WIRES VOICE OF THE ELECTRIC TRANSMISSION INDUSTRY
C/O HELP PLLC, 750 SEVENTEETH STREET N.W. SUITE 900 WASHINGTON, D.C. 20006 TEL. 202-378-2300

February 27, 2012

Submitted via email to: Brian.Mills@hq.doe.gov

Mr. Brian Mills
Office of Electricity Delivery and Energy Reliability (OE-20)
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

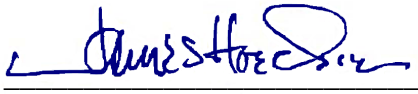
Re: Coordination of Federal Authorizations for Electric Transmission Facilities, RIN 1901-AB18

Dear Mr. Mills:

On behalf of WIRES (www.wiresgroup.com) I am pleased to submit the attached Comments in response to the Notice of Proposed Rulemaking on Coordination of Federal Authorizations for Electric Transmission Facilities. WIRES regards the work of Assistant Secretary Hoffman and OEDER in the area of electric transmission planning and siting to be of great importance to the transmission sector and, in fact, to the economic health of the nation going forward.

We applaud DOE and your Office for seeking public input in this proceeding and we look forward to being of further assistance in this or any additional transmission-related matters. I will be pleased to answer any question you may have about this comment or related matters.

Sincerely,



James J. Hoecker
Counsel to WIRES
Husch Blackwell LLP
Hoecker Energy Law & Policy
750 Seventeenth St., N.W.
Suite 900
Washington, D.C. 20006
James.hoecker@huschblackwell.com

UNITED STATES DEPARTMENT OF ENERGY
OFFICE OF ELECTRICITY DELIVERY AND ENERGY RELIABILITY

Coordination of Federal	)	
Authorizations for Electric	)	**RIN 1901-AB18**
Transmission Facilities	)	

COMMENTS OF WIRES ON THE DEPARTMENT OF ENERGY NOTICE OF PROPOSED RULEMAKING UNDER SECTION 216(h) OF THE FEDERAL POWER ACT

WIRES[1] respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NOPR" or "Proposed Rule")[2], issued by the Office of Electricity Delivery and Energy Reliability ("OEDER") of the Department of Energy ("DOE" or "the Department") to implement Section 216(h) of the Federal Power Act ("FPA"). WIRES expresses strong support for sustained efforts to ensure that Section 1221(a) of the Energy Policy Act of 2005[3] succeeds in achieving more efficient evaluation and siting of electric transmission, including the siting of those facilities that are located on Federal lands subject to one or more executive branch agencies or that affect Federally-protected resources. WIRES therefore supports the strong role that Congress assigned to DOE and applauds DOE's Proposed Rule as an important effort to give meaning to the statute and the 2009 Memorandum of Understanding among the eight Executive Branch agencies responsible for facilities siting on Federal lands and the Federal Energy

[1] WIRES is a national non-profit coalition of investor-, publicly-, and cooperatively-owned electric transmission providers, transmission customers including renewable energy developers, service and technology companies, construction firms, and regional grid organizations, formed in 2006 to promote investment in electric transmission through development and dissemination of information about the nation's need for a stronger, well-planned, and environmentally beneficial high-voltage transmission system. WIRES' website is www.wiresgroup.com.

[2] Coordination of Federal Authorizations for Electric Transmission Facilities, 76 Fed. Reg. 77,432 (Dec. 13, 2011) (to be codified at 10 CFR pt. 900).

[3] 16 U.S.C. 824p (2005) ("EPAct").

Regulatory Commission ("MOU").[4] WIRES believes the Proposed Rule should be improved significantly if it is to achieve its intended purposes.

I.

COMMUNICATIONS

All correspondence and communications regarding this filing should be addressed to the following:

James J. Hoecker
Counsel to WIRES
Husch Blackwell LLP
Hoecker Energy Law & Policy
750 17th St. N.W., Suite 900
Washington, D.C. 20006
Telephone: 202-549-0584
James.hoecker@huschblackwell.com

II.

EXECUTIVE SUMMARY

WIRES supports the Department's efforts to coordinate, streamline, and expedite the siting of electric transmission facilities that will be located wholly or in part on Federal lands or that affect Federally protected resources. However, WIRES is very concerned that the Proposed Rule, or the negotiated MOU upon which it is based, is inconsistent with the letter or intent of Section 216(h) of the FPA. At bottom, we recommend that DOE's best option for moving forward is to ensure that it preserves a stronger action-forcing role, because:

- The Congress' supervening NEPA review process in FPA Section 216(h), crafted specifically for electric transmission on Federal lands, provides DOE with a much stronger set of responsibilities for environmental review documents than does the Proposed Rule, under which DOE could not fulfill those responsibilities;

[4] Memorandum of Understanding Regarding Coordination in Federal Agency Review of Electric Transmission Facilities on Federal Land, October 23, 2009, http://energy.gov/sites/prod/files/Transmission%20Siting%20on%20Federal%20Lands%20MOU%20October%2023%2C%202009.pdf. By its terms, the MOU is intended to "improve coordination among [transmission] project applicants, federal agencies, states and tribes" involved in siting and permitting by providing "a single point of contact (POC) for coordinating all federal authorizations required to site electric transmission facilities on federals lands", excluding lines that cross an "U.S. international border. Federal submerged lands, national marine sanctuaries, or facilities constructed by federal Power Marketing Administrations" or lines within the Electric Reliability Council of Texas. The U.S. Department of Energy is the linchpin of this Federal effort under the FPA to act on transmission proposals fairly but far more efficiently and expeditiously.

- The Proposed Rule relies too heavily on procedures negotiated among Federal agencies but that enshrine the customary allocation of NEPA responsibilities, subject only to imprecise and unenforceable performance standards and oversight requirements, and that most importantly lack any mechanisms to ensure that approval processes will improve the Federal siting process in terms of protection of Federal interests or timeliness; and

- The NOPR does not adequately support the President's important new policy initiatives to re-structure Federal regulatory mechanisms in the interest of greater efficiency, to promote investment in critical infrastructure, and to generate significant job growth in the electric transmission sector.

WIRES qualifies its recommendation for a strong, central role for DOE, in two ways. First, we note that, underlying DOE's approach, is a reasonable concern about availability of in-house human resources and how to administer environmental review in coordination with the numerous laws enacted in the last half century to protect a wide variety of natural resources. In our view, either Congress or the Administration have failed to supply OEDER – the DOE office responsible for implementing Section 216(h) – with the resources necessary to carry out the intent of the statute. This, more than anything, has foreordained DOE's apparent reluctance to undertake a coordinating role in transmission siting on Federal lands that is consonant with the statute. We recognize that a stronger, more sustained effort by DOE to manage a multi-agency review process that conforms more closely to the statute will require the dedication of more resources than apparently exist currently in OEDER. That said, such problems can and should be addressed.

Second, WIRES recommends that, if DOE is to satisfy its Congressionally-authorized status as Lead Agency for transmission siting on Federal lands under Section 216(h), that approach should also be accompanied by the availability of a well-defined opt-out for those transmission project applicants that negotiate with the affected agencies an agreement about the processing of applicable permit applications and environmental reviews that would, in DOE's view, largely obviate the need for DOE's assistance and produce timely results. DOE should accommodate such requests provided DOE concludes that the alternative arrangement comports with the timeliness and efficiency objectives of its Final Rule.

If, on the other hand, the Department persists in adopting the monitoring and coordination role set forth in the Proposed Rule, WIRES respectfully requests a number of

revisions and clarifications in the Final Rule that will be necessary to ensure greater timeliness in Federal siting processes, including *but not limited to*:

- Selection of a more reasonable point from which to peg timely completion of an Environmental Impact Statement (sec. 900.11);

- Establishment of uniform and predictable NEPA timelines to provide the individual agencies with an initial goal for timeliness, with provision for exceptions in unusual cases;

- Adoption of complaint procedures and enforcement mechanisms that afford project applicants and the public timely access to information and relief from undue burden or delay;

- More transparency and accountability through an annually published performance report on all projects subject to Section 216(h), as well as intermediate postings about the ongoing siting processes for *all* transmission projects affecting Federal lands.

WIRES supports a more efficient and centralized environmental review process for transmission facilities on Federal lands that reflects Congress' express command in Section 216(h). This is completely consistent with the protections afforded public lands and resources by Federal law, and should not be mistaken as an effort to curtail them. We take the Administration at its word, that "if there's one overarching theme [for transmission in 2012], it's that the Obama Administration is serious about building high-voltage, long-distance, interstate transmission where necessary to upgrade the existing grid and existing system for reliability and reduced costs to consumers but also to unlock renewable energy in the West and, for that matter, on the Eastern seaboard."[5] A strong, centralized environmental review process, meeting all the applicable standards, is essential if the Administration is to make serious progress on its goals.

III.

BACKGROUND

WIRES and its members are strongly committed to strengthening the grid in the interest of enhanced reliability, access to diverse energy resources (including those encouraged by public policy innovations), competitive wholesale power markets and lower consumer prices, economic

[5] Steve Black, Counselor to Secretary of the Interior, quoted in *Transmission Hub*, January 4, 2012.

development, and energy independence. Many of its members engage in the development or upgrade of high-voltage transmission facilities. Others will be the transmission customers that will depend on, and help pay for, those facilities.

Facilities siting has been, and will continue to be, an important challenge for all energy infrastructure. In addition to individual states where siting authority traditionally resides, the interests of the Federal government can also come into play, particularly in the West. Federal land management agencies, notably the Bureau of Land Management (Department of the Interior) and the U.S. Forest Service (Department of Agriculture), have sprawling responsibilities for Federal land management. In addition, a range of other agencies are charged with protecting fish, wildlife, habitat, endangered species, coastal zones, clean air, and so on. These diverse regulatory requirements were developed and implemented over decades, with little attention to efficient and effective coordination among resource agencies or between resource agencies and economic regulators in individual cases. Laws and policies that encourage efficiency, consistent standards, and inter-agency coordination often lack suitable methods of implementation. Nowhere is this more true than in the case of siting horizontal or networked infrastructure like electric transmission that can simultaneously affect natural features subject to the jurisdiction of multiple resource and land management agencies, necessitating series of regulatory oversight procedures and approvals by multiple Federal (not to mention State) agencies.

Today, as the relevant Federal agencies seek to discharge their individual responsibilities in light of changing economic priorities, the coordination challenge has become even more evident. The problem has been addressed in a variety of ways, including through uniform guidelines for all environmental reviews under the National Environmental Protection Act of 1969 ("NEPA"),[6] which coordinates multiple approval processes through a standard environmental documentation process conducted by a "Lead Agency" and other cooperating authorities with jurisdiction over some aspect or effect of a "major Federal action."[7] Although protracted or duplicative siting processes have been identified as one of the major barriers to

[6] 42 U.S.C. 4321 et seq (2012); Council on Environmental Quality ("CEQ"), 40 CFR Part 1500.

[7] Importantly, agencies that have developed their own NEPA regulations and, although consistent with the CEQ's Guidelines, they can embody very different approaches. For example, an action that could be categorically excluded from NEPA review by one agency can require an environmental assessment by another.

development of the clean energy economy[8] as well as a potential threat to electric reliability,[9] the Congress and the Executive Branch have focused on possible ways to ameliorate unreasonable delays by improving upon the NEPA process where multiple Federal agencies are likely to be involved. DOE has been a leader in efforts to strengthen the nation's electric system. The importance of its role in overseeing aspects of the electric grid, both by virtue of its jurisdiction by law and its special expertise, is readily apparent in the 2005 Act.

Section 216(h) of the Act, entitled *Coordination of Federal Authorization for Transmission Facilities*, announces (at § 216(h)(2)) that "The Department of Energy shall act as the Lead Agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of the facility." Moreover, subsection (h)(4)(A) indicates that the Secretary of Energy "shall establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facility." "The Secretary shall ensure that, once an application has been submitted with such data as the Secretary considers necessary, all permit decisions and related environmental reviews under all applicable Federal laws shall be completed – (i) within 1 year, or (ii) if a requirement of another provision of Federal law does not permit compliance with clause (i), as soon thereafter as is practicable," states subsection (h)(4)(B). While the Secretary has extensive consultation responsibilities – responsibilities that could be fulfilled in large part by the rulemaking process – Section 216(h) over and over commands the Department to establish expeditious procedures and deadlines and concludes (at subsection (h)(5)(A)) that: "As Lead Agency head, the Secretary, in consultation with the affected agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law." Importantly, EPAct did not curtail the jurisdiction or responsibilities of any Federal agency charged with protecting Federally-owned land or Federally-protected resources. However, it did adopt a *novel* approach to implementing the NEPA process aimed at consolidating the NEPA documentation process, thereby eliminating undue delays that are occasioned by multiple Federal

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[8] National Renewable Energy Laboratory (DOE). *20% Wind by 2030* (July 2008), at § 4.2, p.98; National Electrical Manufacturers Association, "Siting Transmission Corridors – A Real Life Game of Chutes and Ladders," October 2010.

[9] National Electric Reliability Corporation, *Long-Term Reliability Assessments* (*2009 Long-Term Reliability Assessment*, Oct. 29, 2009, accessible at http://www.nerc.com/files/2009_LTRA.pdf; *2010 Long-Term Reliability Assessment*, Nov. 16, 2010, accessible at http://www.nerc.com/files/2010_LTRA_v2-.pdf; *2011 Long-Term Reliability Assessment* Nov. 28, 2011, accessible at http://www.nerc.com/files/2011%20LTRA_Final.pdf).

approval processes governing *a particular class of infrastructure projects on Federal land*s, *i.e. high voltage electric transmission lines and appurtenant facilities.*

The Proposed Rule would essentially adopt the approach negotiated by nine Federal agencies and memorialized in the 2009 MOU. Under the MOU, DOE was assigned a coordination role relative to the other agencies, in arguable (but clearly not strict) compliance with Section 216(h). Although it states that DOE's proposed regulations provide "a framework for cooperation and for the compilation of [a] uniform environmental review document in order to coordinate all permitting and environmental reviews required under Federal law to site qualified electric transmission facilities," the preface to the NOPR makes clear that DOE "interprets the term 'Lead Agency' as used in FPA section 216(h)(2) as primarily requiring DOE to coordinate the necessary environmental reviews conducted by other Federal agencies and to ensure that one Federal agency is responsible for preparing a uniform environmental review document."

In sum, the Proposed Rule (10 CFR Part 900, § 900.9) places DOE at the center of a process for *designating* a Lead Agency, *other than DOE in almost all instances*, that will be responsible for creating NEPA documents in individual cases and provide a point of contact for applicants and non-Federal parties. The Proposed Rule would apply to all "Qualifying Projects," defined as high voltage lines (usually 230kV and above) or lines that are regionally or nationally significant, cross lands of one or more MOU signatory agencies, and transmit power in interstate commerce, and "Other Projects" at the discretion of the Director of Permitting and Siting within OEDER. Under the proposal, DOE helps set timelines collaboratively in individual cases and tracks the regulatory processes on a dedicated website. DOE would only serve as Lead Agency where it has direct permitting authority over lines proposed by Federal power marketing administrations or that cross international boundaries. Although the Proposed Rule has several timelines for notice between agencies, it contains one important generic timeline; at § 900.11, an Environmental Impact Statement must be completed "one year and 30 days after the close of the public comment period for a Draft EIS."

The Proposed Rule contains no enforcement provisions that describe DOE's course of action if other agencies fail to comply with the Final Rule that DOE eventually adopts in 10 CFR Part 900 or with any "binding" timelines adopted generically or in particular cases. Without any proposal as to what DOE believes its responsibilities to be in such instances and therefore a

record of comment on that issue, DOE will be unable to adopt defensible enforcement mechanisms in its Final Rule. To WIRES' knowledge, none of the affected Federal agencies propose to adopt rules by which they consent to bind themselves to follow DOE's procedures or timelines, beyond the general, collaborative terms of the MOU.

IV.

COMMENTS OF WIRES

The following comments of WIRES are twofold. First, WIRES argues that the NOPR falls short of the requirements of FPA Section 216 and will, in WIRES' estimation, produce sub-optimal results in terms of expediting consideration of applications for siting electric transmission facilities on Federal lands. For that reason, DOE should reassess whether the approach it has chosen will produce the degree of coordination among Federal agencies that will fulfill Congress' objectives. We recommend that DOE consider a new NOPR that would more reasonably reflect the goals of FPA Section 216. If, on the other hand, DOE decides to move forward with some version of the Proposed Rule, whether because of principles of inter-agency comity or because the resources at the Department are insufficient for it to take on a more central coordination approach, WIRES supplies below a number of specific changes that will make the Final Rule more effective. Although WIRES strongly recommends that DOE adopt a Final Rule that conforms to a plain reading of Section 216(h), even if that entails seeking changes to the MOU, it believes that, absent such an effort, the current proposal must be improved in key ways. WIRES subscribes to the President's announced goal of fostering job creation through infrastructure development and sees this rulemaking as an opportunity for the Administration to demonstrate that it is prepared to reduce procedural obstacles to the timely enhancement of a critical American infrastructure network.

A. DOE'S LEADERSHIP AMONG FEDERAL AGENCIES IS CRITICAL TO EFFECTIVE SITING PROCEDURES UNDER EPACT AND NEPA

Electric transmission is a critical link, not only between generation and load across increasingly integrated regional and national power markets, but to our energy future as well. Federal lands may be affected by the upgrade of existing transmission projects or new projects that serve reliability purposes or that relieve congestion on the grid. This may occur in any region of the nation. However, despite the efforts of developers to avoid them, Federal lands

issues will regularly be implicated when long-distance lines are constructed to provide relatively distant customer loads with access to high quality renewable resources either offshore or, as tends to be the case, in the Midwest, Great Plains, and Western states. In 2005, Congress recognized both the need to re-invest substantially in the nation's high voltage system[10] and the institutional barriers to the efficient evaluation and siting of new transmission. The challenge is frequently described by experts. For example:

> Under current law, states retain the primary role in siting transmission facilities, and their interests often conflict. Any involved state can block a multistate project. Moreover, Federal agencies with missions that include purposes unrelated to energy can and do block or delay the construction of transmission lines across land they control. No agency is charged with considering the broad national interest.[11]

Building highly-needed energy delivery facilities, even when proposed in the context of carefully devised plans, is already highly regulated (including being subject to misinformation and parochial interests)[12] without also adding the institutional barriers created by having many agencies – at different levels of government, with differing priorities and timelines, and applying different criteria – exercising control over the future of a project's development. As a partial response to these challenges, EPAct Section 1221 adopted FPA Section 216, which was designed to overcome the barriers to transmission expansion in two ways: (1) by giving the FERC backstop siting authority in National Interest Electric Transmission Corridors designated by DOE if state siting proceedings failed to meet certain requirements; and (2) by requiring the Secretary of Energy, under Section 216(h), to take control of the environmental review processes related to Federal agency permitting actions that review, authorize, or condition the construction of transmission projects on Federal lands. In both cases, but especially the second, DOE is the executive department assigned by Congress the principal task of ensuring that the Federal government does its work efficiently in the national interest. Its statutory responsibility in this

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[10] One widely-recognized economic study estimates that the U.S., rebounding from a quarter century of under-investment in transmission, will need to invest over $300 Billion in transmission for all purposes before 2030. The Brattle Group, *Transforming America's Power Industry: The Investment Challenge 2010-2030*, prepared for The Edison Foundation, November 2008.

[11] Heidel, Kassakian, and Schmalensee, "Gridlock in 2030: Policy Priorities for Managing T&D Evolution," *Public Utilities Fortnightly* (January 2012), at 23.

[12] "Drawing The Line At Power Lines," *New York Times*, February 18, 2011. http://www.nytimes.com/2012/02/19/sunday-review/drawing-the-line-at-power-lines.html?_r=1&scp=2&sq=Rosenthal&st=cse.

case is based on its jurisdiction by law and special expertise involving the high-voltage grid and the nation's energy supply generally.

Because it is deeply interested in ensuring that existing pro-transmission regulatory reforms such as Section 216(h) are responsibly implemented, WIRES supports DOE's assigned coordination role under Section 216. The central question raised by the Proposed Rule, however, is whether DOE's NOPR is faithful to the spirit and letter of that mandate and whether, in the final analysis, it can achieve the fundamental purposes of the statute.

B. THE DIMINISHED COORDINATION ROLE IN TRANSMISSION SITING ON FEDERAL LANDS PROPOSED IN DOE'S RULE DOES NOT COMPORT WITH THE STATUTE OR WITH OBAMA ADMINISTRATION POLICY

WIRES can only conclude that the Proposed Rule, as well as the MOU upon which is based, is at best an unfinished product with respect to fulfilling the objectives of Section 216(h), as it is simply inadequate to the statutory charge. The Proposed Rule does not exhibit the strong control and oversight of the different administrative processes associated with siting of transmission on Federal lands clearly contemplated by the statute. The rule would expressly not apply to certain projects on Federal lands that are determined not to be used for sales of power at wholesale, proposed within a National Interest Electric Transmission Corridor before FERC exercises siting authority, constructed by Federal Power Marketing Administrations, or lines that cross a U.S. international boundary. DOE should reevaluate the need for these exclusions and eliminate them unless there is a basis for them under the statute. Finally, the NOPR should also afford an opportunity (or provide an incentive) for a project applicant to drive the authorization process by concluding cooperative arrangements with one or more Federal agencies, independent of DOE's oversight, where a mutually-acceptable and responsive review and compliance procedure can be negotiated in advance.[13] In sum, the Proposed Rule does not sufficiently change or improve the current processes for siting transmission.

We point out the two critical instances where DOE departs most dramatically from Congress' mandate. First, DOE proposes no binding milestones or timelines. If anything, its Proposed Rule is written to allow time and leeway for agencies to act in even the most complex cases outside the norm, instead of providing firm benchmarks based on best cases, supplemented

[13] *See* Section F, below.

by procedural avenues for obtaining exceptions to the rule where good cause exists. The Proposed Rule effectively relieves coordinating agencies of the EPAct's obligation to improve performance which would meet the reasonable expectations of the market, improve on the historic time frames for NEPA compliance, and explain and provide fact-specific support for extensions of time if uniform and predictable timelines prove too rigid. The only deadline for action – 13 months from the close of the DEIS comment period for completion of an EIS – is procedurally tentative and, as discussed more extensively below, unacceptable as a substantive matter.

Second, it is clear from the proposal that DOE will not be the Lead Agency in most cases. It will therefore not be responsible for creating the unified environmental documentation as expressly contemplated by Section 216(h), if the U.S. Forest Service, the Bureau of Land Management, the Army Corps of Engineers, or other authorizing agencies or MOU signatories choose to exercise their traditional authority over projects affecting their jurisdiction.[14] WIRES believes this is an unacceptable and unsupportable approach. DOE has instead agreed in the Proposed Rule to oversee a process of *selecting* a Lead Agency which, while conceivably avoiding intramural disputes among agencies with overlapping jurisdictional responsibilities, will seldom accelerate the NEPA process itself ahead of where it might otherwise be without Section 216(h).[15] In fact, DOE has not attempted to demonstrate the efficiency benefits of its proposed coordination procedures, or the types and amount of the benefits it expects its rule to yield. The Proposed Rule provides no studies or analysis, or even projections, about the potential savings of time and resources that can be provided under its proposal, in contrast to a stronger view of its Section 216(h) authority, over and above the way the NEPA review processes currently operate.

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[14] The Preface to the NOPR rejects, without reasoned explanation, the recommendations of commenters on the Interim Rule which argued for a unified documentation process. 76 Fed. Reg. at 77,433.

[15] As the NOPR states, "DOE interprets the requirement to prepare a consolidated environmental review document as merely requiring it to assemble the work of individual agencies and maintain the information available to be used – a clearing house function." NOPR, 76 Fed. Reg. at 77,436. The term "lead agency" derives from the dispositive Guidelines of the CEQ, which govern administration of the National Environmental Policy Act of 1969, as amended ("NEPA"), 42 U.S.C. 4321 *et seq*. CEQ's guidelines (40 CFR Part 1500) state, at § 1501.5(a), that "a lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either: 1. Proposes or is involved in the same action; or 2. Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity." Although § 1501.5(c) provides that diverse agencies can determine "by letter or memorandum" which will be the lead agency in most instances, Congress has already made that decision in FPA Section 216(h) with respect to transmission siting. DOE's interpretation is therefore unavailing.

Conformance with the statute aside, WIRES notes that the Proposed Rule fails to advance policies that, in similar infrastructure-related contexts, have been deemed of national importance by the Obama Administration. Last summer, the President directed the heads of Federal agencies to select high-priority infrastructure projects "within the control and jurisdiction of the executive branch of the Federal Government" and to "efficiently and effectively" complete such projects within a short period.[16] This program, which has resulted in identification of several transmission projects for accelerated permitting under the watchful eye of the interagency Rapid Response Team ("RRT"), was designed to provide "experience . . . [from which] to identify and implement administrative, policy, technological, and procedural best practices . . ." The Proposed Rule does not contemplate any such general program of improvement. Moreover, and more seriously, the Proposed Rule does very little to recognize that, in the near-term, "job growth must be a top priority . . ." for the Federal Government, as the President announced.[17] As WIRES has repeatedly stressed, "assuming the elimination or reduction of certain barriers to the planning, permitting, and cost recovery associated with transmission development . . . 150,000 to 200,000 full-time jobs could be created annually in the U.S. alone over the coming two decades by expanding and upgrading the grid."[18] This does not even count the additional 130,000 to 250,000 jobs potentially created each year in the renewable energy and other industries enabled by a stronger and more extensive transmission system. Nothing in the Proposed Rule reflects the President's sense of urgency about job creation through infrastructure investment. We are not persuaded that it will eliminate undue delays and expense in transmission expansion because the timing of Federal authorizations would be fundamentally unaltered by the Proposed Rule.

More recently, the Administration has turned to structural reform to make "government leaner and smarter and more consumer-friendly." The President has noted correctly that "We live in a 21st century economy, but we've got a government organized for the 20th century."[19] Criticizing duplication and unnecessary complexity in regulation, he urges Federal Government managers to "rethink, reform and remake our government so that it can meet the demands of our

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[16] *Presidential Memorandum – Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review*, August 31, 2011.

[17] The Memorandum states: "[W]ell-targeted investment in infrastructure can be an engine of job creation and growth. In partnership with State, local, and tribal agencies, the Federal Government has a central role to play in ensuring that smart infrastructure projects move as quickly as possible from the drawing board to completion."

[18] WIRES/The Brattle Group, *Employment and Economic Benefits of Transmission Infrastructure Investment in the U.S. and Canada*, Preface, (May 2011), www.wiresgroup.com

[19] The White House, Remarks by the President on Government Reform, January 13, 2012.

time . . .” The diffused and uncoordinated Federal permitting processes to which transmission projects on Federal lands are subject are emblematic of the kinds of institutional barriers to beneficial economic development that so concerns the White House. Section 216 was adopted in recognition of the fact that layers of overlapping permitting processes have become a source of undue delay in authorizing electric transmission rights-of-way on Federal lands and that tends to undermine good projects as well as defeat bad ones.

We freely acknowledge that this proceeding is no place to resolve issues related to the basic administrative structure of Government. However, WIRES does believe that questions can legitimately be raised about whether DOE’s general reliance on mere transparency in tracking the progress of various agency approvals, without a stronger effort to coordinate transmission permitting processes through unified environmental documentation, will achieve the level of efficiency Section 216(h) was designed to promote. The “demands of our time,” as framed by the Administration, clearly include streamlining complex government decision-making procedures, fixing faltering or inadequate infrastructure, strengthening our energy security, and generating thousands of good-paying jobs. Regrettably, the Proposed Rule makes insufficient changes in the way the Federal Government permits transmission facilities for the industry to believe that DOE is prepared to address those priorities in a meaningful way. DOE’s proposal should be rethought in light of those important considerations.

C. COMPLIANCE WITH THE LETTER AND INTENT OF SEC. 216(h) PRESENTS BUDGETARY AND RESOURCE ISSUES THAT CONGRESS AND/OR THE SECRETARY MUST ADDRESS

WIRES acknowledges that the comments above may be demanding a degree of structural reform and expedition that is bound to leave Federal managers incredulous because they lack the resources to undertake the kind of energetic process that Congress contemplated. Without question, DOE cannot implement the centralized review process advocated above unless it is prepared to assign to it a level of qualified resources that resembles the current commitment to such activities among the nine MOU signatory agencies. To our knowledge, DOE has barely committed enough personnel to Section 216(h) implementation to carry out the diminished monitoring role set forth in the Proposed Rule. For example, only *some* of the proposed transmission projects that are located wholly or in part on Federal lands are now being actively

tracked on the DOE website. But assuming that tracking compliance with posted negotiated deadlines for agency action can be a primary tool for improving administration of permitting and related NEPA processes, the publication or updating of timely data on scores of projects is nevertheless a resource-intensive process which multiple Federal agencies must actively support. DOE will be required to invest substantial resources to ensure the continued reliability of its database, not to mention achievement of the much greater task of producing the unified environmental documentation contemplated by the statute and advocated by WIRES. Whether this entails new appropriations by Congress, a reallocation of resources among the affected agencies, or a change in internal priorities by the Secretary is not for WIRES to say, but the need is self-evident.

For some agencies, the costs of staff project-related expenses are recoverable from applicants, serving as a targeted means of ensuring that resources are funded and available to respond to projects of national importance. Agencies like the Bureau of Land Management and the National Park Service in the Department of the Interior and the U.S. Forest Service in the Department of Agriculture, may recover staff costs through fees,[20] but not all agencies that signed the MOU and are also involved in authorizing transmission projects (such as DOE itself or the Rural Utility Service within the Department of Agriculture) have satisfactory cost recovery authority. This clearly restricts their ability to authorize timely travel and investigation or to conduct face-to-face meetings with stakeholders, activities which form the basis for discharging their regulatory obligations. A resolution to this lack of uniformity must ultimately be legislative, but better pooling of financial or human resources may offer some hope of empowering agencies to perform at a higher level.

The Proposed Rule also addresses the management of costs recovery funds as a way to ensure that revenues are rationally applied and accurately accounted for. Proposed Sections 900.7(i) and 900.8(g) more or less assume that Lead Agencies are able not only to seek reimbursements from applicants but act as a cashier in consolidating such revenues or making disbursement in particular cases.[21] The question of which agency assumes responsibility to

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[20] The *Federal Land Policy and Management Act,* 43 U.S.C. 1764(g) (1996) authorizes agencies to require "for applicants and holders of a right-of-way to reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such right-of-way and in inspecting and monitoring of construction, operation, and termination of the facilities pursuant to such right-of-way."

[21] Even if DOE has authority to permit Lead Agencies and cooperating agencies to engage in such financial accounting (which we doubt), the Proposed Rule contains no procedural mechanisms for doing so. DOE should, at a

ensure applicants are not squeezed by multiple financial demands is not resolved. The proposal relies on individual agency discretion once again. WIRES argues that this issue also makes a compelling case for a far more active DOE program than is proposed. We anticipate that, even under a far more DOE-centric process, the major resource commitments and expenses associated with NEPA compliance will still be borne by land and resource agencies, acting in a cooperating capacity.[22] Ensuring that all agencies that have permitting authority for a project also have the funding to perform well is itself a task worthy of a MOU.

In any event, Federal managers in the case of projects on Federal lands should ensure that the overall cost of Federal siting regulation to the taxpayer remains approximately the same or declines when permitting decisions are made more efficiently and related environmental review processes are reorganized as Section 216(h) requires. Section 216 also represents an opportunity to make the benefits to the nation's infrastructure and energy mix more substantial, without compromising environmental protections. WIRES does not want it to be a missed opportunity.

D. THE PROPOSED RULE SHOULD CONTAIN ENFORCEMENT MECHANISMS TO ENSURE THAT AGENCIES COMPLY WITH EPACT, THE MOU, AND THE NEW RULES

WIRES acknowledges that Section 216 does not grant DOE express authority to impose penalties or restrict another agency's authority to act if that agency fails to comply with the provisions of the Proposed Rule or with any "prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facility" that DOE is required to impose under the statute. DOE is not without remedies if its rules implementing the statute are not complied with, however.

Section 216 relies on the Department to hold other agencies accountable for collaborating on NEPA assignments or producing timely data in compliance with milestones and deadlines. There can be no other explanation for Congress' express authorization of "binding" milestones and deadlines than that DOE is responsible for ensuring compliance by other MOU agencies. If

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minimum, propose requirements that agencies exercise cost control or share responsibility for avoiding unnecessary or duplicative expenses.

[22] DOE can promote a more efficient environmental review process by encouraging use of independent or "third party" contractors to assist agency staff in preparing environmental documents. This practice has been supported by CEQ (40 CFR §1506.5) and used to produce significant savings in time and money at the Federal Energy Regulatory Commission. However, some agency efforts to obtain such assistance get snarled in established procurement regulations.

the timelines which DOE choses to adopt in this proceeding are to be truly "binding" on the agencies that exercise the applicable permitting authority and existing environmental review responsibilities, then it is incumbent upon those Executive Branch agencies to agree to be bound by DOE's rulemaking. Although unusual, we can only surmise that Congress intended them to codify or otherwise announce publicly their assent since the Department cannot bind agencies other than itself by rule.

We recognize that DOE will not want to undermine its cooperative inter-agency relationships, but it can make clear that it intends to ensure the law produces its intended results. For example, under the scheme of the Proposed Rule, DOE could adopt firm generic timelines for agency actions and then act as the default Lead Agency if another agency that has control of environmental analysis fails, without adequate justification, to comply with those timelines. In addition, Section 216(h)(6)(A) expressly provides an applicant or State the right appeal to the President if an agency denies siting authority or fails to act timely. The Proposed Rule must provide the details about how an applicant goes about pursuing such an appeal.

In its important role under Section 216, DOE is also entitled to devise measures that shed light on agency performance. For example, we recommend DOE publish a report card – perhaps annually – on agency performance under Section 216, which would distill the data on its website and rate the competence and timeliness of agency actions and document any recurrent problems requiring collaborative solutions or legislation. Clear milestones and deadlines, and a report on how successful those have been in producing individual and coordinated agency actions, would also provide helpful benchmarks for coordination between DOE and participating non-Federal agencies,[23] including Native American tribes, multi-state entities, and State agencies that, although willing to coordinate with the Federal Government, may not be working under the same legal, policy, or operational requirements or constraints.

Whatever DOE can do in advance to make clear the roles of the respective Federal and non-Federal agencies and the anticipated compliance schedule for completing the various parts of the permitting processes would be helpful. WIRES believes some of that can be accomplished in a rule that would heighten awareness of the need for action and compliance with deadlines. Any steps that DOE is prepared to take, if and when another agency does not perform as

[23] Section 216(h)(3) and (4) provide that, in exercising DOE's authority, the Secretary must coordinate with non-federal agencies that have similar authority to issue permits for transmission facilities. Those agencies may voluntarily coordinate their permitting and environmental reviews with the timelines established by the Secretary.

contemplated, ought to be spelled out in the Final Rule. The Proposed Rule is entirely too open-ended and deferential in this regard.

E. AVOIDANCE OF UNDUE DELAY REQUIRES DOE TO PEG ITS EIS COMPLETION DEADLINE TO A MORE REASONABLE POINT IN THE ENVIRONMENTAL REVIEW PROCESS.

Section 900.11 of the Proposed Rule sets a deadline under Section 216(h)(4) for Federal decisions on a proposed project, including both the permitting decision and related environmental review. The application must be deemed complete by the Secretary of Energy for the clock to begin running.[24] Under the statute, all permits and reviews must be completed not later than one year or, if another provision of Federal law prevents that, "as soon thereafter as is practicable."[25] The proposal therefore provides that Federal decisions must be completed one year after (1) a categorical exclusion determination is made or (2) an environmental assessment concludes with a finding of no significant impact, or (3)(where an EIS is required) 30 days after the close of the public comment period on a draft EIS (DEIS).

WIRES believes the Proposed Rule, as written, will provide little if any intended time constraints on prolonged NEPA process schedules. The one year and 30 days allowed for completion of all Federal decisions after a DEIS is virtually finished is unnecessarily long as a general rule. Starting the decisional clock after arguably 80% of the NEPA effort and process is completed blatantly ignores the vast majority of the process where the potential for schedule delays is greatest. By the time a DEIS is completed and comments are taken, the Final EIS ("FEIS") and Record of Decision ("ROD") is six months or less from completion in many cases. Setting a time limit this late in the process is akin to timing a marathon runner for only the last mile. Moreover, it is far too late to allow for corrective action to enable timely permitting decisions, which is the most important function of the deadlines. It is therefore a completely inappropriate point at which to set a deadline if the Proposed Rule is designed to be

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[24] The Proposed Rule does not specify the type or level of data that will constitute a complete application. This would be a valuable addition, both for the applicant and DOE staff. If, as WIRES suggests, DOE becomes the agency that prepares a single environmental document, such specificity would be critical.

In the alternative, a generic outline of required information, developed in consultation with all affected agencies, could still help guide and coordinate the NEPA process. Agencies should not be permitted to re-start the clock based on technical and unforeseeable data requirements.

[25] We acknowledge that the consultations necessary under related laws, such as the Endangered Species Act, Clean Water Act, and National Historic Preservation Act, will often control the "practicable" timing of an FEIS or EA/Finding of No Significant Impact. This simply reinforces our conviction that the agencies responsible for such disparate processes must be given clear and uniform guidance for action.

an action-forcing mechanism, as Section 216 requires. The DEIS is an essential building-block in the NEPA process, and the timing completion of a FEIS is actually "triggered" with that work. The time period for FEIS completion must therefore be moved up to a point where the evaluation of a major Federal action begins – issuance of a NOI (by DOE if not another agency) or initiation of the scoping process for the DEIS. DOE should enforce its deadline from that point, providing check-in points for corrective action, and should afford an exception *only* when a compelling case is made to DOE that circumstances warrant more time – so-called "good cause."

WIRES proposes that uniform and predictable target dates should be considered for multiple phases of the NEPA process to ensure continual progress toward the final decision. These incremental timelines would be proposed for phases where decision delays are common, such as: the acceptance of an application involving proposed transmission infrastructure affecting Federal lands, filing of the Notice of Intent (NOI) to Prepare an EIS, completion of the alternative scoping process, completion of the Draft EIS, and completion of the FEIS and Record of Decision. To that end, WIRES proposes that DOE adopt the following deadlines for key NEPA process milestones, based on industry experience. This posits 26 months as an acceptable target timeline for completion of a FEIS once an agency has determined that NEPA requires one. This compares to the all-too-typical 3 to 5 years the industry now experiences:

1. **Application Acceptance** – Once an agency is given a proposal, it has 30 days to determine if the application provides an acceptable level of detail in order to initiate the process for a Notice of Intent. This review should be done in coordination with the inter-agency Rapid Response Team (RRT) to ensure concurrence on what constitutes "a reasonable level of detail".
2. **Notice of Intent** – 30 days following the acceptance of an application an agency must issue a NOI. That task could fall to DOE, either under the Proposed Rule or as Lead Agency under the preferred approach, in order to inaugurate the EIS process.
3. **Completion of the DEIS** –DEIS should be complete not more than 18 months following the issuance of the NOI We recognize that, while doable, this may be a challenging time frame in some instances. DOE must set the standard for what can be reasonably expected, all things being equal.
4. **Completion of the FEIS and ROD** - Upon completion of the DEIS, the FEIS, and ROD can be filed within 6 months, unless there is good cause to secure additional surveys or studies.

Where a transmission line is proposed in conjunction with development of large renewable generation facilities, DOE could require that the time for completion of an EIS should be closely coordinated with completion of environmental work on the new generation facilities.

Naturally, the timing of these events is in the control of the agency. If authorizing agencies were to engage in wholesale departures from DOE's standard timeframe for action, applicants would have a basis for seeking DOE's assistance, filing a complaint, or appealing to the President, and the Final Rule should so specify.

F. THE PROPOSED RULE SHOULD PROVIDE AN APPLICANT-DRIVEN OPT-OUT OF THE STATUTORY DOE-CENTRIC PROCESS

WIRES contends that, to the maximum extent feasible, the permitting processes for siting electric transmission should be applicant-driven. Section 216's mandate notwithstanding, there will be instances in which applicants for permits and rights-of-way or the agencies with control of project authorization have already pre-established a workable procedure with the Federal agency or agencies with primary permitting and NEPA responsibilities. Recent examples of State and Federal agency collaboration on resource protection procedures within a region may provide applicants with novel opportunities to set up environmental review processes that are unique to certain geographic regions or features, technologies, and regulatory criteria.[26] DOE should take into account the extent to which a negotiated arrangement could work in concert with, or replace (wholly or in part), the Lead Agency process WIRES recommends and contends the statute requires. In such cases, the identification of the Lead Agency may be a foregone conclusion, and DOE's coordination work could become superfluous and even burdensome. We believe that applicants should have an incentive to work early and closely with Federal land management agencies, and an "opt-out" may provide that incentive.

A well-defined opt-out procedure in the Final Rule would depend on an applicant and the affected agency or agencies making a persuasive showing to DOE that supports waiving certain provisions of Part 900. However, no matter how successful this collaboration might be, WIRES does not recommend waiving any obligation of the applicant and the relevant agency to provide regular updates to DOE about the timing of the permitting and environmental processes covering the exempted project. That data should then be entered into the DOE tracking system for purposes of public information.

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[26] Such agreements can significantly impact the planning and siting of electric transmission. *See*, Memorandum of Understanding Between the Department of the Interior and the State of California on Renewable Energy (January 13, 2012), http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=274678.

G. ADDITIONAL RECOMMENDATIONS FOR CHANGES IN THE DRAFT RULE

1. The Final Rule Should Provide Procedural Avenues for Transmission Project Applicants to Seek DOE Assistance, including a Procedure for Appeals to the President under Section 216(h).

The Proposed Rule, although long on collaboration and transparency, does not give applicants clear guidance about how to seek assistance from DOE staff or the nature of what must be contained in any complaint, other filing, or verbal communication. The statute provides for an appeal to the President of the United States of an agency's denial of authorization or failure to act. The NOPR provides no indication as to how that might be accomplished, and WIRES submits that some information would be helpful. If DOE is reluctant to include such details in the Final Rule, it should at a minimum commit to provide the public with a handbook on the details of Section 216(h) compliance.

2. DOE Must Provide For Special Consultation with RTOs, the North American Electric Corporation, and the FERC as Part of This Rulemaking.

DOE's activities under Section 216 will potentially impact regional transmission planning in important ways. In fact, these potential impacts are among the strongest reasons for DOE to adopt WIRES' suggestion that it assert itself as a true Lead Agency with respect to interstate transmission. The work of multiple Federal agencies on the siting of transmission facilities must not occur in isolation or be accomplished without taking account of the reliability, economic, and public policy implications of expanding or upgrading the grid, as well as the impact on the environment and other users of public lands. Much of that information may be concurrently gathered or developed by DOE as it conducts studies pursuant to its National Interest Electric Transmission Corridor designations under FPA Section 216(a).

Perhaps most important for the future of the high-voltage grid, FERC's Order No. 1000 seeks to encourage a degree of efficiency and predictability in the intra- and inter-regional planning and development of electric transmission. Like FERC's efforts to promote a more rational model for planning expansion and upgrade of the transmission network, the implementation of Section 216(h) can also facilitate a greater seamlessness and efficiency, and

less balkanization, in the process of deciding which transmission proposals should and should not be built. WIRES urges DOE to keep Order No. 1000 and its objectives in mind and, as it implements its rulemaking, to keep the MOU signatory agencies apprised of what is occurring in Federal policymaking in this area. The statute (§ 216 (h)(3)) is again quite clear about DOE's obligation to consult with "any Indian tribes, multistate entities, and State Agencies" with permitting or environmental review authority.[27] We think that keeping NERC or its regional organizations informed of its Section 216 activities is also important. While the statute does not prescribe the nature of that consultation, the Proposed Rule has not indicated how that might be done. If untimely or disorganized, this could be a burden on the siting and NEPA processes.

3. The DOE Tracking System Should Track <u>All</u> Transmission Projects That Affect Federal Lands

WIRES understands that maintaining an up to date database is labor-intensive and that OEDER will be challenged to keep current on whether milestones for transmission projects subject to the Final Rule are being met. However, this again is one of the basic charges the Proposed Rule and the law have given DOE. This may at bottom be a resource issue. DOE must nevertheless begin to track all transmission projects – proposed, under construction, or being upgraded – affecting Federal land, and not just a subset of those projects.

4. If it were to assume the statutory role of Lead Agency under Section 216(h) as recommended by WIRES, DOE should prevail upon cooperating Federal agencies *not* to attempt to undertake findings of public need for transmission in the NEPA or related permitting processes

One of the classic institutional barriers to transmission development is the dispersal of authority to determine whether a project is needed and therefore in the public interest. Unless State or Federal law expressly requires an agency to make such a finding, it is inappropriate for Federal land management agencies to inject themselves into that area of enquiry, in which they lack expertise and which Federal and State law generally reserves to energy regulators. We recognize that it is not uncommon in NEPA scoping sessions for stakeholders to raise this very issue and to urge the relevant land or resource agencies to reach this issue in environmental

[27] The Proposed Rule, at § 900.3, defines non-Federal agencies as "local government agencies" with "relevant expertise or authority" or which are conducting separate environmental reviews. WIRES requests clarification of the intent of this provision and consideration of what it invites in terms of a potentially limitless expansion of the consultation obligations under Section 216..

documents. In the final analysis, such an exposition or conclusion is likely to be superfluous or even a usurpation of the authority of the agency of government charged with such a determination.

5. Under the Rule as Proposed:

a. § 900.4(a)(1) should require agencies to provide a "likely" schedule at the initial meeting.

b. The definition of Qualifying Projects should be reexamined because it is limited to projects that cross the jurisdiction of "more than one participating agency." It is unusual for a project affecting any Federal lands to be subject to the authority of just one permitting authority, although a project may cross one "jurisdiction." The Army Corps of Engineers is virtually ubiquitous and should not be ignored in an attempt to narrow the number of projects subject to DOE's proposed process.

c. While fully acknowledging that transmission within ERCOT is not subject to the rule as proposed, DOE has left unanswered the question of whether the Final Rule would apply to lines carrying power originating in ERCOT but delivered elsewhere or to lines carrying power into ERCOT from FERC-regulated wholesale markets. This requires clarification.

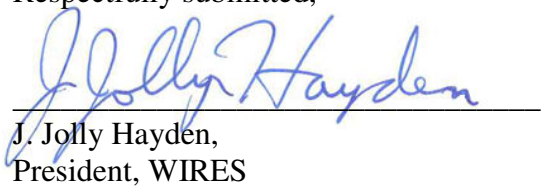
d. §§ 900.8(a) and 900.10(a) do not indicate that DOE will provide any input to the schedule. Even if DOE prefers not to be the Lead Agency as WIRES believes it should, its expertise in electric matters and the Department's central role under Section 216(h) make its input imperative.

e. § 900.6 codifies that, when a project crosses lands managed both by the Department of the Interior and the Department of Agriculture, the agencies will *jointly* decide whether the project is a "qualified project" and which will be the Lead Agency. Under a complicated procedure that is

inexplicably built into DOE's rules, the potential for gridlock is evident and it will occur at the applicant's expense. WIRES urges DOE to make the Lead Agency determination if these two agencies cannot do so promptly.

In conclusion, WIRES believes DOE should seriously consider re-working the Proposed Rule to adopt a coordination scheme more consistent with Section 216(h). The responsibility for implementing the EPAct mandate lies with all of the affected agencies, however. They must, for example, adopt the "binding" timelines that DOE formulates. In order to ensure that the requirements of the law are met, DOE must take a stronger leadership stand within the Federal family than the Proposed Rule currently reflects. We are nevertheless fully cognizant of the difficulties involved in coordinating several such large and important organizations. WIRES therefore offers the Department its continued support in developing ways to make the siting of energy infrastructure on Federal lands more timely and efficient.

Respectfully submitted,



J. Jolly Hayden,
President, WIRES

James J. Hoecker
Counsel to WIRES
Husch Blackwell LLP
Hoecker Energy Law & Policy
750 Seventeenth St., N.W., Suite 900
Washington, D.C. 20006
James.hoecker@huschblackwell.com