THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

RICHARD K. SULLIVAN, JR.
SECRETARY OF ENERGY
AND ENVIRONMENTAL AFFAIRS

ONE SOUTH STATION
BOSTON, MA 02110
(617) 305-3500

ANN G. BERWICK
CHAIR

JOLETTE A. WESTBROOK
COMMISSIONER

DAVID W. CASH
COMMISSIONER

September 9, 2011

Lauren Azar
Senior Advisor to the Secretary
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

Re: The Proposed Delegation of Authority from the Department of Energy to the Federal Energy Regulatory Commission

Dear Ms. Azar:

The Massachusetts Department of Public Utilities ("Mass DPU") submits comments on (i) the proposed *delegation* of authority from the Department of Energy ("DOE") to the Federal Energy Regulatory Commission ("FERC") to conduct electric transmission congestion studies and designate areas as national interest electric transmission corridors ("NIETCs"), and (ii) FERC's proposed adoption of a project-specific NIETC *designation* process subsequent to such delegation. We appreciate your efforts and the efforts of FERC Chairman Jon Wellinghoff in briefing the states on this proposal.

The Mass DPU supports the broad goals envisioned by this approach: the need for robust transmission infrastructure that can deliver reliable power and expand the development of renewable generation. Facilitation of the integration of renewable energy resources moves us towards a cleaner future while promoting economic development, jobs, and energy independence. DOE has facilitated historic cooperative efforts, such as the DOE-funded Eastern Interconnection States' Planning Council ("EISPC").

Privileged, confidential, protected communication, for the intended recipient only
FAX: (617) 345-9101
www.mass.gov/dpu

New England as a region has a proud history of energy cooperation and coordination. Currently, the six New England states are actively engaged in exploring a coordinated competitive procurement of renewable resources. This initiative will ensure that sufficient renewable resources exist to develop locally the generation needed to meet our clean energy goals, and that cost-effective transmission options will exist to deliver this power to consumers. Just this week, an Interstate Transmission Siting Collaborative comprised of the six New England states met for the first time to begin work intended to increase cooperation across state lines. This collaborative work adds to the efforts undertaken by individual states, such as Massachusetts' commitment towards the development of renewable resources.

As a region committed to energy coordination, we have deep concerns about the ramifications of this proposal in its current form. Despite the proposal's well-intentioned effort to create a more unified and efficient process for siting interstate transmission projects, the proposal suggests a striking policy shift with the potential for significant federal involvement in transmission planning and state siting processes, including broad expansion in the application of federal backstop siting. Moreover, we believe that it may have the unintended consequence of delaying appropriate transmission projects by prompting legal challenges to DOE's delegation to FERC as well as both administrative and legal challenges to corridor designations and permit granting proceedings. Successful petitions for project-specific corridor designations prior to state siting proceedings may also dissuade alternative solutions from coming forward, including non-transmission alternatives such as energy efficiency and demand response, which are critical components of Massachusetts' energy solutions.

Also, the proposal does not provide the legal basis on which DOE and FERC believe DOE has authority to delegate these areas of responsibility. Nor does the proposal address the legality of project-specific delegations given what appear to be conflicts with the plain language of the Energy Policy Act of 2005 ("EPACT 2005"). Due to the short comment period, we have largely limited these comments to policy considerations and do not address in detail our concerns that the proposed delegation and the project-specific approach may be legally deficient on a number of grounds. These threshold legal issues should be addressed before any delegation is made.

Given the short time frame available for our response to such a major issue, we are providing below a framework of our concerns. We also respectfully request that you delay any action regarding delegation of your authority to FERC in these areas.

Privileged, confidential, protected communication, for the intended recipient only

I. DELEGATION

- Erosion of Preconditions to Backstop Siting Authority. In EPACT 2005, Congress established a process by which DOE would conduct studies of electric transmission congestion and potentially designate as NIETCs geographic areas experiencing electric energy transmission constraints or congestion that adversely affected consumers. FERC is granted so-called "backstop siting authority" to issue permits for construction of electric transmission facilities conditioned on a DOE NIETC designation. Additional preconditions to FERC implementing backstop siting authority include a state's withholding of approval for more than one year or conditioning approval in a way that the proposed project would not significantly reduce transmission congestion or would be rendered economically infeasible.

  DOE's proposed delegation would undermine important statutory preconditions to FERC's authority to site projects. As proposed, FERC, not DOE, would designate a geographic area as a NIETC. Such a process allows FERC to determine when its own backstop siting authority is triggered.

  The proposal goes even further in enabling FERC to impose its backstop siting authority even where a state has denied siting approval. (Section 216 of the Federal Power Act limits FERC's backstop authority to those situations in which a state has withheld approval for more than one year after an application is filed. FERC issued a final rule interpreting this provision as permitting backstop authority where a state *denies* siting approval, reasoning that this constituted "withholding approval.") In 2009, the Fourth Circuit Court of Appeals disagreed with this interpretation, holding in *Piedmont Environmental Council v. FERC* that FERC does not have backstop authority when a state denies a request for siting approval and that FERC has backstop siting authority only when a state fails to act for one year after an application is filed.[1] However, the proposal states that *Piedmont* is limited only to those states covered by the Fourth Circuit and that other courts may reach a different result. Such an interpretation of Section 216 eliminates yet another precondition to FERC's backstop siting authority: in areas outside the Fourth Circuit, FERC claims that it has the authority to overrule a state siting decision that denies siting approval. This interpretation further diminishes state authority over siting by virtue of its questionable reading of the relevant provision of federal law.

---

[1] *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

Privileged, confidential, protected communication, for the intended recipient only

- Impeding Transmission Development. The delegation to FERC could have the perverse and unintended consequence of delaying needed transmission infrastructure. States and affected stakeholders would likely challenge FERC during both the NIETC designation process and the siting permit process on many grounds, including that FERC has exceeded the authority granted under EPAct 2005. Without a project-specific corridor designation process, many projects may proceed through state siting processes in due course. Stated another way, a concurrent project-specific process will provoke challenges to a project that may have otherwise received state siting approval, obviating the need for a corridor designation and backstop siting in the first place. These challenges and protracted battles over jurisdiction and the merits of the designation/project will likely delay, rather than advance, the investment in transmission needed to meet our collective energy policy goals.

  This delay would undermine successes in regions like New England. Our states have demonstrated an ability to work together to meet common goals, such as our collective participation in the Regional Greenhouse Gas Initiative and our ongoing efforts at coordinated regional renewable procurement detailed above. In transmission investments alone, the New England states have collectively permitted over 300 transmission projects since 2002, representing more than $4 billion in investments. Approximately $5 billion in additional investments are already planned for the next decade. In fact, DOE's 2009 National Electric Transmission Congestion Study found that New England had resolved serious transmission constraints and stated that New England "has shown that it can permit, site, finance, cost-allocate and build new generation and transmission, while encouraging demand-side resources as well."

- State Authority over Resource Planning. States have sole jurisdiction over generation and over which resources load serving entities ("LSEs") use to serve consumers within a state. Of major and very serious concern is that a broad application of NIETC designation and backstop siting authority could override state decisions regarding generation, demand response resources, energy efficiency or other non-transmission alternatives, all of which fall clearly within state jurisdiction. Where FERC provides NIETC status to a project based on the desire to integrate renewable resources or other specific resources into the grid, it is intruding on a state's authority over resource planning and adequacy and implementation of its energy and environmental policies (e.g., a state's renewable portfolio standards program). Backstop siting that favors specific resources places a thumb on the scale that undermines both competitive markets and a state's interest in promoting its desired resource mix. Backstop authority that in

Privileged, confidential, protected communication, for the intended recipient only

effect selects particular resources—particularly if such projects are provided mandatory cost recovery—encroaches upon states' authority over resource adequacy in contravention of the Federal Power Act.

II. PROJECT-SPECIFIC NIETC DESIGNATION PROCESS

- Shifting Policy Decisions to Transmission Project Developers. EPAct 2005 provides that DOE is responsible for conducting congestion studies and making corridor designations. However, the proposal to allow for project-specific NIETC designations contemplates that project developers—rather than DOE as is the case currently or FERC under one part of the proposed delegation—would identify corridors and file with FERC a request for such designation. Private transmission developers are thus accorded a primary role under the proposed project-specific designation process, supplanting a function that should be performed by a government entity acting in the public interest.

  EPAct 2005 clearly divides authority between DOE and FERC, separating policy functions performed by DOE from adjudicatory proceedings (i.e., backstop siting authority) led by FERC. However, even assuming that the delegation from DOE to FERC is legally permissible, the *de facto* delegation from FERC to project developers of the identification of NIETCs is facially inconsistent with EPAct 2005 and fails to ensure that NIETCs are primarily driven by the public interest, as EPAct 2005 clearly intends.

- Limiting State Participation in the Siting Process. We are concerned that state participation could be limited in the project-specific NIETC designation process. Under the current process, DOE designates NIETCs in advance, well ahead of any prospective state siting applications. Under the proposed approach, FERC and the states could conduct concurrent siting processes. Such an approach would limit state involvement in the federal process because state siting authorities would be prohibited from commenting on or taking positions in federal proceedings that could be seen as pre-judging on-going state siting proceedings. Consequently, this represents a very real constraint on state participation.

- Heightened Concern Regarding Erosion of Preconditions to Backstop Siting Authority. As stated above, following the delegation of authority from DOE to FERC as proposed, FERC, not DOE, would designate NIETCs. Such a process would allow FERC to

determine when its own backstop siting authority is triggered. Our concern that this delegation erodes a statutory precondition to FERC's backstop siting authority is heightened by FERC's additional proposed policy shift to project-specific corridor designations. Any type of project (reliability, economic, public policy) could arguably fit into the broad criteria set forth in the proposal to determine whether a NIETC designation might be appropriate (e.g., whether energy independence would be served by the designation or the designation is in the interest of national energy policy). An unintended result of this proposed change could be that FERC would have the authority to site a project anywhere and any time throughout the country.

We believe that we have provided an overview of our major concerns with the proposed approach. The Mass DPU remains committed to working with DOE and FERC to answer the many open questions raised by the proposal, including its legality and impact on regional transmission planning processes. This proposal was only circulated in mid-August, leaving insufficient time to evaluate with DOE, FERC, and other states the full implications of what appears to be a major policy shift.

Thank you for your consideration. We look forward to working with DOE and FERC to address these critical issues.

Sincerely,

/s/ Ann G. Berwick

Ann G. Berwick
Chair

Privileged, confidential, protected communication, for the intended recipient only