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United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510–6150

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September 9, 2011

The Honorable Steven Chu
Secretary of Energy
Washington, D.C. 20585

Dear Mr. Secretary:

Earlier this week, the Department asked for public comment on two papers prepared by the staff of the Federal Energy Regulatory Commission, which together lay out a "theoretical framework" for implementing section 216 of the Energy Policy Act of 2005. As enacted by Congress, section 216 requires you, as Secretary of Energy, to conduct triennial studies of electric transmission congestion, and authorizes you, in your discretion, to designate any area experiencing congestion that adversely affects consumers as a "national interest electric transmission corridor." It then permits the Federal Energy Regulatory Commission to authorize construction of electric transmission facilities within such corridors in certain limited circumstances.

The Commission papers take the view that section 216 "has not yet been effective," but that it can be made effective by having you delegate your authority to study congestion and designate corridors to the Commission. The Commission papers appear to be based upon, or at least inspired by, a third paper prepared by former FERC Chairman Joseph Kelliher. In his paper, Mr. Kelliher asserts that section 216 "was not well conceived or well drafted," that it "unnecessarily bifurcated the federal role between" the Department and the Commission, and that this "bifurcation of the federal role between two agencies was a mistake." Congress's legislative mistake, he suggests, can be fixed by administrative "re-implementation" of the law.

As one of the principal authors of section 216, I am writing to express my serious concerns with the Commission's proposal. I do so as one who has long supported giving the Commission greater authority to site electric transmission facilities. I agree that section 216 is flawed and has proved ineffective. I wish Congress had gone further than it did when it enacted section 216, and I have authored legislation, which has yet to be enacted, to strengthen section 216 and correct many of its shortcomings.

The simple fact is that the States, rather than Commission, have always had exclusive, plenary jurisdiction over electric transmission siting, and Congress has been reluctant to transfer that authority to the Commission. Congress was willing, in enacting section 216, to give the Commission "limited federal backstop siting authority," S. Rept. 109-78, at 48, but only within

areas that the Secretary of Energy had already independently determined were suffering "transmission capacity constraints or congestion that adversely affects consumers," and even then, only within certain narrowly prescribed parameters spelled out in the statute.

I do not question your legal authority to delegate the functions Congress assigned to you in section 216. Section 642 of the Department of Energy Organization Act gives you the power to delegate any of your functions "to such officers and employees of the Department" as you choose, and sections 204 and 401(a) of that Act indicate that the Commission is "within the Department." But it is not a step you should take lightly. The "bifurcation of the federal role" may appear to have been "a mistake" to Mr. Kelliher, but it was an essential part of the hard-won compromise embodied in section 216.

I am also troubled by the prospect, clearly and repeatedly spelled out in the Commission papers, that the Commission would use the authority it is asking you to delegate to designate industry-initiated, "project-specific" corridors. While this may "allow a more efficient, directed process" than the one enacted by Congress, it would, in effect, rewrite, rather than simply "re-implement," section 216.

In enacting section 216, "Congress intended only a measured, although important, transfer of jurisdiction to FERC," not "the sweeping transfer of jurisdiction" that some of us might have preferred. *Piedmont Environmental Council v. FERC*, 558 F.3d 304, 314 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1138 (2010). "Unifying" in the Commission authorities that Congress intentionally separated would eliminate one of the important checks-and-balances that Congress thought essential to limit the transfer of jurisdiction, and it would pave the way for the Commission to use the newly consolidated powers in ways never intended by Congress.

I still believe that Congress needs to amend section 216 to give the Commission greater siting authority. But the decision to rewrite section 216 is for Congress to make. Rewriting section 216 under the guise of reinterpreting it, as the Commission proposes, is extremely ill-advised. It would do serious harm to our efforts to strengthen the federal siting role through legislation.

Sincerely,

Jeff Bingaman
Chairman