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

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

Re: Coordination of Federal Authorizations for Electric Transmission Facilities,
Notice of Proposed Rulemaking, RIN 1901-AB18, 76 Fed. Reg. 77432 (Dec. 13, 2011)

Dear Mr. Mills:

I. INTRODUCTION

The Edison Electric Institute (EEI) is pleased to provide these comments to the Department of Energy (DOE) in response to the above-referenced notice of proposed rulemaking (NOPR) for implementing Federal Power Act (FPA) section 216(h), which was enacted as part of section 1221 of the Energy Policy Act of 2005 (EPAct). The NOPR proposes to amend, and incorporates comments received in response to, DOE's proposed section 216(h) rule issued in September 2008, RIN 1901-AB18, 73 Fed. Reg. 54461 (Sept. 19, 2008) (2008 NOPR).

The current NOPR builds upon the framework of the 2008 NOPR and counterpart interim rule for the coordination of the federal authorization process for the siting and permitting of interstate electric transmission facilities. Specifically, the proposed rule

requires agencies to notify DOE if they receive requests for federal authorizations for Qualifying Projects, provides a mechanism for the selection of a “lead agency” to facilitate federal permitting and associated environmental reviews, and requires the lead agency to establish deadlines for the review process and to compile a consolidated environmental review document, all in keeping with FPA section 216(h).

II. EEI INTEREST IN THIS RULEMAKING

EEI is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide. Our U.S. members represent about 70 percent of the nation’s electric utility industry. To provide electricity to their customers, our members rely on a network of electricity generation, transmission, and distribution facilities, many of which our members construct, own, and operate.

Transmission facilities are used to convey electricity from generating resources to population centers and other customer sites. Transmission facilities can be quite lengthy because most generation facilities (including ones that depend on renewable energy, coal, and other natural resources) are often located some distance from customers.

Furthermore, the transmission facilities form an integrated grid that is highly interdependent and must be carefully designed, built, maintained, and managed at a utility, state, and regional level to ensure a reliable, affordable supply of electricity.

EEI members need to maintain their existing transmission facilities and in many cases will need to upgrade some of the facilities and to build new ones in coming years. Electricity demand is expected to increase 30 percent by 2030, requiring additional

generation and transmission facilities. Renewable energy mandates such as the California 33% by 2020 portfolio requirement, and federal renewable energy incentives and loan guarantees, have increased the demand for renewable energy development, which also will require some upgrades and new transmission. In addition, increased constraints on electricity generating plants, such as new federal air, water, and solid waste regulations, are likely to shut down or require retrofits to some traditional power production and to require new power generation and transmission facilities.

To site transmission facilities, EEI member companies often must acquire many federal permits, including land use authorizations for rights-of-way across federal lands and various environmental permits under federal law, such as wetland dredge-and-fill permits under section 404 of the Clean Water Act. Even as the need for new and upgraded transmission facilities has accelerated, obtaining federal permits has become more difficult and time consuming. Frequently, federal permit decisions for transmission projects lag behind siting and permitting decisions at the state level, complicating the siting process and significantly delaying construction of important facilities.

Thus, EEI and its member companies have a strong interest in seeing the FPA section 216(h) provisions implemented so as to substantially improve the existing federal siting and permitting process throughout the country. We believe substantial improvement in the section 216(h) process will benefit all utility customers, who depend upon adequate, reliable, and reasonably-priced electricity to carry on their daily business and to support economic growth.

At the same time, we encourage DOE to implement its other EPAAct responsibilities to identify and to help address transmission siting issues. Section 216(h) is just one of the tools DOE has to facilitate transmission siting. Others include the responsibility to undertake triennial transmission congestion studies and the authority to designate national interest electric transmission corridors (NIETCs). DOE should use all of these tools as effectively as possible to ensure that needed new transmission can be identified, permitted, and sited as efficiently as possible.

III. EXECUTIVE SUMMARY OF EEI COMMENTS

EEI appreciates the efforts of DOE and the other federal agencies to improve the permitting process to facilitate the development and retention of needed electricity transmission. EEI supports many of the proposals contained in the NOPR, in particular DOE's call on agencies with permitting authority over transmission facilities to coordinate in exercising that authority in order to streamline the review and decisionmaking process. That is the fundamental goal of FPA section 216(h), and EEI supports effective implementation of the section.

That said, EEI urges DOE to include a number of improvements in any final rule DOE adopts as a result of this proceeding, including:

- (1) The section 216(h) process should be more fully applicant-driven, giving applicants access to the process on request absent good cause not to do so, but also allowing applicants to opt-out of the process, if they deem it unnecessary, in cases where the process otherwise would apply.

- (2) Applicants should be kept fully involved in the section 216(h) process, including through inputs as to selection of a lead agency, setting and complying with milestones and ultimate deadlines, and the provision of information for the consolidated environmental review document.
- (3) DOE should stay more fully involved in the section 216(h) process, acting directly as lead agency upon applicant request, and otherwise ensuring that a lead agency is timely appointed, while also ensuring that the deadline and consolidated document requirements of section 216(h) are in fact implemented.
- (4) The section 216(h) process should apply to all transmission facilities, as qualified below, without a constraint that the facilities involve wholesale sales, and without exclusions as to facilities that cross international borders, federal submerged lands, national marine or sanctuaries or that are constructed by federal Power Marketing Administrations (PMAs).
- (5) The section 216(h) process should commence with the filing of applications seeking authorizations under federal law. The filing of such applications, with sufficient information to enable environmental reviews under the National Environmental Policy Act (NEPA) and other applicable federal law, should commence the section 216(h) one-year deadline for completing all permit decisions and related environmental reviews, unless precluded by another provision of federal law in which

case under section 216(h) the deadline must be as soon as practicable after that.

- (6) The normal section 216(h) process should apply even to projects within NIETCs that may qualify for FERC siting approval under FPA section 216(b) unless and until an applicant officially commences pre-filing work for FERC authorization under 18 CFR 50.5 or files an application for such authorization at FERC as described in 18 CFR 50.6. At that point, FERC should take over remaining lead agency responsibilities, completing the section 216(h) process in accordance with deadlines already established, and completing compilation of the environmental review document.
- (7) DOE should more fully encourage involvement of multi-state, state, and tribal agencies with non-federal responsibilities to participate in the section 216(h) process.
- (8) DOE should ensure that the section 216(h) process fully supports and benefits from the work of the Rapid Response Team for Transmission (RRTT), which the Administration has established to search for ways to streamline the transmission siting process. The section 216(h) process should incorporate lessons learned and best practices identified by the RRTT, and should incorporate a steering committee modeled after that used by the RRTT.

IV. COMMENTS ON KEY ISSUES

A. EEI Supports DOE's Goal of Coordinating and Streamlining the Federal Authorization Process for Transmission Facilities

Recognizing the critical need for additional electric transmission infrastructure, Congress enacted EAct sections 1221-42 as a comprehensive, bipartisan set of reforms to support, expedite, and improve the siting, construction, and funding of electric transmission facilities. Section 1221 established new FPA section 216 to address transmission siting. As recognized in the NOPR, section 216(h) directs DOE to act as lead agency to coordinate all authorizations for transmission projects under federal law. In addition, section 216(a) directs DOE to study transmission congestion throughout the country and to report to Congress on that issue every three years, and authorizes DOE to designate areas with congestion and capacity constraints negatively affecting consumers as NIETCs. Section 216(b) provides the Federal Energy Regulatory Commission (FERC) with backstop siting authority in NIETCs, in case states are unable or unwilling to act promptly on siting applications. And EAct sections 1222-42 address advanced transmission technology and transmission rates and funding, including FERC incentive rate authority.

Section 216(h) requires DOE as lead agency to ensure that all agencies issuing authorizations under federal law:

- coordinate their permitting and related environmental review and decisionmaking process,

- set and work within deadlines aiming to complete their decisions within one year of receiving applications for federal authorizations for electric transmission facilities, and
- compile and work from a single consolidated environmental review document.

In addition, section 216(h) requires DOE to seek participation in the coordinated transmission review and decisionmaking process by state, multi-state, and tribal agencies responsible for authorizing transmission projects under non-federal law. Meeting these requirements will necessarily involve the active participation and cooperation of these other agencies. The NOPR takes some positive steps to achieve this participation and cooperation.

EEI appreciates DOE's desire to implement FPA section 216(h) in a way that calls for the active participation and assistance by other federal and non-federal agencies that are responsible for issuing authorizations for transmission facilities. In the remainder of these comments, we will provide suggestions for improvements that would make the proposed section 216(h) administrative process work better and be more effective.

B. DOE Should Make the Section 216(h) Process More Applicant Driven

EEI encourages DOE to recognize that permit applicants play a fundamental role throughout the permitting process. Any final rule DOE adopts in this proceeding should give applicants a greater voice as to use of the section 216(h) process for their projects and greater involvement in the process.

To begin with, EEI encourages DOE to give applicants more control than the NOPR proposes over whether the section 216(h) process applies to their individual projects. On the one hand, the NOPR proposes to have the section 216(h) process automatically apply to all Qualified Projects, using certain voltage and importance thresholds, whether or not an applicant would elect the process for its project. On the other, the NOPR proposes to leave it to the discretion of the DOE siting and permitting director whether applicants can use the section 216(h) process for Other Projects.

EEI encourages DOE to allow applicants to have the section 216(h) process apply to particular projects, as qualified in Section IV. G herein, regardless of whether the projects meet the voltage and importance thresholds. The applicant's preference should be honored as a matter of course, without leaving the decision whether to grant access for projects below the Qualifying Project thresholds to the discretion of DOE's Director of Permitting and Siting.

Ideally, applicants should be able to use the section 216(h) process for Other Projects on request, absent good cause not to allow them to do so. At a minimum, DOE should specify factors that call for the Director to give access to the process to such Other Projects upon request by a permit applicant. Such factors certainly should include the importance of the Other Projects to the local transmission or distribution network, and anticipated difficulties siting the facilities without access to the coordinated review process.

At the same time, we encourage DOE to allow an applicant for a Qualified Project not to have the section 216(h) process apply if the applicant believes that the process is not necessary for its particular project. For example, an applicant may not want to apply the section 216(h) process if only minor federal authorizations are involved or because the agencies involved in providing authorizations for its project already are using a streamlined and efficient review process. The fundamental objective of section 216(h) is to streamline the application process to build needed transmission. If the processes in place as to a particular project are already sufficiently streamlined from an applicant's perspective, DOE regulations should not mandate use of the section 216(h) process if the applicant prefers otherwise.

C. Applicants Should Be Kept Fully Informed and Involved Throughout the Section 216(h) Process

EEI encourages DOE to reflect throughout any final rule adopted in this proceeding that applicants should be notified of developments occurring in the coordinated process and allowed to provide input in response. Such notice should include copies of all agency notices to one another about the procedural status of the project (including milestones, deadlines, and the agencies' plans to meet them), issues being addressed through the coordinated review, and substantive information about the project, so applicants are kept informed of developments and can provide additional input as warranted. An agency should be required to let applicants and DOE know as soon as possible, and no later than 90 days in advance, if the agency is not likely to be able to meet the one-year deadline under section 216(h) for completing its review and decision,

the reason why, and the date by which the agency anticipates being able to complete its review and decision.

D. DOE Should Take a Stronger Role in the Section 216(h) Process

Based on the continuing difficulty in siting transmission facilities even since EPCRA was enacted, EEI is concerned that in the NOPR, DOE is proposing to cede responsibility for implementing section 216(h) too broadly to other agencies, and DOE is not proposing to stay sufficiently involved to ensure that the requirements of section 216(h) are being met as to individual projects.

First, an applicant should be able to have DOE itself be the lead agency for purposes of conducting the section 216(h) process. Section 216(h) assigns the role of lead agency to DOE, and upon request by an applicant DOE should stand ready to take on that role. For example, an applicant may want DOE to be lead agency for transmission facilities that cross multiple state lines and involve multiple federal agencies in relatively minor capacities, where having DOE expertise in electric energy and grid matters could be especially valuable. Upon receipt of an applicant's request in writing for DOE to be the lead agency, DOE should be obligated to take on that role absent some justification based in federal law preventing DOE from performing the role. DOE also should be required to respond to the applicant's request in writing within a fixed period of time (as discussed in the next paragraph, we would recommend 45 days), and if DOE declines the lead agency responsibilities should have to include a justification based on federal law.

In cases where agencies other than DOE will be the lead agency, EEI encourages DOE to ensure that a lead agency is in fact appointed. As discussed in section IV.F of these comments, DOE should set a 45-day deadline after applications are received for agencies to select a lead agency. In the event the agencies fail to do so, DOE should designate the lead agency or again take on that role itself. Setting and enforcing such a deadline would reflect that in section 216(h), Congress intended the coordinated federal authorization process to be time-limited and that Congress made DOE ultimately responsible for ensuring the coordinated review is carried out. Setting and enforcing such a deadline also would be consistent with Council on Environmental Quality (CEQ) NEPA regulations, which set a 45-day deadline after which agencies can request CEQ to pick the lead agency. See 40 CFR 1501.5(e).

Following selection of a lead agency, EEI encourages DOE to ensure that the lead agency properly implements its responsibilities under section 216(h), in particular, setting and enforcing deadlines and compiling a single environmental review document on which all decisions under federal law are to be based. Without DOE taking a leadership role in these areas, we are concerned that agencies will not sufficiently honor the one-year deadline set in section 216(h) or sufficiently work from a single environmental review document, as needed to avoid duplicative reviews.

We also encourage DOE to assist in bringing state, multi-state, and tribal agencies with non-federal authority as to a project into the section 216(h) process. DOE should

enter memoranda of understanding with state governors, tribes, and others to facilitate such involvement.

Also as warranted, DOE should provide its own input to the section 216(h) process, bringing to bear DOE's knowledge of the transmission grid. This could include information from the DOE congestion studies under FPA section 216(a) and DOE interconnection-wide planning efforts.

In other words, DOE should stay actively involved in managing the section 216(h) process as needed to ensure the provisions of section 216(h) are met. DOE should certainly stay actively involved if an applicant calls on DOE for assistance.

E. DOE Should Clarify Several Features of the Provision Governing DOI and USDA as the Lead Agency

In section II.F, the NOPR says that if Qualifying Projects cross lands administered by the Department of the Interior (DOI) or Department of Agriculture (USDA), the two agencies will confer as to which of them will be the lead agency. DOE should clarify that this provision will apply even if lands administered by other federal agencies, such as the Department of Defense, also are involved.

If a transmission project will cross only lands administered by either DOI or USDA alone, no such consultation should be required. The agency responsible for administering those lands should be the lead agency. That said, if multiple land-management agencies within DOI such as the Bureau of Land Management (BLM) and National Park Service are involved, those agencies need to identify which will be the lead

agency. In such a case, BLM generally should take the lead given that most federal lands involved typically are under its jurisdiction.

Lastly, if a project will cross only a small piece of federal land, and another agency has a greater role in authorizing the project under federal law, DOI and USDA should have the option to defer to that other agency.

F. The Section 216(h) Process Should Not Exclude Particular Transmission Facilities, But Should Require Certain Planning Review

In section II.B, the NOPR says it does not apply to transmission lines that cross the U.S. international border, federal submerged lands, national marine sanctuaries, or facilities constructed by federal PMAs. Also, in the proposed regulatory text at 18 CFR 900.2 and 900.3, the NOPR says it applies only to “transmission facilities that are used for the transmission of electric energy in interstate commerce *for the sale of electric energy at wholesale*” (emphasis added). This could be construed to imply that the NOPR applies only to facilities used for wholesale sales. Section 216(h) does not exclude projects that involve international borders, federal submerged lands, national marine sanctuaries, or PMAs, nor does it require use of transmission for wholesale sales to qualify for the coordinated review process. EEI encourages DOE not to impose these constraints.

On principle, there is no reason why a project that may cross an international border, federal submerged lands, or national marine sanctuaries – and involve multiple federal authorizations – should not be covered by the coordinated federal authorization process under section 216(h). Even if in those circumstances, one particular agency or

the President may have ultimate decisionmaking authority, if other authorizations are involved under federal law, the applicant may benefit from being able to avail itself of the section 216(h) process.

Similarly, if a PMA alone or together with other applicants is seeking federal authorizations to site a transmission facility, the section 216(h) process should remain fully available to coordinate the federal authorization process. And the process should cover all requests for authorizations under federal law.

Regarding the “wholesale sales” issue, on its face FPA section 216(h) applies to transmission facilities without a constraint that the facilities must be used for wholesale sales. Also, FPA section 201 confers federal jurisdiction under FPA Part II, which includes section 216(h), over “the transmission of electric energy in interstate commerce *and* the sale of such energy at wholesale.” (Emphasis added) Section 201 has long been understood to provide jurisdiction separately over transmission in interstate commerce – the subject of section 216(h) – and wholesale sales. Proposed 18 CFR sections 900.2 and 900.3 appear to conflate those two grants of jurisdiction into a single standard by stating that for purposes of section 216(h), facilities are those used for interstate transmission “for sale at wholesale.” This could be read as constraining use of the section 216(h) process only to facilities used for wholesale sales, when neither section 201 nor section 216(h) contains such a constraint. To avoid confusion, and to avoid constraining application of section 216(h) to facilities involving wholesale sales, DOE should remove the “wholesale sales” language from sections 18 CFR 900.2 and 900.3.

G. DOE Should Focus the Section 216(h) Process on Projects Reviewed, Included, or Approved in FERC-Approved Regional Planning Processes

DOE should specify that projects 230 kV or higher will qualify for the section 216(h) process only if they are reviewed as part of a FERC-approved regional transmission planning process. Upon applicant request, the section 216(h) process should also apply to a lower-voltage transmission project or to a project in development prior to implementation of, or expected to be reviewed as part of, a FERC-approved regional planning process. This will help to ensure that the need for and implications of higher voltage projects on the regional transmission grid have been evaluated and that potential impacts on transmission system reliability have been addressed. In addition, this will help to put limited DOE and other agency resources to best use on projects that are most needed, as identified through the regional planning processes.

H. The Section 216(h) Process Should Apply Without Awaiting FERC Pre-Filing as to Projects That May Qualify for FERC Siting Approval

EEI is concerned that DOE appears to be too broadly deferring implementation of section 216(h) as to projects that may end up relying on FERC siting under FPA section 216(b). The NOPR broadly excludes such projects, in proposed section 18 CFR 900.2(d), when a section 216(b) application has been submitted to FERC or pre-filing activities have begun.

This raises the question whether transmission projects located in NIETCs identified by DOE under FPA section 216(a), a prerequisite for FERC siting under section 216(b), can rely on the section 216(h) coordination process unless and until they

undertake FERC pre-filing activities or file an application at FERC. Simply because a project is located within an NIETC does not mean that an applicant for federal authorizations such as federal land use authorizations or wetlands permits will ultimately seek FERC siting approval. If states grant the necessary state siting approval, FERC siting will never come into play. Similarly, if DOE initially identifies an area of the country as an NIETC and subsequently removes it as an NIETC, a transmission project could end up not qualifying for FERC siting approval. Meanwhile, the applicants should be able to avail themselves of the section 216(h) coordination process.

We encourage DOE to clarify that the normal section 216(h) process applies prior to an application being filed at FERC or an applicant specifically engaging in pre-filing activities on the way to filing such an application at FERC. Meanwhile, DOE should ensure that section 216(h) is implemented as soon as applications are filed for other federal authorizations, without waiting to see if a particular project may later be the subject of a FERC siting process.

In addition, EEI encourages DOE to provide greater clarity as to how the section 216(h) interagency coordination process and section 216(b) siting process will mesh. In particular, we recommend that DOE have the section 216(h) process proceed unless and until clear steps are taken to trigger the section 216(b) process, at which point FERC should be required to complete implementation of the section 216(h) process, relying on work already completed under the process rather than starting all over. Please see our comments on the relevant regulatory text in section IV.B below.

I. The Section 216(h) Process Should Be Coordinated with the Administration's Rapid Response Team Effort

EEI encourages DOE to ensure that the section 216(h) process dovetails with, supports, and benefits from the Administration's current efforts to streamline the federal authorization process for transmission facilities using the interagency RRTT. The RRTT holds out the promise of improvements to the transmission approval process, and the section 216(h) process should support not hinder the RRTT's efforts. Furthermore, the section 216(h) process should incorporate lessons learned and best agency review practices identified by the RRTT.

In fact, DOE should adopt as a component of the section 216(h) process an institutional steering committee modeled after the RRTT Steering Committee that is meant to guide and enforce interagency activities with respect to the RRTT. This would provide a critical enforcement mechanism that is missing from the NOPR.

J. The Section 216(h) One-Year Deadline Should Apply Earlier Than Proposed in the NOPR

Section 216(h) specifies that agencies are to complete their reviews and authorization decisions within one year after they receive applications for federal authorizations, unless other federal law precludes meeting the one-year deadline, in which case they must complete their work as close as practicable to the one-year deadline. However, in the NOPR, DOE proposes to tie the deadline to completion of initial steps in the NEPA review process – specifically, a determination that a project is covered by a categorical exclusion, or completion of an environmental assessment (EA)

concluding with a Finding of No Significant Impact (FONSI), or completion of a draft environmental impact statement (EIS). DOE explains that only then will the authorizing agencies have a sufficiently complete application to start the one-year clock. But the statute calls for the clock to begin upon receipt of the application, not upon completion of subsequent steps in the environmental review process.

Instead, EEI encourages DOE to direct authorizing agencies to obtain sufficient environmental information contemporaneously with submission of applications so that the one-year deadline can begin with filing of the application, subject only to requests for supplemental information the agencies may need to have a complete application. Many agencies already achieve this goal using the pre-filing process. At the same time, the pre-filing process should remain as concise and streamlined as possible, to avoid simply moving delays in the overall siting process from post-filing to pre-filing.

K. The Section 216(h) Process Should Include Non-Federal Agencies to the Maximum Extent Practicable

In addition, EEI encourages DOE to reflect in any final rule that section 216(h) requires DOE, to the maximum extent practicable, to coordinate the federal authorization process with non-federal authorizations at the state, multi-state, and tribal level. The NOPR allows agencies to coordinate with such other agencies. Instead, it should require them to do so, to the maximum extent practicable. Again, DOE should enter memoranda of understanding with state governors, tribes, and others to facilitate such involvement.

V. COMMENTS ON PROPOSED REGULATORY TEXT

A. Section 900.1 – Purpose

EEI supports DOE’s goal of providing a process for timely, coordinated review of federal authorization requests related to transmission facilities.

For clarity, DOE should modify the opening sentence of section 900.1 slightly, by saying “This part provides a process for the timely coordination of *agency responses to* Federal authorization requests ...” (new words in italics).

B. Section 900.2 – Applicability

As discussed above, EEI encourages DOE to allow applicants for Qualifying Projects to opt out of the section 216(h) process by request if the applicants do not need the process for particular projects. We also encourage DOE to allow applicants for Other Projects to opt into the section 216(h) process by request, absent good cause not to let the applicants do so. To reflect these changes, and to delete text that duplicates the section 900.3 definitions of “Qualifying Projects” and “Other Projects,” DOE should modify section 900.2(a) to read as follows:

Unless an applicant asks to opt-out of the process established by the regulations under this part for a particular project, these regulations apply to Qualifying Projects for which Federal authorizations are required. The provisions of this part also apply to Other Projects on request by an applicant, absent good cause.

As discussed above, EEI also encourages DOE not to exclude from the section 216(h) process transmission lines that cross U.S. international borders, Federal submerged lands, or national marine sanctuaries, or facilities constructed by PMAs. To reflect this, DOE should delete proposed section 900.2(c).

On the other hand, as discussed above, DOE should specify that projects 230 kV or higher will qualify for the section 216(h) process only if they are reviewed as part of a FERC-approved regional transmission planning process. This will ensure that the need for and implications of such projects on the regional transmission grid have been evaluated and that potential impacts on transmission system reliability have been addressed.

As discussed above, EEI encourages DOE to refine the interplay between the section 216(h) process and FERC transmission facility siting approval under FPA section 216(b). Specifically, DOE should ensure that the section 216(h) process will occur as normal unless and until pre-filing work under section 216(b) explicitly begins, at which point FERC will take over the role of lead agency under section 216(h), completing the coordinated review process that is already underway. To reflect this, DOE should modify section 900.2(d) to read as follows:

In the event an applicant for federal authorizations covered by the regulations in this part officially commences pre-filing work under 18 CFR 50.5 in preparation for filing an application to the Federal Energy Regulatory Commission (FERC) for issuance of a permit for construction or modification of transmission facilities, or the applicant files an application with FERC as described in 18 CFR 50.6, FERC shall take over the role of lead agency under these regulations. FERC shall complete the responsibilities of lead agency, in accordance with the time lines already established and in reliance on information already prepared under these regulations.

C. Section 900.3 – Definitions

1. Cooperating Agencies

Proposed section 900.3 defines the term “Cooperating Agencies” as all agencies with federal authorization responsibilities as to a given transmission project. The NOPR then uses this term in specifying responsibilities all such agencies have under the proposed regulations. EEI is concerned that, by using the term this way, the NOPR is blurring a distinction that CEQ NEPA regulations establish in discussing the role of Cooperating Agencies under NEPA.

Under CEQ’s NEPA regulations, at 40 CFR 1501.6, a Cooperating Agency is one that is *requested* to play such a role by a lead agency, or that *asks* to play such a role. Under the CEQ regulations, simply having a permitting role as to a given facility does not automatically turn the agency into a Cooperating Agency. Rather, the role of Cooperating Agency is reserved to cases where such an elevated role is necessary in the view of the agencies.

EEI encourages DOE in its section 216(h) regulations to use an alternative term such as “Authorizing Agencies” to mean all agencies with federal authorization responsibility, thus reserving the term “Cooperating Agencies” to CEQ’s regulatory meaning.

2. Federal Authorization

EEI supports the definition of Federal Authorization as accurately reflecting FPA section 216(h).

3. Non-Federal Entities

EEI encourages DOE to modify the definition of Non-Federal Entities slightly to mean “*multi-state, state, tribal, or* local government agencies ...” (new words in italics). This would better reflect FPA section 216(h)(3), which calls on DOE to engage such other agencies in the coordinated section 216(h) process to the maximum extent practicable under applicable federal law.

4. Other Projects

As discussed above, EEI encourages DOE to delete the constraint in the definition of Other Projects that such projects must be used “for the sale of electric energy at wholesale.”

5. Qualifying Projects

Section 900.3 defines Qualifying Projects as:

... high voltage transmission line projects (generally 230 kV or above) and their attendant facilities, or otherwise regionally or nationally significant transmission lines, . . . in which all or part of a proposed transmission line crosses jurisdictions administered by more than one participating agency and is used for the transmission of electric energy in interstate commerce for sale at wholesale.

EEI agrees that projects covered by the proposed rule should not be limited by voltage. Transmission line voltages may range from 34 kV to 765 kV, and the section 216(h) process should be available for all, as qualified in Section IV. G above.

We also agree that an applicant should have the opportunity to demonstrate the regional or national significance of a project. With such a demonstration, a qualifying project should be eligible for coordinated federal siting.

As discussed above, DOE should delete the constraint that projects must be used “for sale at wholesale.”

In sum, the section 216(h) process should be available for any transmission project in need of coordination assistance and should not be limited by voltage requirements, location, or other overly restrictive criteria.

D. Section 900.4 – Pre-Application Procedures

DOE should specify that the section 900.4(b) pre-application meeting should occur within 60 days of the section 900.4(a) applicant request for information at the pre-application stage, in keeping with FPA section 216(h)(4)(C).

E. Section 900.5 – Notifications

In section 900.5(a), DOE should specify that, in addition to notifying DOE that a project may be a Qualifying Project, permitting entities also should notify the applicant, who may then respond with additional information or may request to opt-out of the section 216(h) process.

In section 900.5(c), DOE should provide a more generic address for applicants to submit requests to use the process for Other Projects.

F. Section 900.6 – Selection of Lead Agency

In section 900.6(a)(1), DOE should provide an opportunity for applicants to submit their views as to which agency best qualifies to be lead agency as to their projects, based on the extent of agency involvement with the projects.

As discussed above, in section 900.6(a)(2), DOE should clarify that if lands administered by either DOI or USDA alone are involved, that agency will be the lead agency, without the need to consult the other. Also, DOE should clarify that either agency may defer to another agency involved in issuing federal authorizations to be the lead agency, if the other agency agrees.

As discussed above, in section 900.6(a)(3), DOE should use the term “authorizing agencies” rather than “cooperating agencies,” to avoid confusion with the CEQ definition of the latter.

DOE should add a section 900.6(a)(4), specifying that if other agencies do not select a lead agency under the procedures set out at sections 900.6(a)(2) or (3), DOE will select the lead agency or will act as lead agency itself. DOE also should specify that the determination as to lead agency, whether under section 900.6(a)(2) or section 900.6(a)(3), must be made within 45 days after an applicant submits one or more applications containing information required by the agencies involved.

As discussed above, in section 900.6(b), DOE should provide greater assurance that applicants can obtain access to the section 216(h) process. DOE should modify the clause “the Director may provide assistance at the Director’s discretion” to read “the Director will provide assistance absent good cause not to do so.”

As discussed above, in section 900.6(c), DOE should strongly encourage entities with non-federal authorizations as to a given project to participate in the section 216(h) process, by changing “may elect” to “are encouraged” to participate.

G. Section 900.7 – Lead Agency Responsibilities

In section 900.7(b), DOE should reflect the FPA section 216(h) statutory deadline for agencies to complete their permit decisions and related environmental reviews within one year, unless another provision of federal law prevents this in which case as soon thereafter as practicable.

In section 900.7(c), DOE should delete the qualifier “to the maximum extent practicable” on the requirement for the lead agency to prepare a unified environmental review document. FPA section 216(h) does not include this qualifier. Also, DOE should change “can base their decisions” to “shall base their decisions” on that document, again more accurately to reflect section 216(h).

H. Section 900.8 – Cooperating [Authorizing] Agency Responsibilities

EEI agrees with DOE in section 900.8(f) that cooperating [authorizing] agencies need to alert the lead agency and DOE immediately of any issues or problems relating to a federal authorization request and that the agencies need to participate fully in seeking and implementing resolutions. EEI encourages DOE to ensure the applicant also is notified of any such issues or problems and offered a chance to address their resolution.

I. Section 900.9 – DOE Responsibilities

As discussed above, DOE should take a more well defined role in the section 216(h) process, allowing an applicant to have DOE be the lead agency, in all other cases ensuring that a lead agency actually is selected, and ensuring that the lead agency sets and enforces milestones and deadlines aiming to complete the federal authorization process

within one year (or if other federal law prevents that as soon thereafter as possible), that the lead agency compiles a consolidated environmental review document for all the reviews, and that other authorizing agencies cooperate fully. Also, DOE should specify that applicants can petition DOE for assistance on these and other matters pertaining to the section 216(h) process.

J. Section 900.10 – Milestones and Deadlines

In section 900.10(b), DOE should require a permitting entity that is subject to a deadline under the section 216(h) process not only to alert DOE and the applicant if the permitting entity is not likely to meet the deadline, but to do so at least 90 days in advance, specifying why, and indicating the deadline by which the permitting entity can complete its work. The applicant should have the opportunity to respond to the permitting entity, lead agency, and DOE with inputs, including a request to meet the original deadline, or a suggested alternative to the permitting entity's proposed extension.

K. Section 900.11 – Deadlines

As discussed above, EEI encourages DOE to modify section 900.11(a) by specifying that the one-year statutory deadline for completing permit decisions and related environmental reviews stems from submission of an application that contains information required by the authorizing agencies, including such environmental information as the agencies may need to undertake their reviews. The agencies generally should specify the information they need in their regulations and other generic guidance, but in some cases may need supplemental information that would need to be provided to

start the one-year clock. That change would conform DOE's lead-agency rule to FPA section 216(h), which specifies that the deadline runs from receipt of the applications – not, as the NOPR proposes, from later steps in the NEPA review process. DOE should work with other agencies to identify their application requirements and to reduce, streamline, and consolidate those requirements as much as possible.

VI. CONCLUSION

EEI appreciates the opportunity to provide these comments in the interest of improving the proposed section 216(h) coordinated federal authorization process for electric transmission facilities. If you have any questions or need additional information, please contact Henri Bartholomot, EEI Director, Regulatory Legal Issues (202/508-5622, hbartholomot@eei.org), Rick Loughery, EEI Director, Environmental Activities (202/508-5647, rloughery@eei.org), Tony Ingram (202/508-5519, tingram@eei.org), or Karen Onaran (202/508-5533, konaran@eei.org).

Sincerely,



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