

STATE OF CALIFORNIA

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SPECIAL INSTRUCTIONS:

Application for Rehearing

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**UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY**

**Southwest Area National Interest
Electric Transmission Corridor**

Docket No. 2007-OE-02

**APPLICATION FOR REHEARING
OF
THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA**

INTRODUCTION

Pursuant to Section 313 of the Federal Power Act (“FPA”), the Public Utilities Commission of the State of California (“CPUC”) hereby files this Application for Rehearing of the Department of Energy’s (“DOE”) designation of a National Interest Electric Transmission Corridor (“NIETC”) in the Southwest Area (“Southwest Area National Corridor”), which was published in the Federal Register on October 5, 2007 (“October 5 Notice”).¹

Pursuant to the October 5 Notice, the CPUC is a party to this proceeding, in that the CPUC filed comments marked “Attn: Docket No. 2007-OE-02” electronically at <http://nietc.anl.gov> on July 6, 2007 (“CPUC Comments”). Moreover, the October 5 Notice incorporates a number of specific references to the CPUC Comments.

¹ See, 72 FR 56992, *et seq.*

The CPUC requests rehearing of the DOE's designation of the Southwest Area National Corridor on the grounds that in making this designation, DOE ignored numerous key facts that were set forth in the CPUC Comments, such that DOE's designation was arbitrary and capricious and not the product of reasoned decision-making. The designation of the Southwest Area National Corridor was contrary to law and/or arbitrary and capricious in the following specific respects:

- DOE's designation of the Southwest Area National Corridor illegally overreaches the geographic and functional scope for such a corridor that was intended by FPA Section.²
- DOE's purported rationale for the designation of the Southwest Area National Corridor on the basis of "persistent congestion" is factually unsupported and is clearly unnecessary to address the actual desert Southwest-to-Southern California congestion issues that were identified in the Congestion Study upon which this designation was presumably based.
- DOE's purported rationale for the designation of the Southwest Area National Corridor, on the basis of diversification of supply and the promotion of energy independence, because it would enhance access to wind, solar and geothermal generation capacity is unsupported by FPA Section 216, and, in light of California's highly proactive renewable energy procurement policies, represents an illegal usurpation of state energy procurement policy.

² FPA Section 216 (16 U.S.C. § 824p) was enacted as Section 1221 of the Energy Policy Act of 2005 (Public Law 109-58).

The discussion below will elaborate upon each of these points.

DISCUSSION

I. DOE's Designation of an Overly Broad Southwest Area National Corridor is Factually and Legally Flawed

DOE concludes that broad corridors are appropriate if based on specific sources and sinks. However, the Southwest Area National Corridor represents an unjustified geographic overreach relative to what FPA Section 216 reasonably intended or what most commenters on DOE's proposed corridor designations supported.

The Southwest Area National Corridor covers over 65,000 square miles, a much larger transmission siting area than is reasonably needed to address transmission capacity constraints or congestion into coastal southern California load centers. It is also not based on well defined "sources." An appropriate corridor would connect electrically and commercially meaningful generation sources or associated substations with identified load centers or "sinks," which would produce a much less geographically expansive corridor.

On August 8, 2006, the DOE issued its *National Electric Transmission Congestion Study* ("Congestion Study"), which identified a "Critical Congestion Area" in Southern California. Before and after release of DOE's Congestion Study, commenters expressed a wide range of opinions regarding the appropriate geographic scope of any NIETCs that DOE might propose, from specific node-to-node paths up to considerably broader areas. DOE ultimately concluded that broad corridors were appropriate if based on specific sources and sinks.

However, the Southwest Area National Corridor represents a seriously flawed geographic overreach relative to what FPA Section 216 requires or what most commenters supported. This corridor covers over 65,000 square miles, ostensibly to serve the greater Los Angeles and San Diego load centers, presuming that the degree of congestion that would justify the designation of the corridor does in fact exist. This is a much larger transmission siting area than is reasonably needed to address transmission capacity constraints or congestion into coastal Southern California. Yet, paradoxically, it excludes most of the lengths of four out of the six transmission lines comprising the critical the “East of River transmission path (Path 49) from the desert Southwest into Southern California,”³ whose simulated congestion in 2008 was prominent in the Congestion Study. Also paradoxically, Table IX-4 of DOE’s earlier, May 7, 2007 Federal Register Notice⁴ (“May 7 Notice”) set forth examples of “existing underutilized generation capacity” in locations “identified as source areas.”⁵ However, fully half of the generators listed in that table were in fact outside of the proposed Southwest Area National Corridor!

A more appropriate corridor concept would connect electrically and commercially meaningful individual or clustered grid nodes that represent identified load centers and identified supply sources that could address the actual supply needs of the load centers. This would produce a less geographically expansive corridor than is

³ The Navajo-Crystal, Moenkopi-Eldorado, Perkins-Mcad, and Liberty-Peacock-Mead lines.

⁴ See, 72 FR 25838, *Notice and Opportunity for Written and Oral Comment*. This Notice proposed a draft designation of the Southwest Area National Corridor.

⁵ See, May 7 Notice, at page 169.

being proposed for the southwest.

Furthermore, it is important to recognize that the greatest footprint of the Southwest Area National Corridor is within California, where the Southwest Area National Corridor's 48,000-plus square mile area exceeds the combined areas of the northeastern states of New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, and Delaware. In contrast, both the text of the DOE's Congestion Study, and most comments that DOE received on it, clearly envision the focus of FPA Section 216 to be on interstate transmission and its congestion or constraints. In fact, the title of FPA Section 216 reads, *Siting of Interstate Transmission Facilities* (emphasis added).

Should there be lingering doubt about the intended interstate emphasis of this law, FPA section 216(i) specifies that states may avoid FERC siting preemption in a designated NIETC by forming multi-state compacts establishing regional transmission siting agencies that include at least three contiguous states. If the intent had been to designate corridors to access "generation in the public interest" within a state, to serve a load center or centers in that state, then multi-state compacts would be an illogical, inefficient and counterproductive vehicle to avoid such federal siting preemption. It would be absurd to conclude that California would have to form a compact with Arizona and Nevada in order to avoid FERC siting preemption over transmission projects to be sited exclusively within California in order to deliver California's renewable generation to California customers.

In fact, the broad rationale for a corridor set forth in the October 5 Notice could

easily justify designating very large portions of the nation as NIETCs in order to access potential generation sources that DOE, at this point in time, judges to be in the public interest, even if only a fraction of the resource areas in such “corridors” might ultimately be viable and desirable to develop. DOE’s rationale in this regard is at extreme variance with DOE’s own acknowledgment that “Congress opted for a limited approach to Federal preemption of transmission siting.”⁶

A. Relevant Case Law and Established Principles of Statutory Construction Do Not Support DOE’s Overly Broad Definition of “Corridors”

Designating *all* of Southern California as a NIETC is contrary to FPA Section 216, because it would read the term “corridor” right out of the Act. As DOE itself acknowledges, the term “corridor” is “commonly understood to refer generally to some sort of path between different areas.”⁷ However, the majority of the entire landmass of Southern California is not a “path.” For DOE to ignore the plain meaning of the terms of the statute and designate all of Southern California as a corridor would strain the term “corridor” such that it would cease to have any meaning.

In FPA Section 216, Congress intended to use the term “corridor” as it is commonly understood. This is clear from the prominent use of this term in FPA Section 216. “Corridors” is in the heading of FPA section 216, and this term appears nine different times in the text of the section. For Congress to rely so extensively on

⁶ See, October 5 Notice, at 72 FR 57007.

⁷ See, May 7 Notice, at page 35; also see, October 5 Notice, at 72 FR 57007.

the term, "corridor," was not a mistake. It evidences that Congress purposefully chose to use this term to describe the designation authority it has delegated to the DOE.

In construing terms in a statute, the words must also be read in the context of the overall statute. The statute must be interpreted as a "symmetrical and coherent regulatory scheme." ... Similarly, the meaning of one statute may also be affected by other Acts." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted). DOE's designation of the Southwest Area National Corridor is inconsistent with other references to the term "corridor" in EPLA, as well as in the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701, *et seq.* Therefore, DOE's misuse of this term undermines the symmetrical and coherent regulatory scheme, which Congress intended.

For example, in section 368 of EPLA, Congress required the DOE to consult with Federal agencies, States and others about "corridors" for various pipelines and electricity transmission and distribution facilities on Federal lands. This indicates congressional intent to use the term "corridor" as it is commonly understood, because section 368 only makes sense if it is referring to a path on Federal land, not the entirety of Federal land, let alone the rest of the State or region in which the Federal land is located.

DOE acknowledges that its approach treats the term "corridors" differently even though the same word is used in different sections of EPLA. Citing *Env't Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1432-34 (2007), the May 7 Notice asserts that it may use different approaches, because there is a different purpose between "corridors"

in FPA section 216 and EPCAct section 368.⁸ The October 5 Notice elaborates on this purported distinction.⁹ Specifically, DOE refers to the language of FPA Section 216(a)(2) that authorizes the designation of NIETCs in “any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers” (emphasis added). However, in its justification for the very large corridors it has designated, DOE unduly emphasizes the first three words of this criterion, “any geographic area,” to the exclusion of the rest of the phrase.¹⁰ Had DOE properly looked to all the words of this criterion, it would have realized that any such “geographic area” in which it sought to designate a NIETC would necessarily have to be an area “experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers” (emphasis added). It defies reason for DOE, or anyone else for that matter, to conclude that the entirety of Southern California is an “area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers,” because there is absolutely no factual justification for such a conclusion. For this reason alone, DOE’s designation of the Southwest Area National Corridor to include virtually all of Southern California is arbitrary and capricious.

Therefore, both Notices erroneously presume that DOE can designate areas as large as all of Southern California as a National Corridor. However, FPA Section 216

⁸ See, May 7 Notice, at page 38, note 30.

⁹ See, October 5 Notice, at 72 FR 57006.

¹⁰ *Id.*

itself refers to corridors on Federal lands (*see*, FPA section 216(h)(5)), such that the two Notices' overbroad use of the term, "corridor," creates a fundamental inconsistency in the usage of this term in the same section, as well as in different sections of EPAct.

What the two Notices never address is why Congress would even use the term "corridor" throughout FPA Section 216 if it meant an area as large as all of Southern California, which is an area larger than numerous states in the U.S. This is not only inconsistent with the common usage of the term "corridor," it is also inconsistent with how that term has historically been used with regard to corridors for transmission lines.

In the context of transmission lines, the term "corridor" has always meant a particular path or route within which transmission lines may be located. *See, e.g., Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 776 (9th Cir. 2006) (230-kilovolt transmission line in a 125-foot-wide corridor); *Mt. Lookout-Mt. Nebo Prop. Protection Ass'n v. FERC*, 143 F.3d 165, 168 (4th Cir. 1998) (proposed transmission corridor would have maximum width of 80 feet); *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 637-638 (5th Cir. 1983) (transmission corridor for three transmission lines along the west Bank of Mississippi River, alternate routes followed U.S. Highway).

In California, transmission corridors have similarly been paths for transmission lines. *See, e.g., Trans-Elect NTD Path 15, LLC*, 117 FERC ¶ 61,214 at P 4 (2006) (Path 15 Upgrade built along the existing Path 15 transmission corridor). State statutes, which have defined transmission corridor, have likewise recognized that a

corridor is a path within which a transmission line right-of-way is located. *See, e.g.,* Fla. Stat. § 403.522(10) (“Corridor” may be the width of the transmission line right-of-way or a wider boundary not to exceed a width of 1 mile).

In the Federal Land Policy and Management Act (“FLPMA”), which is referred to in both EAct Section 368(a) and FPA Section 216 (i.e., EAct Section 1221), the term, “corridors,” means clearly defined paths for utility or transportation rights-of-way. *See, 43 U.S.C. §§ 1763, 1764.* The references in EAct to corridors in the FLPMA are in the context of coordinating and streamlining the environmental review in corridors on Federal lands. However, nothing in EAct suggests the repeal of a major policy of the FLPMA, 43 U.S.C. § 1763, to maximize the use of existing rights-of-way for corridors in order to minimize adverse environmental effects. Indeed, the explicit references in EAct to the FLPMA establish that Congress was not repealing the FLPMA. Therefore, the two statutes can be harmonized as requiring a more expedited review process, but using existing rights-of-way whenever possible and only providing some additional new corridors when necessary.

The canons of statutory construction support harmonization. *See Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 109 (1991). Designating all of Southern California, an entire state or an entire region as a National Corridor, which would be available for rights-of-way for transmission lines, is clearly contrary to this policy of the FLPMA, and accordingly cannot withstand legal scrutiny.

The use of the term, “corridor,” in both the May 7 and October 5 Notices is also contrary to EAct, because it would permit the FERC to have greater preemptive

authority over a much more widespread area than Congress ever intended when it enacted EPAct. Although Congress intended to grant the FERC the authority to preempt states in siting transmission lines when the state took more than a year to grant a certificate (through no fault of the applicant), that was only if the DOE made certain findings in advance on constraint/congestion and adverse affects on consumers and the proposed transmission project is in a path the DOE has designated as a NIETC. However, there would be no point to the DOE ever designating NIETCs if the DOE could give the FERC unlimited preemptive authority anywhere in a state or region once the DOE made the required findings on constraint/congestion and adverse affects on consumers.

If it had intended such a result, Congress could have directly given FERC such widespread preemptive authority based upon the DOE's required findings on constraint/congestion and adverse affects on consumers, rather than also limit FERC's backstop siting authority to designated corridors. Since Congress did not directly give FERC such widespread authority over half of a state, an entire state or region, it does not makes sense to interpret EPAct as delegating to DOE the authority to give FERC such widespread preemptive powers. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

Thus, DOE's overly broad designation of the Southwest Area National Corridor is supported neither by the functional purpose of corridors as described in EPAct, nor by the evidence presented in DOE's own Congestion Study, nor by the language of EPAct itself, nor by the relevant case law, nor by applicable principles of statutory

construction, nor by the plan meaning of the English language.

II. DOE's Claim That Designation Is Necessary to Address the Actual Desert Southwest-to-Southern California Congestion Issues That Were Identified in DOE's Congestion Study Is Factually Unsupported

On October 9, 2006, the CPUC commented on DOE's Congestion Study and, among other things, identified a number of significant errors in that Study. DOE's designation of the Southwest Area National Corridor in the October 5 Notice (as well as DOE's May 7 Notice) fails to address the errors in the Congestion Study that the CPUC had pointed out earlier. Had DOE appropriately considered the CPUC's comments, it would not have taken the drastic step of designating large portions of California and Arizona as a NIETC that covers over 65,000 square miles.

Moreover, DOE's stated rationale for this designation is based on a fundamental misreading of the relevant facts. DOE's rationale is two-fold: (1) to give Southern California load centers greater access to "underutilized" generation in the desert southwest; and (2) to give those load centers access to areas with the potential for substantial development of renewable generation resources. Consistent with FPA Section 216(a)(2), DOE must find that there are "transmission capacity or constraints or congestion that adversely affects consumers" in order to designate a NIETC.

However, in connection with DOE's designation of the Southwest Area National Corridor, the most reliable and current analyses simply do not indicate substantial historical or "persistent" congestion. Rather, these studies clearly show that emerging future congestion can be resolved by planned transmission projects,

specifically, the Devers-Palo Verde 2 (“DPV-2”) transmission project that the CPUC has already certificated. Thus, DOE’s designation of the overly broad Southwest Area National Corridor is unsupported both legally (in that the designation is not predicated upon the required demonstration that consumers are experiencing adverse impacts) and factually (in that the rationale for this designation is contradicted by the best evidence).

A. DOE Has Relied on Flawed Data in Designating the Southwest Area National Corridor

DOE’s Congestion Study identified a “Critical Congestion Area” in Southern California consisting of those portions of the California Independent System Operator (“CAISO”) control area and other parts of Southern California lying south of transmission Path 26. “Increased flows” (presumably meaning increased transmission capacity) into Southern California from Arizona and the Southwest, especially over WECC transmission Paths 46 and 49 (west and east of the Colorado River, respectively) were identified as necessary to reduce congestion.¹¹

However, the relevant technical analyses in fact showed limited historical congestion on these paths relative to other important paths,¹² and the relevant computer modeling studies projected substantial congestion to emerge in the future, especially across certain elements within the East-of-River path,¹³ but that this congestion would be resolved by ongoing or proposed transmission projects, in

¹¹ See, Congestion Study, Figure 5-2.

¹² See, Congestion Study, Figure 4-2.

¹³ See, Congestion Study, Figure 4-4.

particular, the DPV-2 project, which was approved by the CPUC on January 25, 2007.¹⁴

The Congestion Study also identified “Conditional Constraint Areas” in the West, where new transmission could be needed to access “new supply resources in remote area[s].”¹⁵ (It must be emphasized that DOE’s Congestion Study treated such “Conditional Constraint Areas” much differently than the “Critical Congestion Areas” that ultimately were proposed to be designated as NIETCs.) While Southern California as such was not included among the explicitly identified Conditional Constraint areas, Figure 5-5 of the Congestion Study depicted “renewables” in Southern California, and the accompanying discussion refers to a Western Interconnection analysis projecting new wind development in Southern California, for which “only a limited amount of output could be delivered using existing transmission.”

Furthermore, in its proposed designation of a draft Southwest National Corridor in the May 7 Notice, DOE stated that the “Congestion Study identified southern California as a Critical Congestion area, based on evidence of historical persistent congestion.”¹⁶ However, this statement was factually erroneous, as is shown by Figure IX-2 in the May 7 Notice (which figure is itself taken from the DOE’s own Congestion Study), which demonstrates that the major transmission paths into Southern California

¹⁴ See, CPUC Decision D.07-01-040.

¹⁵ See, Congestion Study, at page 49.

¹⁶ See, May 7 Notice, at page 151.

have recently (1999-2005) been less fully loaded than many other major western transmission paths that are not proposed to be designated as NIETCs.

Moreover, in the May 7 Notice, DOE presented additional information on alleged congestion over transmission lines “into or within” Southern California in 2004-2006. This information was not previously included in the Congestion Study, or reviewed by stakeholders or other commenters, and does not provide consistent or conclusive evidence of substantial congestion or, in the case of the information from WAPA, any physical (as opposed to contractual) congestion at all.¹⁷

Finally, in the October 5 Notice, DOE compounds this factual error by cavalierly dismissing the concerns raised about the flawed data submitted by WAPA on the grounds that these data were “but one category of the data used in the May 7 notice to establish persistent congestion.”¹⁸ It is simply arbitrary and capricious, and a failure to engage in reasoned decision-making, for DOE to designate a NIETC in the Southwest on the basis that there is “persistent congestion,” which is the agency’s touchstone criterion for designating a NIETC, when the data on which that finding is based is intrinsically flawed.

B. DOE Ignores the Statutory Requirement That the Identified Constraints or Congestion Must Also Adversely Affect Consumers

FPA section 216(a)(2) provides that DOE may designate corridors only in those areas “experiencing electric energy transmission capacity constraints or congestion

¹⁷ See, May 7 Notice, Table IX-2.

¹⁸ See, October 5 Notice, at 72 FR 57016.

that adversely affects consumers" (emphasis added). However, the May 7 and the October 5 Notices both recognize that the statute does not define any of these terms, and does not "specify the particular type or magnitude of adverse effect intended."¹⁹

DOE has also acknowledged that "there is no generally accepted understanding of what constitutes 'constraints or congestion that adversely affects consumers'" and that the DOE's Congestion Study "did not attempt to define when constraints or congestion 'adversely affects consumers.'"²⁰

Congestion or constraints do not, in and of themselves, adversely affect consumers. Therefore, DOE must develop valid criteria for measuring congestion and transmission constraints, and establish a record basis before finding adverse affects to consumers. However, DOE has not done so in this case.

Rather than developing such criteria and establishing such a record, DOE has summarily concluded that "any congestion can adversely affect at least some consumers"²¹ (emphasis added). DOE has also asserted that if such congestion is "persistent," then DOE has statutory authority to designate a NIETC "without any additional demonstration of adverse effects on consumers."²² However, DOE has not attempted to define or quantify what it means by "persistent" congestion, despite the fact that the statute is silent, the Congestion Study is silent, and there is no generally

¹⁹ See, May 7 Notice, at page 16-17; also see, October 5 Notice, at 72 FR 57003.

²⁰ *Id.*

²¹ See, May 7 Notice, at page 18; also see, October 5 Notice, at 72 FR 57004.

²² *Id.*

accepted understanding or consensus on the meaning of this term, “persistent congestion.”

DOE’s conclusions in this regard are contrary to the express language of the FPA Section 216(a)(2), which requires DOE to identify where congestion or constraints exist, and to determine that consumers are being adversely affected by such transmission congestion or constraints. In this regard, we note that the Federal Energy Regulatory Commission (“FERC”) has issued an order in which it anticipated that DOE would consider whether transmission projects within designated NIETCs would have beneficial effects on consumers such as ensuring reliability and reducing cost of delivered power.²³ FERC’s order constitutes a proper interpretation of FPA section 216(a)(2). By contrast, in failing to explicitly study such factors, DOE was arbitrary and capricious in the way it has sought to implement the statute, *i.e.*, by designating the Southwest Area National Corridor.

Finally, as a practical matter, in regions such as Southern California where competitive markets have been established, higher prices for congestion do not *per se* adversely affect consumers. Instead, such prices appropriately signal the value of transmission.

“[The] DOE should not assume that all transmission congestion is a result of socially suboptimal transmission investment. Where there is transmission congestion, transmission service should be priced to take account of its scarcity. If transmission capacity expansion and its substitutes are costly, then some level of congestion (during at least some time periods or conditions) is efficient, even in long-run

²³ See, FERC Order 679-A, 117 FERC ¶ 61,345, at ¶ 47 (2006).

equilibrium.”²⁴

Efficient price signals allow market participants to make informed choices when determining whether investment in new or improved transmission is economically justified. Therefore, a NIETC should only be designated if a reasoned assessment shows that investment to reduce constraints will clearly yield a net positive benefit to consumers. Going further, and establishing preemptive federal siting of transmission, whether or not the costs actually exceed the benefits, could seriously interfere with market signals and unnecessarily raise costs to consumers.

Given that it is presumably a major purpose of FPA Section 216 to economically benefit consumers, DOE accordingly had to consider, before designating any NIETC, whether consumers are being sufficiently “adversely affected” by congestion or constraints, such that they would be better served by new transmission investment. However, DOE did not conduct any analysis along these lines.

Because DOE’s designation of the Southwest Area National Corridor circumvents the statute’s requirement for a finding of adverse effects on consumers and fails to study or actively consider whether its proposed action will in fact reverse such adverse effects, it is contrary to law. In fact, DOE’s approach renders the statutory phrase “which adversely affects consumers” entirely superfluous, contrary to a fundamental canon of statutory construction. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Accordingly, that designation is not the product of reasoned decision-making

²⁴ See, Comments of the Federal Trade Commission Before the DOE’s Office of Electric Transmission and Distribution, at 4 (September 20, 2004) (footnote omitted). <http://www.ftc.gov/os/2004/09/040924nietbcomment.pdf>.

and is arbitrary and capricious.

C. **There is Justification for a More Narrowly Defined NIETC Corridor in the Southwest**

In its October 9, 2006 comments on DOE's Congestion Study, the CPUC stated that a corridor based on Southern California was premature, because substantial congestion in this area is only emerging or projected, not historically extensive, and would be resolved by existing and planned transmission projects being developed under the well-established collaborative transmission planning process in the Western Interconnection. This process has been significantly enhanced over the past year through the formation and operation of the Western Electricity Coordinating Council's ("WECC") Transmission Expansion Planning Policy Committee ("TEPPC").

While transmission congestion between the desert Southwest and Southern California has not been extensive historically, the CPUC agrees that it is foreseeable and deserving of attention. In fact, such foreseeable congestion has been receiving appropriate attention from California's utilities and from the CPUC and by the stakeholders in West more broadly.

Thus, in terms of corridor designation, DOE should focus not on where it would be "good" to have more transmission, but, rather, on where it would be beneficial to have more transmission and there is significant evidence that the affected states/regions are not addressing the need. Otherwise, DOE and FERC would simply be intervening excessively, duplicating and complicating the role of existing transmission planners, and expending federal efforts inefficiently. It would

accordingly be premature to designate a NIETC unless there is both a credible need for additional transmission between identified source and sink areas and “state and regional processes show clear evidence of being unable to address the transmission needs in a timely manner.”²⁵

Western interstate transmission planning and permitting process have been working well, but hit a significant obstacle this past summer when, after progressing through sub-regional and WECC planning processes and being approved by the CAISO, the CPUC, and the Arizona Power Plant and Transmission Line Siting Committee, the regionally important DPV-2 project was rejected on a 5-0 vote by the Arizona Corporation Commission.

The CPUC still believes that the collaborative planning process in the Western Interconnection can and will be productively used to plan, site and build DPV-2 and other transmission projects in an efficient and beneficial manner. However, it is important that such projects and the underlying planning and permitting processes be allowed to proceed in a timely, predictable manner. The recent uncertainty and delay involving DPV-2 threatens these prospects.

For this reason, CPUC does not oppose the designation of a narrowly tailored desert Southwest-to-Southern California NIETC, provided that such a corridor is narrowly targeted to address an identified congestion concern based on the source-to-sink paradigm supported by most commenters and by DOE itself. In particular, any such corridor should be configured to encompass the key transmission paths from

²⁵ See, CPUC Comments to DOE of October 9, 2006, at page 32.

identified desert Southwest supply source areas or collecting points, to major Southern California load centers or associated substations. The designation of a corridor along the Arizona section of the proposed DPV-2 route, which links the Harquahala substation in Arizona to the Devers substation in Southern California, would satisfy these narrowly targeted criteria.

In light of the fact that DOE must find that congestion would adversely affect consumers before a NIETC can be designated, the CPUC would point out that the CPUC decision approving the DPV-2 project (which included CPUC adoption of a joint federal-state Environmental Impact Report/Statement covering the entire project route in both states) made a series of explicit factual findings to the effect that this project would provide economic benefits to consumers.²⁶

In contrast to the DPV-2 project that has already received environmental approvals and has demonstrable economic benefits, the Southwest Area National Corridor excludes major portions of the relevant transmission paths as well as some of the generators that DOE cites as underutilized sources that could export to Southern California. At the same time, the Southwest Area National Corridor includes extensive land areas, especially in California, that are irrelevant to the desert Southwest-to-California congestion issue. The inclusion of such additional areas within a corridor conveying federal siting preemption does more harm than good.

Finally, in the October 5 Notice, in attempting to demonstrate the ostensible

²⁶ Sec, CPUC Decision D.07-01-040, at pages 11-60 and 103-104.

objectivity of its NIETC designations, DOE abjures any desire or intent to evaluate “the merits of the design or route of any specific proposed transmission project.”²⁷ However, given the lack of justification for the overly broad Southwest Area National Corridor, the DOE should seriously consider the narrowly tailored designation of a NIETC matching the Arizona portion of the route of the DPV-2 project. This would not be “picking winners.” Rather, it would be a judicious exercise of regulatory discretion to facilitate the development of transmission that has already been identified by regional and state entities as “needed” to address emerging congestion. Such an action would be entirely consistent with the letter and the spirit of FPA Section 216.

III. DOE’s Reliance on Access to Renewables Is Unsupported by the Law and Represents an Illegal Usurpation of State Energy Procurement Policy

In the CPUC Comments, we provided DOE with a lengthy explanation of the compelling policy reasons (and with substantial relevant evidence in support of these reasons) why DOE should not designate large parts of Southern California as a NIETC based solely on the renewable energy potential in those areas. This explanation demonstrated that there is not now, and there is unlikely to be in the future, any significant transmission constraint within California in connection with the development the state’s renewable energy potential. This is, in significant measure, because of the State’s aggressive and proactive renewable energy development policies.

²⁷ See, October 5 Notice, at 72 FR 56999.

However, in the October 5 Notice, DOE entirely ignores these compelling policy arguments and the related evidence. Rather, DOE brushes them off with the unsupported assertion that “the evidence of the adequacy of State siting processes is not relevant to the Department’s decision-making under FPA section 216(a).”²⁸ At the same time, DOE specifically relies on the existence of “locations with the potential for substantial development of wind, geothermal, or solar generation capacity” as one of its key justifications for the designation of the Southwest Area National Corridor.²⁹ DOE cannot have it both ways. DOE’s self-contradictory approach to this key element of its justification for the action it has taken is the very definition of arbitrary and capricious agency action, which is not the product of reasoned decision-making.

Specifically, DOE rejects any need to demonstrate that an area is “experiencing” any actual congestion or constraints as required by FPA Section 216. This flawed approach could easily justify designating corridors over much of the United States to access potential generation sources that DOE, at this point in time, judges to be in the public interest. DOE’s flawed justification for designating renewable resource areas as NIETCs reveals legal error throughout DOE’s analysis. FPA Section 216 requires DOE to find both “capacity constraints or congestion,” as well as that it “adversely affects consumers,” in order to designate a NIETC. However, DOE seems to believe that it is not required to either to find congestion, or specific adverse effects, and that the constraints justifying a NIETC designation need

²⁸ See, October 5 Notice, at 72 FR 57013.

²⁹ See, October 5 Notice, at 72 FR 57017.

only be “potential.”

Renewable resources along with their enabling generation technologies and transmission requirements are being assessed and prioritized, along (and in competition) with resources from outside of the proposed corridor. For some resource locations in the Southwest Area National Corridor, development will likely not be in the public interest, or may be in the public interest only at some later time after favorable market, technology and policy developments. The prospect of preemptive federal transmission siting over this entire 48,000 square mile in-state area effectively trumps the state’s ability to establish and pursue its own renewable and other energy procurement goals, and to set its resource priorities, such as those embodied by California’s Energy Action Plan.³⁰

In designating the Southwest Area National Corridor, DOE entirely overlooks the fact that California is actively engaged in assessing and prioritizing the renewable resource potential both inside and outside of the draft corridor along with the transmission requirements needed to access these resources. Preemptive federal transmission siting over 48,000 square miles of its territory would unlawfully usurp California’s authority to establish and pursue its own renewable and other energy procurement goals and to set its resource priorities. It would be unreasonable to disassociate the permitting and construction of major transmission lines to remote areas from the procurement of the new generation accessed by those lines. However,

³⁰ An extensive set of documents relating to California’s Energy Action Plan can be found at the following link on the CPUC’s website:
<http://www.cpuc.ca.gov/static/energy/electric/energy+action+plan/index.htm>.

the designation of the Southwest Area National Corridor will inappropriately interfere with this essential state function of selecting and procuring resources and would unduly complicate the collaborative tradeoffs that Californians must make between different renewable resource options and between incremental versus longer term transmission solutions.

California has the most aggressive renewable energy program in the nation, with 20% of electric energy to serve loads to come from qualifying renewable facilities by 2010, and 33% by 2020. Most of the high quality renewable resources are located far from load centers and available transmission, requiring the development of costly high voltage transmission facilities to access the renewable resource areas, as well as the integration of renewable generation into the overall operation of the transmission system. This overarching policy commitment of the state, in turn, creates planning, procurement, permitting and cost recovery challenges.

In order to meet these challenges, the CPUC, along with other state agencies and key stakeholders have, since the year 2000, convened and actively participated in collaborative study groups, including those for the Tehachapi renewable resource areas. As an example, the Tehachapi planning process has evolved into a coordinated Southern California Edison ("SCE")-CAISO-CPUC process which has resulted in SCE's proposal for an 11-segment transmission project, which will ultimately access 4500 MW of wind generation, involving 250 miles of new transmission at a projected cost of about \$1.8 billion. The first three segments of the project have already been approved by the CPUC, and an application for the remaining 8 segments was filed

with the CPUC on June 29, 2007. A CPUC decision on this major project that is designed to bring a large amount of renewable resources to load in Southern California is expected approximately January 2009.

On the transmission permitting side, working closely with stakeholders, the CPUC has streamlined its permitting process via an executive directive.³¹ More significantly, the CPUC's experience in reviewing the first of the proposed Tehachapi segments, which involved a proposed route through a National Forest north of Los Angeles, has demonstrated that coordination with federal land management agencies is, and will continue to be, a key concern in the siting of transmission facilities needed to access California's significant sources of renewable energy.

On the cost recovery and cost allocation side, there are a number of major challenges to siting new transmission, including: (1) protecting transmission owners and ratepayers from stranded costs due to overly aggressive transmission development ahead of generation; (2) avoiding undesirable delays in siting the new transmission needed by renewable generation developers whose projects are moving forward; and (3) limiting the transmission cost responsibility burdens for renewable energy developers that often lack deep corporate balance sheets.

An initial attempt to help address this complex set of tradeoffs, SCE's "renewable trunk line" funding proposal in FERC Docket EL05-80, was rejected by

³¹ This directive can be found at the CPUC's website:
http://www.cpuc.ca.gov/static/energy/environment/060713_transmission_projectreviewstreamliningdirective.pdf.

FERC.³² However, this “chicken and egg” renewable transmission cost recovery dilemma was subsequently alleviated by: (1) the CPUC’s “backstop” cost recovery policy (implementing state legislation) making transmission needed for renewable energy goals eligible for cost recovery in retail rates if recovery via wholesale (transmission) rates is disallowed;³³ and (2) the recent FERC approval of a CAISO filing that proposed a policy (to be elaborated in more detail via a subsequent tariff filing) to enable cost recovery for remotely-located resource trunk lines through transmission rates.³⁴

As the foregoing discussion amply demonstrates, over the last few years, California has worked through many planning, permitting and cost recovery issues in order to facilitate the transmission needed to access renewable generation. The initial efforts were path-breaking. The stakeholders have encountered obstacles and challenges, but important lessons have been learned, and collaborative relationships have been strengthened, which will benefit our collective efforts going forward.

There are currently many thousands of megawatts of proposed renewable generation projects in the CAISO’s interconnection queue, with more likely to be added in coming months, along with other renewable generation projects within California that will be seeking interconnection outside of the CAISO-controlled grid. It is essential that this magnitude and diversity of resources and their transmission

³² *Southern California Edison Co.*, 112 FERC ¶ 61, 014 (2005).

³³ CPUC Decision D.06-06-034 (June 15, 2006).

³⁴ *California Independent System Operator Corporation*, 119 FERC ¶ 61,061 (2007).

implications be assessed and managed in an efficient, predictable and transparent manner that is consistent with California's energy policy and customer needs. Based on our experience to date, the transmission planning associated with interconnecting and integrating these renewable generation resources will accordingly have to include the following steps:

- Take a proactive, "big picture" approach that considers promising renewable resource areas and the best transmission plans and sequences to access them, as opposed to more piecemeal approaches that may appear fiscally cautious and technically consistent with existing FERC generator interconnection policy, and which may satisfy a few developers, but which in fact are neither efficient nor sufficiently predictable or workable in the long run.
- Assess and prioritize resource areas based on resource potential, demonstrated commercial interest, and realistic (and early enough) assessment of transmission siting barriers.
- Move forward in a staged manner so that initial steps such as resource/transmission feasibility studies requiring limited financing, cost recovery and other commitments are followed, as warranted by critical assessments and decisions, by subsequent stages requiring greater commitments, such as project-specific planning and permitting and, ultimately, construction.
- Appropriate and transparent sharing of financial risk among resource developers, transmission owners, and electricity customers.
- A collaborative process (starting early) among stakeholders including regulatory agencies, transmission providers/owners (both jurisdictional and non-jurisdictional to the CPUC and to FERC), resource developers, and land managers or others affected by the infrastructure siting.

The need for such collaborative assessment and prioritization of resource areas and transmission needs in California extends beyond the CAISO control area and CPUC-jurisdictional utilities. In recognition of this fact, a collaborative, statewide effort to identify the needed transmission to access renewable resources is underway in

California. This effort, the Renewable Energy Transmission Initiative (“RETI”), has already begun its work. The RETI collaborative includes the CPUC, the CAISO, the California Energy Commission, CAISO member utilities and other municipal utilities, including the very large Los Angeles Department of Water and Power, which is not within the CAISO’s control area. To instill “ground truth,” the RETI effort includes renewable resource developers as well as stakeholders impacted by siting of infrastructure. The RETI process was endorsed by the CPUC on August 23, 2007.³⁵

The key point is that the assessment and development of an efficient, prudent and expedited approach to assessing and developing the transmission needed to meet renewable energy goals is well underway in California. This process inherently and necessarily involves considerable detailed assessment, the prioritization of resource areas and transmission options, thoughtful but expedited staging of the planning and project development processes, and on-going collaboration and coordination among various stakeholders. Decisions resulting from this process will necessarily have to rank, delay, accelerate, combine, bypass, reject and/or modify various individual transmission options favored by particular stakeholders. Accordingly, it is essential that this process be efficient, timely and conclusive, and be seen as legitimate.

However, DOE’s designation of over 48,000 square miles of California as part

³⁵ See, CPUC Resolution E-4052, which approved SCE’s request to establish a Renewable Transmission Feasibility Study Costs Memorandum Account in order to record the costs of studying the feasibility of developing transmission to access and deliver output from eligible renewable resources located in Western Nevada, Inyo and Eastern San Bernardino Counties, the Salton Sea Area in California, and Western Arizona. A draft Mission Statement for the RETI is attached to that Resolution. This Resolution is available on-line at:
http://www.cpuc.ca.gov/WORD_PDF/FINAL_RESOLUTION/71832.PDF

of the Southwest Area National Corridor, and the federal siting preemption that such a designation threatens, could seriously undermine all of these efforts, especially given the numerous resource and transmission possibilities within this "corridor." Thus, the designation of the Southwest Area National Corridor will not only add a layer of complexity, it would also provide a basis for second guessing, forum-shopping and re-litigation of decisions regarding complex issues in which difficult tradeoffs will have to be made.

It cannot be said with any certainty at this point precisely which renewable resources are in the public interest, or whether California's process to address the development of such resources will at some point need certain kinds of federal assistance. However, it is clear that broad federal siting preemption would more likely than not have perverse and regrettable consequences for the orderly development of renewable resources in California.

CONCLUSION

In conclusion, DOE's designation of the Southwest Area National Corridor illegally overreaches the geographic and functional scope for such a corridor that was intended by EPCRA section 1221. Moreover, DOE's overly broad corridor designation is both inappropriate and unhelpful for addressing any Southwest-to-Southern California congestion issues that may be emerging but are not historically extensive. Finally, DOE's purported rationale, on the basis of diversification of supply and the promotion of energy independence, of accessing wind, solar and geothermal generation capacity is, in light of California's highly proactive renewable energy

procurement policies, unsupported by EAct and represents an illegal usurpation of state energy procurement policy.

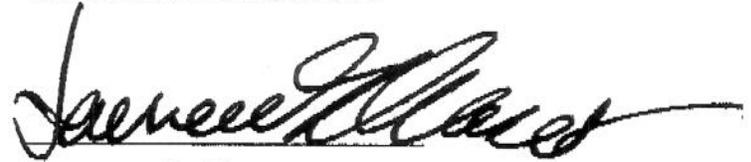
Accordingly, for all the foregoing reasons, DOE should withdraw its designation of the Southwest Area National Corridor and should, rather, designate a much more limited corridor connecting the Palo Verde and Harquahala substations in Arizona with that point where the DPV-2 transmission line that the CPUC has already certificated in California would cross the California-Arizona border. Only in this way can DOE legally and properly carry out in the Southwest the Congressional mandate set forth in EAct section 1221.

November 2, 2007

Respectfully submitted,

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