our belief that moving transmission licensing decisions to the FERC would make it more difficult for ratepayers to participate in transmission decisions.

In light of the concerns we have raised and the short timeframe for review, the North Carolina Utilities Commission encourages you to reject the delegation proposal.

Sincerely,



Edward S. Finley, Jr.
Chairman

C: FERC Chairman Jon Wellinghoff
North Carolina's Congressional Delegation