Congress of the United States
Washington, DC 20510

September 14, 2015

The Honorable Ernest Moniz
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Dear Secretary Moniz,

We are writing to obtain information regarding the U.S. Department of Energy (Department) review of the Plains and Eastern Clean Line Transmission Project (the Project) and to express our views regarding the possible use of Section 1222 of the Energy Policy Act of 2005 (42 U.S.C. 16421). The Project does not appear to meet the statutory requirements of Section 1222, and we believe a state-level review of many serious concerns is necessary. Therefore, the Department should not approve the use of Section 1222 to carry out the Project.

The use of Section 1222 to carry out this Project would severely limit the ability of states and local communities to consider and/or attempt to mitigate a number of serious concerns, including the likelihood of: (1) harmful environmental impacts, (2) disproportionate impacts on rural, poor, and disadvantaged communities, (3) reduced property values on lands adjacent to the project, (4) infringements upon private property rights, (5) negative impacts to energy exploration, development, and production, including harmful impacts to existing energy infrastructure, (6) increased land fragmentation, (7) degraded public safety, (8) tribal opposition and concerns, (9) impacts to migratory birds and threatened or endangered species, (10) the exclusion of many Arkansas and Oklahoma power customers from use of the proposed transmission line, (11) the exclusion of Regional Transmission Organizations (i.e. the Southwest Power Pool and the Midcontinent Independent System Operator) from appropriate control of the transmission line, (12) decreased productivity on farms, ranches, and forests, and (13) adverse socio-economic impacts associated with each of the issues addressed in this letter.

Please thoroughly respond to each of these serious concerns as well as to each of the following items:

1. Please provide a comprehensive and detailed accounting of Department activities, including financial transactions and resources expended, associated both with the implementation of Section 1222 generally, and the review of the Project specifically. This comprehensive and detailed accounting of such activities should include, but not be limited to:

    a. a detailed description of any transactions related to the Advanced Funding Agreement described in the April 5, 2012 letter from Deputy Secretary of Energy Daniel B. Poneman to the President of Clean Line Energy Partners,
    b. any other transactions related to work performed by the Department or by the Southwestern Power Administration (Southwestern),
    c. the number of FTEs required to perform associated work,

d. a list of all contractors and/or consultants hired by the Department and/or Southwestern, the date each contract was entered, a summary of each task performed by each contractor, and amounts paid by the Department and/or Southwestern for each task, including but not limited to modeling, analysis, technical support, drafting, comment review, or public outreach,
e. any available information associated with anticipated future need for contractor and/or consultant services, should the Department approve the use of Section 1222 to carry out the Project,
f. a detailed description of the use of appropriated funds for the implementation of Section 1222,
g. a detailed description of the use of appropriated funds for any work associated with the Project,
h. all letters, emails, briefing materials, agendas, calendar entries, notes, or other documents concerning all communications between the Department or Southwestern and Clean Line Energy Partners or its representatives, since June 10, 2010, and
i. all letters, emails, briefing materials, agendas, calendar entries, notes, or other documents concerning all communications between and among Department employees (including Southwestern employees) referring or relating to the Section 1222 application for the Project.

2. According to Section 1222, projects must be either "located in a national interest electric transmission corridor designated under section 216(a) of the Federal Power Act [16 U.S.C. 824p (a)]" or "necessary to accommodate an actual or projected increase in demand for electric transmission capacity." These requirements were reiterated in the June 10, 2010 Request for Proposal published at 75 Federal Register 32940. We believe the Project fails this threshold test, and therefore the use of Section 1222 should be rejected. The primary potential customer for power from the Clean Line Project does not need the power. As Chairman Lamar Alexander of the Senate Energy and Water Appropriations Subcommittee has stated, "according to the Tennessee Valley Authority's (TVA) Draft Integrated Resource Plan, TVA would not have a need for this wind power until the 2030s, at the earliest. In other words, the project proposes to fill a need that is not present at this time and could force a comparatively expensive source of energy on Southeastern utilities that don't need the additional generation."[1] Also, in comments to the Department, submitted on July 13, 2015, the Office of the Attorney General of the State of Oklahoma stated that "TVA has not committed a single dollar to purchasing power from the Clean Line project" and that "Clean Line fails to name even one customer that has done anything more than 'express interest in the Project's transmission capacity.'" We share the concern that the project is proposed based on wishful thinking (i.e. "if you build it, they will come"), instead of a legitimate and verifiable calculation that the project is "necessary to accommodate an actual or projected increase in demand for electric transmission capacity," as required by law.

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[1] Letter to Secretary Moniz from U.S. Senator Lamar Alexander, June 11, 2015.
[2] *The Federal Government's Role in Electric Transmission Facility Siting*, Congressional Research Service

a. How does the Department determine whether a proposed Section 1222 project is "necessary to accommodate an actual or projected increase in demand for electric transmission capacity"?
b. Has the Department identified concrete evidence to show an actual increase in demand for electric transmission capacity along the Project route that would be best accommodated by the Project, as opposed to being addressed by other plans that have been established by the Southwest Power Pool and other stakeholders? If so, please provide this evidence.
c. Does the Project meet needs identified in the 2015 Southwest Power Pool Transmission Expansion Plan Report?
d. Does the 2015 Southwest Power Pool Transmission Expansion Plan Report include interregional proposals that would be duplicated by the Project?

3. Chairman Alexander also noted "the use of Federal eminent domain authority would strip Arkansas of their traditional property rights," and that "the Department should carefully consider Arkansas' concerns and resist efforts to undermine states' rights." We want to clearly give voice to these concerns, on behalf of our constituents who are alarmed by a process where the federal government may attempt to take private property based on decisions made in Washington, DC rather than in states and local communities. Only in limited circumstances, where the government demonstrates a clear need for public use and where the legal authority is explicit and unambiguous, should eminent domain be exercised to acquire property. The modern electric grid has been constructed for over a century, without resorting to federal eminent domain, and there is no compelling reason to change that practice now. As noted in a report from the non-partisan Congressional Research Service, "the location and permitting of facilities used to transmit electricity to residential and commercial customers have been the province of the states (with limited exceptions) for virtually the entire history of the electricity industry." The report continues that "state and local governments are well positioned to weigh the local factors that go into siting decisions, including environmental and scenery concerns, zoning issues, development plans, and safety concerns."[2] We share this view, and we strongly urge the Department to determine that it is not in the public interest to supersede the long-standing role of states. Does the Department agree that state and local governments are "well positioned to weigh the local factors that going into siting decisions," such as those factors mentioned above?

4. This Project and others like it are far outside the core statutory mission of the federal Power Marketing Administrations (PMAs). PMAs should not be diverted from their primary purpose, which is to market hydropower from federally-owned and operated dams. PMAs operate on limited budgets and their resources should be focused on achieving the primary objective of providing affordable and reliable hydropower-generated electricity, particularly to disadvantaged communities, including many rural and low-income communities that are served by electric cooperatives or municipal utilities. As you know, Southwestern is a PMA within the Department,

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[2] *The Federal Government's Role in Electric Transmission Facility Siting*, Congressional Research Service Report R40657, September 8, 2011, by Adam Vann.

authorized under Section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s) to market and transmit wholesale electrical power from 24 multipurpose reservoir projects operated by the U.S. Army Corps of Engineers to cooperatives, government agencies, and municipalities in several states. Southwestern operates and maintains 1,380 miles of high voltage transmission lines in Arkansas, Missouri, and Oklahoma. Southwestern also markets power in six states: Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas. How would Southwestern's responsibility to market and transmit power from Corps reservoirs to these six states be enhanced by Southwestern's involvement in a project to construct a merchant electric transmission line that is unrelated to Corps reservoirs and that will deliver power to the Mid-South and Southeast via an interconnection with the Tennessee Valley Authority?

5. If approved, the Project would be constructed in the states of Arkansas, Oklahoma, and Tennessee. However, Section 1222 only authorizes the Department to participate in projects that are "located within any State in which the Western Area Power Administration (WAPA) or the Southwestern Power Administration operates." Neither Southwestern nor WAPA operates in the State of Tennessee.

    a. Since this project would be constructed, in part, in a State in which neither Southwestern nor WAPA operates, is the Department permitted to participate under Section 1222?
    b. If the Department claims it is so permitted, please provide a detailed legal analysis explaining the Department's claim. Such legal analysis should be exhaustive, and it should also specifically address the Department's participation in that portion of the project that would be constructed within Tennessee.

6. We are highly concerned that the use of Section 1222 would require electric utilities and their customers – including low and moderate-income families, small businesses, and other power customers – to pay costs associated with transmission lines that are unneeded. Not-for-profit electric utilities have expressed concern that the Department's use of Section 1222 could also make customers liable for costs associated with such projects. Large-scale transmission projects can cost billions of dollars, so this could be a very significant burden. Specifically, the Project could expose Southwestern's customers in Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas to the risk of increased electricity prices. Southwestern sets its rates so as to repay all of its costs. Southwestern does not receive taxpayer support. If Southwestern participates in the Project under Section 1222, it will likely participate in the acquisition of land and facilities on behalf of a private special interest, despite unclear legal authority to do so. Southwestern's customers, as represented by the Southwestern Power Resources Association (SPRA), have urged the Department to "formulate a mitigation plan to insulate both Southwestern and the customers" against risks and liabilities associated with Southwestern's potential role.[3] SPRA has further stated that "SPRA needs to see a clear and precise plan, through both contract

[3] Comment letter from Southwestern Power Resources Association President Brett Bradford to Dr. Jane Summerson (NEPA Document Manager), dated April 16, 2015.

language and mitigation measurements including but not limited to letters of credit and insurance policies, which fully shields Southwestern and its customers from [risk]" associated with third party claims for injury to persons or property that may occur "during development or construction activities, or during the operation of [sic] maintenance of the Project."

a. Will the Department accede to the request that it develop contract language and mitigation measures? If not, why not? If so, please provide a detailed explanation of the status of these efforts.
b. Will the Department formulate a comprehensive mitigation plan? If not, why not? If so, how will the Department involve Southwestern's customers in the development of these plans?

7. Southwestern's customers have also raised concerns regarding contingencies involving non-completion of the project, such as bankruptcy of Clean Line, non-performance of parties under contract, or cost overruns.

a. Before approving the use of Section 1222, will the Department develop measures to ensure that Southwestern's customers would be kept whole in the event of non-completion of the Project and that neither Southwestern's customers nor the taxpayers would bear any financial burden associated with the ownership or decommissioning of a partially-completed, unnecessary, and/or not-profitable merchant transmission line?
b. If not, why not? If so, please provide a detailed explanation of the status of these efforts, and describe how the Department will include Southwestern's customers in the development of these plans?

8. Clean Line representatives have indicated to impacted communities, including communities in Arkansas, that project benefits will include increased tax revenue, including property tax revenue, to local governments and public schools.

a. If the Project is approved and constructed using authority in Section 1222, will Clean Line Energy Partners be generally required to pay property taxes or other taxes associated with the Project?
b. More specifically, will Clean Line Energy Partners be legally required to pay property taxes or other taxes associated with portions of the Project owned by Southwestern?
c. Will any such costs be shifted to Southwestern's customers?
d. As the Department has sought to determine whether the Project is in the public interest, has it analyzed this issue? If not, why not?

9. While we oppose the use of Section 1222 for the Project and while we have broader concerns about the use of Section 1222 in general, we do support efforts to ensure that to the maximum extent practicable, any project carried out under Section 1222 will be sited on (1) existing federal rights-of-way, or (2) federal land managed by the Bureau of Land Management, the Forest Service, the Bureau of Reclamation, or the Corps of Engineers.

a. Does the Department support such siting of Section 1222 projects?
b. Has the Department engaged with federal land management agencies on this issue? If so, which ones?
c. Has the Department actively encouraged the siting of the Project on federal rights-of-way and the types of federal land described above? If so, please provide an exhaustive account of the Department's efforts to require, facilitate, and/or encourage such siting. If not, please provide justification for failing to do so.

10. On July 13, 2015, the Office of the Attorney General of the State of Oklahoma provided comments to the Department that:

> There are numerous material and substantial incorrect, misleading and/or inconsistent statements and omissions in Clean Line's Application materials. DOE should reject Clean Line's proposal based on these conflicting, misleading, incorrect and incomplete statements. In the alternative, DOE should at a minimum perform an independent review and comparison of all statements made by Clean Line to DOE, FERC, the Oklahoma Corporation Commission, the Arkansas Public Service Commission, the U.S. EPA, SPP, MISO, and all other state and federal agencies, transmission organizations, and other entities to whom Clean Line submitted statements and information related to the Plains and Eastern Clean Line Project.[4]

The Attorney General's Office provided several examples of substantial incorrect, misleading, and/or inconsistent statements.

a. Does the Department concur that "substantial incorrect, misleading and/or inconsistent statements and omissions in application materials" are legitimate grounds for rejecting a Section 1222 application? If not, why not? If so, will the Department accede to the request from the Office of the Oklahoma Attorney General that the application be denied on these grounds? Please share any response that has been provided to this request and any analysis of the issue.
b. Alternatively, has the Department begun the "independent review" that the Office of the Attorney General urged? If not, why not? If so, what is the status of the review and the timeline for its completion?

11. In comments to the Department, submitted on April 20, 2015, the Office of the Attorney General of the State of Oklahoma stated "the draft Environmental Impact Statement did not meet the expectations of an inclusive, community-driven feedback process we expect from administrative agencies. Landowners in Oklahoma did not have sufficient opportunity to have meaningful input on the route of the Line, and

[4] Comments from the Oklahoma Attorney General's Office, submitted by P. Clayton Eubanks, Deputy Solicitor General, dated July 13, 2015.

significant communities have been ignored."[5] We agree, and a similar statement could be made for landowners and stakeholders in Arkansas and Tennessee. While an additional public comment period occurred this summer, we remain concerned regarding the continued inadequacy of landowner and stakeholder engagement, particularly since the Project will impact stakeholders such as power customers, throughout a multi-state region, extending far beyond the three states where construction of facilities and the taking of private property will occur. What steps will the Department take to remedy the inadequacy of public engagement?

12. The April 20 comments from the Oklahoma Attorney General's Office also highlight concerns raised by the Tribal Council of the Cherokee Nation, which "passed a resolution opposing the Line." What actions has the Department taken to engage tribal governments and to address tribal concerns?

13. National organizations, such as the American Public Power Association (APPA) and the National Association of Regulatory Utility Commissioners (NARUC), have endorsed the Assuring Private Property Rights over Vast Areas of Land (APPROVAL) Act (S. 485/H.R. 3062), legislation that would reinforce and protect the role of states in the siting of electric transmission facilities under Section 1222. Does the Department agree that protecting the role of states in siting electric transmission facilities helps to ensure that concerns regarding the siting of projects are considered by officials elected within that state and, where appropriate, ensures that states may either resolve or mitigate such concerns prior to project approval?

14. The territory traversed by the Project includes one of the most important waterfowl migration flyways in our country, the Mississippi Flyway. Recreation and economic activity associated with waterfowl and migratory birds are vital to the region, and hundreds of migratory bird species rely on the Mississippi Flyway.

    a. Has the Department analyzed the potential impact to the Mississippi Flyway and considered whether specific mitigation measures would be necessary to address any potential concerns? If not, why not? If so, please provide any analysis performed by the Department.
    b. Has the Department consulted with the Mississippi Flyway Council, which contains representatives from state agencies throughout the Flyway as well as representatives from impacted Canadian provinces?
    c. Has the Department consulted with the U.S. Fish and Wildlife Service on potential impacts to the Mississippi Flyway?

15. The Arkansas Department of Parks and Tourism (ADPT) has expressed concern that the Project will impose "several apparent, immediate, and dire conflicts with public outdoor recreation in Arkansas." Outdoor recreation is a major driver of economic activity in Arkansas, Oklahoma, and Tennessee. The ADPT highlights that the Project would cross several rivers that have been designated as Extraordinary Resource Waterways by the State of Arkansas or as National Wild and Scenic Rivers. In some

[5] Comments from the Oklahoma Attorney General's Office, submitted by P. Clayton Eubanks, Deputy Solicitor General, dated April 20, 2015.

areas, river and stream access could be impaired by the Project. The ADPT is also concerned about significant adverse impacts to areas that are important to sport- and game fish habitat, bird-watching, hunting, hiking, and other outdoor activities. The ADPT has provided a significant list of Arkansas- and/or National Scenic Byways that would be adversely impacted by the Project. In general, the ADPT, "objects to any proposal or proposed route that will cross, disturb, or degrade any of these or other aesthetically-valuable areas in absence of any tangible, long-term gain for average Arkansans or their posterity." Before considering approving the use of Section 1222 authority for the Project, what will the Department do to:

a. address concerns associated with potential impacts to Extraordinary Resource Waterways and National Wild and Scenic Rivers?
b. minimize potential impacts to other aesthetically-valuable areas?
c. address concerns related to river and stream access?
d. minimize land fragmentation?
e. address concerns associated with sport- and game fish habitat, bird-watching, hunting, hiking, and other outdoor activities?
f. eliminate or mitigate impacts to Arkansas- and/or National Scenic Byways?
g. address similar concerns in Oklahoma and Tennessee?

16. Have any Department deliberations regarding the Project or the implementation of Section 1222 taken place on non-government email accounts? If so, please take steps to retrieve and secure such information for the purpose of responding to this letter and for the potential future oversight of Section 1222-related activities.

In complying with and responding to this Congressional oversight letter, we ask that you provide documents in electronic form, and that such documents be organized, identified, and indexed electronically. Specifically, when you produce documents, please identify the paragraph and subparagraph within this letter to which the document is responsive. Unless otherwise specified, the time period covered by the questions contained in this letter is from August 8, 2005 to the present. Questions contained in this letter are continuing in nature and apply to any newly-discovered information that becomes available subsequent to the date of this letter or subsequent to any response from the Department. In the event that any document is withheld on the basis of privilege, please provide a privilege log containing: (1) the privilege asserted, (2) the type of document, (3) the general subject matter, (4) the date, author, and addressee, (5) the relationships of the author and addressee to each other. Also, please take steps to ensure that any records, documents, data, or information associated with requests in this letter are not destroyed, modified, removed, transferred, or otherwise made inaccessible to interested Senators or Representatives, or to Congressional Committees that may seek such information.

In your initial response to this letter, please provide an anticipated timeline for a comprehensive response and production of requested information. If the Department can more quickly produce a complete response through a series of partial productions and responses, please provide an anticipated timeline for such productions and responses.

Again, we believe the Project does not meet the statutory requirements of Section 1222, and state-level reviews of many serious concerns are necessary. Therefore, in our federal

lawmaking and oversight role, we oppose the use of Section 1222 in this context and we urge you to disapprove it. We recognize that in many contexts the development of new electric transmission infrastructure is necessary despite costs and adverse impacts. We are not taking a position on whether this Project or any other should move forward under non-federal authorities. Such decisions regarding electric transmission are appropriately left to elected officials at the state and local level, where they have resided for generations. State and local officials can most effectively weigh the questions and concerns raised in this letter – and more importantly, concerns raised by our constituents – and determine whether such projects should be permitted.

We look forward to your timely response and we ask that you contact us if you need additional information. Thank you for your attention to this matter.

Sincerely,

John Boozman,
U.S. Senator

Tom Cotton,
U.S. Senator

Rick Crawford,
Member of Congress

French Hill,
Member of Congress

Steve Womack,
Member of Congress

Bruce Westerman,
Member of Congress

CC:

The Honorable Lisa Murkowski, Chairman, Senate Energy and Natural Resources Committee

The Honorable Lamar Alexander, Chairman, Senate Energy and Water Appropriations Subcommittee

The Honorable Rob Bishop, Chairman, House Natural Resources Committee

The Honorable Mike Simpson, Chairman, House Energy and Water Appropriations Subcommittee