

**UNITED STATES OF AMERICA
BEFORE THE UNITED STATES DEPARTMENT OF ENERGY**

RE: NATIONAL INTEREST
ELECTRIC TRANSMISSION
CORRIDOR DESIGNATIONS

ATTN: Docket No. 2007–OE–01,
Draft Mid–Atlantic Area National
Corridor

**APPLICATION FOR REHEARING AND REQUEST FOR STAY
OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (“PaPUC”) herewith applies to the United States Department of Energy (“Department”) for rehearing with respect to the Department’s designation¹ of most of Pennsylvania and neighboring mid-Atlantic States as a “National Interest Electric Transmission Corridor” (“NIETC”), as defined by Section 1221 of the Energy Policy Act of 2005, 16 U.S.C. § 824p. In addition, the PaPUC asks that your Department stay the effectiveness of its *NIETC Report* designation of three-quarters of Pennsylvania and surrounding states as a National Interest Electric Transmission Corridor.

Summary of the Case

On May 7, 2007 the United States Department of Energy, Office of Electricity Delivery and Energy Reliability (“Department”) published its *Draft National Interest Electric Transmission Corridor Designations*, 72 FR 25838 (May 7, 2007) (“*Draft NIETC Designations*”), as later amended by an *Notice of Errata*, 72 FR 31571 (June 7, 2007) (“*Errata*”). In that document, the Department designated all or major portions of West Virginia, Pennsylvania, Maryland, Delaware, the District of Columbia, New Jersey, New York and Virginia, as well

¹ *National Electric Transmission Congestion Report*, 72 F.R. 56992 (October 5, 2007) (“*NIETC Report*”).

as minor portions of Ohio as National Interest Electric Transmission Corridors (“NIETC”s) under Section 1221 of the Energy Policy Act of 2005 (“Section 1221”). It requested comments from interested parties and states on or before July 6, 2007.² The PaPUC filed timely comments in response to the *Draft NIETC Designations*, generally in opposition to the designations as proposed.

The PaPUC also appeared on June 13, 2007 at the Pittsburgh, Pennsylvania public meeting held by the Department to receive public comments on the draft designations and the PaPUC made oral comments and filed its comments in written form at that meeting. Among other things, we told your Department at that public hearing that:

States and state judicial systems have shouldered the principal transmission siting responsibilities of the Nation since the advent of interstate electricity grids; indeed, the existing 500 kV transmission backbone grid that serves both Pennsylvania and the larger PJM region was constructed by private utilities acting under the supervision of state siting authorities. It is evident that Congress, in drafting Section 1221 did not intend to indiscriminately “federalize” the entire U.S. transmission grid, and Congress’ expressed intent should carefully guide NIETC designation in a way that results in the least intrusion on traditional state siting authority consistent with Congressional intent.

On October 5, 2007, your Department published its *NIETC Report*, summarily rejecting all arguments or recommendations favoring change or modification of the draft designation and reaffirming without modification the Department’s designation of the proposed Mid-Atlantic Area National Interest

² On June 19, 2007, the PaPUC and the Pennsylvania Department of Environmental Protection filed a motion with the Department for an enlargement of the comment period to August 6, 2007, as a result of the addition of six counties in three states to the Mid-Atlantic designation by the Department in the issuance of its June *Errata*. The motion was not acted upon by your Department.

Electric Transmission Corridor as a NIETC under the provisions of FPA § 216 (a), 16 USC 824p (a). The Department directed that applications for the rehearing be filed on or before November 5, 2007.³

Standing and Agreement

The PaPUC submitted timely comments on July 6, 2007 with respect to your Department's proposed NIETC designation at Docket No. 2007-OE-01. In addition, the PaPUC submitted comments to the Department, both orally and in writing at the public meeting held in this docket in Pittsburgh, Pennsylvania on June 13, 2007. The PaPUC is thus a party and has standing in this proceeding.

NIETC Report, § V. C.

The PaPUC is a state administrative agency created by the General Assembly of the Commonwealth of Pennsylvania and is charged with the regulation of electric utilities and licensing of generation suppliers within the Commonwealth of Pennsylvania. 66 Pa.C.S. §101, et seq. Pennsylvania is served by transmission companies belonging to two Regional Transmission Organizations, PJM Interconnection, LLC (PJM), and the Midwest ISO, Inc. (MISO). Major portions of the NIETC designated in the *NIETC Report* are within the geographic boundaries of the Commonwealth of Pennsylvania; 52 of Pennsylvania's 67 counties have been designated within your Department's

³ *NIETC Report*, 72 FR 56992 at 57026.

NIETC corridor, constituting three-quarters of Pennsylvania's total geographic land area⁴. (See map at Attachment A).

Pennsylvania has historically been the sole source of the eminent domain power exercised by public utilities. Pennsylvania has therefore exercised primary and exclusive jurisdiction to review utility use of eminent domain powers in consideration of system need, private property rights, and preservation of environmental and historical values that might be impacted by the siting of transmission facilities on existing and new rights of way. *Constitution of Pennsylvania*, Art. 1, § 27⁵. FPA § 216 (b), may be only be invoked by a transmission developer to remove such siting and eminent domain powers from the Commonwealth to the Federal Energy Regulatory Commission if, and only if the proposed project lies within the NIETC corridor designated by your Department.

This ill considered, overly expansive exercise of the Department's powers under EPAct § 1221 (a) is arbitrary and capricious, violates Congressional intent and the clear language of the statute and fails to adduce evidence, to make reasoned and clearly articulated decisions and fails to make findings required by law. In so doing, your Department improperly and unlawfully seeks to federalize

⁴ All but 11,490 of Pennsylvania's 44,816 square mile land area lies within the Department's designated NIETC corridor. *U.S. Census Bureau*: <http://censtats.census.gov/cgi-bin/usac/usacomp.pl>

⁵ **Natural Resources and the public estate**

The people have a right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

the Commonwealth of Pennsylvania's existing transmission line siting authority, contrary to the intent of Congress, in a way that materially interferes with and undermines the regulatory scheme of the Commonwealth of Pennsylvania and the exercise thereof by the PaPUC and in derogation of state authority.

As the state regulatory agency charged by the Pennsylvania General Assembly with the protection of the public interest, the supervision of public utilities and electric generation suppliers, and enforcement of the Commonwealth's laws and transmission line siting regulations at 52 Pa. Code § 57.1 *et seq.*, the PaPUC has a manifest stake in the outcome of these proceedings and is therefore legally aggrieved.

Specifications of Error

1. The Department has failed to follow the substantive requirements set forth by Congress for NIETC designations:
 - a. The Department's NIETC designation is not supported by required findings of fact and reasoned judgment.
 - b. The Department has failed to make required the detailed factual findings required by Congress prior to designating NIETC corridors
2. The Department has failed to designate a National Interest Electric Transmission Corridor, as directed by Congress; instead it has designated an overly burdensome "Transmission Park".
3. The Department has acted to broadly preempt traditional state authority without making sufficient findings of necessity for so doing.

Argument

I. The Department has failed to follow the substantive requirements set forth by Congress for NIETC designations

a. The Department's NIETC designation is not supported by explicit findings of fact and reasoned judgment.

Section 1221 of the Energy Policy Act of 2005, Federal Power Act 216 (a), 16 USC § 824p directs the Department to study the National transmission grid and issue a report that “may” designate geographic regions that are “experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.”

Transmission congestion is, simply stated, comprised of the increased cost to consumers arising from the physical limitations of the interstate transmission grid which prevents low cost generation from reaching load that then must utilize higher cost generation. Transmission congestion is measured in monetary terms representing the foregone opportunity costs of not utilizing such lower cost generation. Because such cost differentials vary widely from region to region and over time, simply establishing how many hours of congestion per year exist over a given transmission path tells little about the costs of congestion or its effect upon consumers. The existence of congestion also does not establish any grid reliability concerns; transmission grids are not designed to completely eliminate congestion in all hours; transmission grid design, like any engineering exercise, is a balancing of costs against benefits.

The primary duty laid by Congress upon the Secretary of Energy is to issue a report which:

- (1) Determines whether there are geographic areas which are “experiencing electric energy transmission capacity constraints or congestion, and;
- (2) Whether such constraints or congestion “adversely affects consumers”⁶

The *NIETC Report* asserts that “there is no generally accepted understanding of what constitutes a “geographic area experiencing electric energy transmission constraints or congestion that adversely affects consumers”. Your Department, even though it elsewhere claims administrative expertise in this subject matter, does not attempt to define either phrase, and asserts that the Congressional directive is therefore “ambiguous”. *NIETC Report* at 72 FR at 57000. Your Department goes so far as to assert that this ambiguity is such that it need not even find the existence of *any* congestion, regardless of what Congress has enacted:

We stated [in the May 7, 2007 DOE Notice at 72 FR 25838 (May 7, 2007)] that the statute does not appear to foreclose the possibility of National Corridor designation in the absence of current congestion, so long as a constraint, including the absence of a transmission line, is demonstrably hindering the development of desirable generation.

72 FR at 57000.

Leaving aside for the moment this assertion of nearly unbridled authority to redefine the plain language of a Congressional statute, your

⁶ FPA § 216 (a) (2), 16 USC § 824p (a) (2).

Department has also simply declined to examine any of the factors which Congress deemed relevant to the designation of a NIETC corridor, as discussed in Section (1) (b) below.

The Department's *NIETC Report* is void of any of the statutory findings, except in the most vague and conclusionary language. How any specific transmission constraints within the Department's designated corridor injure economic vitality or development of the region or whether and to what extent any "end markets" are constrained by adequate and "reasonably priced" electricity⁷ are questions that remain unaddressed and unanswered by your Department.

For the Mid-Atlantic Area National Interest Electric Transmission Corridor, there is no reasoned estimate by the Department, either by transmission path, sub region or in the aggregate for the entire designated corridor of any specific injury to the public or the National interests which the Department identifies as affecting "economic vitality...constrained by lack of adequate or reasonably priced electricity"⁸, no identification of economic growth in the corridor or its end markets and how such may be "constrained by lack of adequate or reasonably priced electricity and no reasoned discussion of how such economic growth may be "jeopardized by reliance on limited sources of energy"⁹, no reasoned explanation of the Department's opinion of how "the energy independence of the

⁷ "Reasonably priced electricity" is not defined within the confines of the Act, and your Department has made no attempt to further define it, except to assert that reasonably priced electricity may not be available.

⁸ 16 USC § 824p (a) (4) (A).

⁹ 16 USC § 824p (a) (4) (B).

United States would be served by the designation”¹⁰, no discussion or exercise of expertise on how “the designation would be in the interest of national energy policy” (and no identification of what national energy policies would be benefited¹¹ and no discussion of how the designation “would enhance national defense and homeland security”¹²

The determination of whether transmission congestion exists is not the Department’s sole duty under the statute and such a determination is not in and of itself a sufficient basis to designate a geographic region as a NIETC. Such designation can be made if and only if the Department determines, based upon factual evidence that the congestion “adversely affects consumers” in some specific, quantified manner. Determination of transmission congestion is primarily an engineering exercise; as the Department notes is “the condition that occurs when transmission capacity is not sufficient to enable safe delivery of all scheduled or desired wholesale electricity transfers simultaneously”. 72 FR at 57003. However, the Department then concludes erroneously that congestion “that adversely affects consumers to include congestion that is persistent”¹³, without making any specific findings whether or how persistent congestion affects any particular consumer or group of consumers. In effect, rather than making specific findings on adverse affects on consumers, the Department relies upon a tautology: if congestion exists and is “persistent” (in the undefined term used by the

¹⁰ 16 USC § 824p (a) (4) (C).

¹¹ 16 USC § 824p (a) (4) (D).

¹² 16 USC § 824p (a) (4) (E).

¹³ 72 FR at 57004.

Department) that is sufficient to establish an adverse effect on consumers and is thus justification to designate that geographic region as a NIETC under FPA Section 213 (a).

The Department concedes that *all* transmission systems experience congestion with varying frequency and over varying periods of time. 72 FR at 57004. Where the Department draws the line (i.e., what is the criteria for determining the dividing line between “occasional inconvenience” and “persistent congestion”) is not clearly stated anywhere in the *NIETC Report*. The Department attempts to bootstrap its “technical expertise and policy judgment” into a conclusive finding of “adverse effect” without stating how that technical expertise and policy judgment has been applied. The Department has supplied no objective criteria which it employed that the PaPUC, any adversely affected consumer or any reviewing court may examine to determine what specific congestion was identified as “persistent”, what the dividing line is between persistent and non-persistent, nor how such alleged persistence adversely affects consumers adversely. In effect, the Department declares that it exercises pure unreviewable discretion in the designation of NIETC corridors and need not rely upon any objectively stated criteria.

In effect, the Department has done nothing more than catalog hours of congestion along various transmission paths without showing how such congestion “adversely affects consumers” or what is the effect of such congestion. How many congestion hours mark the dividing line between no adverse effect and

“adverse effect”? This purported exercise of “technical expertise and policy judgment” completely ignores Congress’s clearly expressed direction and intent that the Department conduct a study which not only identifies specific instances of transmission congestion, but also identifies how such congestion affects the National interest. Your Department may not declare a Congressional statute “ambiguous” and then redefine its directives to better suit the Department’s inclination.

There are no specific findings how such “persistent congestion” affects the national interest, and no apparent recognition that some degree of transmission congestion may not have a material adverse effect on consumers, particularly where the long term costs of congestion are low, or are outweighed by the costs of new transmission facilities or the effect of new construction on the environment or aesthetic values of the region served.

b. The Department has failed to make required the detailed factual findings required by Congress prior to designating NIETC corridors

As noted above, Congress has handed your Department a defined task through 16 USC § 824p (a) (2), and has also handed your Department a list of factors to be considered. Although consideration of the five factors which are listed at 16 USC § 824p (a) (4) appears at first blush to be permissive (i.e. “the Secretary *may* consider” (emphasis supplied), the context of the language reveals that explicit consideration of those factors is a mandatory but is not an exclusive

list of all factors to be considered¹⁴. *Lo Shippers Action Committee v. Interstate Commerce Commission*, 857 F.2d 802, 806 (1988) *cert. den.* 490 U.S. 1089 (1989).

Your Department did not look at any specific effect of corridor designation on the corridor or on “end markets”, did not identify any “end markets”, did not associate any particular generation sources with any generation sinks (which would have significantly clarified and aided such economic analysis), did not examine how designation of the corridors would add to the energy independence of the United States¹⁵, did not identify any particular National energy policy or how it would be advanced by this NIETC designation, and did not examine the effect of the corridor designation on National defense or homeland security.

Remembering that this statutory provision involves, by its terms, the designation of *national interest* electric transmission corridors, the essential failure of the Department to identify or discuss the impact of its designation on any

¹⁴ In determining whether to designate a national interest electric transmission corridor under paragraph (2), the Secretary may consider whether—

- (A) the economic vitality and development of the corridor or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity.
- (B) (i) economic growth in the corridor or the end markets served by the corridor may be jeopardized by reliance on limited sources of energy; and
 - (ii) a diversification of supply is warranted
- (C) the energy independence of the United States would be served by the designation;
- (D) the designation would be in the interest of national energy policy; and
- (E) the designation would enhance national defense and homeland security

¹⁵ As noted below, the Department sought to follow the “diversity of supply” directive simply by adding sources of wind generation to the list of generation sources that comprise the outer boundaries of its “corridor”. Unexplained is why the Department considered wind power to be fully representative and completely responsive to the “diversification of supply” sought by Congress)

specific national interest is an abuse of discretion and is plainly at odds with the intentions and direction of Congress.

II. The Department has failed to designate a National Interest Electric Transmission Corridor, as directed by Congress; instead it has designated a overly burdensome “Transmission Park”.

The Department’s methodology for drawing the geographic boundaries of the Mid-Atlantic National Interest Electric Transmission Corridor was to compile a list of major “unused” generation facilities and wind power sources, compile another list of transmission sinks (load) and then draw a box around them, designating every state county within the box. *NIETC Report*, at 72 FR 57007 – 57008. The *NIETC Report* notes that it was told, in earlier comments, that political county boundaries have no impact or importance in the physics or design of electricity transmission facilities, yet county boundaries located within the Department’s source-sink box continue to be the building blocks of the Department’s “corridor”. The Department has failed to designate the starting and ending points of any particular congestion paths it seeks to ameliorate through this designation, and has declined the PaPUC’s request that it define corridors in terms of starting points (generation), ending points (load sink), and a specific congestion interface that would be relieved by the corridor designation.

While there are many dictionary definitions of “corridor”¹⁶, the fact that Congress chose the term “corridor” over “zone”, “region”, “area”, or other

¹⁶ One such definition from the Random House Unabridged Dictionary, 2006 is:

1. a gallery or passage connecting parts of a building; hallway.
2. a passage into which several rooms or apartments open.

undifferentiated geographical description indicates that Congress, at least, was concerned that sources be matched with sinks and that real congestion be identified and relieved by the Department's designations.

A corridor has a starting point, an ending point and a defined pathway between them. In addition, if a corridor is being built to relieve identified congestion, in order to pass through the corridor, a transmission project should relieve the identified congestion, not merely travel along a portion of it. The Department's exceedingly simplistic designation methodology satisfies none of the criteria of a "corridor" and vastly over designates areas of the region that are subject to federalized siting procedures. Transmission projects need only travel through a portion of the region defined by the Department, and need not relieve *any* specific congestion in order to be within the corridor (and thus apply for the extraordinary remedy of federal siting intervention contained elsewhere in the statute).

In Pennsylvania's case, this means that all transmission project owners in three-quarters of the state will putatively have the ability to remove their projects from the Commonwealth's jurisdiction without any showing that those projects

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3. a passageway in a passenger ship or railroad car permitting access to separate cabins or compartments.
 4. a narrow tract of land forming a passageway, as one connecting two major cities or one belonging to an inland country and affording an outlet to the sea: the Polish Corridor.
 5. a usually densely populated region characterized by one or more well-traveled routes used by railroad, airline, or other carriers: The Northeast corridor extends from Washington, D.C., to Boston.
 6. Aeronautics. a restricted path along which an aircraft must travel to avoid hostile action, other air traffic, etc.
 7. Aerospace. a carefully calculated path through the atmosphere along which a space vehicle must travel after launch or during reentry in order to attain a desired orbit, to avoid severe acceleration and deceleration, or to minimize aerodynamic heating.

actually relieve any congestion, contribute to fuel diversity, provide any reliability benefit or meet any of Congress's goals in the passage of this provision in the Energy Policy Act of 2005. Instead of creating transmission corridors, the Department has created transmission parks in which the only protection granted is for transmission developers yearning to be free of state transmission siting laws and regulations. DOE has clearly exceeded the authority and direction given by Congress and is strongly urged to reconsider its methodology of designation.

The Department's interpretation is at odds with the plain language of Congress and is an intolerable and unjustifiable burden on States and the exercise of their traditional state regulatory police powers in the field of transmission siting.

III. The Department Has Acted To Broadly Preempt Traditional State Authority Without Making Sufficient Findings Of Necessity For So Doing

The Department has all but explicitly admitted that its designation is overbroad, conceding that its 'draw the line around the box' methodology is likely to include regions in which the construction of new or improved transmission facilities is already unlawful¹⁷, infeasible or unnecessary¹⁸. *NIETC Report at*

¹⁷ "To the extent that any Federal laws do limit or prohibit construction of transmission facilities in certain areas, FERC as well as the states and other siting authorities already are bound by those limitations or prohibitions. Therefore no exclusion of such areas from the Mid-Atlantic Area National Corridor is needed" *NIETC Report at 57009 – 57010*.

¹⁸ "With regard to PaPUC's comment that the draft Mid-Atlantic Area National Corridor includes areas that for a variety of economic, environmental, or technical engineering reasons would be excluded from any major transmission infrastructure project study, the Department notes that if PaPUC's assessment is correct, then no transmission project will be proposed in such areas. Thus, the objection is more academic than of real consequence." *NIETC Report at 57008, fn. 77*.

Not surprisingly, the PaPUC does not agree with the Department that just because a project is economically, environmentally or technically unlawful, infeasible or unnecessary that someone won't try to build it, and the Department's illegal NIETC designation encourages such ill-considered attempts.

57008 – 57010. In admitting that, it attempts to avoid the difficulty by asserting that FERC will catch any such errors in applications that it receives. However the legal harm that the Department does to the interests of the States regulating transmission siting is already complete when the Department has over designated the Mid-Atlantic Region NIETC without due regard for Congress’s standards limiting such designation, exceeding the preemptive authority given the Department and FERC under FPA Section 216.

Particularly where Congress has limited a Federal agency’s preemptive powers is where caution should be observed by that agency in acting pursuant to its statutory authorization. *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238 (2006) (“NASUCA”). “The historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress.” *NASUCA* at 1252, citing *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004). “[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.” *NASUCA* at 1252, citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L. Ed. 2d 248 (1963).

It is no answer (although it is the answer the Department offers) to the problems raised by an overbroad NIETC designation, that FERC will eventually sort things out once a siting case is presented to it and decided under FERC’s

rules. The harm suffered by the States and their citizens that occurs because traditional state police powers have been short circuited or improperly usurped is complete when your Department exceeds or misapplies the power given by Congress and unnecessarily and promiscuously designates state areas that Congress intended to leave to the traditional police regulatory powers of the States.

By forcing States to pursue their regulatory objectives in a distant federal forum in violation of Congress's specific direction, irreparable harm has already been done by the Department to State jurisdictional authority that cannot be later repaired by DOE or FERC regulations.

As demonstrated above, your Department has exceeded its designation authority under FPA Section 216, failed to engaged in reasoned decision making, and has failed to make adequate findings required of the Department by Congress.

REQUEST FOR STAY

The PaPUC requests, pursuant to 5 USC § 705, that your Department stay or supersede the effectiveness of its *NIETC Report* with regard to the NIETC designations contained therein. In support of its request, the PaPUC represents that for the reasons stated above, it has a strong likelihood of prevailing on the merits, that the harm that will be occasioned to the interests of the Commonwealth of Pennsylvania and to its citizens by the Department's invalid and overbroad designation of three-quarters of Pennsylvania as within an incorrectly designated

NIETC zone will be serious, continuous and irreparable and that on balance, the public interest in granting such stay greatly outweighs any harm to generation owners, transmission project promoters or other entities that would benefit from this flawed designation.

CONCLUSION

For the reasons stated above, the PaPUC respectfully applies for rehearing and asks the Department to withdraw the proposed Mid-Atlantic Area Corridor and issue a new designation in conformance with the above specifications of error and the directions of Congress.

The PaPUC also asks that your Department issue an immediate stay of the effectiveness of its *NIETC Report* designation in the above captioned matter, pursuant to 5 USC § 705, pending such rehearing and reassurance.

Respectfully Submitted,

s/ John A. Levin

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**For the Pennsylvania Public
Utility Commission**

Dated: November 5, 2007

Attachment A

U.S. Department of Energy
Draft NIETC Designation – Atlantic Corridor
(Final Designation in 10/2/2007 Order Makes No Changes)

