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September 9, 2011

Submitted Electronically

Mr. David H. Meyer
Office of Electricity Delivery and Energy
Reliability (OE-20)
U.S. Department of Energy
1000 Independence Avenue SW
Washington DC 20585
congestion09@anl.gov

Re: Informal proposal for DOE to delegate Federal Power Act § 216 powers to FERC

Dear Mr. Meyer:

The Alabama Public Service Commission (APSC) appreciates the opportunity to express its concerns over the proposal being considered by the Department of Energy (DOE) to delegate authority granted to the Secretary by Congress in Section 216 of the Federal Power Act (FPA) – 16 § U.S.C. 824p – to the Federal Energy Regulatory Commission (FERC). As discussed below, the APSC is greatly troubled by this proposed delegation.¹ The APSC finds the proposal to depart significantly from the deliberate separation of responsibilities (and the resulting checks and balances) that Congress enacted in Section 216. These inherent limits on both the designation by DOE of national interest electric transmission corridors (NIETCs) and the limited authority of FERC to award any federal permit to construct or modify transmission facilities within a NIETC prevent the erosion of states' traditional authority over the development of electric facility infrastructure. Given the significance of a NIETC designation, the APSC believes that such authority best remains with DOE, as established by Congress. Delegation to FERC would undermine both confidence in the process and would create substantial controversy (both legally and politically) that will only frustrate, not promote, development of new transmission facilities. Accordingly, the APSC urges the DOE to refrain from making the proposed delegation.

¹ The APSC's understanding of the proposal is based on informal written materials made available on DOE's website (<http://www.congestion09.anl.gov/>) and briefings conducted with various industry groups, including the National Association of Regulatory Utility Commissioners and the Eastern Interconnection States Planning Council.

The APSC regulates essential utility services throughout most of Alabama, including the electric utility service provided by Alabama Power Company. Among other things, the APSC is responsible for balancing the interests of our regulated utilities with those of the consuming public, with the ultimate goal being the provision of reliable service at rates that are fair and reasonable. Over the last several years, the APSC has participated actively in the DOE's triennial congestion study process, including representation at the 2008 Atlanta Regional Workshop by Commissioner Jim Sullivan (who was President of the APSC at that time). The APSC believes the efforts of the DOE in performing congestion studies – and particularly the 2009 Congestion Study – have been comprehensive and the outcome of those studies generally reflective of an accurate assessment of the state of congestion in the nation, and certainly in the Southeast.²

The APSC understands that DOE is considering the possibility of delegating to FERC certain authority vested in the Secretary. Specifically, the Secretary may delegate (1) his authority to conduct triennial studies of electric transmission congestion; and (2) his authority to designate NIETCs, which Section 216 defines as any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers.³ If this authority is delegated, FERC would then proceed to implement new regulations for the performance of congestion studies and the designation of NIETCs. The new regulations apparently would include a focus on project-specific NIETCs and the inclusion of congestion studies and NIETC designations in the Order No. 1000 regional planning processes. In addition, it appears that FERC may allow third-party developers to request NIETC designations for specific projects or corridors that have not otherwise been designated by FERC (assuming delegation).⁴ FERC also may allow backstop permit applications to go forward even without an actually designated NIETC and also may allow both the NIETC request and the backstop permit application to run parallel with a state siting application.

The APSC is greatly troubled by these proposals. At the outset, the APSC cannot help but question the legality of such a proposal given the fact that Section 216 of the FPA clearly divided prerequisites for federal siting among DOE and FERC. DOE was tasked with responsibility over the triennial congestion study and NIETC designation while FERC was tasked with the actual permitting decision. Separate and distinct qualification criteria apply to both the NIETC designation and permit issuance by FERC. Thus, it is inconsistent with the express language and architecture of the statute to concentrate oversight and responsibility over the study obligation, the NIETC designation and the backstop permitting decision under one

² For example, the 2009 Congestion Study correctly recognized that “[b]ecause the southeastern utilities build aggressively in advance of load, there is little economic or reliability congestion within the region.” 2009 DOE Congestion Study at p. 61. Such efforts reflect the proactive design of the utilities, under the oversight of the APSC and its sister state authorities in neighboring jurisdictions, to plan and develop generation, transmission and other alternatives (e.g., demand side management) on an integrated basis, as part of their duty to serve customers in their retail jurisdictions reliably and at the lowest practicable cost.

³ FPA § 216(a)(1) & (2).

⁴ Indeed, based on summaries the APSC has seen of FERC's plans for implementation of any delegation of DOE's authority, it appears FERC intends to allow third-party developers to request NIETC designations, perhaps even if they had projects determined to be impractical under integrated resource plans or an Order No. 1000 regional transmission planning process.

regulatory entity. (Also at seeming odds with the statute is the idea that a third-party – e.g., a business developer – could “recommend” a project-specific NIETC.)

Such concentration of oversight and responsibility also does not seem to make good sense from a policy perspective. The decision to award a federal siting permit (even through a backstop siting process) is a significant one, as it interjects the federal government into an area traditionally left to the prerogative of the states, and authorizes the permit holder to exercise a federal right of eminent domain.⁵ In the APSC’s view, the entity charged with determining whether a permit should be issued must be capable of claiming full independence, both in fact and appearance. The ability to claim such independence would seem to be compromised, however, if that entity was the one who performed the study and designated the NIETC – especially if the NIETC was, as is being considered, a “project-specific NIETC.” Under such circumstances, the outcome of the permit application could be viewed as having been preordained, which would undermine its legality and call in to question the transparency of the process.

Indeed, the proposal contemplated by DOE seems to be an effort to transform Congress’ grant of limited, backstop siting authority to FERC into a means by which FERC can directly grant a siting permit based upon an individual siting request. Such a revision of Section 216 represents poor public policy due to the disruptions and inefficiencies that it would cast upon existing state-regulated transmission planning, siting, and permitting processes. Furthermore, such a “repurposing” of the statute, as the APSC has heard the concept described by FERC officials, may only be lawfully effectuated by Congress.

Also under apparent consideration is the idea of linking the delegated authority to FERC’s recent Order No. 1000. This too strikes the APSC as problematic. The legality of that order has been called into question by a number of entities in both the public and private sectors of the electric industry (including the APSC). Such being the case, the APSC questions the value of embroiling DOE and its congestion study and NIETC designation authorities in the on-going turmoil of Order No. 1000.

The APSC understands that one of the apparent drivers for the possible delegation is a desire for more efficiency in the utilization of FPA § 216 to accomplish more federal siting of transmission. In addition, it is apparently thought that a delegation could help overcome the decision from the Ninth Circuit Court of Appeals that invalidated the 2006 NIETC designations and required DOE to prepare an environmental impact statement (EIS) or environmental assessment (EA) for the actual NIETC designations.⁶ On a related point, the APSC also understands that FERC may view the delegation as a means to work around the consequences of a Fourth Circuit Court of Appeals decision that invalidated part of FERC’s rulemaking to implement its permitting authority. As the Secretary is aware, that decision held that FERC

⁵ In this respect, it should not be forgotten that FPA § 216 (as part of EPAct 2005) was debated and enacted contemporaneously with the Supreme Court’s consideration of and decision in the controversial eminent domain case *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁶ *California Wilderness Coalition v. DOE*, 631 F.3d 1072 (9th Cir. 2011).

could not issue a permit in situations where a state authority had denied an application to site a transmission facility.⁷

The APSC certainly appreciates the value of efficiency. That said, the APSC shares with DOE the view that congestion studies and NIETC designations are not a means to an end, and that just because a NIETC designation has been made, new transmission facilities are not necessarily required.⁸ The notion that FERC might collapse NIETC into a project-specific permit and right of way process essentially eviscerates the entire concept of a corridor (assuming a corridor in plain language is larger than a single project right of way). This undermines, rather than promotes, Congressional purposes, in that backstop siting authority was by design a limited, last-resort option to address situations where a state lacked the ability to act on an application, failed to act on an application, or acted unreasonably with respect to an application. For this reason, the APSC does not believe that the lack of any successful or pending federal transmission siting projects is indicative of any shortcomings in how Congress sought to assign the responsibilities contained in FPA § 216.

Furthermore, the APSC does not understand how a potential delegation and a “repurposing” of Section 216 implementation will alter the requirements flowing from the Ninth Circuit’s and Fourth Circuit’s decisions. As to the former, it seems that FERC will still have to prepare and EIS or EA for its NIETC designation as well as an EIS or an EA for the permit application. If the thinking is that the need to prepare a second EIS/EA can be avoided by collapsing the NIETC designation and permit application process into a single agency action, the APSC questions whether doing so would be compliant with the language of the statute. Section 216 clearly contemplates some degree of bifurcation between NIETC designations and permit issuance. As to the Fourth Circuit decision, the APSC understands that case to have involved several consolidated petitions for review of a FERC rulemaking. It would seem then that FERC is bound by that case directly and nationally.⁹

The APSC understands that DOE and FERC are interested in whether such a delegation would be injurious to federal/state relations. It is difficult for the APSC to imagine such a delegation – and the processes contemplated by FERC upon delegation – as enhancing relations. As discussed above, the APSC believes that Congress has long established that states are to be primarily responsible for transmission siting and transmission facility needs assessment within their borders. Congress created a deliberate system of checks and balances in FPA § 216, being mindful that the authority that could be vested through a backstop federal siting permit included the power of eminent domain. The potential delegation – or “repurposing of the statute” – seems

⁷ *Piedmont Env’t Council v. FERC*, 558 F.3d 3049 (4th Cir. 2009).

⁸ See *National Electric Transmission Report*, 72 FR 56992, 56994 (Oct. 5, 2007) (“A National Corridor designation is not a determination that transmission must, or even should, be built.”); see also *id.* at 56994-95 (“Just as a National Corridor designation is not a decision about the best solution to a congestion or constraint problem, it also is not a siting decision. FPA section 216(a) does not shift to the Department the role of designing routes for transmission facilities, and a National Corridor designation does not dictate or endorse the route of any transmission project. If a transmission project is proposed in a National Corridor, it will be the State or local siting authorities, and potentially FERC if certain conditions are met, that will determine the specific route of that project.”).

⁹ Consolidated for review in *Piedmont* were petitions in the Second Circuit, Fourth Circuit and the D.C. Circuit. See *Piedmont*, 558 F.3d at 309, 312.

to run afoul of Congressional intent. In addition, when FERC implemented its backstop permitting regulations in 2006, it emphasized that the approach it was taking was one “that is more fully respectful of State jurisdiction.”¹⁰ To that end, the regulations avoided the establishment of a parallel federal permitting system. In order to allow the state process sufficient time to run its course and reach a solution that rendered the need for a federal permit unnecessary.¹¹ Such being the case, it is difficult for the APSC not to view the new proposal under consideration as being injurious to State jurisdiction.¹²

The APSC again expresses its gratitude at being given the opportunity to provide comments on this matter of significant public importance. In the view of the APSC, DOE has proven that it is the appropriate entity to perform Section 216’s required congestion studies as DOE has done a commendable job in analyzing and describing the Southeast for purposes of those studies. Furthermore, the proposal is characterized by numerous legal and policy deficiencies and seems likely to harm state/federal relations. For that reason, the APSC believes that the public interest would best be served by directing available resources toward DOE’s undertaking of the 2012 Congestion Study, and that the delegation proposal under consideration should not be pursued.

Sincerely,

s/John D. Free

John D. Free
Electricity Policy Division
Alabama Public Service Commission

¹⁰ *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 117 FERC ¶ 61,202, P 20 (Nov. 16, 2006).

¹¹ *See id.* PP 19-21.

¹² In addition, given FERC’s statement in Order No. 1000 that “nothing in this Final Rule involves an exercise of siting, permitting, and construction authority”, the APSC finds the consideration being given to the inclusion of any delegated authority in the Order No. 1000 regional processes to be at odds with that commitment and similar commitments set forth in the notice of proposed rulemaking. See Order No. 1000, P 107.