October 24, 2018

The Honorable Bruce J. Walker
Assistant Secretary
Office of Electricity (OE-20)
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Procedures for Conducting Electric Transmission Congestion Studies (83 Fed. Reg. 42,647, August 23, 2018)

Dear Assistant Secretary Walker:

I am writing to provide the comments of NextEra Energy, Inc. (NextEra) on the Department's proposal to modify its implementation of section 216(a) of the Federal Power Act to allow for transmission congestion studies focused on specific transmission projects and the designation, if appropriate, of National Interest Electric Transmission Corridors (National Corridors) tailored to specific projects. NextEra supports this proposal and believes it would promote the development of a more robust transmission grid at a reasonable cost. The greatest benefits of the proposal would likely be in the regional transmission organization (RTO) and independent system operator (ISO) regions, where large scale transmission investments are generally not subject to any competitive cost pressures or federal prudence review.

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

Description of NextEra Energy, Inc.

NextEra is a leading energy infrastructure company, the parent of Florida Power & Light Company (FPL), a large vertically integrated utility, and NextEra Energy Resources, LLC (NEER), a

competitive generation holding company and parent of NextEra Energy Transmission, LLC (NEET), a transmission operator and developer outside of Florida. NEET is a regulated transmission utility in ISO-NE and ERCOT, has been awarded transmission projects through competitive processes in NYISO and CAISO, and is acquiring transmission facilities in PJM and SPP. NextEra operates approximately 46,790 megawatts (MWs) of net generating capacity, as of year-end 2017. FPL is an integrated generation, transmission and distribution franchised electric utility that provides wholesale and retail electric service to customers in the State of Florida. FPL owns and operates over 26,600 MWs of generation and operates 75,000 miles or transmission and distribution lines in peninsular Florida. NEER subsidiaries own and operate about 20,950 MW of generation in 32 states and Canada.

Recommendations for Revised Congestion Study and Corridor Designation Processes

NextEra believes the Department's proposal to allow project-specific congestion studies and National Corridor designations would better serve statutory objectives and facilitate transmission development in a manner that achieves greater flexibility, timeliness, and cost effectiveness, while shifting the burden of preparing congestion studies and proposing National Corridors from the Department to transmission developers.

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

A congestion study and National Corridor designation, together, effectively constitute a finding that some increase of transmission capacity is needed in a particular geographic area, i.e., a need finding. A National Corridor is not intended to be a project route, but it is perceived to be one by the general public. But the bifurcation of the federal siting role between the National Corridor designation by the Department and backstop siting by the Federal Energy Regulatory Commission (FERC) makes it difficult for the Department to avoid designation of large National Corridors. One solution would be to designate narrow National Corridors that are effectively project routes. However, the Department is in a poor position to identify routes that are both workable and useful for developers. In addition, because project permitting in any designated National Corridor is reserved to FERC, and FERC commonly requires route changes and variances to mitigate environmental and community impact, closer alignment is needed between a congestion study, National Corridor designation, and backstop siting by FERC.

A solution would be to change the process used by the Department for congestion studies and National Corridor designation by shifting the burden of preparing congestion studies from the Department to transmission developers and allowing developers to request Department

designation of a project-specific National Corridor with submission of a congestion study. These requests could be made at any time, not just every three years. The developer would have the burden of showing that the proposed corridor meets the requirements of section 216(a). The congestion study would be required to demonstrate a transmission constraint or congestion that would be relieved or mitigated by a project in that corridor. The congestion study could be prepared by a contractor on a list approved by the Department. The Department would consult with affected states on this congestion study, as required.[1] The Department would post the congestion study for comment, consistent with section 216(a)(2). If necessary, the transmission developer could submit to the Department a draft congestion study, which only becomes final after the Department's consultation with affected states. The transmission developer could coordinate with FERC on an informal basis throughout this process for preliminary feedback as to potential changes to routing in the event backstop siting is needed, or the Department and FERC could establish a more formal coordination process. There is no statutory impediment to conducting congestion studies more frequently than once every three years, and the Department has indicated it will continue to conduct the triennial congestion studies.[2] At the end of the process the Department would issue a report that may designate a National Corridor.

By allowing project-specific National Corridor designation the Department would avoid past controversies. Any such corridors would be comparable in size to electric transmission and interstate natural gas pipeline proposed routes, far smaller than the National Corridors designated by the Department in 2007. This approach would also allow greater flexibility, timeliness and responsiveness than the prior process used by the Department. Transmission developers would be free to submit a congestion study and request a project-specific National Corridor as needed, not only once every three years. Modifying the congestion study and National Corridor designation processes along these lines would produce a workable process consistent with statutory objectives. Any federal permitting under this revised process would likely remain a last resort, occurring only where state law bars or unduly burdens new entrants.

In all likelihood, any requests for project-specific National Corridor designations would be limited to the RTO and ISO regions. Outside those regions, generally transmission is built by state regulated utilities for the benefit of retail customers and state siting is effective for this purpose. In RTO and ISO regions transmission is regionally planned with benefits that may be interstate. In addition, new entrants that may not qualify for state siting are competing for these projects.

The Department's Proposal Will Strengthen the Transmission Grid at Reasonable Cost

The level of transmission investment has increased significantly in recent years, rising to approximately $20 billion annually. The bulk of this investment is occurring in the RTO and ISO regions, which account for over 80% of recent transmission investment. Grid investment in RTO and ISO regions is also growing faster than in other regions. However, there are rising concerns about increases in RTO and ISO transmission rates resulting from this investment, particularly

[1] Federal Power Act § 216(a).

[2] Procedures for Conducting Electric Transmission Congestion Studies, 83 Fed. Reg. 42,647, 42,648 (August 23, 2018) ("DOE will continue to produce the triennial studies required by the statute").

whether some costs may be excessive. There are two basic approaches to assure these costs are not excessive: prudence review and competitive processes. Unlike transmission investments made by state-regulated utilities, which are subject to prudence review by state commissions, there is no effective FERC prudence review over RTO and ISO transmission investment to assure costs are not excessive. Instead, FERC has chosen to rely on competition to police excessive RTO and ISO transmission costs, rather than prudence review.

FERC issued its landmark transmission planning and cost allocation rule, Order No. 1000, in part to address concerns about excessive costs. Order No. 1000 removed the federal right-of-first refusal (ROFR) from FERC jurisdictional tariffs, removing a barrier to competition in transmission development.[3] One factor in FERC's decision to remove the federal ROFR was a belief that competition in transmission development will help insure the cost of new transmission development is not excessive. Encouraging competition in transmission development is consistent with long-standing FERC policies holding that as a general matter competition will lower costs and shift risks from customers to competitors.

Early experience with Order No. 1000 competitive processes has produced significant cost savings, proving the benefits of competition. RTO and ISO transmission projects not subject to competition have experienced significant cost escalations relative to the projects' initial cost estimates. On average, incumbent projects in RTOs and ISOs were completed at costs that exceeded their initial cost estimates by a weighted average of 34%, varying from an 18% cost escalation for non-competitive projects in MISO and SPP to average escalations of 70% in ISO-NE.[4] By contrast, the track record of competitive projects shows that competition is effective in preventing cost overruns in transmission development. The winning bids of 15 competitive RTO and ISO transmission projects have been priced on average 40% below initial cost estimates.[5] One explanation for this stark difference is that competitive projects typically include cost caps or other cost-control measures, while non-competitive projects lack any cost controls. The average customer savings from competitive transmission processes could be as high as 55%.[6]

Despite the public policy benefits from competition in transmission development, in the form of lower costs, obstacles to competitive transmission remain. One obstacle is that new entrants may not qualify for permitting under state law, or incumbents may enjoy preferential siting rights. FERC policy permits RTOs and ISOs to weigh any siting preferences enjoyed by incumbents under state law, which can favor incumbents in an award of a competitive transmission project.[7] The Department's proposal would produce a more level playing field,

[3] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *affirmed*, *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (DC Cir. 2014).

[4] BRATTLE GROUP, THE BENEFITS OF COMPETITION IN ELECTRIC TRANSMISSION (forthcoming).

[5] *Id*.

[6] *Id*.

[7] *See South Carolina Elec. & Gas Co*. 147 FERC ¶ 61,126 at P 125 (2014); *Midwest Indep. Transmission Operator, Inc. and the MISO Transmission Owners et al*., 147 FERC ¶ 61,127 at P 150 (2014); *PJM Interconnection, L.L.C.*, 147

allowing new entrants to compete for new RTO and ISO transmission projects, facilitating new grid investment and assuring reasonable cost.

Misapprehension of *Piedmont* and *California Wilderness* Decisions

Some comments on the Department's proposal may reflect a misapprehension of the *Piedmont* decision and its implications for designation of National Corridors.[8] This is an important question, and an area where confusion continues to reign since 2009. The effect of *Piedmont* is much more limited than generally understood. While the 4th Circuit faulted FERC's interpretation of the statutory term "withheld approval" in Federal Power Act section 216(b)(1)(C)(i),[9] that interpretation was in the rule preamble, not the regulatory text itself.[10] For that reason, the FERC rule remains intact in the event the Department were to designate a National Corridor.

Importantly, the *Piedmont* decision does not control interpretation of section 216. This is the view of the U.S. Solicitor General, reflected in its brief to the U.S. Supreme Court, where it argued against the grant of certiorari on the grounds that *Piedmont* reflected the view of only one circuit and FERC was free to maintain its original interpretation outside the 4th Circuit.[11] In short, the original FERC interpretation of the term "withheld approval" continues to govern in the Lower 48 outside the 4th Circuit (other than the Electric Reliability Council of Texas[12]).

Even in the 4th Circuit the FERC transmission siting rule continues to apply with respect to certain transmission projects. Congress crafted section 216 in large part to fill a gap in state and local transmission siting laws, since the provision allows for FERC siting when a state lacks authority to approve siting,[13] an applicant for a construction permit does not qualify for siting under state law,[14] as well as when a state unduly conditions project approval.[15] None of these siting approvals in the 4th Circuit or elsewhere are implicated by *Piedmont*.

There is also confusion about the significance of *California Wilderness*[16] and whether that decision limited or narrowed the Department's authority under section 216. In *California Wilderness*, the court vacated both the original congestion study and National Corridor designations because of inadequate consultation by the Department with affected states, as

FERC ¶ 61,128 at P 145 (2014); *Maine Pub. Serv. Co*., 147 FERC ¶ 61,129 at P 35 (2014); and *Southwest Power Pool, Inc*., 149 FERC ¶ 61,048 at P 143 (2014).

[8] *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (2009), cert. denied, 558 U.S. 1147 (2010) ("*Piedmont*").

[9] Federal Power Act §216(b)(1)(C)(i).

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

[11] Brief for the Fed. Energy Regulatory Comm'n in Opposition at 14-5, Edison Elec. Inst. v. Piedmont Envtl. Council (2009) (No. 09-343).

[12] Federal Power Act § 216(k).

[13] Federal Power Act § 216(b)(1)(A)(i).

[14] *Id*. at (b)(1)(B).

[15] *Id*. at (b)(1)(C)(ii).

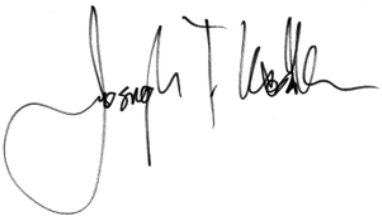
[16] *California Wilderness Coal. v. DOE*, 631 F. 1072 (9th Cir. 2011) ("*California Wilderness*").

required by the statute.[17] However, this decision has no implications for the Department's authority under section 216 and simply stands for the proposition that notice and comment does not constitute "consultation" and the Department must properly perform consultation with affected states when it conducts congestion studies.

Conclusion

In conclusion, NextEra commends the Department for proposing modifications to the processes used for development of congestion studies and National Corridor designation. As stated above, we believe the congestion study process should be modified to allow transmission developers to submit congestion studies paired with requests for project-specific National Corridor designations. The Department should permit transmission developers to submit congestion studies at any time, not only once every three years. These modifications would result in a process that is more flexible, timely, and responsive, allowing designation of much narrower corridors than those established by the Department in the past. This approach would help strengthen the U.S. interstate transmission grid at reasonable cost.

Sincerely,



Joseph T. Kelliher
Executive Vice President, Federal Regulatory Affairs

[17] *Id.* at 1086.