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STATE CORPORATION COMMISSION

September 9, 2011

VIA ELECTRONIC MAIL
TO: congestion09@anl.gov

The Honorable Steven Chu, Secretary
United States Department of Energy
Forrestal Building
1000 Independence Ave., S.W.
Washington, D.C. 20585-1000

Dear Secretary Chu:

The State Corporation Commission of Virginia ("Virginia SCC") appreciates the opportunity to comment on the proposal under which the Department of Energy ("DOE") would delegate certain statutory responsibilities and authority conferred upon DOE by 16 U.S.C. § 824p to the Federal Energy Regulatory Commission ("FERC"). The referenced statute establishes the limited circumstances under which FERC can invoke electric transmission siting authority that otherwise resides with the States. The invocation of this statute by FERC can therefore pre-empt the jurisdiction of the Virginia SCC, which exercises siting authority for transmission projects proposed for construction in Virginia. Due to this direct and substantial interest, the Virginia SCC submits this letter to share concerns about DOE's and FERC's delegation proposal. We ask that this proposal be reevaluated as it appears to be based on misunderstandings of law and, in the specific instance of Virginia, a significant and fundamental misstatement of our state transmission siting activity and processes, which we will discuss in some detail below.

As you are aware, 16 U.S.C. § 824p directs the DOE to conduct a study of electric transmission congestion every three years in consultation with affected States and, following the issuance of such study and additional statutory procedures, further directs DOE to issue a report based on that study. As part of these triennial reports, DOE is authorized to designate certain areas as "national interest electric transmission corridors" ("NIETCs"). For transmission projects located within these NIETCs, federal siting jurisdiction can be triggered under circumstances specified in 16 U.S.C. § 824p. The statute provides this "backstop" siting authority to FERC.

Based on the explanation of the delegation proposal provided during conference calls organized by DOE and FERC and the discussion documents shared by your agencies,¹ we understand that DOE is considering the transfer of its obligations to conduct the triennial congestion studies, to issue the separate reports based on those studies, and to make the NIETC designations, to FERC. We also understand that the delegation is only the first step of a more comprehensive proposal by which FERC would then “repurpose” 16 U.S.C. § 824p to expand FERC siting authority well beyond what Congress intended in enacting the statute in 2005. This statutory “repurposing” would be accomplished through a new process in which FERC may, among other things: (1) conduct congestion studies on a continuing, rather than triennial, basis; (2) allow NIETC designations on a project-specific basis at the request of project developers; and (3) allow FERC to initiate siting proceedings simultaneous to state siting proceedings and before conditions necessary for FERC’s siting jurisdiction have been triggered.

The discussion documents for this proposal assert that 16 U.S.C. § 824p “has not yet been effective” because no *federal* construction permits for projects in NIETCs have been issued.² However, the fact that no federal construction permits have been issued under the provisions of this new statute is not proof that the NIETC process is ineffective. Bear in mind that the authority conferred by Congress on FERC is *backstop* siting authority, which, by statutory design, arises only upon the occurrence of certain events, the first of which is a careful study *by DOE* to determine and designate locations in the United States where transmission congestion actually exists and where a federal purpose might be served by *enabling* FERC to take actions that the States cannot take or will not decide. However, the effectiveness of the *primary* transmission siting authority exercised by the States directly impacts – and can diminish or supplant entirely – a need for federal backstop siting authority that might otherwise arise. And the record thus far establishes that state transmission siting authority is working effectively to process transmission projects proposed for construction in the two NIETCs that DOE has thus far identified.

The state siting process conducted pursuant to the Code of Virginia, for instance, has resulted in the certification of many projects, including, but not limited to, several that have been approved for construction within the area of Virginia included in the Mid-Atlantic Area

¹ DOE has posted links to two of these documents, entitled “Transmission Siting Narrative” and “Transmission Siting Narrative Outline,” on the following website: <http://congestion09.anl.gov>.

² See, e.g., Transmission Siting Narrative Outline at 1.

NIETC designated in 2007 by the DOE.³ In the four years since that designation occurred, Virginia SCC approvals have included two extra high voltage, multi-state transmission projects in addition to many other intrastate projects. Two other such projects have each been presented twice for approval, but withdrawn or not pursued in each instance by their developers.⁴ For your convenience, we have attached to this letter a summary of all projects proposed during this period in the NIETC portion of Virginia. Consistent with Virginia law governing transmission projects proposed for construction anywhere in Virginia, these NIETC projects have been approved when and where they are found to be needed, following a deliberative evidentiary process initiated by applicants.

Notwithstanding these facts, the only discussion of any Virginia transmission project included in the documents circulated in support of the delegation proposal is a significant mischaracterization about State review of AEP's Wyoming-Jackson's Ferry line, which was approved and constructed in West Virginia and Virginia before 16 U.S.C. § 824p was enacted.⁵ Significant delays for this project were prompted by the actions of Congress and federal agencies, including the Forest Service – and not by any inefficiencies in state siting authority. As the facts of this delay are well-documented⁶ and presumably can be easily verified by DOE

³ The Mid-Atlantic Area NIETC included the following counties in Virginia: Arlington, Clarke, Culpeper, Fairfax, Fauquier, Frederick, Loudon, Madison, Page, Prince William, Rappahannock, Rockingham, Shenandoah, Stafford, and Warren. Additionally, the DOE included in the NIETC the following Virginia cities: Alexandria, Harrisonburg, Fairfax, Falls Church, Manassas, Manassas Park, and Winchester.

⁴ See Attachment 1 at 1 (detailing, among other things, the voluntary withdrawals requested and granted in Case Nos. PUE-2009-00043, PUE-2009-00094, and PUE-2010-00115, and the voluntary abeyance requested in Case No. PUE-2010-00148).

⁵ See Establishing Effective Federal Electric Transmission Siting Through Reimplementation of the Energy Policy Act of 2005 at 2. This is a third discussion document circulated by DOE and FERC, but which is not currently posted on DOE's website.

⁶ See, e.g., *Application of Appalachian Power Company, For certificates of public convenience and necessity authorizing transmission lines in the Counties of Bland, Botetourt, Craig, Giles, Montgomery, Roanoke and Tazewell: Wyoming-Cloverdale 765 kV Transmission Line and Cloverdale 500 kV Bus Extension*, Case No. PUE-1997-00766, 2001 S.C.C. Ann. Rept. 366, 367, Order Granting Authority to Construct Transmission Facilities (“The Company identified two developments that led it to withdraw the 1991 application and to file a second application using another route. First, AEP-Virginia stated that Congress had directed a study of a segment of the New River for possible addition to the National Wild and Scenic River System. The [prior route] would have crossed the New River in the segment under study, and the Company determined that the crossing was foreclosed. In addition, the U.S. Forest Service and other federal agencies released on June 18, 1996, a draft environmental impact statement addressing the 1991 route . . . and suggested that the proposed route through federal lands would not be approved. These developments led the Company to reconsider the project.”).

and FERC through discussions with your sister federal agencies, it is unfortunate that this project is now being offered to question the effectiveness of state siting processes. For your reference we have attached a chronology of AEP's attempts, over a period of 12 years, to gain permission from federal agencies for its line to cross the public lands of the United States.⁷ This project certainly does not stand for the proposition that state regulatory processes are or have been impeding the construction of necessary transmission facilities.

Of additional concern is DOE's and FERC's stated desire to "overcome some of the judicial and procedural hurdles to effective use of existing backstop authority."⁸ Because the referenced procedural "hurdles" are codified by statute, efforts to stretch the NIETC process beyond the language of the statute would likely invite the very judicial scrutiny the proposal purports to overcome. Moreover, some of the legal analyses on which this strategy to "overcome" judicial decisions by two federal appellate courts appears to cast doubt on decades of precedent established for the Federal Power Act. The Fourth Circuit's *Piedmont* decision⁹ and the Ninth Circuit's *California Wilderness*¹⁰ decision resolved federal challenges lodged by many parties throughout the country that were each ultimately heard by one appellate court in accordance with the judicial review provisions of the Federal Power Act and the venue provisions of 28 U.S.C. § 2112.¹¹ We ask that you reconsider the legal argument that *Piedmont* is applicable to only the States within the Fourth Circuit in light of the potential ramifications of this position. If correct, DOE's and FERC's argument suggests, for example, that the numerous interpretations of the Federal Power Act by the United States Court of Appeals for the District of Columbia Circuit are applicable only within the District of Columbia.

Finally, it is likely that the carefully crafted statutory opportunities for state consultation and participation in the triennial congestion study would be substantially limited by the use of project-specific NIETC designations and siting proceedings that occur

⁷ See Attachment 2.

⁸ Transmission Siting Narrative at 3.

⁹ *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

¹⁰ *California Wilderness Coalition v. Dep't of Energy*, 631 F.3d 1072 (9th Cir. 2011).

¹¹ In *California Wilderness*, several petitions for review that were originally filed in the Second, Fourth, and District of Columbia Circuits were transferred to the Ninth Circuit pursuant to 28 U.S.C. § 2112. In *Piedmont*, petitions for review were transferred from the Second and District of Columbia Circuits to the Fourth Circuit.

contemporaneously with state siting proceedings. State siting proceedings, including those in Virginia, often include evidence on congestion and other factors that may be considered for NIETC designations under 16 U.S.C. § 824p. By narrowing NIETC designations from corridors to specific project proposals, positions taken on those proposals may require prejudging issues still pending in state proceedings. Such prejudgment is fundamentally at odds with the regulatory responsibility of the Virginia SCC, and presumably other public utility commissions that possess transmission siting authority.

In summary, the Virginia SCC cannot endorse the proposal to delegate DOE's NIETC authority under 16 U.S.C. § 824p to FERC because this plan appears to be based on misunderstandings of law and state siting processes. We therefore respectfully ask that DOE retain its statutory authority so that congestion can be studied, and NIETC designations considered, in the fashion directed by Congress.¹²

Thank you for considering these comments.

Sincerely,

William H. Chambliss

William H. Chambliss
General Counsel

¹² DOE has indicated that, if the proposed delegation does not occur, DOE intends to initiate a proceeding on the congestion study process. See <http://congestion09.anl.gov> ("If, on the other hand, DOE were not to delegate these authorities, it would wish to initiate a proceeding of its own to clarify these questions."). DOE appears better suited than FERC to consider any necessary refinements to the congestion study process, based on DOE's prior completion of two such studies.

ATTACHMENT 1:

**SUMMARY OF ALL TRANSMISSION PROJECTS
PROPOSED IN VIRGINIA
WITHIN THE MID-ATLANTIC AREA NIETC**

**SUMMARY OF THE FOUR EXTRA HIGH VOLTAGE, MULTI-STATE PROJECTS
PROPOSED FOR APPROVAL IN VIRGINIA
WITHIN THE MID-ATLANTIC AREA NIETC**

Trans-Allegheny Interstate Line (“TRAIL”)

Three-state, 500 kV line that is owned and operated by Dominion Virginia Power and Trans-Allegheny Interstate Line Co.

Virginia applications filed April 2007; Mid-Atlantic Area NIETC designated in October 2007; Order approving project issued October 2008 (Case Nos. PUE-2007-00031 and -00033)

Potomac-Appalachian Transmission Highline (“PATH”)

Three-state, 765 kV line that has twice been proposed and then withdrawn by subsidiaries of Potomac-Appalachian Transmission Highline, LLC

First Virginia application filed May 2009; local public hearings held August 3-6, 2009 and November 19, 2009; respondent testimonies filed October 2009; Staff report filed December 2009; withdrawal granted January 2010 at the request of the applicants (Case No. PUE-2009-00043)

Second Virginia application filed September 2010; local public hearings held February 2-3, 2011; withdrawal granted May 2011 at the request of the applicants (Case No. PUE-2010-00115)

Mid-Atlantic Power Pathway (“MAPP”)

Three-state, 500 kV line that has twice been proposed and then either withdrawn or requested to be held in abeyance by Potomac Electric Power Co. and Dominion Virginia Power

First Virginia application filed September 2009; withdrawal granted administratively March 2010 at the request of the applicants (Case No. PUE-2009-00094)

Second Virginia application filed December 2010, but not yet completed by applicants; abeyance of this proceeding requested by the applicants in August 2011 (Case No. PUE-2010-00148)

Mt. Storm to Doubs Rebuild

Three-state, 500 kV line proposed for rebuild at a higher capacity by Dominion Virginia Power and Potomac Edison Company

Virginia application filed January 2011; Order approving project issued September 2011 (Case No. PUE-2011-00003)

**SUMMARY OF VIRGINIA INTRASTATE TRANSMISSION PROJECT PROPOSALS
WITHIN THE MID-ATLANTIC AREA NIETC***

(All Projects Proposed By Dominion Virginia Power and All Were Approved)

Project Description		Virginia Application	Approval Order	Virginia SCC Case No.
Balston-Radnor Heights		January 2010	July 2010	PUE-2010-00004
Loudoun - New Road		December 2009	January 2011	PUE-2009-00134
Remington CT-Gainesville		June 2009	March 2010	PUE-2009-00050
Fort Belvoir-EPG		August 2008	April 2009	PUE-2008-00072
Beaumeade-NIVO		July 2008	February 2010	PUE-2008-00063
Garrisonville Loop		August 2006	April 2008	PUE-2006-00091
Pleasant View-Hamilton	overhead route	April 2005	February 2008	PUE-2005-00018
	alt. route with underground segment	April 2008	May 2008	PUE-2008-00027
	alt. route with lengthened underground segment	May 2008	May 2008	PUE-2008-00042

* Note that many other intrastate projects have been certificated for construction in Virginia but outside of the NIETC, including the Carson-Suffolk-Thrasher project, which consists of 80 miles of 500 kV and 230 kV construction approved in October 2008.
(Case No. PUE-2007-00020)

ATTACHMENT 2:

**CHRONOLOGY OF 12-YEAR FEDERAL PROCESS
FOR APPROVAL OF AEP 765 KV LINE
CROSSING OF JEFFERSON NATIONAL FOREST**

AMERICAN ELECTRIC POWER

765 KV TRANSMISSION LINE

CHRONOLOGY of FEDERAL EVENTS:

MARCH 1990

AEP announces 116 miles of 765 KV transmission line between Wyoming Substation in West Virginia and Cloverdale Substation near Roanoke, with 37 miles of the line in Virginia.

MARCH 1991

AEP files application for Special Use Permit with U.S. Forest Service (USFS) to allow the transmission line to cross Jefferson National Forest.

AUGUST 1991

AEP files application for Certificate of Public Convenience and Necessity with Virginia State Corporation Commission (SCC).

JULY 1992

U.S. Congress designates the portion of New River between Glen Lyn, Virginia, and Bluestorm Lake, West Virginia as a study area for wild and scenic river statutes under federal guidelines.

AUGUST 1992

AEP withdraws its application in West Virginia at the request of West Virginia PSC.

FEBRUARY 1993

AEP refiles application with West Virginia PSC.

MAY 1993

West Virginia PSC dismisses refiled application and decides to await USFS completion of the Draft Environmental Impact Statement (DEIS).

DECEMBER 1993

SCC Hearing Examiner issues his report recommending approval of AEP's application with minor modifications of the proposed route. No federal DEIS yet issued.

DECEMBER 1995

SCC issues Interim Order making a number of preliminary determinations. The Order directs AEP to file additional information on alternate routes, regional transmission improvements and the use and benefit of the line to serve the public interest in a restructured electric industry. Order recites that the U.S. Forest Service has not yet issued its DEIS.

MAY 1996

U.S. Parks Service recommends denial of proposed transmission line crossing the New River in the wild and scenic study area.

JUNE 1996

U.S. Forest Service releases DEIS and states its preliminary preference for "no action," which would deny AEP's request to build the line through Jefferson National Forest.

JUNE 1996

AEP requests SCC to extend filing date for information required by the December 1995 Order and to suspend proceedings until AEP files its comments on the DEIS.

OCTOBER 1996

AEP files comments on DEIS.

AUGUST 2001

AEP filed a supplemental Special Use Permit application with USFS.

APRIL 2002

USFS released the Supplemental Draft Environmental Impact Statement.

DECEMBER 2002

USFS released the Final Environmental Impact Statement and Record of Decision.

NOVEMBER 2003

USFS issues Special Use Permit to AEP to cross 11 miles of Jefferson National Forest.