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ATTENTION: DOCKET NO. 2007-OE-01	

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STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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November 2, 2007

VIA TELEFACSIMILEOffice of Electricity Delivery
and Energy Reliability, OE-20U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585**Attn: Docket No. 2007-OE-01**Re: U.S.D.O.E. Docket No. 2007-OE-01 – Mid-Atlantic Area National Interest
Electric Transmission Corridor

To Whom It May Concern:

Enclosed please find the Petition for Rehearing of the New York State Public
Service Commission in the above-referenced proceeding. Should you have any
questions, please feel free to contact me at (518) 474-7663.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sean Mullany".
Sean Mullany
Assistant Counsel

Enclosure

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

Mid-Atlantic Area National Interest)
Electric Transmission Corridor) Docket No. 2007-OE-01

**PETITION FOR REHEARING
OF THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK**

Pursuant to Section 313 Federal Power Act (FPA), 16 U.S.C. §8251, and the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure, 18 C.F.R. §385.713, the Public Service Commission of the State of New York (NYPSC) hereby submits its Petition for Rehearing of the Order issued by the Secretary of Energy (Secretary) on October 5, 2007 (Order) which designated the Mid-Atlantic Area National Interest Electric Transmission Corridor.¹

BACKGROUND and SUMMARY OF ARGUMENT

Under Section 216 of the Federal Power Act (FPA), 16 U.S.C. §824p(a)(2), the Secretary of Energy (Secretary) may designate "any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers" as a National Interest Electric Transmission Corridor (NIETC or National Corridor). If the Secretary

¹ U.S.D.O.E. Docket No. 2007-OE-01, Mid-Atlantic Area National Interest Electric Transmission Corridor, 72 *Federal Register* 56992 (October 5, 2007).

designates an area as a National Corridor, FERC may, under certain conditions, issue a permit for the construction and modification of electric transmission facilities within the NIETC.

The NYSPSC is the state agency responsible for deciding whether electric transmission facilities will be constructed in New York State, pursuant to New York State Public Service Law (PSL) Article VII. In certifying transmission facilities the NYSPSC looks, *inter alia*, to the need for, and public interest in, the facility, as well as considering the nature of probable environmental impacts and whether such impacts have been minimized. PSL §126(1)(a), (b), (c) & (f). The NYSPSC is also responsible for ensuring that retail rates are “just and reasonable,” PSL §65(1), and intervening before federal agencies with respect to the most cost-effective provision of electricity to retail consumers, PSL §12. The DOE’s Draft Mid-Atlantic Area National Corridor encompasses forty-seven counties within New York State, including all of New York City, Long Island, and large portions of central and northern New York State.² Accordingly, the NYSPSC has a direct and strong interest in this matter.

The DOE has appropriately characterized its act of designating a National Corridor as “the most significant stage of the entire process” under Section 216(a) of the Federal Power Act (FPA).³ Designation of a National Corridor is highly significant because it potentially changes the balance of Federal and State jurisdiction in an area of critical importance to the States. Congress specifically chose not to create nationwide federal siting jurisdiction for electric transmission facilities. Instead, Congress sought to preserve longstanding State jurisdiction, and protect vital local interests, by giving FERC only limited “backstop” siting

² U.S.D.O.E. Docket Nos. 2007-OE-01 & 2007-OE-02, *Notice and Opportunity for Written and Oral Comment*, 72 *Federal Register* 25838, 25909 (May 4, 2007).

³ 72 *Federal Register* 25838, 25850.

authority, and only within those areas designated by DOE as National Corridors. Congress also required DOE to study electric transmission congestion and constraints, consult with the States, and consider alternatives before deciding whether to designate an NIETC.

Importantly, Congress did not require DOE to designate any National Corridors. Instead, it permitted DOE to designate National Corridors, but subject to a requirement that such Corridors be in areas "experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers"⁴ Congress recognized electric transmission congestion and constraints do not, *per se*, adversely affect consumers, and required DOE to both identify where congestion and constraints exist, and determine that consumers are adversely affected as a result.

Instead of fulfilling this responsibility, DOE has summarily concluded that "any congestion can adversely affect at least some consumers" and that, if such congestion is "persistent," the DOE may designate a National Corridor "without any additional demonstration of adverse effects on consumers."⁵ As a result, DOE designated the Mid-Atlantic NIETC without identifying the costs, to consumers, of the transmission congestion and constraints which DOE identified, without considering whether new transmission is a cost-effective solution (let alone the most cost-effective solution), without considering who will bear the costs for such transmission, without examining the efficacy of non-transmission solutions, without evaluating the market impacts of its designation, and without developing specific and finite criteria for designating National Corridors.⁶ DOE also failed to demonstrate that the transmission

⁴ 16 U.S.C. §824p(a)(2) (emphasis added).

⁵ 72 *Federal Register*, at 25844 (emphasis added).

⁶ See 72 *Federal Register*, at 25844-46. See, also, U.S.D.O.E., Notice of Availability of the National Electric Transmission Congestion Study and Request for Comments, Comments Of

congestion and constraint it identified justified including, within the Mid-Atlantic NIETC, all the areas encompassed by DOE's designation.

DOE's approach is contrary to the plain language and purposes of the Federal Power Act, as well established economic principles. DOE has concluded that "end markets served by the corridor may be constrained" but without considering whether end markets are constrained by the "lack of adequate or reasonably priced electricity" as required by the FPA, 16 U.S.C. §824p(a)(4)(A). As such, DOE's designation of the Mid-Atlantic NIETC is an intrusion into the States' historic and important jurisdiction over the siting of electric transmission facilities that is not warranted because of DOE's failure to abide by Congressional standards for creating corridors.

SPECIFICATIONS OF ERRORS and STATEMENT OF ISSUES

The NYSPSC requests rehearing based on the following assignments of error:

1. The Secretary erred by finding that any persistent congestion, by denying users of the grid the benefits of their preferred transactions, adversely affects consumers within the meaning of Section 216 of the FPA by failing to (a) explain why "persistent congestion" adversely affects customers; and (b) consider that congestion only adversely affects customers when it is cost-effective to relieve it.

2. The Secretary erred by failing to (a) define what is meant by "persistent" congestion; and (b) adequately explain how its definition of "persistent" congestion justified its designation of the entire Mid-Atlantic Area as an NIETC.

The NYSPSC identifies the following specific issues:

1. Does the FPA allow the Secretary to designate any geographic area as an NIETC based solely on a finding that such areas have experienced "persistent" congestion, without any further showing that consumers are adversely affected, by, for instance, being deprived of reasonably priced electricity?

the Public Service Commission Of The State Of New York, (October 10, 2006), at p. 10 [Noting that "[c]onsistent and generally-applicable methodologies and criteria are essential to accurately identify and quantify transmission congestion"].

2. Did the "persistent" congestion identified in the DOE's Study justify the Secretary's inclusion within Mid-Atlantic Area NIETC of all the areas designated by the Secretary, when the Secretary has not defined "persistent congestion" or explained how it translated into the Mid-Atlantic NIETC?

ARGUMENT

POINT I

THE SECRETARY ERRED IN FINDING THAT ANY PERSISTENT CONGESTION ADVERSELY AFFECTS CONSUMERS WITHIN THE MEANING OF SECTION 216 OF THE FPA.

Section 216 of the Federal Power Act (FPA)⁷ only allows the Secretary to designate "geographic area[s] experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers" as a National Interest Electric Transmission Corridor (NIETC).⁸ Because it requires DOE to identify transmission congestion and constraints that adversely affect consumers, the statute recognizes that the mere existence of congestion or constraints does not necessarily adversely affect consumers. Instead, the very opposite may be true. In competitive markets, higher transmission prices in response to scarcity ultimately benefit consumers.⁹ Efficient price signals allow market participants to make informed choices when determining whether investment in new or improved transmission is economically

⁷ 16 U.S.C. §824p.

⁸ 16 U.S.C. §824p(a)(2). If the Secretary designates an NIETC, the Federal Energy Regulatory Commission (FERC) may, under certain conditions, issue permits for the construction and modification of electric transmission within such National Corridor.

⁹ "[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." Comment of the Federal Trade Comm'n Before the U.S.D.O.E. Office of Electric Transmission and Distribution, *Designation of National Interest Electric Transmission Bottlenecks*, at 4 (September 20, 2004) (footnote omitted) (available at www.ftc.gov/os/2004/09/040924nietbcomment.pdf).

justified. Congress recognized the relationship between markets and transmission pricing when it allowed DOE to consider whether “end markets served by the corridor may be constrained by lack of adequate or reasonably priced electricity.” 16 U.S.C. §824p(a)(4)(A).¹⁰ Indiscriminate designation of National Corridors, however, could interfere with the operation of transmission markets because it encourages construction of transmission when other solutions may be more cost-effective. Such designation could cause project developers to abandon already-planned facilities, such as additional generation facilities downstream of constrained or congested transmission facilities.¹¹

DOE rejected the idea that the statute requires it to specifically demonstrate that consumers are adversely affected. It reasoned that, because it had defined congestion so broadly,¹² it would be too difficult to identify all the specific adverse effects of the congestion and constraints it had identified.¹³ DOE asserted that, because this “would be a daunting task

¹⁰ Therefore, a National Corridor should only be designated if a cost/benefit analysis shows a transmission solution will clearly yield a net positive benefit to the system. The alternative, *i.e.*, requiring new or upgraded transmission even where costs exceed benefits, could interfere with market signals and unnecessarily raise costs to consumers.

¹¹ “Because transmission congestion may reflect efficient investment decisions, there is a risk that . . . designations could distort efficient investments rather than steer them toward the socially optimal level. Consumers could be harmed by a suboptimal level of investment that wastes resources and results in higher electricity prices caused by more transmission congestion in other areas of the transmission grid.” Comment of the Federal Trade Comm’n Before the U.S.D.O.E. Office of Electric Transmission and Distribution, *Designation of National Interest Electric Transmission Bottlenecks*, at 5-6 (September 20, 2004).

¹² DOE defined “congestion” as “the condition that occurs when transmission capacity is not sufficient to enable safe delivery of all scheduled or desired wholesale electricity transfers simultaneously.” 72 *Federal Register*, at 57003.

¹³ Doing so, DOE said, “could necessitate identification of all the scheduled or desired power transactions that were denied transmission service, all the alternative power transactions that occurred as a result of the congestion, all the parties to both sets of transactions, all the terms of both sets of transactions, and all the sources of power for both sets of transactions.” 72 *Federal Register*, at 57003 (emphasis added).

[which poses] practical complications,” DOE instead identified a category of congestion (*i.e.*, “persistent” congestion) which, according to DOE, *per se* adversely affects consumers.

72 *Federal Register*, at 57003. Thus, the Secretary decided that any congestion, if it is more than “isolated or transient,” adversely affects consumers within the meaning of Section 216:

[A]ny congestion can adversely affect at least some consumers. Nevertheless, congestion remedies are not free; therefore, not all congestion is worth fixing. Under certain circumstances, congestion can arise on any transmission path. But the appearance of isolated or transient instances of congestion usually does not warrant consideration of transmission expansion. While the Department is not attempting in this notice to define the complete scope of the term “congestion that adversely affects consumers” as used in FPA section 216(a)(2), the Department concludes that the term includes congestion that is persistent. Thus, the Department believes that FPA section 216(a) gives the Secretary the discretion to designate a National Corridor upon a showing of the existence of persistent congestion, without any additional demonstration of adverse effects on consumers.

72 *Federal Register*, at 25844 (emphasis added).¹⁴

DOE’s reasoning is erroneous as a matter of law because the alleged difficulty of carrying out its statutory obligations does not entirely excuse DOE from doing so. More specifically, DOE’s assertion that it would be too daunting to document all adverse affects of persistent congestion does not excuse DOE’s decision to adopt a definition of “congestion that adversely affects customers” that does not identify the costs such congestion imposes on consumers or the costs of relieving such congestion. *See PUC of Cal. v. FERC*, 456 F.3d 1025, 1058-59 (9th Cir. 2006) [Nothing in the Federal Power Act limits its application to those transactions that are easy to value, and FERC cannot avoid its obligation to protect consumers

¹⁴ See 72 *Federal Register* at 25844; 72 *Federal Register* at 57002-04 [Noting comments questioning DOE’s position “that it has the discretion to designate the Mid-Atlantic Area National Corridor upon a showing of the existence of persistent congestion, without further demonstration of adverse effects on consumers”].

from unjust or unreasonable rates based only on a conclusory observation of difficulty, and without a reasoned explanation of impossibility].

DOE's approach is also flawed because its finding that consumers are adversely affected by all "persistent" congestion necessarily implies that all "persistent" congestion is "worth fixing."¹⁵ DOE, however, offered no basis for finding that all non-isolated or non-transient congestion is worth fixing. Instead, DOE argued that it may consider factors other than cost when deciding whether to designate a National Corridor, and concluded that consumers are adversely affected, regardless of costs, because congestion and constraints "deny users of the grid the benefit of their preferred transactions."¹⁶ According to DOE,

any congestion, by definition, thwarts customer choice, because it prevents users of the transmission grid from completing their preferred power transactions. These users include wholesale industrial consumers of power as well as load-serving entities buying power on behalf of retail consumers, all of whom are prevented by congestion from obtaining delivery of desired quantities of electricity from desired sources. In other words, any congestion on a line necessarily interferes with the choices of those who wish to use that line on their own or their customers' behalf. Whenever there is congestion on a transmission path, there simply is not enough transmission capacity to accommodate all the desired power transactions, and some sort of rationing of available capacity is needed.

72 *Federal Register*, 25844 (emphasis added).¹⁷

¹⁵ The alternative, *i.e.*, that consumers are "adversely affected" by "persistent" congestion, even if relieving such congestion would impose even higher costs on consumers than the congestion itself, would be irrational and contrary to principles governing transmission system planning.

¹⁶ 72 *Federal Register*, at 57004 ["Some commenters suggest that congestion only adversely affects consumers if the costs of relieving the congestion are less than the costs of the congestion itself. As discussed above, we conclude that Congress intended the Department to consider adverse effects on consumers beyond increases in the delivered price of power, some of which effects may not be easily monetized."].

¹⁷ See, 72 *Federal Register*, at 25843-44 ["[E]lectricity buyers generally seek power from the most economic source. Arranging for delivery of power from less preferred sources is referred to as "redispatching" power. When congestion occurs, resulting in the need for buyers to accept power from less-preferred generating sources in order to meet their power needs, redispatch is required and typically results in the use of more expensive power.

DOE's reasoning here is flawed, however, because it assumes that consumers prefer certain power transactions, free of congestion, regardless of how much they cost in terms of relieving any congestion. This reasoning ignores that all power purchase decisions are based on the cost of the power and the cost of delivering that power, and that it is not possible to determine whether a power purchase transaction is "desirable" or "preferred" without considering transmission costs, including the costs of relieving congestion. Thus, DOE did not explain how the purchase of electricity from one or more generation sources can be "preferred" or "desirable" regardless of the cost of delivering such power, and regardless of how such costs are allocated. Instead, DOE expressly acknowledged that it did not measure the consumer costs of the transmission congestion and constraints it identified.¹⁸ Similarly, DOE made no findings that consumers would pay lower costs if the "persistent" congestion and constraints which the DOE identified were relieved. Indeed, it specifically declined to consider such issues.¹⁹ Moreover, although it claimed it had "documented that consumers in the Mid-Atlantic Critical

Congestion also usually reduces competition and diversity, by limiting the range of generators from which buyers can obtain power."]; *72 Federal Register*, at 57013 ["[O]ur designation of the draft Mid-Atlantic Area National Corridor is not motivated solely by a concern over price differentials."].

¹⁸ DOE's criteria do not accurately measure the costs of congestion. See U.S.D.O.E., Notice of Availability of the National Electric Transmission Congestion Study and Request for Comments, *Comments Of the Public Service Commission Of The State Of New York*, (October 10, 2006), at p. 11 & n. 11 [Noting that congestion rents represent a benefit, rather than a cost, to consumers of electricity, and reflect the market value of the existing transmission system, rather than the costs of congestion.]. DOE's response to these comments was that it "did not intend to suggest that congestion rents represent the actual monetary cost that consumers pay specifically as a result of congestion . . ." *72 Federal Register*, at 25852.

¹⁹ *72 Federal Register*, at 25853 ["[T]he Department is specifically *not* seeking to assess the benefits of different fixes to a congestion or constraint problem [and] is simply identifying congestion or constraint problems . . ."]; *72 Federal Register*, at 25845 ["[P]reparation of a transmission cost-benefit analysis by the Department would be inconsistent with the very role that the statute assigns to the Department [which] is to identify constraint or congestion problems and ... does not call for the Department to analyze and decide upon solutions."].

Congestion Area are currently paying higher power prices because of persistent congestion that thwarts access to cheaper power sources," 72 *Federal Register*, at 57013, DOE made no attempt to determine that the "higher prices" it identified were unreasonable, or were higher than they would have been if the transmission system was modified or upgraded to relieve such "persistent" congestion.

DOE's approach is contrary to the express language of Section 216 (a)(2), which requires DOE to identify "transmission capacity constraints or congestion that adversely affects consumers" before designating a National Corridor. DOE's approach is also contrary to the analysis permitted by FPA §216(a)(4)(A). 16 U.S.C. §824p(a)(4)(A). That section provides that DOE "may consider whether [] end markets served by the corridor [] may be constrained by lack of adequate or reasonably priced electricity" *Id.* (emphasis added). The statute, on its face, allows DOE to consider whether end markets are constrained. However, if DOE chooses to do so, it must consider whether end market constraints by a "lack of adequate or reasonably priced electricity." DOE chose to consider end market impacts when it asserted that constrained customer choices "adversely affect" consumers within the meaning of Section 216. 72 *Federal Register*, at 25844. However, DOE did not consider whether end-markets are constrained by a lack of adequate or reasonably priced electricity. It did not consider, for instance, that the price of electricity in a constrained situation may nonetheless be reasonable because, in fact, it reflects the price of relieving the constraint, and it may simply be uneconomic to relieve the constraint. Rather, DOE has apparently assumed that, in any constrained situation, prices are unreasonable.

That assumption is simply not correct; prices may, in fact, be reasonable if the costs of relieving the constraint would impose even higher prices for the delivery of energy.²⁰

DOE's approach is also contrary to basic economic principles. For example, a DOE-funded study concluded that "[i]t is essential to understand who pays, how much, and how do they benefit in evaluating options (both transmission and non-transmission alternatives) to address transmission congestion."²¹ The NYPSC, the FERC and the New York Independent System Operator have all expended considerable efforts to develop competitive energy markets for the New York Control Area. The DOE essentially failed to consider whether those markets are providing reasonably priced energy and delivery, and appropriately reflecting electric transmission constraints and congestion in New York. The DOE has also failed to consider whether alleviating congestion through additional or upgraded transmission will impose additional, and uneconomic, costs on consumers. Non-transmission alternatives, such as additional generation or demand-side management may be more cost-effective in relieving congestion, and more consistent with preserving environmental values. DOE's corridor designation fails to address such issues.

In view of this, the Secretary's findings are unreasonably overbroad. The statute recognizes that transmission congestion and constraints do not, *per se*, adversely affect consumers. Congress did not intend DOE to designate corridors in areas where relieving

²⁰ Similarly, the DOE has apparently concluded that "end markets served by the corridor" are affected by limited supplies of energy without considering whether such markets are "jeopardized by reliance on limited sources of energy" as required by FPA §216(a)(4)(B)(i), 16 U.S.C. §824p(a)(4)(B)(i).

²¹ B. Lesieutre & J. Eto, Ernest Orlando Lawrence Berkeley National Laboratory, University of California Berkeley, Electricity Transmission Congestion Costs: A Review of Recent Reports, (October, 2003) p. vi (available at <http://www.oe.energy.gov/73.htm>) (emphasis added). "In some cases, there may be no good (i.e., lower cost) alternatives to existing levels of congestion." *Id.* at n. 1 (emphasis added).

congestion and constraints will impose even greater costs on consumers. Instead, the statute only allows DOE to designate a National Corridor in areas where consumers are “adversely affected.” Further, the statute does not allow DOE to conclude that end markets are constrained without also deciding that the constraint is due to a lack of “adequate or reasonably priced electricity.”

POINT II

THE SECRETARY ERRED BY FAILING TO DOCUMENT AND EXPLAIN HOW ITS DEFINITION OF “PERSISTENT” CONGESTION JUSTIFIED ITS DESIGNATION OF THE ENTIRE MID-ATLANTIC AREA AS AN NIETC.

DOE did not define what is meant by “persistent” congestion. Instead, it only distinguished such congestion from that which it described as “isolated” or “transient.”

72 Federal Register, at 25844.²² Moreover, DOE did not demonstrate how the “persistent” congestion it had identified justified its designation of all of the areas included within the Mid-Atlantic NIETC. Instead, DOE summarily asserted that it had

documented that congestion is causing consumers in the Mid-Atlantic Critical Congestion Area to face consistently higher electricity prices; that congestion poses threats to the reliability of electricity supply to consumers in the Mid-Atlantic Critical Congestion Area; and that congestion limits supply diversity and energy independence for Mid-Atlantic Critical Congestion Area consumers.

72 Federal Register, at 57005. For support, DOE cited to Section VIII.C.1-3 of its Draft Designation of the Mid-Atlantic NIETC.²³

²² See, also, *72 Federal Register*, at 57004 [“While the Department concludes that, in theory, any congestion adversely affects at least some consumers, it is not adopting that interpretation of the term ‘congestion that adversely affects consumers.’ Instead, the Department recognizes that isolated instances of congestion can arise on any transmission path, and such events are more in the nature of occasional inconveniences than a significant adverse effect on consumers.”].

²³ *72 Federal Register* 25838 (May 7, 2007).

However, DOE's Draft Designation does not support such a sweeping conclusion. For example, while DOE's Draft Designation noted that wholesale electricity prices in the day-ahead market for western and upstate New York are lower than prices in New York City and Long Island, and that wholesale price disparities widen during peak operating hours, *72 Federal Register*, at 25888-92, DOE did not demonstrate that these price disparities are due to transmission congestion or constraints, did not show that such price differentials are unreasonable, and did not show that changes in the transmission system would reduce such price disparities. Similarly, although DOE claimed that Installed Capacity price differentials between upstate and downstate New York "represent a premium ... customers [] must pay to ensure reliability by maintaining local generation capacity instead of improving the transmission system..." DOE also acknowledged that increased reliance on transmission could harm reliability. *72 Federal Register*, at 25892-93 & n. 67.²⁴

In addition, DOE's reliance on the New York Independent System Operator's Comprehensive Reliability Planning Process 2007 Reliability Needs Assessment, (March 16, 2007) to support its conclusion that reliability concerns warrant its National Corridor designation, *72 Federal Register*, at 25895-96, is belied by the NYISO's observation that "there is no need for a National Corridor from a reliability standpoint." *72 Federal Register*, at 25860. Moreover, DOE did not provide data to support its claim that "[t]he absence of transmission facilities that would enable more hydro-, wind-, or coal-based electricity to reach the downstate load centers prolongs the area's current relatively high dependence on oil and natural gas as fuel

²⁴ Because DOE did not consider the costs of increasing transmission capacity, its claim that "[t]he data ... indicate that consumers in the Mid-Atlantic Critical Congestion Area now pay high electricity prices because their electricity suppliers are unable to access low-cost supplies due to insufficient transmission capacity," is unsupported.

sources,” and that a lack of adequate transmission capacity may jeopardize economic development and energy independence. *See 72 Federal Register*, at 25896.

Lastly, DOE did not provide record support for the specific boundaries of the Mid-Atlantic Area National Corridor. Instead, it summarily asserted that it had “selected as source areas locations of substantial amounts of existing, under-used economic generation capacity, as well as locations with the potential for substantial development of wind generation capacity,” and concluded that “existing under-used economic generation capacity could readily ensure adequate supplies of reasonably priced power if additional transmission capacity were made available.” *72 Federal Register*, at 25897. This definition of the boundary does not, on its face, address DOE’s definition of “persistent congestion” as being time-dependent. Rather, DOE seems to be adopting an economic test for when transmission needs to be constructed even though it eschewed such a test in defining when congestion “adversely affects consumers.” Moreover, its decision to adopt such an economic test is fatally flawed because it does not consider the other side of the equation – the cost of additional transmission capacity.

DOE sought to justify designating vast areas of upstate and western New York as part of the Mid-Atlantic NIECT by asserting that the Mid-Atlantic NIETC was “broad enough to encompass a range of potential projects and a range of potential routes, and it includes the sink areas as well to encompass ... several important transmission constraints between New York City and Long Island....” *72 Federal Register*, at 25901. DOE also asserted that the Mid-Atlantic NIETC “encompasses several transmission constraints that may frequently prevent electricity flows from the source areas to the sink areas [and] a major electricity pathway that is frequently constrained, preventing electricity flows from the source areas to the sink areas.” *72 Federal Register*, at 25906. According to DOE, it also included central upstate New York,

“from New York City northward to include an area around the city of Saratoga Springs, and westward to include an area around the city of Utica,” because it “encompasses a number of the existing constraints that limit the delivery of additional electricity in bulk from the source areas to the sink areas [and] easing the constraints in this area could provide benefits in the sink areas” 72 *Federal Register*, at 25905. DOE’s sweeping definition of the corridors, however, finds no basis in the transmission congestion and constraints it identified, and DOE has not explained how such congestion and constraints translate to the boundaries of the Mid-Atlantic Area NIETC it designated.

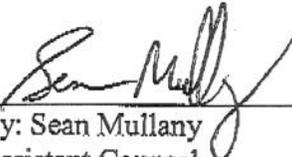
Because DOE has not provided record support for the Secretary’s designation of those areas of New York State which are included in the Mid-Atlantic NIETC, such designation is not warranted, and the Secretary should grant rehearing.

CONCLUSION

The Secretary’s interpretation of FPA Section 216 is improper and affected by errors of law. The Secretary’s designation of corridors reflects an undefined standard and a lack of any explanation of how that standard was used in defining the corridors. Therefore, the NYPSB respectfully requests that rehearing be granted.

Respectfully submitted,

Peter M. McGowan
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Public Service Commission
Of the State of New York


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Dated: November 2, 2007
Albany, New York