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October 20, 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 Interim Final Rule for Coordination of Federal Authorizations for Electric Transmission Facilities (73 Fed. Reg. 54,456)

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 an Interim Final Rule for Coordination of Federal Authorizations for Electric Transmission Facilities and request for public comments.[1] The Interim Final Rule attempts to implement 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 Interim Final Rule provides for DOE's assumption of an "at request" role in the preparation of a single environmental review document for purposes of federal agency review and authorization of a proposed electric transmission facility.[3] In addition, DOE also establishes minimum requirements for the submission of pre-application information requests and a 60-day deadline for agency responses to such requests.[4]

The Allegheny Energy Companies firmly believe that better coordination of federal authorizations for the siting of interstate electric transmission facilities is

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[1] 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).
[2] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005).
[3] 73 Fed. Reg. at 54,457–58, proposed §§ 900.2, 900.3, 900.5 and 900.6.
[4] 73 Fed. Reg. at 54,457, proposed § 900.4.

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 projects provide critical reliability support to the local transmitting zones in which they are constructed, facilitate access to 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[5] 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"[6] and such role extends to "any authorization required under Federal law in order to site a transmission facility."[7] The Act also provides that DOE should coordinate "to the maximum extent possible" the federal authorization and review process with separate permitting and environmental reviews conducted by Indian tribes, multistate entities, and state agencies.

1. Extent of DOE's Role as a "Lead Agency"

DOE has interpreted FPA section 216(h) as solely "making [DOE] responsible for being the lead coordinating agency for environmental reviews, not the lead agency for preparing the environmental review under the National Environmental Policy Act (NEPA)."[8] Section 216(h) directs that DOE "shall act as the lead agency for purposes of coordinating all applicable federal authorizations and related environmental reviews of the facility."[9] As part of the responsibility as lead agency, section 216(h) directs DOE, "in consultation with the affected agencies," to prepare "a single environmental review document" to serve as the basis for federal decisions, and shall include consideration by the relevant agencies of criteria required by law.[10] Further, the statute makes clear that DOE is the lead agency for purposes of coordinating the federal authorizations necessary for the siting of electric transmission projects.

The Allegheny Energy Companies urge DOE to reconsider the scope of their role as "lead agency" and adopt methods whereby DOE can more actively facilitate the timely

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[5] Codified at 16 U.S.C. § 824p.
[6] 16 U.S.C. § 824p(h)(2).
[7] *Id.* § 824p(h)(1)(A).
[8] 73 Fed. Reg. at 54,456.
[9] 16 U.S.C. § 824p(h)(2).
[10] *Id.* § 824p(h)(5)(A).

completion of federal agency reviews and authorization. For example, rather than merely serving as a clearinghouse, DOE could act under the clear instructions of section 216(h)(5)(A) to undertake the preparation of the necessary environmental analyses—at the direction and with the oversight of the designated "lead agency" under NEPA. This would essentially be similar to the third party contractor development of environmental impact statements that is routinely undertaken today.

2. Conduct of Section 216(h) Coordination on a Request-Driven Basis

In its preamble to the Interim Final Rule, DOE notes that its coordination of federal authorizations "would be most beneficial as a request driven process."[11] We agree. The purpose of FPA, section 216(h) is to provide for a means to ensure the timely resolution of federal permitting and environmental reviews—where further coordination may be necessary. DOE coordination of federal authorizations is not always necessary or warranted. In fact, it is ultimately our present experience that federal agencies are dedicated to ensuring that permit authorization reviews are conducted on a timely basis. Further, such measures should not be considered an attempt to usurp other federal agencies. Rather, section 216(h) was enacted in light of the recognition that, in certain instances—particularly those where timing is of the essence, there are complex technical issues that may benefit from DOE's expertise and/or there are a significant number of federal agency authorizations involved—such that coordination will benefit both the applicant and the federal agencies involved.

3. Details Required for Initiation of DOE Coordination

Proposed section 900.5 requires that a request for DOE coordination include specific details regarding the proposed facility, including a "concise general description of the proposed transmission facility sufficient to explain its scope and purpose" with an enumeration of data that must be included. While we agree with the general requirement for sufficient descriptive information, there may be instances where the specific details noted in section 900.5(b)(2) are not yet known to an exact level of detail. To avoid any confusion in this respect, we recommend that the requirement for submission of detailed information be explicitly conditioned upon being made available "to the maximum extent practicable, at a level that is presently known and available to the applicant." This clarification will allow for an appropriate balance between providing to the federal agencies and DOE information necessary to proceed with coordination efforts, while not creating technical barriers to the ability of an applicant to avail itself of DOE's assistance. Accordingly, we propose that section 900.5(b)(2) be modified as follows:

> §900.5 Request for coordination.
> . . .
> (b) . . .
> (2) A concise general description of the proposed transmission facility sufficient to explain its scope and purpose, including <u>to the maximum</u>

[11] 73 Fed. Reg. at 54,457.

extent practicable, at a level that is presently known and available to the applicant or prospective applicant:

4. Further Clarification of the Pre-Application Information Request Process

As enacted, section 216(h) requires the institution of a pre-application mechanism, whereby applicants for a proposed electric transmission facility can confer with the agencies involved in environmental permitting of such a project in order to review and receive feedback from those agencies on the likelihood of approval for the potential facility and "key issues of concern to the agencies and the public."[12] This commitment is reinforced by a federal agency Memorandum of Understanding regarding section 216 implementation which provides that, no later than 60 days after receiving an information request from any applicant, prospective applicant or DOE, federal agencies with a potential authorization role for the proposed project will coordinate with DOE to provide information concerning (i) key issues of concern that need to be addressed in order for the responding agency to meet its obligations; and (ii) the likelihood of approval for a potential facility.[13] In its Interim Final Rule, DOE provides a different articulation of the pre-application information process. First, the request for information must originate from an applicant or prospective applicant and be directed to a "permitting entity,"[14] with notice to DOE of the request.[15] Second, requests are required to "specify in sufficient detail the information sought from the permitting entity and shall contain sufficient information for the permitting entity to provide the requested information."[16] Third, the permitting agency has 60 days from receipt of the information request to provide, "to the extent permissible under existing law," information concerning the request to the applicant or prospective applicant, and DOE. Notably, DOE's pre-application mechanism does not include any explicit mention of the two specific categories of information noted in FPA, section 216(h)—key issues of concern and the likelihood of approval for a potential facility. Rather, the proposed pre-application section merely makes a passing reference to requests for information pursuant to section 216(h)(4)(C).

The proposed pre-application mechanism fails to meet the directives of FPA, section 216(h)(4)(C) and requires further clarification. As an initial matter, DOE must explicitly ensure that the pre-application process allows an applicant or prospective applicant the opportunity to request information from permitting entities regarding key issues of concern to the agency and the public, and the likelihood of approval of a potential facility. FPA, section 216(h)(4)(C) unequivocally directs that DOE establish an "expeditious pre-application mechanism" for prospective applicants to confer with agencies with respect to both the likelihood of approval of a potential facility and key

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[12] 16 U.S.C. § 824p(h)(4)(C).
[13] Memorandum of Understanding on Early Coordination of Federal Authorizations and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities (Aug. 8, 2006).
[14] Permitting Entities are defined as a federal or non-federal entity that is responsible for issuing federal authorizations. Proposed § 900.2.
[15] Proposed § 900.4(a)
[16] Proposed § 900.4(b).

issues of concern to the agencies and public.[17] Under the Interim Final Rule, DOE merely cites to information being sought "pursuant to [section 216(h)(4)(C)]" but makes no mention of the specific categories of information exchange intended to be covered, creates hurdles to the pre-application information exchange by requiring "sufficient detail" regarding the information sought and limits any response "to the extent permissible under existing law."

As drafted, proposed section 900.4 frustrates the clear purpose of FPA, section 216(h)(4). The enactment of FPA, section 216(h)(4) explicitly authorizes the sharing of information by the federal agencies regarding key issues of concern and likelihood of approval. While the agencies must ensure that they do not make any pre-decisional commitments regarding their future consideration of a permit application or authorization request, this should not be a means for "hiding the ball" with respect to issues or concerns that must be addressed by the applicant. The intent of enacting a pre-application process is to ensure transparency in the exchange of information so that potential conflicts and concerns can be identified and addressed as early as possible. As drafted, however, the pre-application mechanism perpetuates the existing lack of transparency. Further, the requirements for "notice" to DOE and threshold for submission of "sufficient detail" could have the unfortunate effect of limiting the free flow of information. Accordingly, the Allegheny Energy Companies proposes that the following modifications be made to the pre-application process under section 900.4:

900.4 Pre-Application mechanism.

(a) Pursuant to 16 U.S.C. 824p(h)(4)(C), an ~~An~~ applicant, or prospective applicant, for a Federal authorization ~~seeking information~~ from a permitting entity ~~pursuant to 16 U.S.C. 824p(h)(4)(C) must~~ may request information from a potential permitting entity concerning the likelihood of approval for a potential facility and potential key issues of concern to the agencies and the public. ~~pursuant to the terms specified in this section with a permitting entity, and notify the Director of the request to the permitting entity.~~ Upon receipt of such information request, the permitting entity shall promptly notify the Director of such request. Such notice shall include the date of such receipt and an anticipated date by which a response shall be provided, which shall be no later than 60 days from the receipt of the information request.

(b) To the extent possible, any ~~Any~~ request for information ~~filed~~ made under this section shall specify in sufficient detail the information sought from the permitting entity and shall contain sufficient information for the permitting entity to provide the requested information ~~pursuant to 16 U.S.C. 824p(h)(4)(C)~~.

(c) Within 60 days of receipt of such a request for information, a permitting entity shall provide~~, to the extent permissible under existing law,~~ information concerning the request to the applicant, or prospective

[17] 16 U.S.C. § 824p(h)(4)(C).

applicant, and the Director. The provision of such information shall not be considered or otherwise deemed to constitute a commitment by the permitting entity to approve or disapprove any such permit application or other Federal authorization request.

These proposed modifications will ensure a more transparent information exchange between applicants and permitting entities—which was the clear intent of section 216(h)(4)(C). Additionally, it is equally important that federal agency's retain independence and impartiality regarding the federal permitting or authorization decision that ultimately must be rendered. By including a specific proviso that the exchange of information shall not be considered to be a commitment to approve or disapprove a particular application or authorization request, these regulations also will remove what could be a lingering concern by the agency as to what information it can and cannot provide without prejudice to its ultimate decisionmaking process.

5. Coordination with Non-Federal Permit Authorizations

Section 216(h)(3) provides that, to the maximum extent practicable under federal law, DOE shall coordinate any federal authorization and review process under section 216(h) with any Indian tribe, multistate entity or state agency that has responsibility for separate permitting and environmental review of the proposed facility.[18] In recognition of this requirement, in the Interim Final Rule proposed section 900.6(a)(2), DOE proposes that non-federal entities "may elect" to participate in the coordination process.

This approach requires additional safeguards to ensure that the nature of such participation by non-federal entities is consistent with the purpose and language of FPA section 216(h)(3). First, DOE must explicitly clarify that the non-federal entity's participation is always to the extent allowed under both federal and state or tribal law. FPA section 216(h)(3) explicitly states that the non-federal entity's participation shall be "to the maximum extent practicable under Federal law."[19] Under the Interim Final Rule, DOE does not recognize the statutory limitations to non-federal entity participation. Revising the Interim Final Rule to include the phrase "to the maximum extent allowed under both Federal and State or tribal law" is consistent with FPA section 216(h)(3) because participation that is contrary to a provision of federal law is not "practicable." Moreover, it is logical that this limitation extend to limit participation that is contrary to state and tribal law.

Further, it is necessary to clarify in proposed section 900.5(b)(6) that the applicant has an option to request whether the coordination is limited to federal entities or whether the applicant wishes to request DOE coordination of both federal and state processes. The interaction of federal and state agency approvals is often affected by individual aspects of a particular transmission siting proposal. While in some cases coordination of federal and state reviews is warranted, there may other times where it is necessary to maintain separate schedules and timeframes for completion. For this

[18] 16 U.S.C. § 824p(h)(3).
[19] 16 U.S.C. § 824p(h)(3).

reason, a decision to coordinate such reviews should not be unilaterally made. Rather, consistent with the overall "request-driven" framework established in the Interim Final Rule, DOE should ensure that the initiation of a potential coordination between federal and state agencies should be only undertaken upon a request of the applicant. Under this approach, after a request by an applicant or prospective applicant, the appropriate federal and state agencies would then consult as to the ability to coordinate their review processes and determine if such coordination is appropriate. The ultimate decision to act upon an applicant's coordination request would remain with the applicable agencies. To ensure full transparency in such efforts, the regulations should further ensure that there is a formal communication from the appropriate federal and state agencies to the applicant regarding their decision as to the ability of the entities to coordinate on the permitting and environmental review of the proposed project.

Accordingly, the Allegheny Energy Companies propose that the following modifications be made to the pre-application process under section 900.6(a)(2):

> **900.6 Coordination of permitting and related environmental reviews.**
> . . .
> (a) . . .
> (2) ~~Non-Federal entities that have their own separate non-Federal permitting and environmental reviews may elect to participate in the coordination process under paragraph (a)(2) of this section.~~ To the maximum extent permitted under both Federal and State or tribal law, an applicant or prospective applicant may request that DOE coordinate the completion of all Federal authorization and environmental reviews with similar permitting/reviews being undertaken by one or more State, multistate or tribal authorities that have separate permitting or environmental review obligations with respect to such project. In making such request, the applicant or prospective applicant shall provide to DOE a list of those State, multistate and tribal authorities, including available contact information, for which it is requesting coordination between the Federal and non-Federal permitting or environmental review proceedings. Upon receipt of such request, DOE shall promptly contact the necessary State, multistate or tribal authorities and seek their participation in the coordination process under this section. No later than 30 days after submission of a request for coordination under this paragraph (a)(2), DOE shall communicate, in writing, to the applicant or prospective applicant whether the relevant State, multistate or tribal authorities have agreed to coordinate pursuant to this section and the process by which such coordination shall occur.

To ensure consistency with the process outlined above, DOE also must modify section 900.5(b) to delete paragraph (6). Such deletion is necessary to reflect the fact that the applicant makes the coordination request to DOE and that communications regarding the ability to coordinate occur between DOE and the

necessary agencies—not through "service" upon the non-federal entities by the applicant.

6. Level of Coordination Required

Proposed section 900.6(a)(1) provides that DOE and the permitting entities "shall jointly determine the appropriate level of coordination required."[20] This approach fundamentally isolates the requesting party—the applicant or prospective applicant—from the very coordination process that it is requesting. Moreover, this present formulation does not recognize the statutorily directed role of DOE as the "lead agency head"[21] and its obligation to "act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of the facility."[22]

By its nature, coordination of federal agency authorizations always will be specific to a particular project. However, there are general frameworks—such as technical assistance procedures; requirements for notice of actions; ability to share data between coordinating agencies; consistency in data collection protocols; protection of an applicant's confidential business information held by agencies; and timing of key agreements or decisions necessary to facilitate the required environmental review—that can benefit from the establishment of guidelines and procedures. Leaving such details to a project-by-project development will likely cause unnecessary delay where the purpose of coordination initiation is streamlining of federal agency reviews.

It is equally important that applicants or prospective applicants have a full role in the actual coordination efforts. This is particularly important with respect to such matters as the establishment of coordination deadlines, coordination or conduct of site visits and avoidance of multiple or conflicting data production requests from coordinating agencies to the applicant.

In order to further improve the coordination process, we support modification of section 900.6 as follows:

> **900.6 Coordination of permitting and related environmental reviews.**
>
> (a)(1) Upon receipt of a request for coordination, DOE, as the coordinator of all applicable Federal authorizations and related environmental reviews, the requester, and the permitting entities shall jointly determine the ~~appropriate level of coordination required~~ milestones, procedures and timetable by which coordination of the Federal authorization process will be led by DOE and, where applicable, the appropriate ~~permitting~~ entity ~~to be the lead agency for~~ responsible for preparing NEPA compliance documents, including all documents

[20] 73 Fed. Reg. at 54,460, proposed § 900.6.
[21] 16 U.S.C. § 824p(h)(5)(A).
[22] 16 U.S.C. § 824p(h)(2).

required to support a final agency decision, and all other analyses used as the basis for all decisions on a proposed transmission facility under Federal law. Designation of the lead agency for preparing NEPA documents shall be in compliance with regulations issued by the Council on Environmental Quality at 40 CFR 1500 et seq.

. . . [*See revisions to (a)(2) above*]. . .

(b)(1) DOE as the lead agency coordinating Federal authorizations shall establish, maintain, and utilize, to the extent practicable and in compliance with Federal law, a single location to store and display (electronically if practicable) all of the information assembled in order to fulfill Federal obligations for preparing NEPA compliance documents and all other analyses required to comply with all environmental and cultural statutes and regulations under Federal law. This information shall be available to the applicant, all permitting entities, DOE, and all Indian tribes, multistate entities, and State agencies that have their own separate non-Federal permitting and environmental reviews.

(2) DOE shall establish and maintain, to the extent practicable and in compliance with Federal law, a single location to store and display the information utilized by the permitting entities as the basis for their decisions on the proposed project under Federal law, including all environmental, cultural protection and natural resource protection statutes and regulations.

(3) In coordinating the preparation of a single environmental review document, DOE will rely upon the permitting entities and the requester, as appropriate, to ensure compliance with all applicable requirements of Federal law.

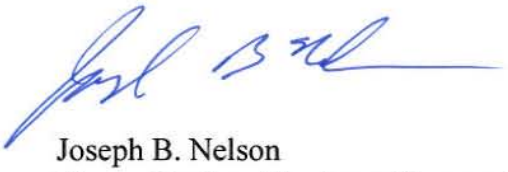
(4) The single environmental review document shall be made available to all permitting entities for making their agency decisions in order to ensure that each permitting entity's environmental review is in compliance with the statutory mandates and regulatory requirements applicable to action by that permitting entity.

Conclusion

The Allegheny Energy Companies urge DOE to timely issue modifications to its Interim Final Rule 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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