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**UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY**

**IN THE MATTER OF THE FINAL
NATIONAL INTEREST ELECTRIC
TRANSMISSION CORRIDOR
DESIGNATIONS – FINAL
SOUTHWEST AREA NATIONAL
CORRIDOR; 72 Fed. Reg. 56,992
(October 5, 2007); NOTICE AND
OPPORTUNITY FOR WRITTEN
AND ORAL COMMENT; 16 U.S.C.
§ 824p(a)(2)**

DOCKET NO. 2007-0E-02

**THE HONORABLE SAMUEL W. BODMAN,
SECRETARY, UNITED STATES
DEPARTMENT OF ENERGY**

**APPLICATION FOR REHEARING OF THE
ARIZONA CORPORATION COMMISSION**

INTRODUCTION

On October 5, 2007, the United States Department of Energy (“DOE” or the “Department”) published a notice in the Federal Register (the “October 5, 2007 Notice”).¹ The October 5, 2007 Notice included DOE’s decision to issue final designations for two National Interest Electric Transmission Corridors (“NIETCs”). It also included DOE’s responses to comments received on draft designations issued for the corridors.

DOE issued the final designations in accordance with Section 1221 of the Energy Policy Act of 2005.² DOE designated a Southwest Area National Interest Electric Corridor (“Southwest Corridor”) in Docket No. 2007-OE-02³; and a Mid-Atlantic Area National Interest Corridor (“Mid-Atlantic Corridor”) in Docket No. 2007-OE-01.⁴ The designations became effective on October 5, 2007; and are effective until October 7, 2019.⁵ Arizona counties included in the Southwest Corridor are La Paz, Maricopa, and Yuma.⁶

On May 7, 2007, DOE published a notice in the Federal Register (the “May 7, 2007

¹ 72 Fed. Reg. 56,992 (October 5, 2007) (“Final Designations”).

² See Pub. L. 109-58 (August 8, 2005); 119 Stat. 946 (“EPAAct 2005”); and codified as 216 of the Federal Power Act (“FPA”); *see* 16 U.S.C. § 824p.

³ Final Designations at 57,025.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

1 Notice”).⁷ The May 7, 2007 Notice included draft designations for the above corridors. The data
2 on which DOE relied to make its draft designations are included in the May 7, 2007 Notice. In
3 the notice, DOE included responses to comments received for its National Electric Transmission
4 Congestion Study (“Congestion Study”).⁸ The Congestion Study was issued on August 8, 2006.
5 DOE also solicited comments on the draft corridors.⁹ DOE explained that interested persons did
6 not need to refer to the Congestion Study in their comments on the draft corridors.¹⁰

7 In both the Draft Designations and Final Designations, DOE identified the Palo Verde
8 Market Hub in Arizona as a “source area” of generation for use in a “sink area” of the corridor.¹¹
9 The “sink area” of the corridor is most of southern California.¹² In the Draft Designation, DOE
10 also included Clark County in Nevada in the Southwest Corridor.¹³ The Mead Market Hub is
11 located in Clark County.¹⁴

12 DOE identified source areas that are separated from sink areas by one or more
13 constraints. In the Final Designations, DOE explained:

14 The results of this analysis was the identification of two categories
15 of source areas: (1) The closest locations with substantial amounts
16 of existing, underused generation capacity separated from the
17 identified sink area by *one or more constraints identified as*
18 *causing congestion* adversely affecting consumers; and (2) the
19 *closest locations with the potential for substantial development* of
20 wind, geothermal, or solar generation capacity separated by *one or*
21 *more of the constraints identified as causing congestion* adversely
22 affecting consumers.¹⁵

19 DOE clarified the second consideration above. DOE stated, “the statute does not appear to
20 foreclose the possibility of National Corridor designation in the absence of current congestion, so
21

22 ⁷ 72 Fed. Reg. 25,838 (May 7, 2007) (“Draft Designations”).

23 ⁸ *Id.* at 25,839.

24 ⁹ *Id.* at 56,995; *see also* 71 Fed. Reg. 45,047 (August 8, 2006) (Notice of issuance of the
25 Congestion Study; and notice of opportunity to comment).

26 ¹⁰ *Id.* at 25,849-25,850.

27 ¹¹ *Id.* at 25,921; *See also, Id.* at 25,918-25,919 and Figure IX-5 at 25,920. For the Final
28 Designations *see* Final Designations at 57,017.

¹² Draft Designations at 25,918 (including the cities of Los Angeles, San Bernardino, Riverside,
Anaheim, and San Diego).

¹³ Draft Designations at 25,923.

¹⁴ Final Designations at 57,017.

¹⁵ *Id.* (emphasis added).

1 long as a constraint, including absence of a transmission line, is demonstrably hindering the
2 development of desirable generation.”¹⁶ DOE then “delineated the draft Southwest Area National
3 Corridor by identifying the counties linking the identified source areas with the sink areas.”¹⁷

4 In response to comments by the ACC and the CPUC, DOE clarified its identified source
5 areas. The Department stated that it “extended the draft Southwest Area National Corridors only
6 so far into those source areas as needed to encompass *one or more possible strong points on the*
7 *transmission network that serves* [the sink areas].”¹⁸

8 The ACC filed comments in Docket No. 2007-OE-02 on July 6, 2007 in compliance with
9 DOE’s May 7, 2007 Notice.¹⁹ Thus, the ACC has party status under the requirements of the
10 notice.²⁰ The ACC is also an “aggrieved party” because the Department did not adequately
11 address its concerns. The ACC’s concerns were provided in its July 6, 2007 filing and in prior
12 correspondence with the Department. They are further explained below. The ACC incorporates
13 its July 6, 2007 filing and all prior written correspondence with the Department.

14 The ACC’s grounds for rehearing below include all information provided in Docket No.
15 2007-OE-02. They also include information provided in Docket No. 2007-OE-01 to the extent
16 the information is relevant to both dockets. One additional issue must be addressed in this
17 introduction.

18 The ACC recently issued a decision in a siting matter that is referenced in the Final
19 Designations. The siting matter is ACC Docket No. L-00000A-06-0295-00130 (Case No. 130).
20 The subject matter of the case was a project commonly known as Devers/Palo Verde 2
21 (“DVP2”). Two issues must be addressed related to this project.

22 First, Mr. Kevin M. Kolevar, Director, Office of Electricity Delivery & Energy
23 Reliability, made public comments that are a mischaracterization of the ACC’s decision. The
24 Arizona Republic interviewed Mr. Kolevar following DOE issuance of the final designations.
25 The following passage was included in an article published by the Arizona Republic on October

26 ¹⁶ *Id.* at 57,000.

27 ¹⁷ *Id.*

28 ¹⁸ *Id.* at footnote 112 (emphasis added).

¹⁹ See Attachment A.

1 3, 2007:

2 Energy Department officials said Tuesday that Arizona regulators
3 had valid concerns when they rejected the so-called “Devers Palo
4 Verde 2” line in May, but that they don’t see the issue as Arizona
5 vs. California.

6 “If we continue down the path of each state looking at its own
7 needs, we will continue to run into reliability problems across the
8 region,” said Kevin Kolevar, the DOE assistant secretary for
9 electricity delivery and energy reliability. “It is simply not
10 tolerable to have the states in a region turning their backs on one
11 another. This is a regional issue, and we need regional
12 solutions.”²¹

13 The ACC cannot comment specifically about the project because it is the subject of pending
14 litigation.

15 However, the ACC provided substantial evidence to DOE about its contributions to the
16 regional transmission grid. As stated in its July 6, 2007 comments, Arizona law specifically
17 provides for the needs of other states in line siting matters. The ACC has a strong track record of
18 providing for the needs of Arizona and neighboring States. Mr. Kolevar’s implied accusations
19 are not supported by the facts of Case No. 130 nor any other line siting matter decided by the
20 ACC.

21 DOE did address the issue of conflicts between regional needs and the needs of States and
22 portions of States. DOE stated:

23 Given the increasingly interconnected nature of the transmission
24 grid and wholesale power markets, siting of electricity
25 infrastructure poses increasingly complex questions about how to
26 balance equitably all competing interests. Tensions can exist
27 between what is perceived to be best for a region as a whole versus
28 what is perceived to be best for an individual State or an individual
portion of one State.²²

Notwithstanding the above truism, designation of a corridor must be based on substantial
evidence.

Second, if any State is falling behind in its contributions to the regional grid, it is
California, not Arizona. The ACC provided relevant information in its July 6, 2007 comments.

²⁰ See Draft Designations at 25,838; and Final Designations at 57,026.

²¹ Attachment B at 2.

²² Final Designations at 57,021.

1 The ACC also notes that DPV2 was presented as an economic only project to the California
2 Independent System Operator (“CAISO”).²³ In the Final Designations, DOE noted:

3 The California Public Utilities Commission (CPUC) opposes
4 designation of a Southwest Area National Corridor that would
5 include all of southern California. However, CPUC notes that
6 since issuance of the May 7 notice, ACC has rejected an
7 application by Southern California Edison Company (SCE) to
8 construct the Devers-Palo Verde 2 (DPV2), which according to
9 CPUC, would increase transfer capability between the desert
10 Southwest and southern California....Thus, CPUC supports
11 designation of a National Corridor that is more narrowly targeted
12 than the draft Southwest Area National Corridor, such as a
13 National Corridor along the Arizona section of the proposed DPV2
14 route.²⁴

15 The ACC has and will continue to support projects that provide for the needs of a regional
16 transmission grid. The ACC is statutorily bound to weigh the public interest with the need for
17 economic, reliable and adequate (i.e. resource adequacy) facilities. The ACC applies its
18 obligations equally to ratepayers in Arizona and California. Economic only projects are possible
19 under Arizona law. But such projects must still satisfy the requirements of Arizona law, i.e. the
20 above balancing test for the public interest. Furthermore, nothing in EAct 2005 precludes
21 balancing the public interest in the manner required by Arizona law.

22 Finally, the ACC is not bound by any law to provide economic subsidies to California or
23 any other State. Congress did not intend EAct 2005 to allow one State to extort economic
24 subsidies from other States; particularly if economic subsidies would threaten the other State’s
25 need for economic, reliable and adequate electric transmission system.

26 The ACC respectfully requests DOE to rehear the above captioned matter. Grounds for
27 rehearing are set forth below and in the ACC’s July 6, 2007 filing and prior written
28 correspondence. The ACC further requests DOE to stay its decision issued on October 5, 2007 in
accordance with 16 U.S.C. § 825(I)(c).

29 **GROUND FOR REHEARING**

30 Neither the May 7, 2007 Notice, nor the October 5, 2007 Notice, presented substantial

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32 ²³ GET CITATION

33 ²⁴ Final Designations at 57,015.

1 evidence supporting the designation of a Southwest Corridor. Throughout the DOE process set
2 out in EPAct 2005, DOE has received information that inclusion of Arizona counties is contrary
3 to the intent of the act. Inclusion of Arizona counties is also contrary to the Department's own
4 rationale for its designation. The ACC sets out some of the grounds for rehearing below.
5 However, rehearing is also appropriate based on the ACC's prior written filings and
6 correspondence with the Department.

7
8 **I. DOE Erred by Failing to Adequately Consult with the ACC and the ACC's
Commissioners in Accordance with FPA Section 216(a).**

9 Federal Power Act Section ("FPA") 216(a)(1) provides, "[T]he Secretary of Energy . . . , in
10 consultation with affected States, shall conduct a study of electric transmission congestion." FPA
11 Section 216 does not include a definitions section and does not define "affected States."²⁵ FPA
12 Section 216(a)(2) further provides, "After considering alternatives and recommendations from
13 interested parties (including an opportunity for comment from affected States), the Secretary shall
14 issue a report, based on the study, which may designate . . . a national interest electric transmission
15 corridor."²⁶ The distinction between the two sections is ambiguous.

16 DOE acknowledged, "It is difficult to know which States are 'affected' until the
17 conclusions of the congestion study are known."²⁷ The ACC agrees. The Department also
18 explained, "[T]he most significant state of the entire process under FPA section 216(a) is the
19 National Corridor designation state."²⁸ Again, the ACC agrees. DOE accurately describes the
20 ambiguity of the process of "consultation." However, the Department failed to implement a
21 consultation process that complies with the intent of the statute.

22 In its Draft Designations, DOE described its outreach efforts to provide "opportunities for
23 input" from affected States. The ACC recognizes the significant efforts made by DOE.
24 Nevertheless, DOE did not consult with Arizona in compliance with the intent of FPA Section
25 216(a). The Department noted that the ACC and other interested parties " . . . argued that the

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27 ²⁵ 16 U.S.C. § 824p.

28 ²⁶ *Id.*

²⁷ Draft Designations at 25,850.

²⁸ *Id.*

1 Secretary should not designate any National Corridors without further consultation with affected
2 States.”²⁹ DOE did not adequately address the parties’ concerns. Instead, it merely argues,
3 “[T]here are practical difficulties in conducting the level of consultation that some may prefer in
4 the context of a study with the magnitude of the Congestion Study within the statutorily mandated
5 deadlines.”³⁰ The Department misinterpreted the ACC’s concerns.

6 In the Final Designations, DOE further addressed parties’ concerns that it did not
7 adequately consult with affected States.³¹ DOE concluded as follows:

8 [T]he Department believes that its consultation with States, as
9 documented in the May 7 notice, satisfied the requirements of FPA
section 216(a)(1)....

10 The Department has sought to ensure that it understands the
11 concerns of the States within the Mid-Atlantic Area National
12 Corridor and the Southwest Area National Corridor; that it has
13 accommodated those concerns where possible consistent with its
obligations under FPA section 216(a); and that it has fully
explained its position where it concludes that it cannot
accommodate those concerns.

14 [T]he Department engaged in additional consultation with each of
15 the affected States within the draft National Corridors....as
documented in Section I.C above.³²

16 The Department also repeated the practical considerations described in the Draft Designations.

17 In Section I.C of the Final Designations, the Department described its consultation as
18 follows:

19 The Department sent a letter to the Governor of each of the States
20 within the draft National Corridors....on April 26, 2007,
21 requesting an opportunity to consult with them on the draft
designations....Arizona: The Department met with staff from the
Governor’s Washington DC office on May 9, 2007.³³

22 In the Draft Designations, DOE states that it “held numerous meetings with State officials to
23 discuss the Congestion Study.”³⁴ In footnote 35, the Department listed the meetings. DOE held
24 conference calls with several public utilities commissions, including the California Public

25 _____
²⁹ *Id.*

26 ³⁰ Final Designations at 57,002.

27 ³¹ *Id.* at 57,001.

28 ³² Final Designations at 57,002.

³³ *Id.* at 56,996, footnote 18.

³⁴ Draft Designations at 25,850.

1 Utilities Commission (“CPUC”).³⁵

2 In Section 1.3 (Consultation with States and Regional Entities) of the Congestion Study,
3 the Department described steps taken for consultation prior to issuing the study on August 8,
4 2006. The Department stated:

5 It initiated a series of conference calls in December 2005 and
6 January 2006 with several electric reliability organizations,
7 regional transmission operators, electric trade organizations and
8 their members, *and the states* to describe DOE’s study plan and
9 request parties’ cooperation, comments, information, and
10 suggestions.³⁶

11 The Congestion Study did not identify the State representatives with which DOE consulted.

12 The ACC appreciates the practical difficulties of consulting with every State and the
13 District of Columbia. But practical difficulties of consulting with affected States are irrelevant
14 under EPC Act 2005. Consultation with affected States is mandatory. The ACC also appreciates
15 the Department’s consultations with the Governors of affected States. Such consultation provides
16 critical input from affected States. Notwithstanding such consultation, the intent of FPA Section
17 216(a) requires consultation with State siting authorities.

18 On February 27, 2007, the ACC notified the Department that it was the appropriate State
19 representative in Arizona for consultations in accordance with FPA Section 216.³⁷ The ACC did
20 not receive a response from the Department. On May 24, 2007, the ACC invited the Department
21 to participate in an open meeting at the ACC.³⁸ The ACC did not receive a response from the
22 Department. Given that the Department held a conference call with the CPUC, the ACC does not
23 understand why it did not receive responses to its requests.

24 FPA Section 216 is titled “Siting of Interstate Electric Transmission Facilities.” Section
25 216(b) directly addresses the role of State siting authorities. It also addresses limitations on
26 backstop siting authority given to the Federal Energy Regulatory Commission (“FERC”). In its
27 Final Designations, DOE stated, “FPA Section 216(a)(3) requires the Department to conduct the

28 ³⁵ *Id.* at footnote 35 (“CPUC, conference call, Sept. 20, 2006).

³⁶ *National Electric Transmission Congestion Study*, U.S. Department of Energy, 2006 at 6.

³⁷ Attachment C at 1.

³⁸ Attachment D at 1.

1 congestion study and issue the report in consultation with any appropriate Regional Entity.”³⁹

2 FPA Section 216(a)(3) refers to entities described in FPA Section 215 on electric reliability.

3 Obviously, the context of both sections of the statute suggests that “consultation” is
4 necessary with all regional entities and State representatives with appropriate expertise. State
5 siting authorities have technical expertise necessary for the consultation process created by FPA
6 Section 216. Consultation with the Governors of affected States is not a substitute for
7 consultation with State siting authorities.

8 The ACC appreciates the Department’s responses to some of its written comments in the
9 Final Designations. But the Department only responded to the ACC’s written comments provided
10 by its legal counsel. Even though DOE responded to individual comments throughout its Final
11 Designations, it did not respond to comments made by individual ACC Commissioners. The
12 ACC Commissioners are responsible for determining the public interest in line siting matters in
13 Arizona.⁴⁰ Failure to consult with the Commissioners or respond to the Commissioners’ concerns
14 violates the intent of FPA Section 216.

15 Additionally, addressing written comments by the ACC’s legal counsel is not adequate
16 consultation. The DOE has not alleged that the term “consultation” is ambiguous. Therefore, the
17 term should be given its common meaning. Black’s Law Dictionary defines “consultation” as an
18 “act of consulting or conferring.”⁴¹ Webster’s New Collegiate Dictionary defines “consulting” as
19 “providing professional or expert advice.”⁴² Webster’s New Collegiate Dictionary defines
20 “confer” as “to come together to compare views or take counsel.”⁴³

21 DOE erred by not adequately consulting the ACC, and the ACC’s Commissioners. The
22 steps taken by the Department show an understanding of what is necessary for consultation. DOE
23 took those steps with other State citing authorities. The failure of the Department to consult with
24 the ACC is discriminatory and in violation of FPA 216.

25 _____
³⁹ Final Designations at 56,993.

26 ⁴⁰ See Arizona Revised Statute (“A.R.S.”) § 40-360.07(B). See generally, Arizona Constitution
27 § 15.

27 ⁴¹ GET CITATION

28 ⁴² GET CITATION

⁴³ GET CITATION

1 DOE also stated that identification of “affected” States could not occur until issuance of
2 the Draft Designations. The ACC agrees. But the ACC disagrees that consultation with affected
3 States after the Draft Designations was discretionary. FPA Section 216(a)(1) requires
4 consultation with affected States. If affected States were not identified until May 7, 2007, DOE
5 was required to consult with them after that date. The ACC formally requested such consultation
6 on two occasions. DOE did not act on either request. Therefore, DOE did not comply with FPA
7 Section 216(a)(1).

8 The ACC respectfully requests the Department to stay its Final Designations. The
9 Department should consult with State siting authorities in all affected States, including the ACC.
10 DOE should also consult with the ACC’s publicly elected officials. Designation of final corridors
11 should only occur after consultation with State siting authorities in affected States.

12
13 **II. DOE Erred by Basing its Designation for the Southwest Corridor on Contractual**
14 **Congestion Rather than Physical Congestion; and by Failing to Adequately Analyze**
15 **Physical Congestion.**

16 In its Final Designation, DOE claims that contractual congestion is sufficient to designate
17 a corridor. DOE defined congestion as a first step in its analysis. DOE explained:

18 In the Congestion Study, the Department defined “congestion” as
19 the condition that occurs when transmission capacity is not
20 sufficient to enable safe delivery of all scheduled *or desired*
21 *wholesale electricity transfers* simultaneously. This definition was
22 based on common usage within electric system operations.⁴⁴

23 The Department provided only two sources in support of its definition.⁴⁵ DOE further argued,
24 “Whenever there is congestion on a transmission path, there is simply not enough transmission
25 capacity to accommodate all the desired power transactions.”⁴⁶ Finally, DOE reasoned, “Given
26 the definition of “congestion,” *any congestion* prevents some users of the transmission grid from
27 completing their preferred transactions.”⁴⁷

28 DOE’s analysis is not based on substantial evidence. There is no common usage of the

44 Final Designations at 57,003.

45 *Id.* at footnote 62.

46 *Id.* at 57,004.

47 *Id.* at 57,003 (emphasis added).

1 term “congestion.” For example, DOE noted, “TEPPC⁴⁸ questions whether the Western Area
2 Power Administration (WAPA) data on denial of transmission service requests cited in the May 7
3 notice reveal an actual lack of physical capacity as contrasted to a contractual issue.”⁴⁹ The
4 CPUC agreed that the data on physical congestion did not support designation.⁵⁰

5 DOE’s response was inadequate. DOE stated, “The WAPA data questioned by TEPPC
6 are but one category of data used in the May 7 notice to establish the presence of persistent
7 congestion.”⁵¹ In its July 6, 2007 comments, TEPPC cited three categories of data used by DOE
8 to identify congestion: 1) data provided by Western Congestion Analysis Task Force, dated May
9 8, 2006; 2) analyses by CAISO; and 3) denied transmission requests from WAPA.⁵²

10 The ACC acknowledges that the data may be relevant, but disagrees that they represent
11 substantial evidence. It is also noteworthy that the CAISO footprint is a reorganized market, with
12 market clearing prices. WECC includes cost-of-service markets. Therefore, WECC is in a better
13 position to analyze congestion more broadly than the data used by DOE allows.

14 TEPPC questions whether the data show a clear pattern of physical congestion. WECC is
15 an electric reliability organization as defined by FPA Section 215(a)(2).⁵³ Physical congestion is
16 a far greater concern for reliability than contractual congestion. TEPPC recommends “a clear and
17 concise definition of congestion that includes a method for measurement.”⁵⁴ The ACC agrees.
18 Without a sufficient, relevant and reliable definition of congestion, designations of corridors are
19 not based on substantial evidence.

20 Moreover, neither physical nor contractual congestion can be analyzed in a vacuum. State
21 energy, regulatory and environmental policy choices have significant effects on both physical and
22 contractual congestion. In competitive markets, contractual congestion is transitory by definition.
23 Eventually, market participants will bid up prices where they are low and any contractual

24 ⁴⁸ The Transmission Expansion Policy Planning Committee (“TEPPC”) is a committee of the
25 Western Electricity Coordinating Council (“WECC”).

26 ⁴⁹ *Id.* at 57,015.

27 ⁵⁰ *Id.*

28 ⁵¹ *Id.* at 57,016.

⁵² TEPPC’s July 6, 2007 comments at 2.

⁵³ See also 16 U.S.C. § 824o.

⁵⁴ TEPPC’s July 6, 2007 comments at 2.

1 congestion will be eliminated. Additionally, contractual congestion may be the result of state
2 policy choices.

3 Therefore, designation should be based on physical congestion rather than contractual
4 congestion. Obviously, contractual congestion may be the result of physical congestion. In
5 competitive markets, persistent price differentials will eventually result in new transmission
6 projects. The same is probably true for cost-of-service markets. Accordingly, persistent physical
7 congestion is a necessary showing for designation of a corridor. In order to identify persistent
8 physical congestion, DOE should reconsider its definition of “congestion.”

9 DOE provided a definition of “constraints” in its Congestion Study. DOE stated, “The
10 term *transmission constraint* may refer either to a piece of equipment that limits electricity flows
11 in physical terms, or to an operational limit imposed to protect reliability.”⁵⁵ Inexplicably, DOE
12 did not further analyze transmission constraints for the purpose of designating corridors. In its
13 Draft Designations, DOE explained:

14 As the Department is not issuing any draft National Corridors
15 today based on the existence of constraints in the absence of
16 persistent congestion, it is unnecessary in this notice to reach the
17 question of what type of information that would be required to
18 demonstrate that a constraint is hindering the development or
19 delivery of a generation source that is in the public interest.⁵⁶

20 The Department’s explanation demonstrates an abuse of discretion in collecting
21 substantial evidence prior to designation. TEPPC and WECC do not believe DOE collected
22 sufficient evidence on congestion. FPA Section 216 also requires an analysis of both congestion
23 and constraints.

24 Not all constraints require a remedy. Not all congestion, even persistent congestion,
25 requires a remedy. The ACC disagrees with DOE’s claim that a designation is not a remedy.⁵⁷
26 Some constraints or congestion could be the result of (1) efficient market choices; and (2)
27 efficient state siting processes that fairly balance stakeholder interests. The standard of
28 substantial evidence requires a more complete analysis, including identification of the cause(s) of

⁵⁵ Congestion Study at 3 (emphasis in the original).

⁵⁶ Draft Designations at 25,844 at footnote 15.

⁵⁷ GET CITATION

1 constraints or congestion.

2
3 **III. DOE Erred by Failing to Consider the Costs of Externalities, Including But Not Limited to, State Energy, Regulatory and Environmental Policy Choices.**

4 In its Final Designations, DOE states:

5 [T]he Department concludes that Congress intended the
6 Department to consider the effects on consumers beyond increases
7 in the delivered price of power, some of which effects may not be
8 easily monetized.⁵⁸

9 The ACC agrees with the above interpretation. However, DOE did not discuss or analyze
10 whether effects, which may not be easily monetized, influenced its decision to designate. Instead,
11 DOE appears to only be addressing the issue of whether “the costs of relieving congestion are less
12 than the costs of the congestion itself.”⁵⁹

13 The ACC agrees with commenters who argue that DOE should not designate a corridor if
14 the costs of relieving the congestion are less than the costs of the congestion. However, the
15 ACC’s July 6, 2007 comments addressed a much more significant issue. DOE appears concerned
16 about differences in commodity prices on either side of a constraint. But it fails to consider the
17 causes of price differentials. The ACC argued that the differences in costs are misleading
18 because they do not include the cost of externalities. The ACC is particularly concerned about
19 the costs of externalities related to State energy, regulatory, and environmental policy choices.

20 In its Final Designations, DOE states, “The Department concludes, based on its technical
21 expertise and *policy judgment*, that it is reasonable to interpret the phrase “congestion that
22 adversely affects consumers” to include congestion that is persistent.”⁶⁰ DOE did not address the
23 ACC’s concerns. The data upon which DOE relies is meaningless if it is not interpreted within
24 the context of non-monetized costs.

25 In both its Draft and Final Designations, DOE discussed its use of historical locational
26 marginal prices (“LMPs”) to identify persistent congestion.⁶¹ In its Draft Designations, DOE
27 discussed use of cost differentials for the Southwest Corridor. CAISO does not yet have an LMP

28 ⁵⁸ Final Designations at 57,015; *see also Id.* at 57,004.

⁵⁹ *Id.*

⁶⁰ *Id.* at 57,004 (emphasis added).

⁶¹ *See e.g. Id.* at 56,996.

1 congestion management system. Therefore, DOE relied on other cost differentials to demonstrate
2 persistent congestion.

3 In particular, DOE relied on other CAISO measures.⁶² DOE's reliance on California data,
4 and lack of any reference to Arizona data, is unduly discriminatory. Additionally, the data fails to
5 include the cost of relevant externalities. In its July 6, 2007 comments, the ACC identified
6 differences in non-monetized externalities between Arizona and California.

7 As we stated in our comments, differences in LMPs are appropriate if they reflect non-
8 monetized externalities. DOE erred by not considering the causes of price differentials over
9 specific constraints. It also erred by not analyzing the costs of non-monetized externalities.

10 **IV. DOE Erred by Finding the Terms “Corridor,” “Alternatives and Recommendations**
11 **from Interested Parties,” and “Geographic Areas Experiencing Electric**
12 **Transmission Capacity Constraints or Congestion” are Ambiguous; and by Using a**
13 **“Source-and-Sink Approach” to designate the Southwest Corridor.**

14 DOE seeks to justify its “source-and-sink approach” on findings of ambiguity for various
15 terms in FPA Section 216. The terms are not ambiguous. DOE's analysis is a substitute for the
16 findings intended by Congress. Congress intended DOE to designate corridors only upon a
17 showing of substantial evidence. Substantial evidence is required for the considerations in FPA
18 Section 216(a)(4). DOE's “source-and-sink approach” is unduly discriminatory because it creates
19 a bias for the location of transmission lines and generation.

20 In its Final Designations, DOE alleges:

21 The term “geographic area experiencing electric transmission
22 capacity constraints or congestion that adversely affects
23 consumers” envisions an area that encompasses the load being
24 adversely affected by congestion and the constrained transmission
25 lines causing such congestion, but the statute is ambiguous with
26 regard to the precise scope of the area. The Department believes
27 that its source-and-sink approach to delineating the boundaries of
28 the draft Southwest Area National Corridor represents a reasonable
29 interpretation of this ambiguous term.⁶³

30 DOE further claims the term “corridor” is ambiguous. In its Draft Designations, DOE alleges:

31 [T]he statute does not define the term “corridor.” While this term
32 is commonly understood to refer generally to some sort of path

33 ⁶² Draft Designations at 25,916.

34 ⁶³ Final Designations at 57,017.

1 between different areas, the specific meaning of the term in this
2 context is ambiguous. After careful consideration of the overall
3 purpose and effect of [FPA Section 216(a)], as well as comments
4 received, the Department has concluded that, *while there may be
5 circumstances where a project-based approach would be
6 appropriate*, in general the Department will use a source-and-sink
7 approach to defining National Corridors.⁶⁴

8 Finally, DOE asserts, “the phrase ‘alternatives and recommendations from interested parties’ as
9 used in FPA Section 216(a)(2) is ambiguous.”⁶⁵

10 For the latter finding, DOE misinterprets parties’ concerns about DOE’s failure to
11 consider non-transmission alternatives. More importantly, a finding of ambiguity would render
12 the statutory phrase meaningless. The ACC recognizes the difficulty of weighing all of the
13 evidence on the draft designations. But DOE cannot avoid its statutory obligations by finding
14 ambiguity when there is contradictory evidence.

15 DOE’s findings of ambiguity for “corridors” and “geographic areas experiencing
16 transmission capacity constraints or congestion” are not consistent with the intent of Congress.
17 DOE leverages its findings to justify its source-and-sink approach. As discussed below, it also
18 leverages the findings to identify boundaries for corridors. The source-and-sink approach is
19 fundamentally flawed.

20 DOE argues that the approach does not create a bias for transmission solutions. DOE
21 claims that designation only provides for a federal forum for review of projects.⁶⁶ DOE
22 consideration of the “benefits” of designation is incomplete. If benefits are considered, it is an
23 abuse of discretion to ignore the costs.

24 Inappropriate designations, or designations not based on substantial evidence, impose an
25 unfunded mandate on affected States. Such designations also could be unduly discriminatory.
26 Because of designations, affected States must defend their siting decisions in federal forums.
27 EAct 2005 did not provide compensation to affected States to participate in federal forums.

28 Designations also could be discriminatory for two reasons. First, a State’s siting process
and decision making could fairly balance all stakeholder interest. Congress intended EAct 2005

⁶⁴ Draft Designations at 25,848 (emphasis added).

⁶⁵ Final Designations at 57,010.

⁶⁶ *Id.* at

1 to create a very limited federal safety net. If a safety net is used when it is not needed, DOE's
2 designation would be unduly discriminatory for the affected State. Second, a source-and-sink
3 approach creates a bias against source areas. Source areas would be forced to provide both
4 transmission and generation to sink areas. If sink areas are not contributing their fair share of
5 resources to the regional grid, source areas would be subsidizing them.

6 DOE conclusively dismisses these concerns:

7 A number of the comments seem premised on the assumption that
8 designation of a Southwest Area National Corridor would create a
9 bias in favor of long transmission lines running the full length of
10 the Corridor, and in particular long transmission lines to generation
11 located in Arizona. The Department regards such an assumption
12 as unfounded.⁶⁷

13 The CPUC's comments on the Draft Designations demonstrate that DOE's conclusion is wrong.
14 The CPUC wants a project specific corridor. For the CPUC, the only purpose of a Southwest
15 Corridor is for California to access cheaper power at the Palo Verde Hub. In its July 6, 2007
16 comments, the ACC provided information on why prices at the Palo Verde Hub are supportive of
17 a designation.

18 **V. DOE Erred by Finding that the Arizona Counties Could Increase Supply
19 Diversification in southern California; and Have Substantial Amounts of Existing,
20 Underused Generation Capacity.**

21 As stated above, DOE identified three counties in Arizona as a source area. DOE asserts
22 that the counties include locations of generation and transmission. It explains that Arizona
23 generation and transmission could relieve congestion in southern California. Specifically, DOE
24 stated:

25 The results of this analysis was the identification of two categories
26 of source areas: (1) The closest locations with substantial amounts
27 of existing, underused generation capacity separated from the
28 identified sink area by *one or more constraints identified as
causing congestion* adversely affecting consumers; and (2) the
closest locations with the potential for substantial development of
wind, geothermal, or solar generation capacity separated by *one or
more of the constraints identified as causing congestion* adversely
affecting consumers.⁶⁸

28 ⁶⁷ *Id.* at 57,019.

⁶⁸ *Id.* at 57,017 (emphasis added).

1 The ACC addressed both categories in its July 6, 2007 filing. The ACC will not repeat
2 those comments again in this Application for Rehearing. But several issues bear repeating. For
3 the first category, existing, underused generation capacity is a snapshot at a single point in time.
4 The generation capacity identified by the Department will not be underused at the relevant time.
5 By the time a project in the Southwest Corridor could be sited by FERC and constructed by a
6 project sponsor, the unused capacity will be necessary for local uses.

7 For the second category, the ACC noted that both California and Arizona have aggressive
8 renewable portfolio standards. The ACC also noted that more renewable energy projects are
9 being located in California than in Arizona. Therefore, the closest location with the potential for
10 development of renewable energy projects is California. DOE has not presented substantial
11 evidence that Arizona is a location with potential for substantial development of renewable
12 energy. Instead, the ACC provided information that Arizona is unlikely to develop enough
13 projects to satisfy its own portfolio requirements.

14 The ACC must reiterate one final issue already discussed in its July 6, 2007 comments.
15 The unused capacity cited by DOE is gas-fired generation. Gas-fired generation is being retired
16 in California. Access to gas-fired generation in Arizona would not increase supply diversification
17 in California as contemplated by Congress. Generation in Arizona is only necessary for southern
18 California because gas-fired generation is being retired in that State.

19
20 **VI. DOE Erred by Designating the Boundaries of Corridors Using County Boundaries;
and by Designating the Southwest Corridor for a 12-Year Period.**

21 The ACC addressed the first issue in Section IV above. Nevertheless, a few additional
22 comments are necessary. In its Final Designations, DOE eliminated Clark County from the
23 Southwest Corridor. The ACC offers no opinion on the exclusion of Clark County. However, in
24 its Draft Designations, DOE identified the Mead Hub as a potential source of generation for
25 southern California.

26 The data relied upon by DOE shows different trends for the Palo Verde Hub and the Mead
27 Hub. Congestion and congestion revenues appear to be decreasing for the Palo Verde Hub. On
28

1 the other hand, congestion and congestion revenues appear to be increasing for the Mead Hub.⁶⁹
2 The disparate treatment of the Palo Verde Hub and the Mead Hub is unduly discriminatory to
3 Arizona. DOE claims that its designations are not project based. Yet the only current project
4 identified is DPV2. DOE has not identified substantial evidence to support inclusion of the three
5 Arizona counties.

6 The ACC also agrees with many commenters' concerns about using county boundaries to
7 designate the boundaries of the Southwest Corridor. For example, Governor Napolitano pointed
8 out that "Arizona counties are some of the largest in the country."⁷⁰ DOE's use of county
9 boundaries results in overly broad corridors. DOE's argument that corridors must be broad to
10 allow FERC to consider alternates⁷¹ is not persuasive. As previously discussed, a designation
11 imposes unnecessary costs on affected States. Therefore, the boundaries should be drawn
12 narrowly.

13 DOE also states that county boundaries create certainty⁷² and are an easy way to identify
14 boundaries for designating corridors.⁷³ The ACC agrees with many commenters who argue that
15 broad boundaries create uncertainty.⁷⁴ DOE's choice of county boundaries should not be based
16 on the ease of implementation.

17 DOE's choice of county boundaries also discriminates against affected States that have
18 counties large in geographic area. The costs of defending State siting decisions at FERC and in
19 federal courts are significant. Affected States with large counties should not be subjected to
20 greater federal preemption than States with smaller counties.

21 Finally, the duration of the Southwest Corridor is unreasonable and arbitrary. The
22 designation is the first of its kind. Analytical processes and data gathering are very likely to
23 improve with the next Congestion Study. Therefore, even if subsequent designations have longer
24 durations, the first designation should be of short duration. DOE's response is not adequate.

25 ⁶⁹ Draft Designations at 25,915-25,916, Tables IX-1 and IX-2.

26 ⁷⁰ Final Designations at 57,017.

27 ⁷¹ *Id.* at 56,994.

28 ⁷² *See e.g. Id.* at 57,008.

⁷³ GET CITATION FROM FINAL DESIGNATIONS

⁷⁴ GET CITATION FROM FINAL DESIGNATIONS

1 DOE claims that termination of a designation could affect projects pending at the time.⁷⁵ DOE
2 could terminate an existing designation and grandfather projects still at FERC.

3
4 **VII. DOE Erred by Finding that the Term “Constraints or Congestion that Adversely
Affects Consumers” is Ambiguous.**

5 In its Final Designations, DOE found that the term “constraints or congestion that
6 adversely affects consumers” is ambiguous.⁷⁶ DOE assumes that persistent congestion adversely
7 affects consumers. DOE defined the terms “constraints” and “congestion” in its Congestion
8 Study. Thus, DOE appears to claim that “adversely affects consumers” is ambiguous. DOE is
9 attempting to avoid providing substantial evidence on adverse effects. DOE’s only attempt to
10 identify adverse effects is provided in Table IX-3. DOE argues that “buyers must rely on power
11 from less-preferred generating sources.”⁷⁷

12 Although the term “adversely affects consumers” requires some interpretation, it is not
13 ambiguous. The only issues that must be decided are the quantity and nature of adverse effects
14 requiring a designation. DOE recognizes the issues, but does not adequately address them. DOE
15 identified two types of adverse effects: (1) “congestion results in parts of the transmission
16 system being so heavily loaded that grid operators have fewer options for dealing with adverse
17 circumstances or unanticipated events”; and (2) “as congestion increases consumers are exposed
18 to increased risk of blackouts, forced interruptions of service, or other grid-related disruptions.”⁷⁸

19 In the Draft Designations, DOE received the following comments from the CPUC:

20 CPUC noted that one of the studies provided to DOE concluded,
21 based on physical flow data from 1999 through 2005, that Arizona-
22 to-southern California was not among the areas found to be
23 experiencing heavy path usage. CPUC noted that the year 2008
24 simulations cited in the Congestion Study as indicating high
economic significance of congestion from Arizona into southern
Nevada and southern California actually show that the highest
simulated congestion costs occur on lines from Arizona into
southern Nevada.⁷⁹

25 DOE’s response was evasive. It stated, “the Department believes that the totality of

26 ⁷⁵ *Id.* at 57,021.

27 ⁷⁶ *Id.* at 56,995.

28 ⁷⁷ Draft Designations at 25,916.

⁷⁸ Final Designations at 57,004.

1 circumstances in southern California warrant its identification as a Critical Congestion Area.”⁸⁰

2 As discussed in Section VIII below, the data cited by DOE do not rise to the level of
3 substantial evidence. DOE identified different types of adverse effects on consumers. DOE’s
4 claim of ambiguity should not be not be an “out” for identifying substantial evidence. DOE
5 should identify portions of the grid that have so few resource options that reliability is
6 jeopardized. DOE should identify evidence showing a risk of grid-related disruptions. Finally,
7 DOE should provide all relevant information it has related to potential adverse effects on
8 consumers.

9
10 **VIII. DOE Erred by Finding that Persistent Congestion is Sufficient Evidence for a**
11 **Determination that Constraints and Congestion are Adversely Affecting Consumers;**
12 **and Evidence Cited by DOE does not Satisfy the Requirements of FPA Section**
13 **216(a)(4).**

14 In its Final Designations, DOE stated, “FPA section 216(a) gives the Secretary the
15 discretion to designate a National Corridor upon a showing of the existence of persistent
16 congestions, as persistent congestion has adverse effects on consumers.”⁸¹ The data relied upon
17 by the Department neither demonstrates persistent congestion, nor demonstrates adverse effects
18 on consumers. DOE’s own rationale appears to assume that persistent congestion causes adverse
19 effects on consumers. Even if DOE could demonstrate persistent congestion, FPA Section
20 216(a)(4) requires more before a designation can be made.

21 In its Draft Designations, DOE stated, “the Department has documented the existence of
22 persistent congestion into and within the Southern California Critical Congestion Area, as well
23 as the constraints causing that persistent congestion.”⁸² The documentation does not provide
24 substantial evidence of the existence of persistent, physical congestion. Nor does it provide
25 substantial evidence of adverse effects. DOE argues that “[t]he Palo Verde and Mead branch
26 groups were the most congested in 2006 with binding hours of 15 and 13 percent respectively.”⁸³

27 ⁷⁹ Draft Designations at 25,860.

28 ⁸⁰ *Id.*

⁸¹ Final Designations at 56,995.

⁸² Draft Designations at 25,916.

⁸³ *Id.* at 25,915 (Apparently, CAISO identifies the branch from the Palo Verde Market Hub as PALOVRDE_BG. *See e.g.* Table IX-1.).

1 The percentages cited are not substantial. Accordingly, the ACC disagrees that 15%
2 represents congestion that requires a designation. DOE only included historical data for the
3 years 2004-2006. Although, DOE never defined “persistent,” three years of data is insufficient.
4 Importantly, the term “persistent” does not appear in FPA Section 216. Nevertheless, Webster’s
5 New Collegiate Dictionary defines “persistent” as “existing for a long or longer than usual time
6 or continuously.”⁸⁴

7 The data in Table IX-1 do not satisfy the definition of persistent. For the Day-Ahead
8 Market, the Palo Verde branch group was congested for the following percentages of hours: (1)
9 22% for 2004; (2) 23% for 2005; and (3) 15% for 2006. For the Hour-Ahead Market, the Palo
10 Verde branch group was congested for the following percentages of hours: (1) 7% for 2004; (2)
11 8% for 2005; and (3) 8% for 2006.⁸⁵ None of the data indicates there is persistent physical
12 congestion. Rather, the data indicate that physical congestion is declining on the Palo Verde
13 branch group.

14 Congestion revenues collected by CAISO do not support a conclusion for contractual or
15 physical congestion. Again, DOE only presents data for 2004-2006. But the data indicate the
16 opposite of DOE’s conclusion. In Table IX-2, congestion revenues for the total of the Day-
17 Ahead Market and the Hour-Ahead Market were: (1) \$21,713,209 for 2004; (2) \$19,771,012 for
18 2005; and (3) \$17,070,548 for 2006.⁸⁶ DOE did not include enough information to evaluate
19 whether the congestion revenues were material for the size of the relevant markets. Again, none
20 of the data indicates there is persistent contractual congestion. Rather, the data indicate that
21 contractual congestion is declining on the Palo Verde branch group.

22 DOE did provide other CAISO information on congestion revenues. DOE did not rely on
23 that information for designation. The information puts congestion revenues for the Palo Verde
24 branch group into perspective. DOE quoted CAISO’s 2006 Annual Report on Market Issues and
25 Performance:

26 Total estimated intra-zonal congestion costs for 2004, 2005, and

27 ⁸⁴ GET CITATIONS

28 ⁸⁵ Draft Designations at 25,915, Table IX-1.

⁸⁶ *Id.* at 25,916, Table IX-2.

1 2006 were \$426 million, \$222 million, and \$207 million,
2 respectively. These costs have been declining over the period due
3 to installation of appropriately located generation and transmission
4 upgrades.⁸⁷

5 The data demonstrates that the problem is not persistent physical constraints or congestion
6 between Palo Verde and southern California. The problem is within California.

7 DOE also points to capacity reservations denied by WAPA to demonstrate persistent
8 congestion. The data in Table IX-3 is for path SP15 in California.⁸⁸ The path from Palo Verde
9 to southern California is path 49.⁸⁹ The data does not support a finding of persistent physical or
10 contractual congestion from Palo Verde to southern California.

11 FPA Section 216(a)(4) sets out considerations for designation. A mere showing of
12 persistent congestion does not satisfy FPA Section 216(a)(4). DOE also failed to provide
13 substantial evidence on any of the considerations for designation.

14 For FPA Section 216(a)(4)(A), the data in Table IX-2 do not demonstrate lack of adequate
15 or reasonably priced electricity. DOE relies on the fact that transmission customers cannot
16 accomplish all of their preferred transactions. No competitive or regulated markets guarantee
17 market participants will accomplish all of their preferred transactions.

18 For FPA Section 216(a)(4)(B), DOE failed to provide substantial evidence that economic
19 growth may be jeopardized by limited sources of energy. DOE pointed to the size of
20 California's economy and its growth rate.⁹⁰ In the ACC's July 6, 2007 comments, similar data
21 was provided for Arizona and Maricopa County. Arizona will soon face its own resource
22 adequacy problems.⁹¹ DOE did not cite any evidence that the economic growth in southern
23 California may be jeopardized by limited sources of energy. It only speculated about the
24 possibility. Speculation is not substantial evidence.

25 Furthermore, DOE did not identify any advantages for developing new sources of energy
26 in Arizona compared to California. More renewable energy is being developed in California

26 ⁸⁷ *Id.* at 25,916, footnote 103.

27 ⁸⁸ *Id.* at Table IX-3.

28 ⁸⁹ *Id.* at 25,915.

⁹⁰ GET CITATION

⁹¹ GET CITATION

1 than Arizona.⁹² Finally, DOE did not provide substantial evidence related to FPA Sections
2 216(a)(4)(C)-(E).

3
4 **IX. DOE Erred by Not Adequately Analyzing Adverse Effects on Consumers to
Determine Whether Congestion or Constraints Adversely Affect(s) Consumers**

5 The final ground for rehearing is also addressed in Section VII above. DOE's
6 identification of adverse effects is one of the most debated issues by commenters. DOE states:

7 [T]he term "congestion that adversely affects consumers" in FPA
8 Section 216(a)(2) does not dictate a two-step analysis---first to
9 determine the level of congestion and second to determine the
specific resulting adverse effects---before a National Corridor
designation may be made.⁹³

10 DOE's interpretation of the statutory language renders "adversely affects consumers"
11 meaningless.

12 DOE's interpretation is contrary to the rules of statutory construction. In its July 6, 2007
13 comments, the ACC also provided detailed information and analysis on evidence related to
14 adverse effects. DOE's interpretation is not based on substantial evidence. It is simply a way to
15 minimize its statutory obligations. DOE should gather evidence and analyze adverse effects as
16 described in the ACC's July 7, 2007 comments.

17
18 **CONCLUSION**

19 The ACC respectfully requests the Secretary to rehear the above captioned matter. Upon
20 rehearing, DOE should make findings of fact consistent with the ACC's Application. Additionally,
21 DOE should not designate a Southwest Corridor that includes the Arizona counties of La Paz,
22 Maricopa, and Yuma. The ACC further requests DOE to immediately stay its October 5, 2007
23 decision in accordance with 16 U.S.C. § 825(I)(c). Finally, the ACC requests that the stay remain in
24 place until DOE issues a final decision on rehearing.

25
26 RESPECTFULLY SUBMITTED this ____ day of November, 2007.

27
28 _____
⁹² GET CITATION

⁹³ Final Designations at 57,003.

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