

IN THE UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

PENNSYLVANIA PUBLIC UTILITY  
COMMISSION,

Plaintiff

v.

DR. SAMUEL BODMAN, in his official  
capacity as THE SECRETARY OF  
ENERGY FOR THE U.S. DEPARTMENT  
OF ENERGY KEVIN M. KOLEVAR, in his  
official capacity as Assistant Secretary of  
THE U.S. DEPARTMENT OF ENERGY'S  
OFFICE OF ELECTRICITY DELIVERY  
AND ENERGY RELIABILITY;  
THE U.S. DEPARTMENT OF ENERGY;  
and THE FEDERAL REGULATORY  
ENERGY COMMISSION,

Defendants

CIVIL ACTION NO.:

## **COMPLAINT**

Plaintiff Pennsylvania Public Utility Commission by its attorneys hereby file its Complaint for declaratory and injunctive relief against Dr. Samuel Bodman, in his official capacity as the Secretary of Energy of the United States Department of Energy, Kevin M. Kolevar in his official capacity as Assistant Secretary of the Department of Energy's Office of Electricity Delivery and Energy Reliability, the Department of Energy and the Federal Regulatory Energy Commission and in support thereof, avers as follows:

### **Parties**

1. Plaintiff Pennsylvania Public Utility Commission is an agency of the Commonwealth of Pennsylvania with Executive Offices at the Commonwealth Keystone Building, 3<sup>rd</sup> Floor North, Harrisburg, PA 17105-3265.

2. Defendant Dr. Samuel Bodman, Secretary of Energy for the United States Department of Energy ("Secretary"), with Executive Offices at 1000 Independence Ave., SW, Washington, DC 20585, and is sued in that official capacity.

3. Defendant Kevin M. Kolevar is the Assistant Secretary of the United States Department of Energy's Office of Electricity Delivery and Energy Reliability, with its offices at 1000 Independence Ave., SW, Washington, DC 20585, and is sued in that official capacity.

4. Defendant the United States Department of Energy (“Department”) is an agency of the United States with Executive Offices at 1000 Independence Ave., SW Washington, DC 20585.

5. Defendant Federal Regulatory Energy Commission (“FERC”) is an agency of the United States with Executive Offices at 888 First Avenue, NE, Washington, DC 20426.

### **Jurisdiction and Venue**

6. Jurisdiction exists by virtue of 28 U.S.C. § 1331 since there is a federal question before the Court. This is a civil action arising under Acts of Congress establishing energy policy for the United States and involves the action of federal agencies of the United States authorized by Acts of Congress to implement that energy policy.

7. The Commission also relies upon that jurisdiction exists by virtue of 42 U.S.C. § 7192 and 42 U.S.C. § 7151 since the Department of Energy and the Secretary of Energy are parties to this action.

8. Declaratory judgment is sought pursuant to Federal Rule of Civil Procedures 57.

9. Injunctive relief is sought pursuant to Federal Rule of Civil Procedure 65.

10. Venue is proper in this judicial district under 28 U.S.C. § 1391 as it is in the district in which Plaintiff PaPUC resides.

### **Factual Background**

11. Plaintiff is a state commission which has the power and authority to supervise and regulate all public utilities doing business in Pennsylvania and the character of service and the facilities. 66 Pa.C.S. §§ 331, 501, and 1501. The Commission also has the authority to review siting and construction of electric transmission lines pursuant to 52 Pa. Code §§ 57.71, *et seq.* and 66 Pa. C.S. §§ 331, 501, 504, and 1501.

12. In Public Law 109-58 Congress enacted the Energy Policy Act of 2005, 119 Stat. 594 (2005) (“EPAAct 2005”). Section 1221 of EPAAct 2005 added a new section to the Federal Power Act (“FPA”), Section 216, which was codified at 16 U.S.C. § 824p (“Section 216”).

13. Section 216 requires the Secretary to conduct a nation wide study of electric transmission congestion within one year from the date of enactment of EPAAct and every three years thereafter.

14. Section 216(a)(2) provides “interested parties” with an opportunity to offer “alternatives and recommendations.”

15. The Secretary, after considering such alternatives and recommendations, is required to issue a report on the study “which may designate

any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

16. On May 7, 2007, the Department's Office of Electricity Delivery and Energy Reliability published its *Draft National Interest Electric Transmission Corridor Designations* ("Draft Designations") 72 FR 25838 that was subsequently amended by a *Notice of Errata* ("Errata") 72 FR 31571.

17. The Department requested comments on or before July 6, 2007.

18. On July 6, 2007, the Pennsylvania Public Utility Commission filed comments regarding the Department's designation of the Mid-Atlantic Area National Interest Electric Transmission Corridor ("Mid-Atlantic NIETC Corridor").

19. On October 2, 2007, the Department issued its Report and Order designating two national interest electric transmission corridors ("NIETC"): the Mid-Atlantic Area National Interest Electric Transmission Corridor and the Southwest Area National Interest Electric Transmission Corridor.

20. The Department designated most of Pennsylvania and neighboring states as part of the Mid-Atlantic NIETC Corridor.

21. The Department included most of Pennsylvania's counties, 52 out of 67, in the designation of the NIETC Corridor.

22. On October 5, 2007, the Department published its Notice of the *National Electric Transmission Congestion Report* (“*Report*”) in the Federal Register 72 FR 56992 (Exhibit A) in which it summarily rejected 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 Electric Transmission Corridor as a NIETC under Section 216(a) of the FPA.

23. This complaint is filed regarding the Mid-Atlantic Area National Interest Electric Transmission Corridor.

24. H.R. 829, the “*National Interest Electric Transmission Corridor Clarification Act*”, introduced February 5, 2007 and referred to the House Subcommittee on Energy and Air Quality, would, *inter alia*, prohibit designation of NIETCs within one mile of lands protected by federal or state law relating to environmental concerns, scenic, natural, cultural or historic assets.

25. The Pennsylvania General Assembly has passed separate resolutions in both houses (Senate – **S.R. 129**; House – **H.R. 297**) calling for amendment or repeal of provisions of Section 216 that interfere with or preempt traditional state siting authority.

**COUNT I – The Department’s Report Fails to Apply Section 216 In A Manner That is Minimally Intrusive on State Siting Authority and Jurisdiction**

26. Paragraphs 1-25 are incorporated herein by reference as if fully set forth at length.

27. States such as Pennsylvania have long exercised plenary jurisdiction over the siting and permitting of transmission facilities within their borders.

28. Section 216, which gives the Federal government a limited role in interstate facility siting in limited circumstances, represents a cautious move by Congress to address only those transmission issues in which the “national defense and homeland security” are implicated.

29. Although the newly enacted Section § 216 (a)(2) declares that the Secretary “may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers”, the declaration power is sharply limited by the standards in Section 216 (a)(4), regarding economic vitality and growth in the corridor, diversity of supply, energy independence, together with the overriding requirement that the designation be directly related to the enhancement of national defense and homeland security.

30. Rather than designating NIETC corridors pursuant to these statutory standards, the Department has erroneously and over expansively misread Section 216 to give itself nearly unbounded authority to designate a NIETC wherever it

sees either transmission congestion **or** an impediment to any generation unit selling its output into any other region, and has done so without making specific required findings that limit the Secretary's authority:

31. The Department believes that

FPA section (sic) 216 (a) gives the Secretary the discretion to designate a National Corridor upon a showing of the existence of a constraint, including the total absence of a transmission line, that is hindering the development or delivery of one or more generation sources that is in the public interest, regardless of whether there is congestion and without the need for any additional demonstration of adverse effects on consumers..."

Given the statutory limitations on the exercise of FERC's permitting authority, there is no need to interpret narrowly the Secretary's National Corridor designation authority...

These draft National Corridors are based on the existence of well-known, persistent congestion that adversely affects large numbers of consumers...the department does not believe it is necessary to develop a specific and finite set of criteria to guide the exercise of the Secretary's discretion. Instead, the most reasonable interpretation of FPA section (sic) 216 is that the Secretary may make National Corridor designations based on the totality of the information developed; taking into account relevant considerations, including the considerations identified in FPA section (sic) 216 (a) (4), as appropriate.

*Draft Designation at 258444 - 258555.*

32. The Department asserts that it has the authority to designate a NIETC in any region where it finds that chronic congestion exists, whether or not that congestion adversely impacts consumers.



33. The Department also suggests that it *also* has the power to designate NIETCs where *non-chronic* congestion exists under some undefined circumstances.

34. The Department claims unlimited power to designate NIETCs almost anywhere in the United States, since every transmission pathway may become congested at some point in time.

35. The PaPUC alleges that no transmission grid is free of congestion, nor is it the usual practice of transmission engineers to design a transmission grid that is completely free of congestion.

36. The PaPUC also alleges that the Department's expansive interpretation of its own powers is neither reasonable, nor reasonably required to effectuate Congress' purpose, nor is it supported by the plain language of the Act. In drafting Section 216, Congress intended it to apply to a narrow set of transmission problems and did not intend to indiscriminately "federalize" the entire U.S. transmission grid.

37. The Department's NIETC corridor designation is contrary to Section 216 because it fails to designate corridors in a way that results in the least intrusion on traditional state siting authority and, accordingly, fails to comply with the standards for corridors established by Congress.

**COUNT II – The Department’s Designation is Overly Broad and Inconsistent with Congressional Intent and Contrary to Section 216**

38. Paragraphs 1-37 are incorporated herein by reference as if set forth at length.

39. Congress’s intent is best carried out by making conservatively determined designations targeted at actual “national interest” congestion and consistent with the physical laws governing electric transmission.

40. Designations should take into account electrical congestion boundaries between sources and sinks that the Department should determine, based upon solid evidence, rise to a level of importance affecting a clearly defined national interest, consistent with Congressional intent.

41. The PaPUC alleges that only those transmission projects that clearly link well defined sources and sinks and cross a previously identified transmission congestion interface determined to involve the declared national interest should be deemed to be within a Section 216 NIETC corridor.

42. It is not sufficient simply to establish that transmission congestion exists in the region; there is congestion inherent in every transmission grid.

43. Congress did not intend to make a broad brush change in the balance of federal/state authority over the interstate transmission grid.

44. Section 216 was directed only at giving the federal government a limited role in the siting of specific kinds of transmission facilities and only those

facilities that have a demonstrable relationship to the national interest and homeland security.

45. The Department has not clearly identified specific flows, related national interests or congestion interface boundaries in drawing its NIETC boundaries.

46. Under the *Report's* designation process any transmission project developer within the NIETC zone may ask for a federal override of state authority whether or not the project actually reduces any significant congestion and whether or not the relief of congestion affects any “national interest”.

47. The Department declined to require that its definition of the corridor include such requirements, asserting that there is no problem since FERC, the agency to which NIETC applications would be made, has an asserted ability to reject improper Section 216 NIETC federal siting applications by transmission developers.

48. In Pennsylvania's case, based upon the Department's *Report*, it may reasonably be expected that virtually *every* Pennsylvania transmission siting case would potentially qualify for Federal intervention. This could have a seriously adverse effect on FERC's caseload in processing such a plethora of NIETC-based applications. Pennsylvania currently processes about two dozen minor transmission siting applications a year under expedited procedural regulations.

49. Although the PaPUC has not analyzed a large number of historic cases in the light of the Department's proposed designation, it is believed that almost all of its minor and major transmission siting cases would fall partially or wholly within the proposed NIETC, even though most of them would be relatively minor in scope and unlikely to play any substantial role in the relief of interstate transmission congestion or constraint, as required by the standards in Section 216.

50. Over designation risks excessive, unnecessary and undue federal involvement with state transmission siting proceedings that have no impact on the national interest, a result that Congress surely did not intend.

51. Over designation also burdens States such as Pennsylvania by making it possible that virtually every Pennsylvania developer might appeal an adverse state siting decision to a federal agency. 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 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. It is unlikely that was the intent of Congress.

52. Section 216 language is couched in terms of geography and, as such, source, sink and congestion interfaces must all be specified in terms of geographic

coordinates to produce actual transmission corridors. Instead of creating transmission corridors, the Department has created transmission parks in which the only protection is for transmission developers who can not be free of state transmission siting laws and regulations.

53. Accordingly rather than defining the NIETC corridor as a zone within which any transmission project may seek to avoid meaningful state review, NIETCs should be defined as true “corridors” with an entry point at the source, an exit point at the load and a congestion interface across which the transmission project crosses.

**COUNT III - The Department’s Report Fails to Adequately Identify  
Congestion Levels, Sources and Lacks the Required Findings of Fact  
Required by Section 216**

54. Paragraphs 1-53 are incorporated herein by reference as if set forth at length.

55. Section 216 requires the Department to designate national interest “corridors” not national interest “zones”. While there are many dictionary definitions of “corridor”<sup>1</sup>, the fact that Congress chose the term “corridor” over

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<sup>1</sup> 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.
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.

“zone”, “region”, “area”, or other 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.

56. The statutory language is controlling and the distinction is significant.

57. A corridor (to be a “corridor”) must have a starting point, a termination point and a defined passageway between the two points.

58. In order for a transmission project to qualify for Section 216 treatment, it must demonstrate that it relieves congestion by connecting a defined source with a defined sink through a defined passageway been determined by the Department to be in the national interest based upon a factual record.

59. The Department has failed to demonstrate that its NIETC corridor designations relieve congestion through defined passageways.

60. Instead, the Department makes generalized observations that there is congestion in the PJM region, that there are price differentials across PJM zones during many hours, and that consumers in the Mid-Atlantic Critical Congestion

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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.

Area face threats to reliability if existing congestion problems are not addressed, while admitting that the exact cost of electric supply disruptions is difficult to quantify.

61. While generally asserting that reliability is a matter of national interest, the Department makes no specific findings of serious and unaddressed reliability issues that are likely to affect any specified national interest.

62. The ultimate finding of the Department is three brief conclusory paragraphs which cite to a mass of preceding undigested data and accordingly, the finding fails to meet the standards for corridor designation in Section 216 and fails to reflect reasoned decision making.

63. Rather, the Department's decision making process is completely unexplained and opaque.

#### **COUNT IV -The Department's Determination of NIETC Boundaries Fails To Comport With the Requirements of Section 216**

64. Paragraphs 1-63 are incorporated herein by reference as if set forth at length.

65. The Department unreasonably and over expansively asserts nearly unbounded authority, claiming that it has authority to designate a NIETC wherever there is "persistent congestion", whether or not there is any national interest involved and even where such congestion does not adversely affect consumers.

66. The Department's overly expansively designation may result in the absurd outcome that if only a very small portion of a county is involved for purposes of the designation that the entire county is included.

67. The Department concludes that the term "congestion that adversely affects consumers" as used in FPA Section 216(a)(2), includes congestion that is persistent.

68. The Department believes that FPA Section 216(a) gives the Secretary the discretion to designate a National Corridor upon a showing of the existence of persistent congestion, without any additional demonstration of adverse effects on consumers.

69. Whether the Secretary should exercise his discretion to designate a National Corridor in a given instance of congestion is a separate question.

70. Section 216 (a)(2) states that [T]he Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

71. The Department's reading ignores Congress's general designation standards enacted in FPA Section 216 (a)(4) and the limiting language of FPA Section 216 (a)(2).



**COUNT V - Reliance on Static Flow Analysis Is an Inadequate Basis  
For NIETC Designation under Section 216**

72. Paragraphs 1-71 are incorporated herein by reference as if set forth at length.

73. The Department refused the call of several commentors, including the PaPUC, not to rely solely upon a static DC flow analysis, but instead to perform a more informative dynamic modeling utilizing AC flows, as is used in actual transmission grid planning models.

74. The *Draft Designation* asserted that it is “not possible” to perform an AC flow analysis for the Eastern Interconnection. *Draft Designation* at 25853.

75. That assertion may or may not be true, but it is irrelevant.

76. The Department, in having zeroed in on a small sub region of the Eastern interconnection, ought to have performed an AC flow analysis to more accurately model the constraints of the actual sub region it was considering for a NIETC designation.

77. The Department has improperly and erroneously relied upon an inaccurate model in making its designation since AC network flows are much more complex and variable than DC flows (and the designated region is overwhelmingly an AC network).

**COUNT VI - The Department Failed To Include In Its NIETC Designation the Requirement That Projects Not Conflict With Regional Planning**

78. Paragraphs 1-77 are incorporated herein by reference as if set forth at length.

79. The Federal Energy Regulatory Commission (FERC) has reaffirmed its view that transmission grid planning should be a regional process in its issuance of *Preventing Undue Discrimination and Preference in Transmission Service; Final Rule*, 72 FR 12266 (March 15, 2007) (*Order 890*), which is in the process of being implemented this summer.

80. FERC has directed all jurisdictional entities to create open, transparent and regional grid planning processes so that this may be done.

81. Such planning processes will include both reliability and economic considerations. *Order 890* at P. 542 (72 FR 12333).

82. Such coordinated regional planning processes are intended to further FERC's policy to combat grid planning stalemate and lack of transmission investment by transmission owners reluctant to add capacity that may disadvantage their owned generation facilities.

83. FERC's regional planning policies could be undone by the Department's overly broad NIETC designation, which permits any transmission developer to qualify for Section 216 treatment, as long as the project is physically

located within the zone, whether or not it conflicts with a regionally developed grid planning process.

84. It is entirely possible for a single project to relieve some congestion, while creating much worse congestion in another, geographically removed region. This issue is particularly important in the case of projects that may be proposed by independent merchant transmission operators, which have an economic incentive to maximize the profitability of their specific facilities, regardless of the effect of such facilities elsewhere in the region.

85. At a minimum, the Department should include a requirement that, in order to be considered to be within a designated NIETC, the developer must demonstrate that the project does not conflict with the existing regional planning process.

### **COUNT VII – FERC Should Be Enjoined From Implementing the Department’s Unlawful Report**

86. Paragraphs 1-85 are incorporated herein by reference as if set forth at length.

87. If the Department’s Report and Order is allowed to be implemented, FERC will use the decision for any resolution of a siting case in the applicable designated area.

88. Unless corrected, FERC will be using designation information that is overly broad and legally incorrect.

89. FERC should be enjoined from using or implementing the Department's Report and Order.

90. 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.

**PRAYER for RELIEF**

WHEREFORE, The PaPUC respectfully requests this Court:

1. Declare that the Department's *Report* fails to apply Section 216 in a manner that is minimally intrusive on state siting authority and jurisdiction.
2. Declare that the Department's designation is overly broad and inconsistent with Congressional intent and contrary to Section 216.
3. Declare that the Department's *Report* fails to adequately identify congestion levels, sources and sinks and lacks the required findings of fact set forth by Section 216.
4. Declare that the Department's determination of NIETC boundaries for Mid-Atlantic corridor fails to comport with the requirements of Section 216.
5. Declare that reliance on static flow analysis is an inadequate basis for NIETC designation for the Mid-Atlantic corridor under Section 216.
6. Declare that the Department failed to include in its NIETC designation for the Mid-Atlantic corridor the requirement that projects not conflict with regional planning.

7. Enjoin FERC from implementing the NIETC designation for the Mid-Atlantic corridor.
8. Award Plaintiff such other and further relief as the Court deems just and proper.

Respectfully submitted,

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