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JON S. CORZINE  
*Governor*

*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
PO Box 45029  
NEWARK, NJ 07101

ANNE MILGRAM  
*Attorney General*

ROBERT J. GILSON  
*Director*

November 5, 2007

Office of Electricity Delivery and Energy Reliability  
OE-20  
U.S. Department of Energy  
1000 Independence Avenue S.W.  
Washington, D.C. 20585

RE: DOE National Transmission Corridor – Request for Rehearing  
DOE Docket No. 2007-EO-01

Dear Sir/Madam:

Attached please find Request for Rehearing of the New Jersey Board of Public Utilities in the above matter.

We will also be faxing an additional signature page to (202) 586-8008, in the event a facsimile signature page is required.

Respectfully,

ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY

By: Margaret Comes

Margaret Comes  
Deputy Attorney General  
On behalf of the New Jersey Board  
of Public Utilities

Enc.



124 Halsey Street, Newark, NJ 07101 • TELEPHONE: (973) 648-4866 • FAX: (973) 648-3555  
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**UNITED STATES OF AMERICA**  
**BEFORE THE**  
**DEPARTMENT OF ENERGY**

**Draft National Interest Electric     )**  
**Transmission Corridor                )**     **Attn: Docket No. 2007-EO-01**  
**Designations                            )**

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**REQUEST FOR REHEARING OF THE**  
**NEW JERSEY BOARD OF PUBLIC UTILITIES**

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The New Jersey Board of Public Utilities, a party of record in this proceeding respectfully submits this request for rehearing of the Department of Energy's (DOE's) October 5, 2007 notice designating the National Interest Electric Transmission Corridor (National Corridor) for the Mid-Atlantic area. The New Jersey Board of Public Utilities (NJBPU) is the administrative agency charged under New Jersey law with the general supervision and control over all public utilities in the State, including electric utilities and their rates and service.<sup>1</sup>

**I. BACKGROUND**

Section 1221(a) of the Energy Policy Act of 2005 added a new section 216 to the Federal Power Act (FPA).<sup>2</sup> Section 216 directs the Secretary of Energy to conduct a study of electric transmission congestion. Section 216 authorizes the Secretary to designate a geographic area experiencing electric energy transmission capacity

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<sup>1</sup> N.J.S.A. 48:2-13; N.J.S.A. 48:2-21.

<sup>2</sup> 16 U.S.C. 824p.

constraints or congestion as a National Interest Electric Transmission Corridor (National Corridor). Before designating a National Corridor, Section 216 provides that the Secretary must first consider alternatives and recommendations from interested parties, including affected States.

The Department of Energy (DOE) issued a congestion study on August 8, 2006. The congestion study identified an area stretching from Albany, New York to the Washington, DC metropolitan area, including all of New Jersey, as a “critical congestion area.” On May 7, 2007, the DOE published a notice in the Federal Register proposing a Mid-Atlantic Area National Corridor and a Southwest Area National Corridor, and soliciting comments on the proposals.<sup>3</sup> The Mid-Atlantic Area National Corridor includes the critical congestion area identified in the congestion study, plus an area that stretches as far as West Virginia, Ohio, and the western border of New York State.

The NJBPU asked the DOE to refrain from designating the Mid-Atlantic Area National Corridor until after it analyzed whether alternative measures, including energy efficiency, demand response, and clean local generation within the critical congestion area could relieve congestion more effectively, at lower cost, with less harm to the environment, with better assurance of the reliability and security of our electric supply, or with less vulnerability to uncertainties such as future fuel costs, future environmental requirements, and other variables. The NJBPU expressed this view in testimony at the DOE’s New York City public meeting on May 23, 2007, and in written comments submitted on July 6, 2007.

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<sup>3</sup> *Draft National Interest Electric Transmission Corridor Designations*, Notice and Opportunity for Written and Oral Comment, 72 Fed. Reg. 25,837 at 25,839 (May 7, 2007) (“*May 7 Notice*”).

On October 5, 2007, the DOE issued its notice designating the Mid-Atlantic Area National Corridor.<sup>4</sup> In doing so, the DOE disclaimed any obligation to consider alternative means to mitigate congestion<sup>5</sup>

## II. SPECIFICATIONS OF ERROR

1. The DOE Erroneously Designated The Mid-Atlantic Area National Corridor Without Complying With The Requirement Of Section 216(a)(2) To Consider Alternatives Proposed By Interested Parties And Affected States To Address The Congestion Problems In The Mid-Atlantic Critical Congestion Area.
2. The DOE Designated the Mid-Atlantic Area National Corridor in Violation of Section 216(a)(2), By Including Areas That Are Not Experiencing Electric Energy Transmission Capacity Constraints or Congestion.

## III. REQUEST FOR REHEARING

### **A. THE DOE ERRONEOUSLY DESIGNATED THE MID-ATLANTIC AREA NATIONAL CORRIDOR WITHOUT COMPLYING WITH THE REQUIREMENT OF SECTION 216(A)(2) TO CONSIDER ALTERNATIVES PROPOSED BY INTERESTED PARTIES AND AFFECTED STATES TO ADDRESS THE CONGESTION PROBLEMS IN THE MID-ATLANTIC CRITICAL CONGESTION AREA.**

- 1. The Statutory Requirement to Consider Alternatives Is Not Ambiguous, and Cannot Reasonably Be Construed to Prohibit the DOE from Considering Alternative Ways to Mitigate Congestion.**

The FPA requires the DOE to consider the alternatives and recommendations from interested parties before designating any geographic area as a National Corridor.<sup>6</sup>

The NJBPU and other parties recommended that the DOE consider alternative means of alleviating congestion before designating the Mid-Atlantic Area National Corridor. The DOE is well-suited to analyze these alternative means, because its National Laboratories

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<sup>4</sup> *National Electric Transmission Congestion Report*, Order, 72 Fed. Reg. at 56,992 (October 5, 2007).

<sup>5</sup> 72 Fed. Reg. at 57010.

<sup>6</sup> FPA Sec. 216(a)(2), 16 USC 824p(a)(2).

and other aspects of its work provide it with the necessary expertise in energy efficiency, demand response, and other alternatives.

However, the DOE states that consideration of non-transmission solutions to the congestion problems is neither required nor necessary as a precondition to designating the Mid-Atlantic Area National Corridor.<sup>7</sup> Instead, the DOE decided that the straightforward requirement to consider alternatives was ambiguous, and then chose to construe it as providing for consideration of nothing more than the following:

- "comments suggesting National Corridor designations for different congestion or constraint problems";
- "comments suggesting alternative boundaries for specific National Corridors";
- and
- "comments suggesting that the Department refrain from designating a National Corridor."

The DOE provides no support for its statement<sup>8</sup> that the phrase "alternatives and recommendations from interested parties" is ambiguous. Instead, the DOE claims that "it is more appropriate to interpret this phrase in a manner that recognizes the statutory limits on its authority,"<sup>9</sup> and then proceeds to paint an inaccurately limited picture of its statutory authority. Specifically, the DOE states that the statute gives DOE only two options once the congestion study has been completed: "Designate one or more National Corridors or do not designate any National Corridors."<sup>10</sup>

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<sup>7</sup> 72 Fed. Reg. at 57010.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

Even taking this statement at face value cannot rule out consideration of alternative means of mitigating congestion. The DOE identifies congestion, and then has the choice of designating or not designating a National Corridor. Once the DOE recognizes that it has the discretion to choose between designating or not designating a National Corridor in a congested area, the DOE's decision necessarily depends on whether the DOE finds the designation to be a wise means of addressing congestion.

Similarly, even the DOE's constrained view of the "alternatives and recommendations from interested parties" includes "comments suggesting that the Department refrain from designating a National Corridor." In other words, the DOE is apparently saying that after it solicits comments on a congestion finding, makes the congestion finding, and proposes to designate a National Corridor, it would accept comments opposing the designation; however, it will not consider any reasons behind that request, such as the availability of better alternatives.

**2. In Deciding Whether to Designate a National Corridor, the DOE Can Consider the Availability of Alternative Means to Mitigate Congestion Without Supplanting, Duplicating, or Conflicting with State Authorities.**

The DOE expresses concern about its authority and the authority of the States as follows:

The Department believes that expanding its role to include analyzing and making findings on competing remedies for congestion could supplant, duplicate, or conflict with the traditional roles of States and other entities.<sup>11</sup>

The NJBPU appreciates the DOE's concern, but does not see the same danger. The DOE faces the decision whether to designate a National Corridor. If the DOE makes that decision after considering whether other measures to mitigate congestion would be

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<sup>11</sup> Id.

preferable, that consideration does not threaten to “supplant, duplicate, or conflict with” the traditional roles of States. Considering the availability and merits of other measures before making a decision on a National Corridor designation is a far cry from taking action to require the implementation of those other measures. That consideration is simply an important factor that should guide the DOE’s exercise of its authority under section 216.

**3. In Refusing to Consider Alternative Means to Mitigate Congestion, the DOE Relied On an Unsupported Finding that Designating the Mid-Atlantic Corridor Would Not Discourage Non-Transmission Solutions to Congestion.**

Without any support in the record, the DOE blithely concluded that providing an enormous competitive advantage to a transmission-based solution to congestion would not hinder alternative solutions. Specifically, the DOE stated:

Designation of the draft Mid-Atlantic Area National Corridor will neither prejudice State or Federal siting processes against such non-transmission solutions, nor discourage market participants from pursuing such solutions. Thus the existence of such non-transmission alternatives does not provide a basis for adjusting the boundaries of the draft Mid-Atlantic Area National Corridor or declining to designate the Corridor.<sup>12</sup>

Designating the Mid-Atlantic Area National Corridor accomplishes two things: it provides the FERC with the ability to override State siting decisions for transmission projects in the corridor, and it enables the FERC to grant the power of eminent domain to such projects. Therefore, the sole consequence of the designation is to give a huge advantage to transmission expansions over other means to mitigate congestion. The developer of a generation project within the critical congestion area has no ability to have the federal government override an unfavorable State or local siting decision, and certainly has no ability to obtain a site for the project through the power of eminent

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<sup>12</sup> 72 Fed. Reg. at 57008.

domain. The same is true of anyone developing demand response capacity or energy efficiency projects.

The DOE nonetheless argues that alternatives have an advantage despite this steep tilt of the playing field in favor of transmission projects. Specifically, the DOE states, “If competing projects were to fully resolve the congestion or constraint problem before the issuance of a FERC permit, it would be difficult for the sponsor of a transmission project” to show that its project “will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers.”<sup>13</sup> In other words, if the developer of another project to mitigate congestion can (1) acquire the necessary site or sites without the power of eminent domain, (2) obtain all necessary state and local approvals without the power to have the federal government overturn unfavorable decisions, (3) complete the project, and (4) operate the project long enough to show that it has completely eliminated the congestion at issue, then and only then would it be difficult for the sponsor of the transmission project to make the case for a FERC permit. There can be no question that the designation gives the sponsor of the transmission project an enormous advantage over the competition.

Although the DOE asserts that the designation of a National Corridor will not crowd out alternative measures to mitigate congestion, the DOE’s own statements explain why this is not so. The DOE acknowledges that “if a transmission line enabling the delivery of low-cost power from generation sources outside of a load center were to be put into service, the economic incentive to build a new generator closer to load could be eliminated.”<sup>14</sup> More plainly, anyone seeking to develop or finance a local generation

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<sup>13</sup> 72 Fed. Reg. at 56994.

<sup>14</sup> *Id.*

project in the critical congestion area must face facts: the generation project will take years to site, permit, construct, begin operations,<sup>15</sup> and demonstrate that it has eliminated congestion, and during that time its economics could be completely undermined by a transmission project which would be supported by the threat of federal overrides of unfavorable state and local permitting decisions, and by the power of eminent domain.

The DOE correctly recognizes that “Designation of a National Corridor . . . does not constitute, advocate, or guarantee approval of any particular transmission project.”<sup>16</sup> Unfortunately, for the reasons discussed above, designation of a National Corridor does offer an enormous advantage to a transmission-based solution to congestion, which will undermine alternative solutions.

**B. THE DOE DESIGNATED THE MID-ATLANTIC AREA NATIONAL CORRIDOR IN VIOLATION OF SECTION 216(A)(2), BY INCLUDING AREAS THAT ARE NOT EXPERIENCING ELECTRIC ENERGY TRANSMISSION CAPACITY CONSTRAINTS OR CONGESTION.**

The DOE designated a Mid-Atlantic Area National Corridor that extends far beyond the critical congestion area that the DOE identified in the congestion study. It also includes an area that stretches as far as West Virginia, Ohio, and the western border of New York State. This designation exceeds the DOE’s authority under section 216, which empowers the DOE to designate only a “geographic area experiencing electric energy transmission constraints or congestion that adversely affects consumers.” Much of the National Corridor experiences no such constraints or congestion.

Furthermore, the DOE’s effort to stretch section 216 to cover the entire designated Mid-Atlantic Area National Corridor shows not only a disregard for

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<sup>15</sup> U.S. Department of Energy, Energy Information Administration, “Assumptions to the Annual Energy Outlook 2007,” Table 39, [http://www.eia.doe.gov/oiaf/aeo/assumption/pdf/electricity\\_tables.pdf](http://www.eia.doe.gov/oiaf/aeo/assumption/pdf/electricity_tables.pdf).

<sup>16</sup> 72 Fed. Reg. at 56994.

alternatives to transmission solutions to congestion problems, but also a risky plan to link loads in the Mid-Atlantic Area to coal-based power plants that have not even been built. An understanding of the risk in that plan, and an understanding of how the plan usurps authority from States and other more appropriate entities, should have led the DOE to refrain from designating the Mid-Atlantic Area National Corridor.

**1. The DOE Exceeded Its Authority Under Section 216, By Designating a National Corridor In Areas That Are Not Experiencing Electric Energy Transmission Capacity Constraints Or Congestion.**

Section 216(a)(2) allows the DOE to designate only a “geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers” as a National Corridor. As designated, the Mid-Atlantic Area National Corridor includes areas that are not experiencing such capacity constraints or congestion.

The DOE attempts to expand its authority under Section 216(a)(2) by once again claiming that straightforward statutory language is ambiguous.<sup>17</sup> Notwithstanding the statute’s use of the present tense in referring to areas that are “experiencing” constraints or congestion, the DOE interprets the statute as encompassing areas where there is no current congestion and the only identified “constraint” is in delivering non-existent electricity from non-existent generating plants. Specifically, the DOE states:

[T]he statute does not appear to foreclose the possibility of National Corridor designation in the absence of current congestion, so long as a constraint, including the absence of a transmission line, is demonstrably hindering the development of desirable generation.<sup>18</sup>

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<sup>17</sup> 72 Fed. Reg. at 57000.

<sup>18</sup> Id.

The DOE goes on to define a “constraint” to include “the absence of transmission facilities between two or more nodes.”<sup>19</sup> Even accepting this definition at face value cannot support the notion that a “constraint” exists between a non-existent generating plant (which the DOE claims has not been developed because of the lack of transmission) and the load it could theoretically serve; there is no “node” associated with the non-existent generating plant, and there can therefore be no “constraint” even under the DOE’s definition.

The DOE has identified a Mid-Atlantic critical congestion area that it concluded is experiencing electric transmission capacity constraints or congestion. The DOE’s attempt to designate a National Corridor that reaches hundreds of miles beyond the congested area, far into areas that experience no such constraints or congestion, exceeds its authority under Section 216.

**2. The DOE Should Rescind the Designation of the Mid-Atlantic Area National Corridor, Because Expanding that Corridor Far Beyond Areas Experiencing Electric Energy Transmission Capacity Constraints Or Congestion Usurps the Authority of States and Other Entities and Creates Risks that Those Entities Are Better Equipped to Manage.**

The DOE explained its understanding of its role under section 216 as follows:

The very structure of FPA section 216 indicates that the Department's role is limited to the identification of congestion and constraint problems and the geographic areas in which these problems exist, and does not extend to the functions of electric system planners or siting authorities in evaluating solutions to congestion and constraint problems. . . . The Department believes that expanding its role to include analyzing and making findings on competing remedies for congestion could supplant, duplicate, or conflict with the traditional roles of States and other entities.<sup>20</sup>

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<sup>19</sup> Id.

<sup>20</sup> 72 Fed. Reg. at 57010.

By extending the Mid-Atlantic Area National Corridor far beyond the areas where congestion and constraints exist, the DOE has taken a far different role than the one it describes. As discussed above, the DOE has not limited its role to “the identification of congestion and constraint problems and the geographic areas in which these problems exist;” rather, it has encompassed within the National Corridor areas with no such problems.<sup>21</sup> The uncongested and unconstrained areas included in the extended National Corridor demonstrate that the DOE has, despite its disclaimer, taken on the function of an electric system planner in evaluating solutions to congestion and constraint problems – thus “supplant[ing], duplicate[ing], or conflict[ing] with the traditional roles of States and other entities.”

These uncongested and unconstrained areas of Ohio, Pennsylvania, Virginia, and West Virginia account for more than two-thirds of the coal produced in the Appalachian region in 2006.<sup>22</sup> The DOE argued that the lack of transmission capacity into these areas “is demonstrably hindering the development of *desirable generation*.”<sup>23</sup>

The meaning is unmistakable. “Desirable generation,” in the DOE’s view, is coal-based generation. The DOE has identified what it calls a “constraint” hindering the development of electric generation in areas marked not by congestion but by coal production. It designated a National Corridor that extends to those areas to expedite transmission lines that would spur the development of the “desirable generation.” The DOE’s intention is plain, both from its own words and from even the most cursory review of the map of the National Corridor.

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<sup>21</sup> Id.

<sup>22</sup> U.S. Department of Energy, Energy Information Administration, “U.S. Coal Supply and Demand - 2006 Review,” April 2007 (<http://www.eia.doe.gov/cneaf/coal/page/special/feature.html>).

<sup>23</sup> 72 Fed. Reg. at 57010 [emphasis added].

As discussed above, the DOE has rejected requests that it consider alternative means of addressing congestion, asserting that section 216 gives it very specific authority that cannot be stretched to evaluate alternatives. At the same time, the DOE has issued a National Corridor that is unmistakably based on the choice of a specific type of “desirable” generation in specific uncongested and unconstrained areas. In other words, the DOE has designated the Mid-Atlantic Area National Corridor in order to eliminate a constraint that DOE perceives as hindering the development of that desirable generation; however, it has disclaimed any authority to consider the merits of mitigating congestion with generation located in the critical congestion area, or with increased demand response or energy efficiency within the critical congestion area.

The DOE has therefore designated the Mid-Atlantic Area National Corridor based on the same criteria that it has claimed it cannot consider: the choice among alternative means of mitigating congestion.

On rehearing, the DOE must choose: if it deems currently non-existent coal-based generation is “desirable” generation hindered by what it describes as a “constraint,” it must also justify why it prefers that congestion solution to one that relies more heavily on demand response, energy efficiency, and clean local generation within the critical congestion area. If the DOE instead believes that it lacks the authority to make this judgment, then it cannot argue that extending the Mid-Atlantic Area National Corridor into centers of coal production is necessary to relieve a “constraint” that hinders the development of “desirable generation” in that part of the National Corridor.

In testimony and written comments in this proceeding, the NJBPU has stated why its proposed alternatives make for wiser energy policy. The NJBPU has explained that

linking concentrated power production to concentrated load over a slender thread  
hundreds of miles long leaves us:

- Vulnerable to disruptions of that thread - by terrorists, by bad weather, or even by inadequate tree pruning similar to what led to the August 2003 blackout;
- Vulnerable to disruptions in coal supply and price spikes, as we experienced when two train derailments in May 2005 led the price of coal from the Powder River Basin to more than double in a period of just five months; and
- Vulnerable to threats from power plant operators to shut down rather than reduce their impact on climate, on air quality, and on the health of our residents.

The NJBPU therefore continues to maintain that energy efficiency, demand response, and clean local generation all can mitigate congestion. On rehearing, the DOE should consider whether these alternative solutions will be less costly, more cost-effective, more reliable and secure, better for the environment and our health, or a more prudent investment than linking load centers to “desirable” generation in coal production areas.

The DOE states that the designation of a National Corridor does not constitute a finding that transmission must or even should be built; and that it does not prejudice State or Federal siting processes against non-transmission solutions; and it should not discourage market participants from pursuing such solutions.<sup>24</sup> Even though the NJBPU believes that the designation of a National Corridor favors transmission, the NJBPU compliments the DOE for recognizing that the designation of the Corridor is not a mandate to site transmission lines. Recognizing that other solutions besides transmission

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<sup>24</sup> 72 Fed. Reg. at 57012.

exist, the DOE should participate in siting proceedings before the FERC. In doing so, the USDOE can assist the FERC is examining how federal permitting of transmission lines in the Corridor would address state environmental requirements.

#### IV. CONCLUSION

Wherefore, the foregoing reasons, rehearing is respectfully requested of the DOE's October 5, 2007 Order designating the Mid-Atlantic National Corridor.

Respectfully submitted,

ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for the New Jersey Board of Public  
Utilities

By: 

Margaret Comes  
Deputy Attorney General  
State of New Jersey  
Office of the Attorney General  
Department of Law and Public Safety  
P.O. Box 45029  
Newark, New Jersey 07101  
Tel.: (973) 648-4866

Date: November 5, 2007