

**BEFORE THE ENERGY AND NATURAL
RESOURCES COMMITTEE**

**TESTIMONY OF COMMISSIONER TYRONE J. CHRISTY
ON BEHALF OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**REGARDING IMPLEMENTATION OF TRANSMISSION PROVISIONS
OF THE ENERGY POLICY ACT OF 2005**

Submitted: August 1, 2008

TESTIMONY OF COMMISSIONER TYRONE J. CHRISTY

To the Chairman and Members of the Senate Energy and Natural Resources Committee:

I am Tyrone J. Christy, one of the five Commissioners of the Pennsylvania Public Utility Commission (PAPUC). I am submitting the following written testimony, on behalf of the majority of the PAPUC, in lieu of presenting formal testimony to the Senate Energy and Natural Resources Committee in its hearings scheduled to occur on July 31, 2008.¹ This testimony addresses the implementation of Section 1221 of the Energy Policy Act of 2005, specifically with regard to the statutory provisions governing designation of National Interest Electric Transmission Corridors (NIETCs).

We believe that both the statutory provisions of Section 1221 and the implementation of those provisions by the U.S. Department of Energy ("DOE") and the Federal Energy Regulatory Commission ("FERC") are flawed. The statute is flawed because it is based upon the unproven assumption that State commissions and State judicial systems cannot be trusted to properly review transmission siting applications and that federal oversight is needed over all State siting proceedings. Additionally, Section 1221 gives transmission project owners nearly unfettered discretion to pursue their interests either in State courts or at FERC, while giving other parties no choice of forum at all. This open invitation to forum shop is contrary to traditional notions of justice and due process. The federal agencies have converted a statute meant to encourage the speedy resolution of State transmission siting applications into a vastly greater preemption of State police powers that have been properly exercised by the states from the earliest days of the development of the interstate electric transmission

¹ Commissioner Powelson did not concur in this Testimony.

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grid. The implementation of Section 1221 is flawed because DOE has ignored or given short shrift to Congress's required findings of National interest, actual congestion and severe economic loss as a necessary predicate to the establishment of NIETCs.

Moreover, Section 1221 has allowed the FERC to expand its jurisdiction over the siting application review process to include not only those State proceedings that are delayed by more than one year or approved subject to burdensome conditions, but additionally to those State transmission siting proceedings that result in the rejection of a transmission siting application.

As background, I would note that the PAPUC is a State administrative agency created by the General Assembly of the Commonwealth of Pennsylvania and is charged with the regulation of rates and service for electric distribution utilities within the Commonwealth and the licensing of generation suppliers within the Commonwealth. Pennsylvania is also served by transmission companies belonging to the PJM Interconnection, LLC (PJM) and the Midwest ISO (MISO). Major portions of the Commonwealth (approximately 52 of 67 counties) have been designated as being within the DOE's initial designation of the Mid-Atlantic NIETC corridor in its order issued October 5, 2007. This designation constitutes three quarters of the Commonwealth, and includes many State parks and game lands, historical and archeological sites and areas of the State where no significant transmission exists today. Pennsylvania is not unique in the Mid-Atlantic region. Equally large portions of our neighboring states were also identified within the Mid-Atlantic NIETC including New York, New Jersey, Delaware, Maryland, Virginia and West Virginia. In fact, there is relatively little area in the Mid-Atlantic region that is not encompassed within the Mid-Atlantic NIETC. Oddly,

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DOE's designation stops at the border between New York and New England, even though there is substantial transmission congestion in that region.

The purpose of my statement is to express our essential disagreement with DOE's implementation of the transmission provisions of the Energy Policy Act of 2005 (EPAAct of 2005). My comments address the following general concerns:

- (1) Section 1221 of EPAAct of 2005 unambiguously directed the DOE to consider a number of listed factors in its designation of NIETC corridors. The DOE did not, in fact, adequately consider those factors in any meaningful way, such that its ultimate interpretation and implementation of Section 1221 is inconsistent with the Congressional intent behind EPAAct of 2005.
- (2) The process followed by DOE, in its corridor designation process, was both seriously flawed and overbroad in that DOE has designated a "transmission park" not a "transmission corridor" or series of corridors, as Congress intended.
- (3) The process followed by DOE in its corridor designation failed to adhere to Congress's limited grant of authority and therefore unlawfully pre-empted State authority and State police powers to review and approve siting of transmission projects within State boundaries.
- (4) The overly expansive interpretation and administration of Section 1221 by DOE and FERC have rendered most State transmission siting review proceedings within Pennsylvania to be subject to review by the FERC, an administrative agency that routinely disposes of important matters summarily without hearing. The federal "back-stop" process delegated to the FERC has been interpreted by that agency in a manner that renders State review essentially as a formality.

DOE was directed, pursuant to Section 1221(a), to consider five factors in whether to designate a NIETC:

In determining whether to designate a National interest electric corridor under paragraph (2), the Secretary may consider whether:

- (1) The economic vitality and development of the corridor or the end markets served by the corridor may be constrained by the lack of adequate or reasonably priced electricity;

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- (2) Economic growth in the corridor or the end markets served by the corridor may be jeopardized by reliance on limited sources of energy and whether a diversification of supply is warranted;
- (3) The energy independence of the U.S. would be served by the designation;
- (4) The designation would be in the interest of National energy policy;
- (5) The designation would enhance National defense and homeland security.

The DOE designation of the Mid-Atlantic corridor failed to adequately consider any of the foregoing factors to any significant degree. One significant flaw was DOE's failure to adequately address the existence of end-markets that are defined to be the areas where electric load is the greatest and where the greatest consumption of electricity will occur. Despite the clear enumeration of these factors in Section 1221, the DOE implementation Order of October 5, 2008 did not examine or even explain the effect of corridor designation on "end markets." "End-markets" are defined to be the area where electricity is delivered for ultimate consumption. The DOE Order did not identify "end markets" nor did DOE associate any generation source with such "end markets." The DOE Order did not address how the economic vitality, growth or the development of the corridor would be affected by lack of reasonably-priced electricity as mentioned in Section 1221 (a)(4)(A) and (B). Little or no consideration of diversification of supply was apparent in the Order (Section 1221(a)(4)(B)). Other notable deficiencies include DOE's failure to explain how the corridor designation would contribute to the energy independence of the U.S. and DOE's failure to identify any particular energy policy or how such an energy policy would be advanced by this NIETC designation. (Section 1221(a)(4)(C)). There was no analysis of the effect of corridor designation on National defense or homeland security. (Section 1221(a)(4)(D)). These deficiencies

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are not minor. Section 1221 requires, by Congress's own express terms, the designation of ***National Interest Electric Transmission Corridors***. The obvious failure of DOE to identify or discuss in any clear way the impact of its designation positively or negatively on the National interest, economic vitality, development and growth of the corridor or end-markets represents a fundamental flaw in DOE's implementation of this provision.

The DOE's methodology for drawing the geographic boundaries was to compile a list of major "underused" generation facilities and wind facilities, compile another list of transmission "sinks" (load or demand areas) and then draw a boundary line around those facilities, including every county even if only a small portion of that county was touched by the boundary line. DOE's own *NIETC Report* notes that political boundaries located within the "source and sink" designation would have no impact on the design of the electricity transmission facilities yet county boundaries are the building blocks of the DOE's corridor. The DOE failed to designate the starting points and the ending points of any particular congestion path that it seeks to ameliorate through this designation that would have been a more rational methodology than the method so employed.

A corridor has a starting point and an ending point and a defined path between the two points. DOE's designation might have been easy to execute, but satisfies none of the characteristics of a corridor and vastly over-designates portions of the Mid-Atlantic region subject to federalized siting procedures. This DOE designation may rightfully be termed a "transmission park" painted with a broad brush. By its action, DOE has opened up large regions of the Mid-Atlantic region to transmission developers seeking to take advantage of DOE's expansive designation.

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In Pennsylvania's case, this designation means that all transmission project owners in three quarters of the State will have the ability to remove their projects from Commonwealth jurisdiction without a showing that any of these projects actually relieve any congestion, contribute to fuel diversity, provide any reliability benefit or meet any of the Congressional goals in the passage of this provision of EPAct 2005.

Traditionally, the state, as sovereign, has been the sole source of the eminent domain power exercised by public utilities subject to State police power regulation. Because of the permanently disruptive effect that transmission line construction has on the populace along the route of the line (as well as the permanent impact on the environment, and on cultural and archeological resources), the PAPUC has promulgated detailed regulations and hearing procedures designed to fully examine, on the record, the reasons and justification for the transmission line, available alternative routes and other relevant considerations. Landowners that might be subject to a potential taking are provided an opportunity to appear in the proceeding and actively participate. This procedure has worked well for many years. Other affected states have similar procedures. The preemption of State authority by a separate FERC siting procedure, if left unchecked, will freeze many interested participants out of the process, and leave the vindication of State environmental, cultural, archeological and aesthetic concerns to the discretion of a federal agency far removed from the local, environmental, historical, cultural and aesthetic issues involved in every siting proceeding.

This federal assumption of power does not only apply to a few big project proposals. Because of DOE's overdesignation, in Pennsylvania's case, virtually every

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transmission siting case would be subject to the FERC permitting process if the PAPUC did not act on a siting application within a year or “withheld approval” of a project. While DOE and FERC may believe that Federal agencies can always do a better job of transmission siting than any state, a recent minor and typical transmission siting application case before the PAPUC illustrates the problem. The siting application involved a 138 kV transmission line spanning three townships in a single county and took 11 months to process—only one month short of the required one-year timeframe. Small cases are not necessarily quicker to process than large cases. Most transmission project filings that come before the PAPUC and other State siting agencies consist of relatively local transmission facility upgrades that play no substantial role in the relief of interstate transmission or constraints. But DOE’s very expansive interpretation of Section 1221 and the NIETC designation process do not prevent such minor or wholly intrastate transmission projects from seeking FERC review. Any transmission project within the DOE NIETC may apply. It is little comfort that FERC might assure your Committee that it *may* decide that such projects aren’t worthy of its review. FERC’s interpretation of its discretion under its current rules is broadly expansive and does not comport with the explicit statutory standards imposed on FERC. State siting authorities and citizens should not be required to go to Washington to preserve the integrity of State siting proceedings which Congress did not intend to extinguish.

Indeed, as reflected in FERC’s regulation at 18 C.F.R. Section 50.6, that agency’s interpretation of the statutory phrase “fails to act” suggests that the State has no real option other than to approve (or approved with limited conditions) a proposed transmission line that lies in a NIETC corridor, regardless of whether the line meets

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State law standards. If this interpretation is correct, State proceedings become, in large measure, a formality. While Congress may have a legitimate interest in making sure that State transmission siting cases are not unreasonably delayed, FERC's interpretation appears to go well beyond that goal, nearly to the extent of wholly preempting state transmission siting jurisdiction.²

There is a relatively simple solution to this dilemma—DOE must more narrowly define NIETCs as true corridors. Corridors have an entry point at the source, an exit point at the load and a congestion interface across which the transmission project crosses and where the congestion occurs. By defining corridors in this way, the ability of competing solutions (increased generation, transmission or load response) to resolve the congestion issue would be greatly enhanced. As we interpret it, that would properly effectuate the true intent of the Section 1221, promote needed National interest transmission capacity and preserve the critical role of the PAPUC and other State siting authorities in exercising their siting duties. Our Constitution recognizes, in its creation of the federal system with the complementary roles of State and National authority, that it is not wise to centralize every function of government. Most transmission siting cases are local or regional in scope, have little or no impact on interstate commerce and the broad National interest and are best handled at the State level in a manner respectful of State police powers and State interests.

The current expansive implementation of Section 1221 by DOE and FERC does not respect such State interests, burdens State jurisdiction and resources, and threatens to render every State transmission siting proceeding as an empty prelude to

² See FERC Order at Docket RM06-12-000 at p.129.

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the initiation of the Federal transmission siting process. Our Nation's federal system of government was prescribed in the Constitution because experience has repeatedly shown that it is not wise to centralize all decision making at the National level—local and regional issues are more effectively and efficiently decided on a local or regional basis.

This concludes my testimony. I appreciate the opportunity to file this testimony with the Committee.