

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES

THE COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM

Subcommittee on Domestic Policy

Testimony of Gerald Norlander
For

NATIONAL ASSOCIATION OF STATE
UTILITY CONSUMER ADVOCATES

Regarding

Federal Electric Transmission Corridors

Washington, DC
April 25, 2007

**NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER ADVOCATES**

8300 Colesville Road, Suite 101

Silver Spring, MD 20910

Tel: (301) 589-6313 FAX (301) 589-6380

Email: nasuca@nasuca.org

Website: www.nasuca.org

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Summary of Testimony

The National Association of State Utility Consumer Advocates (NASUCA) respectfully submits this written testimony regarding the implementation of Section 1221(a) of the Energy Policy Act of 2005. In Section 1221, Congress for the first time enabled the federal government to approve the siting and location of new electric transmission line projects within designated “National Interest Electric Transmission Corridors (National Corridors).” As a result of Section 1221, jurisdictional authority over location of transmission lines is now divided with respect to transmission line proposals within any “National Corridors.”

The new law required the Department of Energy (DOE) to prepare a national transmission congestion study in consultation with states and issue it for comment by August 2006, and every three years thereafter. Based on the congestion study, DOE is empowered to designate geographic areas as “National Corridors.” DOE issued its first congestion study report and has identified expansive areas where federally designated transmission corridors may be established, but has yet to identify any particular National “Corridor.”

The Federal Energy Regulatory Commission (FERC) issued new rules November 16, 2006 to implement the Section 1221 provision relating to FERC siting authority in situations where a state has withheld approval for more than one year for a transmission project in a National Corridor. In the order approving new rules, FERC asserted the power to exercise siting

authority not only when a state *fails to act* within one year on a proposed transmission project but also when a state has made a *considered denial* of an application. NASUCA submits this testimony to apprise the Subcommittee that

- DOE's indication that broad geographic areas are potential "National Corridors,"
- DOE's lack of consultation with some affected states before issuing its congestion study, and
- FERC's assertion of power to override timely state denials of transmission projects

may, in combination, interfere with state and regional electric energy planning efforts for generation, transmission, and other projects states need to assure reliable, cleaner electric energy for consumers at affordable prices.

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Thank you for inviting written testimony from the National Association of State Utility Consumer Advocates (NASUCA). NASUCA has members in 42 states and the District of Columbia.¹ NASUCA members are charged by the laws of their respective jurisdictions with the responsibility to represent utility consumers in proceedings before state and federal regulatory commissions and courts. My name is Gerald Norlander, and I am the Chairman of the NASUCA Electricity Committee.²

Prior to the enactment of the Energy Policy Act of 2005, NASUCA testified to a House Committee in opposition to proposed transmission rate incentives³ and to a Senate Committee

¹ NASUCA also has associate and affiliate members, including international agencies and not for profit utility consumer advocacy organizations.

² I am the Executive Director of an Associate Member of NASUCA, the Public Utility Law Project of New York, Inc., with offices at 194 Washington Avenue, Suite 420, Albany, NY 12210.

³ See NASUCA testimony regarding transmission rate incentive provisions of a House version of a proposed Energy Policy Act (March 14, 2003), available at <http://www.nasuca.org/filings/testimony-31403.pdf>

opposing federal siting power for electric transmission lines in designated areas.⁴ In its Senate testimony, NASUCA testified as follows:

Under state laws, utilities typically have the continued obligation to provide reliable and adequate service upon demand to all retail customers. *State regulators have the ability to address the need for new facilities, and to determine the appropriate mix of solutions, whether they be transmission, generation, demand side, distributed generation, or other means.* The proposed Staff draft would allow the Secretary of Energy to designate transmission congestion zones and gives FERC ultimate authority to issue certificates for siting new facilities. * * * *

Meanwhile, authority to make other transmission siting decisions, and decisions about the location of power generating plants, would still remain under state jurisdiction, and so *it may prove to be even more difficult to evaluate the cost effectiveness of long term additions, improvements, and investments in either generation or transmission if siting responsibility is fragmented as proposed.* Accordingly, NASUCA does not support federal eminent domain power for siting of transmission facilities.⁵

In section 1221 of the Energy Policy Act of 2005,⁶ Congress adopted measures that began to involve the federal government in the siting of transmission lines on non federal land.⁷ Its major elements include: transmission congestion studies and designation by the Department of Energy (“DOE”) of “National Interest Electric Transmission Corridors (National Corridors),” and FERC authority, under certain circumstances, to authorize siting of lines in the DOE-designated corridors.

⁴ See NASUCA Senate testimony on transmission siting provisions in a proposed Electric Transmission and Reliability Enhancement Act of 2003 (S. 475) (March 27, 2003) *available at* <http://www.nasuca.org/filings/testimony-32703.pdf>

⁵ *Id.*, at 5 (*Emphasis added*).

⁶ A new Section 216 of the Federal Power Act (“FPA”) was created, Pub. L. No. 109-58, 119 Stat. 594 (2005).

⁷ Portions of the Energy Policy Act of 2005 relating to siting of transmission lines on federal land have not proved controversial.

DOE Implementation: The August 2006 Congestion Study

It now appears that NASUCA's concerns regarding federalization of part of the transmission siting process were justified. DOE issued the first transmission congestion study under Section 1221 on August 8, 2006.⁸ DOE identified broad "critical" congestion areas in "the Atlantic coastal area from metropolitan New York southward through Northern Virginia." DOE now has power, under the statute, to designate any part of these large areas deemed in the report to be "congested" as a National Corridor. DOE has not yet designated a National Corridor within these wide areas.⁹

Section 1221 required DOE to engage in "consultation with affected states" before DOE issued its congestion report.¹⁰ Some states, however, appear not to have been consulted prior to issuance of the August 8, 2006 congestion report designating critical congestion areas. As stated by the Attorney General for the Commonwealth of Virginia:

Section 216(a) of the Federal Power Act requires that any NIEC designation be made only after an electric transmission congestion study *conducted in consultation with affected States*. It has come to my attention that the Department [of Energy]'s August 2006 transmission congestion study, in which it identified

⁸ Department of Energy, National Electric Transmission Congestion Study, Executive Summary (2006), http://www.oe.energy.gov/energy_policy/epa_sec1221.htm#Timeline (follow "Congestion Study Executive Summary" hyperlink).

⁹ On November 9, 2006, DOE issued a press release announcing the opportunity for further public comments on its August 2006 study. *Department of Energy Announces Plans for Additional Comment Period on National Interest Electric Transmission Corridors*, available at <http://www.energy.gov/news/4458.htm>

¹⁰ "(a) Designation of National Interest Electric Transmission Corridors- (1) Not later than 1 year after the date of enactment of this section and every 3 years thereafter, the Secretary of Energy (referred to in this section as the 'Secretary'), *in consultation with affected States*, shall conduct a study of electric transmission congestion." FPA § 216(a)(1). (*Emphasis added*).

portions of the Commonwealth as Critical Congestion Areas, apparently was conducted without this required consultation with Virginia.”¹¹

In its response to the Virginia Attorney General, DOE did not maintain that it had engaged in any “consultation” with Virginia state officials before it issued the August 8, 2006 study identifying portions of Virginia as “critical congestion areas.” Without any reference to the state consultation requirement of the statute in connection with preparing its August 2006 congestion study, DOE stated:

Under section 1221(a) of EPAct, the DOE must issue a report based on its August 2006 Congestion Study, and in that report, may designate a “National Interest Electric Transmission Corridor” (National Corridor) any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers. DOE *invited public comment on the Congestion Study*, and we continue to evaluate the comments received. We have not yet determined whether, and if so where, to designate any national Corridors.¹²

As a result, although advance “consultation with affected states” is required by Section 1221(a), Virginia was afforded only a general right to comment on DOE’s congestion study after it was done.

NASUCA believes the experience of Virginia shows a lack of effort to consult with affected states with the result that broad areas were charted by DOE as critical congestion areas without adequate prior consultation. In another example, the Maine border with New Hampshire was identified in DOE’s August 8, 2006 study as congested. This designation of a critical

¹¹ November 15, 2006 letter from Robert F. McDonnell, Attorney General of Virginia, to Samuel W. Bodman, Secretary of Energy. (*emphasis is original*). A copy of this letter is attached.

¹² January 10, 2007 letter from Kevin M. Kolevar, Director, DOE Office of Electricity Delivery and Energy Reliability, to Robert F. McDonnell, Virginia Attorney General. *Emphasis added*. A copy of the letter is attached. This DOE letter also indicates that when a National Corridor is designated, DOE will issue a proposal in draft form for public comment although, in DOE’s view, under EPAct 2005 “the additional comment period is not required. . . .” *Id.*

congestion area, within which a National Corridor could exist, was made without consultation with the Maine Governor, the Maine Congressional delegation, the Maine Public Utilities Commission, or the Maine Public Advocate. The Maine Public Utilities Commission filed comments on the DOE study, stating:

DOE never contacted or met with any Maine regulator or government representative in the process of conducting the study. * * * *

In addition to violating the law by not consulting with Maine, the congestion study is an inferior product as a result of the failure. Consultation with the affected state, as required by statute, would have quickly revealed flaws in the DOE's conclusions. Had DOE provided the MPUC (or any other Maine agency) the assumptions, data or modeling supporting the study, serious flaws in the study could have been avoided. The remedy is for DOE to go back to the drawing board, provide the MPUC with the data and the modeling it has requested and revise the study as necessary after the required consultation has taken place. Only after these steps are taken, may the second step of designation be considered.¹³

In summary, the failure of DOE adequately to consult with affected states as it developed its congestion study has led to a lack of confidence and seriously flawed results.

FERC's Assertion of Power to Override Timely State Permit Denials

The Federal Energy Regulatory Commission (FERC) issued new rules November 16, 2006 to implement the new FPA Section 216 that was created by EPAct Section 1221.¹⁴ In a divided opinion, FERC asserted the power not only to act as backstop siting authority *if a state fails to act* within one year on a proposed transmission project in a National Corridor, but also to

¹³ Comments of Maine Public Utility Commission on DOE Congestion Study, p. 3, September 8, 2006. Available at http://web.ead.anl.gov/1221a/involve/searchcomment/act_displayfile.cfm?filename=MPUC.pdf

¹⁴ *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, FERC Docket No. RM 06-12-000, Order No. 689, Final Rule, Nov. 16, 2006, *petitions for rehearing pending*.

override a state's denial of an application.¹⁵ In dissent, Commissioner Suedeen Kelly said FERC has asserted power not granted by the plain language of the statute in which the power of FERC to approve a project comes into play only if a state fails to act on a transmission siting proposal:

States have always had exclusive, plenary jurisdiction over transmission siting.... In 2005, Congress passed EPCRA, which, for the first time, carefully carves out a limited role for the federal government in the area of transmission siting. EPCRA amended the FPA [Federal Power Act] to give the Commission the authority to site electric transmission facilities in five specific situations.... The majority's interpretation of Section 216(b)(1)(C)(I) would add a sixth situation: the Commission would have jurisdiction to approve the siting of a transmission line pursuant to federal law where the State has lawfully denied an application pursuant to state law. * * * *

The authority to lawfully deny a permit is critically important to the States for ensuring that the interests of local communities and their citizens are protected. What the Commission does today is a significant inroad into traditional state transmission siting authority. It gives states two options: either issue a permit, or we'll do it for them. Obviously this is no choice. This is preemption.¹⁶

Commissioner Kelly noted that of the 51 comments on the proposed rules, none had mentioned the broad reading of FERC powers that was announced by FERC when it adopted the final rule in November 2006. NASUCA agrees with Commissioner Kelly's view of the plain language of the statute. FERC's jurisdiction comes into play only if a state does not act on a proposed transmission project in a designated National Corridor within a year. If a state issues a timely decision denying a project, the statute simply does not authorize FERC to override it.

¹⁵ “[T]he Commission finds that when a State fails to act or rejects an application, it has withheld approval and the proposed facility would be subject to the Commission’s jurisdiction.” *Id.* at ¶ 31.

¹⁶ *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities* Docket No. Rm06-12-000 Order No. 689, Final Rule, *Dissenting Opinion of Commissioner Kelly*, p. 2 - 3. Available at <http://www.ferc.gov/whats-new/comm-meet/111606/C-2.pdf>

The Result: Fractured Energy Planning

These developments have given rise to concerns that in the course of implementing EPAct Section 1221, DOE and FERC have gone beyond the intent of Congress in ways disruptive to orderly state and regional planning of electric infrastructure development. States and regions have mechanisms in place to consider facets of planning and implementation for electricity transmission lines.¹⁷ These facets include much more than transmission.

States are still responsible for siting of electric generation plants, for determining fuel mix issues and in some instances, the amount of renewable energy resources to be developed, demand response, and efficiency measures to reduce the need for new generation or transmission. DOE's issuance of a critical congestion report identifying large areas as potential National Corridors without adequate prior consultation with states, as required by Section 1221(a), and FERC's assertion of authority to override state decisions on transmission siting undermine comprehensive state and regional solutions. In conclusion, NASUCA submits that

- DOE's indication in its congestion study that broad geographic areas of some states are potential "National Corridors"
- DOE's lack of consultation with some affected states before identifying critical congestion areas in its congestion study, and
- FERC's assertion of power to preempt timely state denials of transmission projects

¹⁷ For example, the Western Governors' Association and several federal agencies have entered into a protocol for consultation and collaboration in siting of interstate transmission line projects. This process is disrupted if FERC can approve a projects disapproved by a state and this regional group. The protocol is available at <http://www.westgov.org/wieb/electric/Transmission%20Protocol/9-5wtp.pdf>

may, in combination, interfere with state and regional electric energy planning efforts for generation, transmission, and other projects states need to assure reliable, cleaner electric energy for consumers at affordable prices.

Thank you for the opportunity for NASUCA to submit this testimony. This concludes my remarks.



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

November 15, 2006

The Honorable Samuel W. Bodman
Secretary of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585-0001

Dear Secretary Bodman:

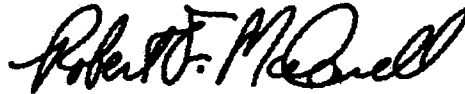
I am writing to express my concern with the Department of Energy's potential designation of a National Interest Electric Transmission Corridor ("NIETC") through parts of the Shenandoah Valley and Virginia's Piedmont region. This area of the Commonwealth of Virginia includes numerous sites of significant historic, scenic, and cultural importance to the Commonwealth and to the Nation. As legal counsel for the Virginia Outdoors Foundation, I am particularly concerned with the preservation of the scenic integrity of more than 70,000 acres of open-space easements held by this Foundation pursuant to state law. While I recognize the need for ensuring sufficient electric transmission infrastructure in the Mid-Atlantic, the unique qualities of this region of the Commonwealth must be considered carefully and affected parties must be consulted.

Section 216(a) of the Federal Power Act requires that any NIETC designation be made only after an electric transmission congestion study *conducted in consultation with affected States*. It has come to my attention that the Department's August 2006 transmission congestion study, in which it identified portions of the Commonwealth as Critical Congestion Areas, apparently was conducted without this required consultation with Virginia. Before proceeding further with any designation of a NIETC in Virginia, the Department must engage the Commonwealth of Virginia -- and by implication its agencies and localities -- in this very important undertaking. In addition, because of the environmental and cultural sensitivity of this area, a full Environmental Impact Statement should be prepared in accordance with the National Environmental Policy Act so all relevant information on the environmental and social costs of an NIETC in this area and possible alternatives may be known and considered in making this decision.

The Honorable Samuel W. Bodman
November 15, 2006
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Thank you for your attention to this matter.

Sincerely,



Robert F. McDonnell

RFM/cmb

cc: Hon. Timothy M. Kaine, Governor of Virginia
Hon. John Warner, Member U.S. Senate
Hon. George Allen, Member U.S. Senate
Hon. Frank R. Wolf, Member, U.S. House of Representatives
Hon. Mark R. Herring, Member, Senate of Virginia
Hon. Clifford L. Athey Jr., Member, Virginia House of Delegates
Mr. G. Robert Lee, Executive Director, Virginia Outdoors Foundation
Hon. Betsy A. Davis, Mayor, Town of Middleburg
Hon. Scott K. York, Chairman, Loudoun County Board of Supervisors
Mr. Daniel Murphy, President, The Hill School Board of Trustees Directors
Hon. Richard H. Traczyk, Chairman, County of Warren Board of Supervisors
Hon. Ray Graham, Chairman, Board of Supervisors of Fauquier County
Hon. John R. Staelin, Chairman, Clarke County Board of Supervisors