

DEPARTMENT OF ENERGY

National Electric Transmission Congestion Report

[Docket No. 2007-OE-01, Mid-Atlantic Area National Interest Electric Transmission Corridor; Docket No. 2007-OE-02, Southwest Area National Interest Electric Transmission Corridor]

AGENCY: Department of Energy.

ACTION: Order Denying Rehearing.

SUMMARY: On October 5, 2007, the Department of Energy (Department or DOE) published in the Federal Register a National Electric Transmission Congestion Report and Order (Report and Order) in the above dockets in which it designated the Mid-Atlantic Area and the Southwest Area National Interest Electric Transmission Corridors (National Corridors) (72 FR 56992). Numerous parties in each of the above named dockets filed timely applications for rehearing of DOE's Report and Order. Some parties also requested that the National Corridor designations be stayed. On December 3, 2007, in order to afford additional time for consideration of all of the matters raised in the timely-filed rehearing applications, the Department granted rehearing of DOE's Report and Order in both of the dockets for the limited purpose of further consideration (72 FR 69202, December 7, 2007). As discussed in greater detail in this Order Denying Rehearing (Order), the Department has completed its consideration of the issues raised in the rehearing applications, as well as in the requests for stay, and has concluded that they

are without merit. Therefore, the rehearing applications and requests for stay in both dockets are denied.

DATES: This Order denying rehearing applications and requests for stay is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The National Corridor designations were effective October 5, 2007, and will remain in effect until October 7, 2019, unless the Department rescinds or renews the designations after notice and opportunity for comment.

FOR FURTHER INFORMATION CONTACT: For technical information, David Meyer, DOE Office of Electricity Delivery and Energy Reliability, (202) 586-1411, david.meyer@hq.doe.gov. For legal information, Warren Belmar, DOE Office of the General Counsel, (202) 586-6758, warren.belmar@hq.doe.gov, or Lot Cooke, DOE Office of the General Counsel, (202) 586-0503, lot.cooke@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A detailed discussion of the statutory framework and procedural background underlying the Department's authority to designate National Corridors and its rationale for doing so is contained in the Report and Order. Most of the issues raised in the rehearing applications were raised earlier, prior to the issuance of the Report and Order, in comments filed in response to: (1) DOE's August 8, 2006, National Electric Transmission Congestion Study (the Congestion Study); and (2) DOE's May 7, 2007, Federal Register notice (May 7 notice) which presented and solicited comment on the draft designations of the Mid-Atlantic Area and the Southwest Area National Corridors (72 FR 25838). The Department addressed these issues in either or both the May 7 notice and the Report and Order, and those two documents, as well as the Congestion Study, are

incorporated by reference in this Order. While DOE has considered all of the arguments advanced in the timely filed rehearing applications, this Order will briefly address only some of these issues again, it will not readdress at length determinations the Department made in the Report and Order for which no new or substantive argument has been advanced in rehearing. The Department's decisions on the designation of the two National Corridors are based on the totality of the record in these proceedings, including the Congestion Study, the May 7 notice, all public comments submitted to DOE, the Report and Order, and this Order.

A. Statutory Framework

Section 1221(a) of the Energy Policy Act of 2005 (EPAAct) (Pub. L. 109-58) added a new section 216 to the Federal Power Act (FPA) (16 U.S.C. 824p). FPA section 216(a) requires the Secretary of Energy (Secretary)¹ to conduct a national study of electric transmission congestion within one year from the date of enactment of EPAAct (i.e., by August 2006) and every three years thereafter. FPA section 216(a)(2) provides "interested parties" with an opportunity to offer "alternatives and recommendations." 16 U.S.C. 824p(a)(2). Following consideration of such alternatives and recommendations, the Secretary is required to issue a report, based on the study, "which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor." FPA section 216(a)(2), 16 U.S.C. 824p(a)(2).

FPA section 216(a) assigns to the Department the role of identifying transmission congestion and constraints, and the geographic areas in which these problems exist. FPA section 216(a) does not, however, shift to the Department the roles

¹ This Order uses the terms "Secretary," "Department," and "DOE" interchangeably.

exercised by electric system planners or siting authorities in evaluating solutions to congestion and constraint problems. A National Corridor designation is not a determination that transmission must, or even should, be built, nor is it a determination that any particular transmission facility is needed or where any such facility should be located. Transmission expansion is but one possible solution to a congestion or constraint problem, and other potential solutions include increased demand response, improved energy efficiency, deployment of advanced energy technologies, and siting of additional generation, including distributed generation, close to load centers.

B. Procedural Background

In accordance with the requirement in FPA section 216(a)(1), the Department issued the Congestion Study on August 8, 2006 and requested comments. The Congestion Study gathered historical congestion data obtained from existing studies prepared by the regional reliability councils, RTOs and ISOs, and regional planning groups. The Congestion Study also modeled future congestion: the years 2008 and 2011 for the Eastern Interconnection, and the years 2008 and 2015 for the Western Interconnection. Based on the historical data and the modeling results, the Congestion Study identified and classified the most significant congestion areas in the country. Two “Critical Congestion Areas” (i.e., areas where the current and/or projected effects of congestion are especially broad and severe) were identified: the Atlantic coastal area from metropolitan New York through northern Virginia (the Mid-Atlantic Critical Congestion Area); and southern California (the Southern California Critical Congestion Area).

In the May 7 notice, the Department noted that the term “constraints or congestion that adversely affects consumers” as used in FPA section 216(a)(2) is ambiguous and interpreted the phrase to include congestion that is persistent. Thus, the Department stated that FPA section 216(a) gives the Secretary the discretion to designate a National Corridor upon a showing of persistent congestion because persistent congestion has adverse effects on consumers. Further, the Department stated that it would use a source-and-sink approach to delineate the boundaries of the Mid-Atlantic Area National Corridor and the Southwest Area National Corridor.²

With regard to the Mid-Atlantic Critical Congestion Area, the Department noted that the Congestion Study had identified this area based on evidence of historical, persistent congestion caused by numerous well-known constraints that are projected to continue and worsen unless addressed through remedial measures. The Department determined that if action is not taken to address congestion, consumers in the Baltimore-Washington-Northern Virginia area, the northern New Jersey area, and southeastern New York face threats to the reliability of their electricity supply. The Department also documented that congestion exacerbates the degree to which consumers in the eastern portion of the PJM Interconnection and in southeastern New York rely on generation fueled by natural gas and oil. Finally, the Department described the importance of the Mid-Atlantic Critical Congestion Area to the security and economic health of the Nation as a whole. Thus, the Department stated its belief that economic development, reliability, supply diversity and energy independence, and national defense and homeland security

² “Source” refers to an area of existing or potential future generation, and “sink” refers to an area of consumer demand or “load.”

considerations warrant exercise of the Secretary's discretion to designate a National Corridor for the Mid-Atlantic Critical Congestion Area.³

With regard to the Southern California Critical Congestion Area, in the May 7 notice the Department noted that the Congestion Study had identified evidence of historical, persistent congestion caused by numerous well-known constraints that are projected to continue and worsen unless addressed through remedial measures. The Department determined that if action is not taken to address congestion, consumers in the Southern California Critical Congestion Area face threats to the reliability of their electricity supply. The Department also described the importance of the Southern California Critical Congestion Area to the security and economic health of the Nation as a whole. Thus, the Department stated its belief that reliability, supply diversity, and national defense and homeland security considerations warrant exercise of the Secretary's discretion to designate a National Corridor for the Southern California Critical Congestion Area.

To delineate the boundaries of both the Mid-Atlantic Area National Corridor and the Southwest Area National Corridor, the Department identified source areas that would enable a range of generation options and then identified the counties linking the identified source areas with the respective sink areas, i.e., the Mid-Atlantic Critical Congestion Area and the Southern California Critical Congestion Area. The Department stated that both the Mid-Atlantic Area National Corridor and the Southwest Area National Corridor would have 12-year terms, and explained why that was an appropriate length of time for a designation.⁴

³ Section VIII.C of the May 7 notice, 72 FR 25884 – 25896.

⁴ Section VI of the May 7 notice, 72 FR 25851.

The Department provided a sixty day period to intervene and file comments on the draft National Corridor designations announced in the May 7 notice. In addition, DOE held a series of public meetings on the draft designations during the public comment period.⁵ All timely filed comments, as well as written comments submitted at the public meetings and transcripts of those public meetings, were posted on the Department's website in order to facilitate public review. In addition, the Department consulted with each of the States within the two draft National Corridors⁶, as well as with the Regional Entities (as provided in FPA section 216(a)(3)) that have authority within the draft National Corridors.⁷

II. Mid-Atlantic Area National Corridor (Docket No. 2007-OE-01) Rehearing Issues

A. *Procedural Matters*

1. Rehearing Applications and Requests for Stays

The May 7 notice provided instructions on how to provide comments and how to become a party to the proceeding in this docket. Consistent with those instructions, the Department granted party status in this docket to all persons who either: 1) filed comments electronically at <http://nietc.anl.gov> on or before July 6, 2007; 2) mailed written comments marked "Attn: Docket No. 2007-OE-01" to the Office of Electricity Delivery and Energy Reliability, OE-20, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, that were received on or before July 6, 2007; or 3) hand-delivered written comments marked "Attn: Docket No. 2007-OE-01" at one of the

⁵ Arlington, VA, May 15, 2007; San Diego, CA, May 17, 2007; New York City, NY, May 23, 2007; Rochester, NY, June 12, 2007; Pittsburgh, PA, June 13, 2007; Las Vegas, NV, June 20, 2007; and Phoenix, AZ, June 21, 2007.

⁶ See 72 FR 56996, footnote 18.

⁷ Id., footnote 19.

public meetings. Ordering Paragraph E of the Report and Order provided instructions on how to apply for rehearing. Consistent with those instructions, the Department received numerous applications for rehearing from parties in this docket.⁸ In addition, DOE received filings which did not meet the requirements of FPA section 313 (16 U.S.C. 825I) to seek rehearing, either because they were filed by non-parties or were filed late.⁹ The Department has reviewed and considered all of the submissions, treating as comments the submissions from filers who do not qualify as applicants for rehearing. However, those commenters will not be able to seek review of the Report and Order and this Order in a United States Court of Appeal. See, FPA section 313. For convenience, when referring to a filing in this Order, the term “rehearing application” will be used whether the filing is an actual application for rehearing or a comment.

On November 5, 2007, the State of New York (New York) submitted a timely application for rehearing; however, it had not filed comments on the May 7 notice and therefore was not a party to the proceeding. New York asserted that “to the extent New York has previously commented on the Designation Order through its political subdivisions including, but not limited to, the New York State Department of Environmental Conservation (NYSDEC) and the New York State Public Service Commission (NYSPSC), the State has the right to petition for rehearing.”¹⁰ In the alternative, New York moved to intervene late. In addition, on January 31, 2008, New York made another submission, which it styled as a supplement to its November 5 filing, in which it raised issues concerning CRA International, Inc. (CRA), a contractor used by the Department to assist in the preparation of the Congestion Study.

⁸ Listed in Appendix A of this order.

⁹ Those filings and their status are listed in Appendix B of this order.

¹⁰ New York Motion for Intervention at 1.

A person seeking to intervene in a proceeding out of time, particularly after the Department has issued a final order, must provide good justification for being permitted to do so. In this instance, given New York's stated interest in the designation of the Mid-Atlantic Area National Corridor, the fact that subordinate state agencies already are parties in the proceeding, and the fact that New York's initial petition raises no issues that were not previously raised by New York state agencies, DOE believes there is good cause to grant New York's motion and that other parties will not be prejudiced thereby. Therefore, DOE grants New York's late-filed petition to intervene and will accept for filing New York's November 5, 2007 request for rehearing. However, FPA section 313 requires that applications for rehearing shall be made within thirty days after the issuance of an order. The Report and Order was issued on October 5, 2007, and rehearing requests therefore must have been filed by November 5, 2007. Moreover, the Report and Order specified that DOE would not accept responses to requests for rehearing. Therefore, New York's January 31, 2008, supplemental filing is rejected.¹¹

DOE received requests that the Department stay the designation of the Mid-Atlantic Area National Corridor from the Southern Environmental Law Center (SELC), the Pennsylvania Public Utility Commission (PaPUC), in a joint filing from the Wilderness Society, the Natural Resources Defense Council, Inc., Forest Guardians, Western Resource Advocates, and the California Wilderness Coalition (Wilderness Society *et al.*), and New York.¹² The Department has decided to deny the applications for rehearing as discussed in this Order and affirm the determination to designate the

¹¹ The January 31, 2008, submittal also inquired about a Freedom of Information Act (FOIA) request made to DOE by New York. That FOIA request will be addressed by the Department separately outside of this proceeding.

¹² New York's request for a stay was made in its untimely January 31, 2008, submission.

Mid-Atlantic Area National Corridor. Therefore, the Department also denies the requests for a stay, which would delay the effectiveness of the designation, on the grounds that they fail to satisfy the burden necessary for DOE to grant such relief.

2. Authority For, and Fairness of, the Designation Process

Summary of Rehearing Arguments

As in the comments filed in response to the May 7 notice, many rehearing applications argued that the Department had failed to provide adequate opportunity for the public to review and comment on the National Corridors.¹³ For example, Greg Bandel stated that the Department “did not include adequate input from affected states, counties, local governments, communities, and affected home owners.”¹⁴ Communities Against Regional Interconnection (CARI) contended that the designation of the Mid-Atlantic Area National Corridor is a “rule” subject to the notice and comment rulemaking requirements in the Administrative Procedure Act (APA)(5 U.S.C. 553) and that DOE failed to follow rulemaking procedures.¹⁵ New York contended that FPA section 216(a) does not authorize DOE to issue either an adjudicatory order or a rule that is binding on the affected States.¹⁶ It further argued that neither FPA section 309 (16 U.S.C. 824h) nor the APA authorizes DOE to issue a designation order. Moreover, New York argued that in issuing the Report and Order, DOE failed to follow the APA’s adjudicatory hearing requirements in 5 U.S.C. 554, 556-557, as well as DOE’s adjudicatory hearing regulations. New York also stated that if the Report and Order is viewed as a rule, DOE

¹³ See, e.g., the applications for rehearing of Faith Bjalogok, New York, and the Commonwealth of Virginia.

¹⁴ Application for rehearing of Greg Bandel at 1.

¹⁵ CARI rehearing application, at 4-6.

¹⁶ New York rehearing application, at 6-9.

did not comply with the procedural requirements for rulemaking in the APA (5 U.S.C. 553). Finally, New York asserted that DOE improperly relied on a report prepared by CRA and failed to consider certain relevant economic factors in issuing the Report and Order. Various other rehearing applications asserted that the Department did not conduct a wholly independent study of congestion, improperly relying on data and analyses from utilities or others with a vested interest in transmission expansion.¹⁷

DOE Response

In the Report and Order, the Department concluded that its process has been fair, open, and transparent, and that it has provided ample opportunity for public comment.¹⁸ In addition, DOE stated that the designation of National Corridors constitutes informal adjudication under the APA, and concluded that it “employed procedures that satisfy all applicable procedural requirements.”¹⁹ Nothing in the requests for rehearing persuades the Department that its conclusions and decisions on these issues, and discussed in the Report and Order, were incorrect.

Although some issues regarding the Department’s authority and choice of procedures were raised in comments on the draft designations in the May 7 notice and were addressed in the Report and Order, other issues were raised for the first time in rehearing applications. The Department addresses these issues here.

As stated in the Report and Order, the Department does not agree that its designation of a National Corridor is a “rule” subject to the APA’s informal rulemaking provisions (5 U.S.C. 553).²⁰ Instead, the designation of National Corridors is properly

¹⁷ See, e.g., rehearing applications of Jeffery Brown, Rick Layton, and CARL.

¹⁸ 72 FR 57001.

¹⁹ Id.

²⁰ Id.

viewed as informal adjudication under the APA. The term “informal adjudication” is used to describe the residual category of agency actions that are not rulemakings and that need not be conducted through formal adjudication.²¹ FPA section 216(a) does not require DOE to issue a rule in order to designate a National Corridor. It also does not require a decision on the record after opportunity for an agency hearing, which would make the APA’s formal adjudication provisions applicable.²² The fact that designation orders under FPA section 216(a) have future effect, as noted by CARI, does not preclude DOE from treating this action as informal adjudication. The APA defines “adjudication” as “an agency process for the formulation of an order.”²³ An order is “the whole or a part of a final disposition, whether affirmative, negative, injunctive, *or declaratory* in form, of an agency in a matter other than rule making but including licensing.”²⁴ The Department’s Report and Order designating National Corridors is the final disposition in declaratory form of how DOE chooses to address the results of the study it must conduct under FPA section 216(a), and, therefore, is properly characterized as an informal adjudication. The Supreme Court has long held that absent a statutory or other legal requirement providing otherwise, whether to use rulemaking or adjudication in a particular matter is the administrative agency’s decision to make.²⁵

The Department rejects New York’s argument that FPA section 216(a) does not authorize issuance of either an adjudicatory order or a rule that has binding effect on the affected States. New York is correct that the statute unambiguously requires DOE to

²¹ See A GUIDE TO FEDERAL AGENCY ADJUDICATION 146 (Michael Asimow, ed., 2003)(co-authored book published by the American Bar Association’s Section on Administrative Law & Regulatory Policy).

²² 5 U.S.C. 554(a).

²³ 5 U.S.C. 551(7).

²⁴ 5 U.S.C. 551(6) (emphasis added).

²⁵ NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), affirming the principle enunciated in SEC v. Chenery Corp., 332 U.S. 194 (1947).

conduct a study of electric transmission congestion and issue a report based on the study.²⁶ FPA section 216(a)(2) provides that after conducting the study required by FPA section 216(a)(1), and after considering alternatives and recommendations from interested parties, including affected States, the Secretary “shall issue a report, based on the study, *which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.*”²⁷ Thus, while not mandating that the Secretary designate National Corridors, the statute clearly authorizes the Secretary to designate such corridors. Designation of National Corridors may occur in the statutorily-required report, and designation may affect the procedural rights of potential applicants for transmission line siting within the corridor and of citizens in the affected States.

Under the APA, agency actions are either rules or orders.²⁸ As previously explained, the designation of National Corridors is properly characterized as informal adjudication, and issuance of the Report and Order designating the Mid-Atlantic Area National Corridor clearly is authorized by FPA section 216(a). While FPA section 216(a) provides ample authority for issuance of the designation order, FPA section 309 provides additional authority. FPA section 309 provides that the Federal Power Commission, whose powers (in relevant part here) were transferred to DOE in the Department of Energy Organization Act (42 U.S.C. 7151(b)), “shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and

²⁶ New York rehearing application at 6.

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

²⁸ ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT at 15 (1947).

regulations as it may find necessary or appropriate to carry out the provisions of this Act.”²⁹

New York acknowledges that the Department has latitude and discretion in performing its regulatory functions pursuant to FPA section 309. However, New York argues that neither such latitude or discretion apply to the designation of National Corridors because “[t]he APA, 5 U.S.C. §§ 554, 556 and 557, does not authorize DOE’s issuance of the Designation Order, nor the ‘informal’ process DOE followed in issuing it.”³⁰ As explained previously, the Department concludes there is ample authority for issuance of the Report and Order, and FPA section 216(a) does not require use of formal adjudication for the designation of corridors.

The APA does not prescribe procedures that agencies must follow when engaging in informal adjudication. Subject to any constraints imposed by due process, or by particular statutes or regulations, agencies are free to establish procedures for informal adjudication.³¹ The Department has provided ample opportunities for public comment, both written and oral, in carrying out its responsibilities under FPA section 216(a). The Department solicited comments on the Congestion Study through a notice of availability and request for comments published in the Federal Register on August 8, 2006. (71 FR 45047). The Department allowed 60 days for submission of public comments on the Congestion Study. After considering the comments received on the Congestion Study, the Department published the May 7 notice in the Federal Register and provided a 60-day public comment opportunity on the draft National Corridor designations. The May 7

²⁹ 16 U.S.C. 825h.

³⁰ New York rehearing application at 7.

³¹ See *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 655-56 (1990); see also A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* footnote 19 at 147-48. .

notice stated that public comments would be considered prior to DOE issuing the report required by FPA section 216(a)(2). The Department provided this comment opportunity even though FPA section 216(a) does not require DOE to solicit comments on the report or on any proposed or draft National Corridor designations. Section 216(a) only requires that DOE solicit comments on the study, upon which the report and any designation of National Corridors are based.

The May 7 notice announced the locations of three public meetings, which were held in Arlington, Virginia, New York, New York, and San Diego, California. Thus, two hearings were initially held in areas that would be affected by the draft Mid-Atlantic Area National Corridor and one in an area that would be affected by the draft Southwest Area National Corridor. On June 7, 2007, the Department announced four additional public meetings, two in the area of the Mid-Atlantic Area National Corridor (in Rochester, New York, and Pittsburgh, Pennsylvania) and two in the area of the Southwest Area National Corridor (in Las Vegas, Nevada, and Phoenix, Arizona). 72 FR 31571. Thus, a total of seven public meetings on the draft National Corridors were held in the areas that potentially would be affected by the draft National Corridors in order to obtain public views, data and arguments. Additional information about the Department's process for receiving comments on the Congestion Study and the National Corridors is contained in the Report and Order. The Report and Order sets forth the Department's detailed responses to written and oral comments received from members of the public and an explanation of the bases for the National Corridor designations.

Finally, DOE disagrees with New York's comments that DOE improperly relied on a report prepared for the Department by its contractor CRA, and failed to consider

certain relevant economic factors in designating the National Corridors.³² CRA produced its report under contract to and with the supervision of the Department, and as such the CRA report is a Departmental document. For that reason and because the document was properly a part of the record for this proceeding, DOE could properly rely on it in producing the Congestion Study. Moreover, as stated in the Report and Order:

The Department did not rely solely on data and information from any single source or category of sources. While conducting the Congestion Study, the Department contacted a wide range of stakeholders for publicly available and current data, and then, through the notice of inquiry and technical conference, opened the call for data to all entities. The Department then performed its own review of the information provided. All interested persons had an opportunity to comment on the May 7 notice, and the Department has considered all timely filed comments.³³

3. Adequacy of State Consultation

Summary of Rehearing Arguments

Several rehearing applications asserted that the Department failed to consult adequately with affected States. For example, the Commonwealth of Virginia stated that “(d)espite the clear and unambiguous statutory consultation language, the DOE’s August 2006 congestion study, upon which DOE’s NIETC designation is based, was conducted without any consultation with the Commonwealth of Virginia.”³⁴ New York stated that “DOE was required to formally consult with the affected States in the proposed

³² In a related matter, New York filed a FOIA request for a Cambridge Energy Research Associates (CERA) Study titled “Grounded in Reality: Eastern Interconnection” which is listing number 7 in Appendix I of the Congestion Study. As was noted in that Appendix I, the CERA study was reviewed by CRA in preparing its report to DOE but was not used by CRA in its report or by DOE in the preparation of the Congestion Study because it was considered confidential. Therefore, the CERA study is not in the record of this proceeding and was not used as a basis for the Department’s decisions. In addition, CERA and CRA International, Inc. are separate, non-affiliated companies.

³³ 71 FR 57001.

³⁴ Virginia rehearing applications at 4.

designated Corridor”³⁵ and “DOE failed to initially create a formal consultation process in which the States could pursue a dialogue about the Corridor.”³⁶

DOE Response

The Department fully addressed these arguments in the Report and Order and the applications for rehearing raise no new issues or arguments. As stated in the Report and Order:

... the Department believes that its consultation with States, as documented in the May 7 notice, satisfied the requirements of FPA section 216(a)(1). Moreover, in recognition of the importance of National Corridor designation to States, upon issuance of the May 7 notice, the Department engaged in additional consultation with each of the States within the draft National Corridors and the District of Columbia, as documented in Section I.C above.³⁷

The Report and Order documents the Department’s extensive consultations with the affected States. The Department finds the arguments that DOE inadequately consulted with the States to be without merit. Indeed, DOE provided even more consultation and comment opportunities to the States and to the public than is called for by FPA section 216(a).

B. Adequacy of Showing of Congestion that Adversely Affects Consumers

Summary of Rehearing Arguments

Many rehearing applications argued that the Department had failed to show the presence of congestion adversely affecting consumers. The rehearing applications took particular issue with the Department’s position that it has the discretion to designate the Mid-Atlantic Area National Corridor upon a showing of the existence of persistent

³⁵ New York rehearing application at 13.

³⁶ Id.

³⁷ 72 FR 57002.

congestion, without further demonstration of adverse effects on consumers. For example, NYPSC stated that “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 consumers’ that does not identify the costs such congestion imposes on consumers or the costs of relieving such congestion.”³⁸ Toll Bros. Inc. (Toll Bros.) asserted that, when identifying congestion, it is impermissible for DOE to consider economic factors, and the only determination DOE should make is whether the existing transmission is in compliance with applicable reliability standards.³⁹

DOE Response

The Department affirms the conclusion in the Report and Order that it has sufficiently demonstrated and found the existence of congestion that adversely affects consumers in the Mid-Atlantic Area National Corridor.⁴⁰ In the Report and Order, referencing the Congestion Study, the Department 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.⁴¹ Under this definition, any congestion prevents some users of the transmission grid from completing their preferred power transactions. In the Report and Order, the Department concluded, based on its technical expertise and policy judgment, that it is reasonable to interpret the phrase “congestion that adversely affects consumers” to include congestion that is persistent.⁴² Thus, the Secretary appropriately exercised his authority and discretion to

³⁸ NYPSC rehearing application at 7 (emphasis in the original).

³⁹ Toll Bros. rehearing application at 7-8.

⁴⁰ 72 FR 57003.

⁴¹ Id.

⁴² 72 FR 57004.

designate the Mid-Atlantic Area National Corridor after finding the existence of persistent congestion.

DOE disagrees with the assertion by Toll Bros. that DOE cannot consider economic factors in identifying congestion that adversely affects consumers. Toll Bros. offers no persuasive rationale for its preferred interpretation of the term “congestion.” Instead, Toll Bros.’ view - that FPA Section 216’s references to transmission congestion should be understood as pertaining only to reliability – is inconsistent with industry usage. Having identified congestion in the Congestion Study, DOE can and did properly look to the FPA section 216(a)(4) considerations, including those dealing with the economic impacts of congestion, in making both its determination that the congestion adversely affects consumers and that a National Corridor should be designated.

C. Boundaries of the Mid-Atlantic Area National Corridor

Summary of Rehearing Arguments

Numerous rehearing applications reiterated arguments made in response to the May 7 notice that the Mid-Atlantic Area National Corridor is impermissibly broad. For example, Willard R. Burns stated that “(d)esignation of an area spanning the entire Mid-Atlantic region – and 52 of 67 counties in Pennsylvania – exceeds the Secretary’s authority, and renders the definition of ‘corridor’ so broad as to be meaningless.” The PaPUC refers to the designation as a “Transmission Park” rather than a corridor. SELC reiterated its position that the definition employed by DOE in establishing corridors under EPC Act section 368 should also apply to National Corridors designated under FPA section 216(a).

New York objected to the Department's use of the source-and-sink approach, saying that that "approach is contrary to the express language of section 216(a), which directs DOE to include in the Corridor *only* those geographic areas found to be experiencing constraints that adversely affect consumers in the retail consumer end markets or 'sinks' of congestion."⁴³ The Pennsylvania Department of Environmental Protection (PaDEP) asserted that the source-and-sink approach is inconsistent with the express language of FPA section 216 which only supports a project-based approach to designating corridors.⁴⁴

DOE Response

The Department's approach to defining the boundaries of the Mid-Atlantic Area National Corridor is consistent with EPC Act and with FPA section 216(a). FPA section 216(a) does not limit the shape, proportion, or size of a National Corridor. In addition, as was stated in detail in the Report and Order, the Department concludes that the differences in the language and intent of FPA section 216(a) and EPC Act section 368, underscore the appropriateness of the Department's overall approach to establishing the boundaries of the Mid-Atlantic Area National Corridor. As stated in the Report and Order:

The Department does not think it is reasonable, as some commenters have suggested, to interpret the term "geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers" as restricting a National Corridor designation to the specific confines of the load being adversely affected by congestion or the constrained transmission lines causing such congestion. FPA section 216(a)(4)(A) and (B) both refer to the Department considering economic factors in "the corridor, or the end markets served by the corridor." Since

⁴³ New York rehearing application at 11.

⁴⁴ PaDEP application for rehearing at 4.

the end markets served by a National Corridor are the load centers where consumers are being adversely affected by congestion, this language indicates that Congress envisioned designation of National Corridors that extend beyond the location of the adversely affected consumers.⁴⁵

Moreover, as explained in detail in the May 7 notice and in the Report and Order, DOE believes the source-and-sink approach to designating National Corridor boundaries is a permissible and reasonable way of delineating the corridors, and that using county boundaries is a reasonable means of establishing precise and readily identifiable limits for corridors. PaDEP's assertion that the only valid approach to designating National Corridors is a project-based approach is not consistent with the statutory design of FPA section 216. That provision authorizes the Department to exercise its discretion in determining whether and where to designate a geographic area as a National Corridor, and vests in FERC the authority to issue one or more permits for the construction or modification of electric transmission facilities in a National Corridor. It would make little sense to interpret FPA section 216 as requiring DOE to designate narrowly-defined corridors that, in effect, would constitute siting decisions by DOE, since any siting authority to be exercised under FPA section 216 is plainly the responsibility of FERC, not DOE. Thus, if Congress had intended a National Corridor designation to pertain only to a specific electric transmission project, and had intended DOE to select specific routings, it seems likely that Congress would have authorized DOE to both make the National Corridor designation and issue the construction or modification permit. Congress did not do so. Finally, the inclusion of the phrase "1 or more permits" in FPA section 216(b) would be rendered largely meaningless, if, as PaDEP asserts, DOE could only designate corridors using a project-based approach. As explained at length in the

⁴⁵ 72 FR 57007.

Report and Order, DOE's source-and-sink approach is entirely appropriate and reflects the designation of a National Corridor in a geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers.

D. Consideration of Alternatives under FPA section 216(a)(2)

Summary of Rehearing Arguments

Several rehearing applications argued that the Department should evaluate non-transmission solutions to congestion before designating the Mid-Atlantic Area National Corridor. Maryland Governor Martin O'Malley stated that DOE failed to properly consider non-transmission solutions to congestion and constraint issues.⁴⁶ Willard R. Burns said that "the Department has not considered alternative solutions for constraints and congestion other than corridor designations and new high-voltage lines."⁴⁷ The State of New Jersey said the designation of a National Corridor gives transmission facilities a huge competitive advantage, and therefore DOE must consider non-transmission alternatives prior to making a designation.⁴⁸ SELC stated that "energy efficiency, conservation, distributed generation, demand-side management, and other tools are alternatives not just to transmission construction, but also to corridor designation itself."⁴⁹

CARI asserted that the designation of the Mid-Atlantic Area National Corridor was not warranted because New York already has mechanisms in place to relieve transmission congestion and that there "is no legal or institutional barrier to the licensing

⁴⁶ Governor Martin O'Malley rehearing application at 1.

⁴⁷ Willard Burns rehearing application at 1.

⁴⁸ State of New Jersey rehearing application at 6.

⁴⁹ SELC rehearing application at 33.

or construction of new or modified transmission facilities under state law.”⁵⁰

Furthermore, CARI asserted that DOE should consider the potential effects of the New York Independent System Operator’s August 2006 Comprehensive Reliability Plan, New York Governor Eliot Spitzer’s comprehensive plan for reducing electricity use, and New York City Mayor Michael Bloomberg’s energy plan for reducing projected demand for energy. Toll Bros. stated that DOE should have considered alternatives such as Virginia’s 2007 Energy Plan prior to issuing the Congestion Study.

DOE Response

The Department concludes that consideration of non-transmission solutions to the congestion problems facing the Mid-Atlantic Critical Congestion Area is neither required nor necessary as a precondition to designating the Mid-Atlantic Area National Corridor.

As stated in the Report and Order:

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. Even the statutory requirement to consider alternatives is not couched in terms of an independent analysis of a reasonable range of alternatives, as one would expect if Congress had intended the Department to analyze and select a solution, but rather refers merely to the Department considering those alternatives and recommendations offered by interested parties. 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.⁵¹

The CARI and Toll Bros. rehearing applications suggested that prior to making a determination on whether to designate a National Corridor the Department needs to

⁵⁰ CARI rehearing application at 14.

⁵¹ 72 FR 57010.

examine in detail the feasibility, advantages, and disadvantages of all possible alternatives to building additional electric transmission facilities. Nothing in FPA section 216(a) requires DOE to do so. Nor is it clear why such examining would be helpful, much less necessary, for DOE when it decides whether and where there are problem transmission capacity constraints and congestion that adversely affects consumers and a National Corridor should be designated. The examination envisioned by CARI and Toll Bros. apparently would include reviewing the impacts of all regional, State and local energy plans to determine if the cumulative effects of the plans would provide alternatives to transmission that would obviate the need to designate a National Corridor. In order to make this examination, DOE presumably would need to review the underlying data, assumptions, and analyses in each plan and determine what the effects of the plans would be and whether those effects would be sufficient to eliminate the need to make a corridor designation. In other words, DOE would assume the role of electricity planning czar in all areas of the country experiencing constraints or congestion, ruling on the acceptability of the methodology and data used in the formulation of regional, State and local energy plans, and the adequacy and efficacy of each area's electricity planning, as part of DOE's National Corridor decision making process. FPA section 216(a) does not require the Department to play such a large and invasive role in electricity planning, nor does it require the Department to undertake this level of scrutiny before designation of a National Corridor. The Department has engaged in a searching review and analysis of reasonably available data and information, and has exercised its professional and technical judgment and expertise in making determinations based on that information. It

is not required to explore and examine a wide range of possible future actions by many persons or organizations before issuing a designation.

E. Whether DOE Should Exercise its Discretion to Designate the Mid-Atlantic Area National Corridor

Summary of Rehearing Arguments

Many of the rehearing applications raised issues previously addressed in the Report and Order. For example, CARI and PaPUC asserted that the economic development, reliability, supply diversity, energy independence, and national defense and homeland security considerations contained in FPA section 216(a)(4) do not support designation of the Mid-Atlantic Area National Corridor.⁵² Other rehearing applications reiterated the argument that the Department should accord more deference to existing State and regional planning and siting processes and delay any designation of a Mid-Atlantic Area National Corridor unless and until it has become clear that a Federal siting forum is needed.

DOE Response

As the Department stated in the Report and Order:

The Department recognizes that FPA section 216 adopted a novel approach to addressing congestion problems, and that many commenters have grave concerns about the effects of this new approach. However, after careful consideration of these concerns, the Department concludes that designation of the draft Mid-Atlantic Area National Corridor is consistent with the intent of FPA section 216(a).⁵³

⁵² CARI rehearing application at 29.

⁵³ 72 FR 57012.

This is particularly so given the limited function that FPA section 216 assigns to DOE and which a designation is to accomplish – i.e., the role of identifying transmission congestion and constraints, and the geographic area in which the problems exist. The Department also reaffirms its conclusions, as the May 7 notice documented, that economic development, reliability, supply diversity, energy independence, and national defense and homeland security considerations all warrant designation of the Mid-Atlantic Area National Corridor.⁵⁴

Finally, the Department notes that it strongly supports State and regional efforts to address collectively the congestion problems confronting the region, whether those efforts are focused on transmission solutions, non-transmission solutions, or a combination of both, and the Department does not believe that designation of the Mid-Atlantic Area National Corridor necessarily will disrupt ongoing State or regional planning processes. Further, as stated in the May 7 notice and reiterated in the Report and Order, DOE does not believe that Congress envisioned the adoption of a wait-and-see approach to National Corridor designation. National Corridor designation provides, in a defined set of circumstances, a potential mechanism for analyzing the need for transmission from a national, rather than State or local, perspective.

III. Southwest Area National Corridor (Docket No. 2007-OE-02)

A. Procedural Matters

1. Rehearing Applications and Requests for Stay

⁵⁴ See May 7 notice, Section VIII.C, 72 FR 25884 and FPA 216(a)(4), 16 U.S.C. 824p(a)(4).

The May 7 notice provided instructions on how to provide comments and how to become a party to the proceeding in this docket. Consistent with those instructions, the Department granted party status in this docket to all persons who either: 1) filed comments electronically at <http://nietc.anl.gov> on or before July 6, 2007; 2) mailed written comments marked “Attn: Docket No. 2007-OE-02” to the Office of Electricity Delivery and Energy Reliability, OE-20, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, that were received on or before July 6, 2007; or 3) hand-delivered written comments marked “Attn: Docket No. 2007-OE-02” at one of the public meetings. Ordering Paragraph E of the Report and Order provided instructions on how to apply for rehearing in this docket. Consistent with those instructions, the Department received, reviewed and considered all timely filed applications for rehearing from parties in this docket.⁵⁵

DOE received requests that the Department stay its Report and Order designating the Southwest Area National Corridor from the Arizona Corporation Commission (ACC), SELC, and the Wilderness Society *et al.* The Department has decided to deny the applications for rehearing as discussed in this Order and affirm the determination to designate the Southwest Area National Corridor. Therefore, the Department also denies the requests for a stay, which would delay the effectiveness of the designation, on the grounds that they fail to satisfy the burden necessary for DOE to grant such relief.

2. Adequacy of State Consultation

ACC asserted that DOE did not meet its statutory obligation to consult with affected States in making the determination to designate the Southwest Area National Corridor. ACC stated that while it appreciates the Department’s consultations with the

⁵⁵ Listed in Appendix C of this order.

Governors of affected states, FPA section 216 requires consultation with State siting authorities.⁵⁶

DOE Response

FPA section 216(a)'s provision that DOE consult with affected States does not require it to consult with a particular State agency as opposed to the State's chief executive. In any case, as evidenced by its filings in this proceeding, ACC has been given the opportunity to participate in the Department's decision making process. As discussed in Section II.A.3 above, the Department's consultation with States, as documented in the May 7 notice and in the Report and Order, satisfied the requirements of FPA section 216(a)(1).

B. Adequacy of Showing of Congestion that Adversely Affects Consumers

Summary of Rehearing Arguments

Several rehearing applications argued that the Department improperly concluded that there was congestion adversely affecting consumers, which the applications assert is a prerequisite to designation of the Southwest Area National Corridor. Essentially, the submissions take issue with the Department's position that it has the discretion to designate the Southwest Area National Corridor upon a showing of the existence of persistent congestion without a further demonstration of adverse effects on consumers. For example, ACC stated that "not all congestion, even persistent congestion, requires a remedy."⁵⁷ The California Public Utilities Commission (CPUC) reiterated its position that congestion and constraints do not, in and of themselves, adversely affect consumers,

⁵⁶ ACC rehearing application at 8.

⁵⁷ ACC rehearing application at 12.

and that DOE must develop valid criteria for measuring congestion and transmission constraints and show how they impact consumers.⁵⁸ CPUC also questioned the Western Area Power Administration (WAPA) data on denial of transmission service applications cited in the May 7 notice.⁵⁹ The Imperial Irrigation District (IID) stated that DOE's designation is flawed because it failed to demonstrate that consumers are adversely affected in each of the counties included in the Southwest Area National Corridor.⁶⁰

DOE Response

The Department has established a record and has found the existence of congestion that adversely affects consumers in the Southwest Area National Corridor. As discussed in Section II.B above, the Department concludes, based on its technical expertise and policy judgment, that it is reasonable to interpret the phrase "congestion that adversely affects consumers" to include congestion that is persistent. Thus, the Department believes that FPA section 216(a) gives the Secretary sufficient authority and discretion to designate the Southwest Area National Corridor upon a showing of the existence of persistent congestion. Whether this persistent congestion requires a "remedy" – i.e., construction of new facilities or any other action – is not a decision that FPA section 216(a) calls on DOE to make, nor does the designation of the Southwest Area National Corridor require DOE to make any such decision.

In response to CPUC's questioning of the WAPA data, DOE addressed that issue in the Report and Order, saying that the WAPA data questioned by CPUC is but one category of data used in the May 7 notice to establish the presence of persistent congestion and noting that "if FERC jurisdiction under FPA section 216(b) were

⁵⁸ CPUC rehearing application at 16.

⁵⁹ Id. at 15.

⁶⁰ IID rehearing application at 18.

triggered, parties could raise any concerns they had about the contractual nature of the congestion.”⁶¹.

Finally, regarding IID’s contention, the Department’s approach to delineating the Southwest Area National Corridor was designed to connect the sink area containing consumers adversely affected by congestion with a range of source areas separated from the identified sink area by the transmission constraints causing such congestion. Given the overall framework of FPA section 216 and the physical properties of the electric grid, the Department concludes that this approach is consistent with the statutory authorization in FPA 216(a) for DOE to designate as a National Corridor a “geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers.”

C. Boundaries of the Southwest Area National Corridor

Summary of Rehearing Arguments

Some of the rehearing applications reiterated arguments made in response to the May 7 notice that the Southwest Area National Corridor is impermissibly broad. CPUC opposes designation of a Southwest Area National Corridor that would include all of southern California, but supports designation of a National Corridor that is more narrowly targeted than the corridor DOE has designated, such as a National Corridor along the Arizona section of the proposed Devers-PaloVerde 2 route.⁶² CPUC also states that while the focus of FPA section 216(a) is on interstate transmission, more than 48,000

⁶¹ 72 FR 57016.

⁶² CPUC rehearing application at 20.

square miles of the Southwest Area National Corridor falls within California alone.⁶³

CPUC states that the prospect of Federal transmission siting over this in-State area effectively trumps California's ability to establish and pursue its own energy goals.⁶⁴ The ACC argues that DOE's source-and-sink approach is fundamentally flawed.⁶⁵

DOE Response

The Department concludes that its general approach to defining the boundaries of the Southwest Area National Corridor is consistent with the statute. As discussed in Section II.C above and in the Report and Order, the language of FPA section 216(a), which refers to designation of a "geographic area," does not dictate any particular shape, proportion, or size for a National Corridor, and the Department's approach to delineating right-of-way corridors under EPCA section 368 does not inform or constrain the delineation of National Corridors under FPA section 216(a). In addition, as explained in detail in the May 7 notice and the Report and Order, DOE continues to believe the source-and-sink approach to designating National Corridor boundaries is a permissible and reasonable way of delineating the boundaries of the corridors, and that using county boundaries is a reasonable means of providing the precise limits of National Corridors. The applications for rehearing have not persuaded DOE otherwise.

D. Consideration of Alternatives under FPA section 216(a)(2)

Summary of Rehearing Arguments

IID claimed that DOE refused to consider any non-transmission solutions to congestion, did not meaningfully analyze IID's recommendation that DOE adopt a more

⁶³ Id. at 5.

⁶⁴ Id. at 29.

⁶⁵ ACC rehearing application at 14.

reasonably-tailored corridor, or refrain from making a designation until FERC's new regional transmission planning requirement is given a reasonable opportunity to work.⁶⁶

DOE Response

For the reasons set forth in Section II.D above and in the Report and Order, the Department concludes that consideration of non-transmission solutions to the congestion problems facing the Southern California Critical Congestion Area is neither required nor necessary as a precondition to designating the Southwest Area National Corridor. As stated in the Report and Order:

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. Even the statutory requirement to consider alternatives is not couched in terms of an independent analysis of a reasonable range of alternatives, as one would expect if Congress had intended the Department to analyze and select a solution, but rather refers merely to the Department considering those alternatives and recommendations offered by interested parties. 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.⁶⁷

In addition, as stated in section II.E above, while the Department strongly supports State and regional efforts to address collectively the congestion problems confronting the region, nothing in FPA section 216(a) requires DOE to adopt a wait-and-see approach to National Corridor designation, or to ensure that all other possible venues for identifying and addressing transmission capacity constraints and congestion have been exhausted before DOE designates a National corridor.

⁶⁶ IID rehearing application at 19.

⁶⁷ 72 FR 57010.

G. Whether DOE Should Exercise its Discretion to Designate the Southwest Area National Corridor

Summary of Rehearing Arguments

ACC stated that DOE failed to consider the costs of externalities, including but not limited to, State energy, regulatory and environmental policy choices when determining to designate the Southwest Area National Corridor.⁶⁸ Further, ACC reiterated comments it made in response to the May 7 notice that differences in locational marginal prices between California and Arizona “are appropriate if they reflect non-monetized externalities.”⁶⁹

DOE Response

The concerns expressed by ACC in its application for rehearing were addressed in the Report and Order. As stated there, the Department recognizes that FPA section 216 adopted a novel approach to addressing congestion problems, and that some commenters are concerned with this new approach. However, after careful consideration of these concerns, and after considering the entire record in this proceeding, the Department concluded that designation of the Southwest Area National Corridor is consistent with the intent of FPA section 216(a).⁷⁰ In addition, as stated in the Report and Order, “the Department’s designation of a Southwest Area National Corridor is not motivated by price differentials between California and Arizona.”⁷¹ As detailed in the Report and Order, the Department documented that congestion poses a threat to reliability of supply

⁶⁸ ACC rehearing application at 12.

⁶⁹ Id. at 13.

⁷⁰ 72 FR 57019.

⁷¹ 72 FR 57020.

and limits supply diversity for the Southern California Critical Congestion Area consumers.⁷²

IV. NEPA, NHPA, and ESA

Several rehearing applications in both dockets reasserted arguments previously made in this proceeding that before designating any National Corridors, the Department must conduct reviews under the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act (NHPA), and the Endangered Species Act (ESA).⁷³ Most of these contentions were previously raised in comments filed in response to the May 7 notice and a detailed discussion of those comments appears in Section IV of the Report and Order.⁷⁴ As stated in Section I of this Order, DOE will not readdress at length determinations on matters it made in the Report and Order for which no new argument has been advanced in rehearing that persuades the DOE to alter its decision. However, DOE does address below those rehearing applications that raised new approaches to NEPA, NHPA, and ESA arguments, or that suggest the need for further clarification.

A. Issues discussed in the Report and Order

Summary of Rehearing Arguments

Many rehearing applications included arguments contending that designation of a National Corridor requires NEPA review: (1) because designation is part of a continuing agency action constituting a new federal plan or program; (2) because it permits other

⁷² 72 FR 57016.

⁷³ See, e.g., rehearing applications of the Energy Conservation Council of PA, Mitchell S. Diamond (requesting a “comprehensive assessment of alternatives”), Jim Feeney, Michael B. Gerrard, New York, CARI, PaDEP, SELC, Toll Bros. and the Wilderness Society *et al.*

⁷⁴ 72 FR 57021.

parties to take action; (3) to discuss cumulative impacts from anticipated transmission development; or (4) to examine non-transmission solutions to the congestion identified in the Congestion Study. In addition, rehearing applications reasserted that the Department should have conducted reviews under the NHPA and ESA.

DOE Response

These rehearing applications raised no new arguments or perspectives that require further discussion or persuade the Department to alter the determinations made in the Report and Order. As stated in the Report and Order, section 102(2)(C) of NEPA requires that all Federal agencies include an Environmental Impact Statement (EIS) for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). NEPA section 102(2)(C) ensures that Federal agencies provide full and fair discussion of significant environmental impacts and inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment. NEPA review is designed to examine the foreseeable, measurable, and predictable consequences of a proposed Federal action; it is not intended to be used to forecast hypothetical or unknowable proposals or results.

As described in Section IV(B)-(D) of the Report and Order, these National Corridor designations are not a pre-condition to siting transmission lines; nor are they part of a group of concerted agency actions to implement a plan or program for executing projects, such as siting transmission lines. These two corridors are not interconnected or related to each other; each corridor designation is separate and distinct in size and

location. As specified by statute, the factors that FERC will consider in any decision to permit a transmission line are different from the factors that DOE considered in designating National Corridors. As such, the two corridor designations are unique, and FERC and the Department must take distinct actions to implement Section 216. DOE's designation of National Corridors is not a part of the type of multi-agency program for which a programmatic EIS (PEIS) is required.

In addition, DOE does not know what the States' or FERC's response will be after the designation of the National Corridors at issue here, or whether energy planners and utilities will use transmission or non-transmission solutions to address transmission congestion or constraints that DOE has identified. Therefore, endeavoring to analyze hypothetical impacts from future potential transmission lines, including any cumulative impacts, is premature and speculative at this time. The designation of National Corridors only specifies geographic areas in which DOE has identified electric congestion or constraint problems; the designations have no environmental effect, and it would not serve NEPA's purposes to analyze alternatives that would also not have impacts. Therefore, the Department concludes on rehearing that the National Corridor designations do not comprise an action subject to NEPA, NHPA, or ESA review.⁷⁵

B. New Issues and Issues Needing Further Clarification

Some rehearing applications raised new arguments with respect to NEPA, NHPA, and ESA review. These arguments do not change DOE's ultimate determination that environmental and NHPA review is not required before the Department designates the

⁷⁵ Nothing in this Order restricts the Department's authority or ability to prepare a NEPA document for future corridor designations, pursuant to Section 216 of the Federal Power Act; nor does this Order limit the size or form of any such future corridor designations.

two corridors at issue here. However, because they were not previously addressed, these new arguments, described below, warrant discussion.

1. National Corridor Designation Itself Impacts the Environment

Summary of Rehearing Arguments

Certain rehearing applications stated that NEPA review is required because the very act of designating National Corridors impacts the environment. For example, Mitchell S. Diamond stated that the Department's designation of a National Corridor alters the likely pattern of electricity development, impacting fuel use and air quality patterns.⁷⁶ PaDEP claimed that designation promotes transmission based solutions, which in turn, have environmental impacts.⁷⁷ SELC asserted that NEPA review cannot wait until the site-specific permitting stage of a particular transmission line because the designation is causing utilities to make investments in new transmission lines now. In addition, several of the rehearing applications suggest that the designation of National Corridors will inevitably result in State or Federal permitting, and the construction, of planned or proposed transmission lines and therefore the impacts of such projects should be reviewed at this time.

DOE Response

The Department does not agree that the very act of designating National Corridors impacts the environment. DOE agrees that the effect of a National Corridor designation is to delineate geographic areas within which, under certain circumstances, FERC may

⁷⁶ Mitchell S. Diamond rehearing application at 1.

⁷⁷ PaDEP rehearing application at 9.

ultimately authorize the construction or modification of electric transmission facilities. However, the designations neither permit nor preclude the construction of any transmission projects (or, for that matter, any other type of energy-related project). DOE has no authority under FPA section 216 to site and authorize the construction of transmission facilities, and FERC's authority to approve transmission projects located within National Corridors is circumscribed by FPA section 216.⁷⁸ It is only if and when FERC issues a permit for a transmission line that there may be an environmental impact. Moreover, FERC regulations require the Commission to conduct a full NEPA review as part of its consideration of any permit application it accepts.⁷⁹ Therefore, no construction permit will be issued under FPA section 216 without a full NEPA review having been conducted.

The Department also does not believe that the designation of National Corridors at issue here promotes transmission based solutions to the exclusion of non-transmission based solutions, or that the designations will necessarily lead to the development of transmission lines. As described in Section 1.A. of the Report and Order, FERC's discretion to issue permits for transmission facilities within National Corridors is dependent upon several factors, including the existence of a congestion problem and whether another response, such as a non-transmission solution, has resolved the problem or appears likely to do so. Therefore, it would be highly speculative for the Department to make assumptions about whether, when, or where FERC might permit transmission facilities. Although the Department understands that applications are pending before State authorities for new transmission facilities within the two National Corridors the

⁷⁸ 16 U.S.C. 824p(b).

⁷⁹ See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, FERC Stats. and Regs. ¶ 31,234.

Department has designated, the Department does not know how the States will act upon these applications, whether the sponsors of the these proposed facilities will seek a permit from FERC under FPA section 216, whether FERC will ever have jurisdiction to address these facilities even if the sponsors seek a FERC permit, or, if FERC does assert jurisdiction, how it would act upon the permit applications.

2. State Environmental Protection Statutes

Summary of Rehearing Arguments

In its application for rehearing, Toll Bros. asserted that the designation of National Corridors curtails a State's ability to issue conditional permits. Toll Bros. asserted that designating National Corridors encourages States to issue permits without conditions because FERC has jurisdiction to review permit applications if a State siting authority conditioned its approval of a transmission facility permit in an area designated as a National Corridor in such a manner that construction of the line "is not economically feasible."⁸⁰ Toll Bros. further asserted that FERC will not have authority to consider "state conservation statutes, state conservation easements, or local land use planning when approving or denying a permit application."⁸¹

DOE Response

The Department agrees that a National Corridor designation allows FERC, in limited circumstances and if all applicable requirements are satisfied, to issue construction permits for electric transmission facilities within the geographic area of a

⁸⁰ Toll Bros. rehearing application at 16.

⁸¹ Id.

National Corridor. However, this does not mean that the designation itself causes any physical impacts or compels FERC to make decisions that would have environmental impacts. As stated earlier, the Department cannot foresee the proposed location of particular facilities that FERC may consider permitting, or whether or not those permits would be subject to conditions. Additionally, it would be pure speculation for the Department to attempt to assess whether FERC's standards for reviewing individual permit applications and permit terms would demand more or less environmental and other analysis than State standards or State permit terms. Nor can the Department make a reasoned assessment of whether any ultimate FERC permitting decision would be more or less environmentally protective than would have been a particular State's permitting decision. Hypothetical differences between FERC and the States, which might or might not lead to environmental impacts, do not constitute foreseeable impacts from the Department's designation of National Corridors such that DOE is required to conduct a NEPA analysis is required.

4. EPAct Section 368

Summary of Rehearing Arguments

Certain rehearing applications, including that of SELC, stated that DOE should have prepared a PEIS because DOE and several other agencies have prepared a PEIS for the designation of corridors on Federal lands in eleven western States under EPAct section 368.

DOE Response

The Department explained in detail the differences between EPCA sections 368 and 1221 in Section IV.J of the Report and Order, and will not repeat that discussion here. Subsequent to the Department issuing the Report and Order, the Department and several other agencies issued the Draft PEIS for the Section 368 energy corridors. The Section 368 Draft PEIS clarified that the relevant federal agencies proposed designating the section 368 corridors with a defined width, length and centerline that the agencies would incorporate into land use plans. The agencies noted that the corridors would represent the preferred location for future energy transportation projects and would encourage applicants to apply for permits in a narrow geographic area. Further, in determining where they propose to site the corridors, the agencies responsible for implementing Section 368 avoided areas where local land use planners from the Bureau of Land Management, the Forest Service, and the Department of Defense had identified incompatible land uses.⁸²

In contrast, the designation of National Corridors under FPA section 216 has no land use component. The designation relies on no determination of how suitable particular areas of land are for future transmission lines or any other use: if FERC considers a permit application under its FPA section 216 authority, it will make that kind of land use determination at that time. In addition, unlike the text of EPCA section 368, FPA section 216 does not require the amendment of land use plans. As stated before, FPA section 216(a) merely authorizes the Department to designate as National Corridors geographic areas experiencing electricity congestion and constraints. As such, the designation has no environmental impacts.

⁸² BLM regulations provide that BLM conduct a NEPA review prior to any amendment to its Federal land resource management plans. 43 CFR § 1610.5-5.

5. DOE Should Have Invoked a Categorical Exclusion or Conducted an EA

Summary of Rehearing Arguments

Certain rehearing applications stated that DOE did not follow the proper NEPA process in designating National Corridors. For example, the Wilderness Society *et al.* asserted that DOE should have completed an Environmental Assessment (EA) and then issued a Finding of No Significant Impact (FONSI) before designating National Corridors. SELC stated that if DOE did not complete an EA or EIS, it was required to use a categorical exclusion.

DOE Response

The Department did not need to prepare an EA or invoke a categorical exclusion before designating the National Corridors at issue here because NEPA does not apply to the designations DOE has made. The Department's designation of these two National Corridors does not trigger NEPA because the designations are not major Federal actions significantly affecting the quality of the human environment. "Major Federal actions," pursuant to regulations promulgated by the Council on Environmental Quality, include actions with effects that may be major and which are potentially subject to Federal control and responsibility. 40 C.F.R. 1508.18. The designation of National Corridors itself has no environmental impacts.

V. Miscellaneous

To the extent other issues were raised in applications for rehearing that have not been addressed in this Order or in the other documents incorporated by reference in this Order, they have been considered by the Department and are denied.

Order

For the reasons set forth herein, it is hereby ordered that:

A. In Docket No. 2007-OE-01, the applications for rehearing and stay are denied.

Any party to this proceeding that submitted a timely application for rehearing and is aggrieved by the Report and Order and this Order may seek judicial review in a United States Circuit Court of Appeals pursuant to section 313(b) of the FPA (16 U.S.C. 825I).

B. In Docket No. 2007-OE-02, the applications for rehearing and stay are denied.

Any party to this proceeding that submitted a timely application for rehearing and is aggrieved by the Report and Order and this Order may seek judicial review in a United States Circuit Court of Appeals pursuant to section 313(b) of the FPA (16 U.S.C. 825I).

The Secretary of Energy has approved the publication of this Order.

Issued in Washington, D.C. on March 6, 2008.



Kevin M. Kolevar,
Assistant Secretary
Electricity Delivery and Energy Reliability.

APPENDIX A – Applications for Rehearing in Docket No. 2007-OE-01

Arrington, Linda
Arrington, Michael
Bair, John R.
Balasko, John A.
Bandel, Debra
Bandel, Greg
Bjalobok, Faith
Brogle, Arthur
Brogle, Kevin
Brown, Jeffrey J.
California Public Utilities Commission (Chaset, Laurence)
Communities Against Regional Interconnect (Murphy, Kevin C.)
Cooley, Frances M.
DeWeese, Bill; Pennsylvania House of Representatives
Diamond, Mitchell S.
Edison Electric Institute (Comer, Edward H.)
Eickhoff, Jane
Energy Conservation Council of Pennsylvania (Burns, Willard R.)
Feeney, Jim
Ferguson, Carol
Gerrard, Michael B.; Arnold & Porter LLP
Greene County, Pennsylvania, Department of Economic Development (Matesic, Robbie M.)
Groce, Dennis
Hanham, Alison
Hanham, Robert
Hendley, Martha
Hildebrand, Thomas & Kathy
Hixson, Jennifer
Hollowood, John T.
Kessinger, Barbara
Layton, Rick
Ly, Kirsten
Maize, Cindy
Martin, Dan
Martin, Tina
Maryland, Governor of (O'Malley, Martin)
McCoy-O'Donnell, Kimberly
Mid-Atlantic Concerned Citizens Energy Coalition (Kessinger, Barbara)
Miller, Randy Keith
Moran, Dennis & Margaret
Morin, Philip
Moyer, Ben
Murphy, Wayne
New Jersey Board of Public Utilities (Comes, Margaret)
New York Department of Environmental Conservation (Snyder, J. Jared)
New York Department of Public Service (Mullany, Sean)
New York, the State of (Leary, Maureen F.)
Nicholl, Laurie
Pennsylvania Department of Environmental Protection (Perry, Scott)
Pennsylvania Public Utilities Commission (Levin, John A.)
Piroch, Cheryl
Scherer, Lisa
Schlossberg-Kunkel, Elena
Southern Environmental Law Center *et al* (Jaffe, Cale, *et al*)

Stein, Glenn E.
Stout, J. Barry; Pennsylvania State Senate
Sullivan, J.R. & Becky
Tishok, Paula S
Toll Brothers, Inc. (Sullivan, Sean M.)
Virginia Office of the Attorney General (Matsen, Maureen Riley)
Wilderness Society, The, *et al* (Culver, Nada, *et al*)
Wood, Donna

APPENDIX B – Comments on Docket No. 2007-OE-01

Balasko, Mary Jane²

Ben-Dov, Zohar^{1,2}

Citizens Campaign for the Environment (Eckel-Dalrymple, Sarah)²

Delaware, Lieutenant Governor of (Carney, John C.)¹

Pike County, Pennsylvania, Commissioners (Forbes, Harry)²

Goroncy, George D.¹

Grese, Chuck & Lisa²

Jacob, Frank¹

New York Adirondack Park Agency (Stiles, Curtis)^{1,2}

Nicoloff, Richard P.¹

Oak Ridge Farm (Warrender, Patricia and Anthony)^{1,2}

Schwartz, Allyson Y.; U.S. House of Representatives (Pennsylvania)¹

Widawski, Donna¹

¹ Not a party of record in this proceeding

² Application for Rehearing filed late

APPENDIX C - Applications for Rehearing in Docket No. 2007-OE-02

Arizona Corporation Commission (Kempley, Christopher, *et al*)
California Imperial Irrigation District (Swanstrom, Deborah A.)
California Public Utilities Commission (Chaset, Laurence)
Edison Electric Institute (Comer, Edward H.)
Energy Conservation Council of Pennsylvania (Burns, Willard R.)
Hildebrand, Thomas & Kathy
Maize, Cindy
Mid-Atlantic Concerned Citizens Energy Coalition (Kessinger, Barbara)
Southern Environmental Law Center *et al* (Jaffe, Cale, *et al*)
Wilderness Society, *et al* (Culver, Nada, *et al*)