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November 3, 2008

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

Re: Comments on Notice of Proposed Rulemaking for Coordination of Federal Authorizations for Electric Transmission Facilities (73 Fed. Reg. 54,461)

Dear Mr. Schnagl:

On behalf of Allegheny Energy, Inc. and its subsidiaries, Monongahela Power Company, The Potomac Edison Company and West Penn Power Company, all doing business as Allegheny Power; Trans-Allegheny Interstate Line Company; and PATH Allegheny Transmission Company, LLC (collectively, the "Allegheny Energy Companies"), the following comments are submitted in accordance with the September 19, 2008 Department of Energy ("DOE") announcement of a Notice of Proposed Rulemaking for Coordination of Federal Authorizations for Electric Transmission Facilities and opportunity for public comments.[1]

The Notice of Proposed Rulemaking ("NOPR") proposes rules implementing the new section 216(h) of the Federal Power Act ("FPA"), which was enacted as part of the Energy Policy Act of 2005 ("EPAct 2005").[2] In particular, the NOPR clarifies the additional responsibilities of both DOE and the permitting entities regarding notification requirements and the establishment of interim and final deadlines.[3]

The Allegheny Energy Companies firmly believe that better coordination of federal authorizations for the siting of interstate electric transmission facilities is necessary. The Allegheny Energy Companies operate within the PJM Interconnection ("PJM") system. At the direction of the Federal Energy Regulatory Commission ("FERC") and with the support of stakeholders, PJM has developed a regional transmission planning process that identifies and plans for the construction of future system upgrades necessary to maintain reliability within the PJM control area. These

[1] Coordination of Federal Authorizations for Electric Transmission Facilities, 73 Fed. Reg. 54,461 (proposed Sept. 19, 2008) (to be codified at 10 C.F.R. Part 900).
[2] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005).
[3] 73 Fed. Reg. at 54,464–65, proposed §§ 900.7, 900.8, 900.9.

projects provide critical reliability support to the local transmitting zones in which they are constructed, facilitate access to a more diverse set of generating resources (including renewable energy facilities) and reflect the increasing interdependence of the interstate electric transmission grid. As a practical matter, many of the regional planning projects are likely to extend beyond a single state or transmission zone, cross multiple federally-owned or managed lands and require federal permits or authorizations. As reliability upgrades, timely implementation of such projects will be critical.

The Allegheny Energy Companies strongly support the purposes of FPA, section 216(h). Under EPAct 2005, section 216 of the FPA[4] was established to facilitate and streamline the siting of electric transmission facilities and specifically contemplated a central role for DOE in transmission siting, as the "lead agency." To that end, section 216(h) directs that DOE "shall act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews"[5] and such role extends to "any authorization required under Federal law in order to site a transmission facility."[6] One element of this lead agency role is that DOE is required to "establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed [transmission] facility."[7] Further, DOE must ensure that, unless subject to other requirements of federal law, all federal agency authorizations are completed within one year of the date that the initial application is determined to have "sufficient data."[8]

The Allegheny Energy Companies submitted comments on the Interim Final Rule for Coordination of Federal Authorizations for Electric Transmission Facilities on October 20, 2008.[9] In those comments, the Allegheny Energy Companies urged DOE to reconsider the scope of their role as "lead agency" and adopt methods whereby DOE can more actively facilitate the timely completion of federal agency reviews and authorizations; supported the coordination process being request-driven; and recommended refinements to the request for initiation of DOE coordination, the pre-application information request, and the application processes and to the guidelines for the determination of the level of coordination required.

In addition to making the improvements noted in the Allegheny Energy Companies' October 20th comments on the Interim Final Rule, we urge you to address the following matters:

1. Notification of Requests for Federal Authorizations

DOE has interpreted FPA, section 216(h) to require a permitting entity which receives a request for an authorization required under federal law to site an interstate

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[4] Codified at 16 U.S.C. § 824p.
[5] 16 U.S.C. § 824p(h)(2).
[6] *Id.* § 824p(h)(1)(A).
[7] *Id.* § 824p(h)(4)(A).
[8] *Id.* § 824(h)(4)(B).
[9] Coordination of Federal Authorizations for Electric Transmission Facilities, 73 Fed. Reg. 54,456 (Sept. 19, 2008) (to be codified at 10 C.F.R. Part 900).

electric transmission facility that will sell electricity at wholesale to inform the Director of the request within five days of issuing a notice of intent to prepare an environmental impact statement ("EIS").[10] DOE must revise the timing and scope of this notice requirement. DOE's responsibilities under section 216(h) are triggered upon the filing of an *application* for federal authorization or review of a proposed transmission facility siting. Providing notice only upon a decision of a notice of intent to prepare an EIS is antithetical to the purpose of section 216(h). Congress directed DOE to act as "lead agency" in the coordination of federal authorizations and reviews of proposed siting of transmission facilities. In order for DOE to fully meet its responsibilities, it must have immediate notice of the federal authorization request.

The Allegheny Energy Companies recommend that DOE include a more stringent notice requirement to more actively facilitate the coordination of federal agency reviews and authorizations. In fact, this is already contemplated by the federal agency Memorandum of Understanding ("MOU") regarding section 216 implementation. That MOU requires Participating Agencies to notify DOE and the other affected Participating Agencies within <u>*one week of receiving the application*</u> for a federal authorization if the project is: (1) equal or greater than 230 kV; (2) reasonably likely to require an EIS; <u>*or*</u> (3) reasonably likely to require more than one federal authorization.[11] DOE's proposed regulation should be consistent with the commitment made in the MOU and with the intent and purpose of section 216(h). By receiving notice upon filing of applications, DOE will more precisely achieve its purpose for imposing the requirement as stated in the NOPR: "to allow DOE to be aware of Federal authorization requests for significant electric transmission facilities even in cases where no coordination request has been received."[12] DOE does not fulfill the statutory mandate of FPA, section 216(h)—to coordinate "to the maximum extent practicable under applicable Federal law" "all applicable Federal authorizations and related environmental review processes"—when it limits the notice requirement to projects that require an EIS.[13] Accordingly, the Allegheny Energy Companies request that DOE modify its notice provisions to be consistent with the MOU commitment. We propose that section 900.7 be modified as follows:

> **900.7 Notification of requests for Federal authorizations.**
> A permitting entity which receives an authorization request required under Federal law in order to site a facility used for the transmission of electricity in interstate commerce for the sale of electric energy at wholesale must inform the Director within ~~five days~~ <u>one week</u> of ~~issuing a notice of intent to prepare~~ <u>receiving the application if the project is equal or greater than 230 kV, reasonably likely to require</u> an environmental impact statement~~.~~<u>, or reasonably likely to require more than one federal authorization.</u>

[10] 73 Fed. Reg. at 54,464, proposed § 900.7.
[11] Memorandum of Understanding on Early Coordination of Federal Authorizations and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities (Aug. 8, 2006).
[12] 73 Fed. Reg. at 54,462.
[13] 16 U.S.C. § 824p(h)(2)–(3).

2. Nature and Applicability of Interim and Ultimate Deadlines

Proposed section 900.8 of the NOPR would limit the establishment of interim and ultimate deadlines for completion of federal authorizations to situations where a "coordination" request has been made under section 900.5 and only set such deadlines after issuance of a notice of intent to prepare an EIS.[14] This proposal would unnecessarily narrow and undermine the intent of section 216(h)(4)(A).

Under FPA, section 216(h)(4)(A), DOE is unequivocally directed to establish "*prompt and binding* intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facility."[15] As proposed, section 900.8 fails to meet the directives of FPA, section 216(h)(4)(A) because the milestones and deadlines are not binding and are not applicable to the full range of federal authorization decisions.

The proposed rule would limit the interim/ultimate deadlines requirement to those instances where a formal coordination request has been made *and* an EIS will be prepared. Establishment of milestones and deadlines can be effective tools in assisting the siting of transmission facilities even in those instances where more formal DOE coordination is not needed or where the NEPA review process will not require an EIS. In fact, such milestones and deadlines may be even more important in those instances to ensure that projects that have a perceived lower priority are not shunted or unnecessarily delayed. FPA, section 216(h)(4)(A) requires DOE to establish intermediate milestones and ultimate deadlines "for the review of, and Federal authorization decisions relating to, the proposed facility."[16] A project that does not require an EIS still requires at least one, and likely multiple, federal authorizations. Thus, excluding projects on the basis that a formal coordination request has not been made or that the project will not require an EIS is inconsistent with FPA, section 216(4)(A).

An additional concern with DOE's proposal for interim/ultimate deadline procedures is its open-ended extension process. As proposed, a permitting entity subject to an interim or final deadline would be allowed to inform DOE thirty days before the milestone or deadline if the deadline will not, or is not likely to be met. DOE may then, in consultation with the permitting entity, extend the deadline.[17] Deadlines that may be extended without any explanation or required showing of necessity cannot be considered "binding." Proposed section 900.8 should be revised to require permitting entities that cannot meet milestones or deadlines to provide an explanation of why the milestone or deadline cannot be met. Moreover, it is absolutely imperative that the applicant be included in the decision as to whether and how to extend the milestones or deadlines set pursuant to this provision.

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[14] 73 Fed. Reg. at 54,464, proposed § 900.8(a).
[15] 16 U.S.C. § 824p(h)(4)(A).
[16] *Id.* § 824p(h)(4)(A).
[17] 73 Fed. Reg. at 54,464, proposed § 900.8(b)–(c).

The Allegheny Energy Companies note that DOE attempts to justify its interim/ultimate deadline procedures on the use of "as appropriate" in the FPA, section 216(h)(4)(A) and characterizes this provision as requiring that DOE "establish, as appropriate, intermediate milestones and ultimate deadlines . . . ."[18] DOE's interpretation of the "as appropriate" phrase is inconsistent with the statute. The pertinent part of FPA, section 216(h)(4)(A) actually states that "[a]s head of the lead agency, the Secretary, in consultation with agencies responsible for Federal authorizations, and as appropriate, with Indian tribes, multistate entities, and State agencies that are willing to coordinate their own separate permitting and environmental reviews with the Federal authorization and environmental reviews, shall establish prompt and binding intermediate milestones and ultimate deadlines . . . ."[19] The phrase "as appropriate" applies only to the part of the sentence separated with commas, thus requiring that DOE establish milestones and deadlines only for the non-federal entities as appropriate because the entities are willing to coordinate their review processes. DOE clearly misconstrues Congress's intent by reading into the statute an ability for DOE to determine when it is "appropriate" to establish milestones and deadlines. Congress was clear that DOE must establish *binding* intermediate deadlines and ultimate deadlines for *all* federal authorization decisions relating to a proposed facility. Therefore, the phrase "as appropriate" must be removed from the proposed section.

Consistent with the comments above, the Allegheny Energy Companies propose that the following modifications be made to the pre-application process under section 900.8:

> **900.8 Prompt and binding intermediate milestones and ultimate deadlines.**
> (a) Within 30 days after the ~~Upon~~ receipt of ~~a request for coordination~~ a notice pursuant to section 900.7, DOE, in consultation with the permitting entities and the applicant, will establish~~, as appropriate,~~ intermediate milestones and ultimate deadlines for the review of Federal authorization applications and decisions relating to a proposed electric transmission facility ~~when a permitting entity has issued a notice of intent to prepare an environmental impact statement~~.
> (b) No later than 30 days prior to any intermediate or ultimate deadline established by DOE under this part, the permitting entity subject to the deadline shall inform DOE and the applicant if the deadline will not, or is not likely to, be met and provide DOE and the applicant with a written statement describing the reasons as to why such deadline will not be met, an estimate of additional time required and a description of actions that the permitting entity will take to ensure timely completion of the federal agency decision.

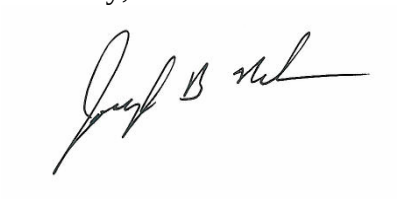
[18] 73 Fed. Reg. at 54,462.
[19] 16 U.S.C. § 824p(h)(4)(A).

(c) DOE, in consultation with the permitting entities and the applicant, may not extend an interim or ultimate deadline unless DOE, the permitting entity and the applicant mutually agree to extend the interim or ultimate deadline.

Conclusion

The Allegheny Energy Companies urge DOE to revise its proposed regulations to ensure a full and effective implementation of FPA, section 216(h). Adopting the recommendations discussed in these comments will further ensure that the federal authorization and review process for electric transmission facilities is streamlined to the benefit of both the transmitting utilities and the federal agencies overseeing these projects.

Sincerely,



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