



## COMMENTS ON DOE DRAFT NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY

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Office of Electricity Delivery and Energy Reliability (OE)  
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Dear Mr. Meyer:

I am writing to provide the comments of NextEra Energy, Inc. (NextEra) on the draft U.S. Department of Energy (DOE) National Electric Transmission Congestion Study (Congestion Study). Our comments are limited in scope, responding to DOE questions about the value of the Congestion Study and solicitation of suggestions on possible revisions in the processes used to develop future Congestion Studies and National Interest Electric Transmission Corridors (Transmission Corridors).

In our view, the processes used for the conduct of Congestion Studies should be revised to better align with the process for proposing and designating Transmission Corridors. Transmission developers should be allowed to submit a Congestion Study paired with a request to designate a project-specific Transmission Corridor, which together would be the basis of consultation by DOE with affected states. These changes would result in a process that is more flexible, and allows for designation of much narrower corridors than those established by DOE in the past, thereby avoiding the political backlash the agency experienced after the original Transmission Corridor designations in 2007. This approach recognizes that transmission developers are in the best position to identify potential Transmission Corridors of actual use, while also facilitating new entry into transmission development and supporting the recent emergence of competitive transmission processes, which promises transmission cost savings.

### Description of NextEra Energy, Inc.

NextEra is the parent of Florida Power & Light Company (FPL), a large vertically integrated utility, and NextEra Energy Resources, LLC (NEER), a competitive generation holding company and parent of NextEra Energy Transmission, LLC (NEET), a transmission facilities operator outside of Florida. FPL is an integrated generation, transmission and distribution franchised electric utility that provides wholesale and retail electric service to customers in the State of Florida. FPL owns and operates over 24,000 MWs of generation and over 6,700 miles of

transmission lines in peninsular Florida. NEER subsidiaries own and operate approximately 18,000 MW of generation in 24 states and Canada, including approximately 10,000 MW of wind energy generators, as well as entities that provide retail electricity in competitive markets. NEET and its subsidiaries are dedicated to developing, owning and operating transmission facilities and currently owns and operates utilities in New Hampshire and Texas and is developing transmission projects throughout North America.

### Usefulness and Relevance of the Congestion Study

DOE specifically invited comments on the usefulness and relevance of its triennial Congestion Study.<sup>1</sup> In our view, the Congestion Study has limited usefulness and relevance in its current form. The purpose of the Congestion Study is to serve as the basis for possible designation of Transmission Corridors.<sup>2</sup> However, it would be difficult to use the Congestion Study in its current form for that purpose given that the proposed findings are general in nature.

For example, the Congestion Study finds that current congestion in the West is relatively low, but more congestion is expected in the next few years.<sup>3</sup> The Congestion Study finds that there is substantial congestion in the East, but existing constraints bind less often than when previous Congestion Studies were prepared.<sup>4</sup> The Congestion Study has general findings about the Midwest, including that congestion results from high and growing levels of wind generation that cannot be delivered from western sources to more distant loads, the lack of transmission to enable further development in renewable-rich areas, and there is congestion due to generation and capacity reserves that are higher in the western and central side of Midcontinent Independent Service Operator Inc. than they are in the East, increasing west-to-east flows.<sup>5</sup> All of these findings are general and nonspecific in nature and, as a result, it would be difficult to use them as the basis for designation of a Transmission Corridor. With respect to the Northeast, the Congestion Study finds that constraints limit flows across the Northeast, that congestion exists, but has mitigated somewhat compared to prior periods.<sup>6</sup> The Congestion Study does make a finding that transmission is needed to interconnect new generation in New England and resolve transmission planning criteria violations,<sup>7</sup> and that transmission constraints restrict power delivery into load centers in central New York and New York City and Long Island.<sup>8</sup> These findings are somewhat more specific, but again appear inadequate to serve as the basis for a Transmission Corridor designation. The only region where the Congestion Study

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<sup>1</sup> U.S. DEP'T OF ENERGY, NAT'L ELEC. TRANSMISSION CONGESTION STUDY, DRAFT FOR PUB. COMMENT at 86 (Aug. 2014).

<sup>2</sup> Federal Power Act § 216(a), 16 U.S.C. § 824p(a) (2014).

<sup>3</sup> Congestion Study at xx, 47.

<sup>4</sup> *Id.* at 48.

<sup>5</sup> *Id.* at xxi, 83.

<sup>6</sup> *Id.* at xxii, 83-4.

<sup>7</sup> *Id.* at 73.

<sup>8</sup> *Id.* at xxii, 84.

is specific is in the Southeast, where it correctly finds there is no persistent congestion, ruling out the possibility of Transmission Corridor designation entirely.

Although not stated in the Congestion Study, DOE may have altered its approach so that the study cannot serve as the basis for a Transmission Corridor designation. Yet the result is a report that largely repeats high level information on transmission development based on the North American Electric Reliability Corporation's (NERC) Long-Term Reliability Assessment. As a result, the Congestion Study provides little new analysis to supplement information readily available elsewhere. The Congestion Study process should therefore be redesigned to link more closely to Transmission Corridor designation for actual projects being pursued by transmission developers.

### Misapprehension of Significance of *Piedmont* Decision

DOE invited comments on its authority to designate Transmission Corridors to help ensure that the Nation's transmission needs are met in a timely manner.<sup>9</sup> This is an important question, and an area where confusion continues to reign since the *Piedmont* decision in 2009.<sup>10</sup> However, the Congestion Study manifests a fundamental misunderstanding of the *Piedmont* decision. The court in *Piedmont* did not "reject" the "FERC[] regulations for exercising its backstop siting authority," as characterized by DOE in the Congestion Study.<sup>11</sup> Instead, the court faulted the interpretation of the Federal Energy Regulatory Commission (FERC) of the term "withheld approval"<sup>12</sup> in Federal Power Act section 216(b)(1)(C)(i).<sup>13</sup> That interpretation was in the preamble to the FERC rule, not the text of the rule itself.<sup>14</sup> Since no change to the FERC siting rules was required by *Piedmont*, the rules naturally were never revised. For that reason, DOE's statement that "the Commission has not announced plans to adopt new regulations" is perplexing, since no change to the FERC siting rules is required as a result of *Piedmont*.<sup>15</sup> To the extent DOE believes that the FERC transmission siting rules were vacated and the permitting of transmission facilities in any Transmission Corridors that may be designated by DOE is a legal impossibility, it is mistaken. In reality, the FERC rules remain intact in the event DOE were to designate Transmission Corridors.

Importantly, the *Piedmont* decision does not control interpretation of section 216. This is the view of the U.S. Solicitor General, reflected in its brief to the U.S. Supreme Court, when it argued against the grant of certiorari on the grounds that *Piedmont* reflected the view of only

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<sup>9</sup> *Id.* at 86.

<sup>10</sup> *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (2009), *cert. denied*, 558 U.S. 1147 (2010) ("*Piedmont*").

<sup>11</sup> Congestion Study at 87.

<sup>12</sup> *Piedmont* at 315-6, 320.

<sup>13</sup> Federal Power Act §216(b)(1)(C)(i).

<sup>14</sup> *Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities*, Order No. 689, 117 FERC ¶ 61,202, at P26 (2006), *order on reh'g*, Order No. 689-A, 119 FERC ¶61,154 (2007).

<sup>15</sup> Congestion Study at 87.

one circuit and FERC was free to maintain its original interpretation outside the 4<sup>th</sup> Circuit.<sup>16</sup> In short, the original FERC interpretation of the term “withheld approval” continues to govern in the Lower 48 outside the 4<sup>th</sup> Circuit (other than the Electric Reliability Council of Texas<sup>17</sup>).

Even in the 4<sup>th</sup> Circuit the FERC transmission siting rule continues to apply with respect to certain transmission projects. Congress crafted section 216 in large part to fill a gap in state and local transmission siting laws, since the provision allows for FERC siting when a state lacks authority to approve siting,<sup>18</sup> an applicant for a construction permit does not qualify for siting under state law,<sup>19</sup> as well as when a state unduly conditions project approval.<sup>20</sup> None of these siting approvals in the 4<sup>th</sup> Circuit or elsewhere are implicated by *Piedmont*.

There is also confusion about the significance of *California Wilderness*<sup>21</sup> and whether that decision limited or narrowed DOE authority under section 216. In *California Wilderness*, the court vacated both the original Congestion Study and the Transmission Corridors because of inadequate consultation by DOE with affected states, as required by the statute.<sup>22</sup> However, this decision has limited implications for DOE’s authority under section 216 and simply stands for the proposition that notice and comment does not constitute “consultation” and that DOE must properly perform consultation with affected states when it conducts Congestion Studies.

#### Congestion Study Ignores Development of Competitive Transmission Sector

The Congestion Study reviews transmission developments in recent years. However, one major development conspicuously missing from any discussion in the study is the advent of competition in transmission development, the potential for competition to lower transmission costs, and the prospect that new entrants may not qualify for permitting under state law.

The Congestion Study describes the significant increase in transmission costs in recent years, noting transmission investment nearly doubled between 2006 and 2013.<sup>23</sup> But the report fails to recognize the concerns about increases in transmission rates resulting from this increased investment, particularly whether some costs may be excessive. In part to address these cost concerns FERC issued its landmark transmission planning and cost allocation rule, Order No. 1000. Order No. 1000 removed the federal right-of-first refusal (ROFR) from FERC jurisdictional tariffs, removing a barrier to competition in transmission development.<sup>24</sup> One

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<sup>16</sup> Brief for the Fed. Energy Regulatory Comm’n in Opposition at 14-5, *Edison Elec. Inst. v. Piedmont Envtl. Council* (2009) (No. 09-343).

<sup>17</sup> Federal Power Act § 216(k).

<sup>18</sup> *Id.* at (b)(1)(A)(i).

<sup>19</sup> *Id.* at (b)(1)(B).

<sup>20</sup> *Id.* at (b)(1)(C)(ii).

<sup>21</sup> *California Wilderness Coal. v. DOE*, 631 F. 1072 (9<sup>th</sup> Cir. 2011) (“*California Wilderness*”).

<sup>22</sup> *Id.* at 1086.

<sup>23</sup> Congestion Study at 26.

<sup>24</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

factor in FERC's decision to remove ROFR was a belief that competition in transmission development will help insure that the cost of new transmission development is not excessive.<sup>25</sup> Encouraging competition in transmission development is consistent with long-standing FERC policies holding that as a general matter competition will lower costs and shift risks from customers to competitors. Order No. 1000 was recently robustly affirmed by the U.S. Court of Appeals for the D.C. Circuit, including federal ROFR elimination.<sup>26</sup>

The rise of competitive transmission providers is a consequence of effective regional transmission planning, rules governing regional cost allocation, and concerns about controlling the cost of new transmission. Competitive processes have unfolded in many of the organized electricity markets, including the PJM Interconnection, L.L.C., California Independent System Operator Corp., and Southwest Power Pool, and are expanding to other regions. Through our subsidiary NEET, we are actively participating in these competitive processes, and already have become a regulated transmission utility in the Electric Reliability Council of Texas while developing a regulated transmission project in Ontario.

Despite the public policy benefits from competition in transmission development, in the form of lower costs, obstacles to competitive transmission remain. One obstacle is that new entrants may not qualify for permitting under state law, or incumbents may enjoy preferential siting rights. FERC policy permits regional transmission organizations to weigh any siting preferences enjoyed by incumbents under state law, which can favor incumbents in an award of a competitive transmission project.<sup>27</sup> State siting is an effective means to permit transmission projects developed by state-regulated utilities to meet the needs of their regulated retail customers. But state siting laws were not drafted with an eye to competitive transmission and new entrants. To the extent state law disqualifies new entrants from competitive transmission development, substantial cost savings may be lost by eliminating potential competition. Section 216 provides DOE clear authority to level the playing field, facilitate competition in transmission development, and deliver cost savings to customers.<sup>28</sup>

#### Recommendations for Revised Congestion Study and Corridor Designation Processes

The Congestion Study requested comments on whether the process used for designation of Transmission Corridors should be modified to better serve statutory objectives.<sup>29</sup> We believe the process should be modified to better serve statutory objectives to facilitate transmission development in a manner that avoids the controversy of the original Transmission Corridor designation, achieves greater flexibility, shifts the burden of preparing Congestion

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<sup>25</sup> *Id.*

<sup>26</sup> *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (DC Cir. 2014).

<sup>27</sup> See *South Carolina Elec. & Gas Co.* 147 FERC ¶ 61,126 at P 125 (2014); *Midwest Indep. Transmission Operator, Inc. and the MISO Transmission Owners et al.*, 147 FERC ¶ 61,127 at P 150 (2014); *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128 at P 145 (2014); *Maine Pub. Serv. Co.*, 147 FERC ¶ 61,129 at P 35 (2014); and *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,048 at P 143 (2014).

<sup>28</sup> Federal Power Act § 216(b)(1)(B), (b)(1)(C)(i).

<sup>29</sup> Congestion Study at 88.

Studies from DOE to transmission developers, allows for designation of project-specific Transmission Corridors, and respects state authority.

The original Transmission Corridor designation process used by DOE in was highly controversial and resulted in significant political backlash against the agency. The original Congestion Study prepared by DOE was careful to designate geographical areas experiencing transmission constraints or congestion, as required by the statute, and the DOE report designated relatively large Transmission Corridors in two regions of the country. One of those corridors included most of the Commonwealth of Pennsylvania. That created the perception that the federal government was poised to authorize a lattice work of transmission projects that would blanket Pennsylvania for the benefit of neighboring states.

A Congestion Study and Transmission Corridor, together, effectively constitute a finding that some increase of transmission capacity is needed in a particular geographic area, i.e., a need finding. A Transmission Corridor is not intended to be a project route, but it is perceived to be one by the general public. But the bifurcation of the Transmission Corridor designation by DOE and backstop siting by FERC makes it difficult for DOE to avoid designation of large Transmission Corridors that invite political backlash. One solution would be to designate narrow Transmission Corridors that are effectively project routes. That solution is not viable, in large part because DOE is in a poor position to identify routes that are both workable and useful for developers. In addition, because project permitting in any designated Transmission Corridor is reserved to FERC, and FERC commonly requires route changes and variances to mitigate environmental and community impact, closer alignment is needed between a Congestion Study, Transmission Corridor designation, and backstop siting by FERC.

A solution would be to change the process used by DOE for Congestion Studies and Transmission Corridor designation by shifting the burden of preparing Congestion Studies from DOE to transmission developers and allowing developers to request DOE designation of a project-specific Transmission Corridor with its submission of a Congestion Study. The Congestion Study would be required to demonstrate a transmission constraint or congestion that would be relieved or mitigated by a project in that corridor. The Congestion Study could be prepared by a contractor on a list approved by DOE. DOE would consult with affected states on this Congestion Study, as required.<sup>30</sup> If necessary, the transmission developer could submit to DOE a draft Congestion Study, which only becomes final after DOE consultation with affected states. The transmission developer could coordinate with FERC on an informal basis throughout this process for preliminary feedback as to potential changes to routing in the event backstop siting is needed, or DOE and FERC could establish a more formal coordination process.

By allowing Transmission Corridor designation on request, DOE would avoid the controversies of the past. Any such corridors would be comparable in size to electric transmission and interstate natural gas pipeline proposed routes, far smaller than the Transmission Corridors designated by DOE in 2007. This approach would provide greater

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<sup>30</sup> Federal Power Act § 216(a).

flexibility than the process used by DOE to date, which has produced three Congestion Studies in nine years, one of which was vacated by the courts, and one Transmission Corridor designation report, also vacated. Under this approach, transmission developers would be free to submit a Congestion Study and request a project specific Transmission Corridor as needed, not only once every three years. Modifying the Congestion Study and Transmission Corridor designation processes along these lines would produce a workable process consistent with statutory objectives. Any federal permitting under this revised process would likely remain a last resort, occurring only where state law bars or unduly burdens new entrants.

### Conclusion

In conclusion, NextEra commends DOE for soliciting recommendations on possible modifications to the processes used for development of Congestion Studies and designation of Transmission Corridors. We believe there is a need to modify the DOE approach in both areas. As stated above, we believe the Congestion Study process would be modified to allow transmission developers to submit to DOE Congestion Studies paired with requests for Transmission Corridor designations, at which point DOE would engage in consultation with affected states as required by statute. DOE should permit transmission developers to submit Congestion Studies as needed, not only every three years. These modifications would result in a process that is more flexible, and allows for designation of much narrower corridors than those established by DOE in the past, thereby avoiding the political backlash the agency experienced after the original Transmission Corridor designations in 2007. This approach also facilitates new entry into transmission development and encourages the development of competitive transmission processes, which promises transmission cost savings.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph T. Kelliher". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke at the end.

Joseph T. Kelliher  
Executive Vice President  
Federal Regulatory Affairs