

**Before the
United States House of Representatives
Subcommittee on Domestic Policy
For the
Committee on Oversight and Government Reform**

Regarding

**Implementation of Section 1221 of the Energy Policy Act of 2005
Concerning Federal Government Authority for Electric Transmission Line Siting**

Testimony of

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Good afternoon Chairman Kucinich, Chairman Waxman, Ranking Member Issa, Ranking Member Davis, and members of the Subcommittee.

My name is Paul D. Tonko and I am a Member of the New York State Assembly. I represent the 105th Assembly District, which encompasses Schenectady and Montgomery Counties in New York. I am also the Chairman of the Assembly Energy Committee, a position I have enjoyed serving for the past 15 years.

In the 15 years that I have served as Energy Committee Chairman, few issues have given rise to the concern and sense of “disempowerment that the potential exercise of federal preemption regarding transmission line siting has created. At its core, this sense of loss of local power strikes directly to public fears that the voices of individual citizens will be lost to corporate interests; that profit motive will trump the rights of individuals to enjoy private property. There is little confidence, at this moment, that federal government officials – who are far removed from the physical and socio-economic location of local proposals – will be able to fully appreciate the environmental, economic and social impacts of long-range, high-voltage transmission lines in local communities.

Further aggravating this situation is that transmission line proposals, with their wide-ranging environmental and economic impacts, may prove to be disruptive of the state government’s attempts to implement broad energy policy. Federal government officials who have not been made aware of the full complement of state energy policies and programs, and their intricate interrelationship – may unwittingly, or possibly purposefully, disrupt progress

towards achievement of those goals, possibly to the sole economic benefit of the corporation seeking that federal government intervention.

The purpose of my testimony today is to support a reversal of those provisions of the Energy Policy Act of 2005 which permit the Federal Energy Regulatory Commission (“FERC”) to finally determine the siting of electric transmission lines. This newly-conferred regulatory power may hold hostage the ability of states to craft and implement energy policy best suited to the state’s needs and policy goals. What is needed at the state level is the freedom of each state to take a holistic approach to energy policy – an approach which looks at all the supply-side and demand-side options available – without fear that such policies, programs, and decision-making could be trumped or thwarted by private interests seeking alternate government intervention.

New York is certainly one of the battleground states in this particular arena. Eastern New York State was identified as a Critical Congestion Area in the Department of Energy National Electric Transmission Congestion Study of August 2006. Also identified in that study was an Upstate New York to Downstate New York direction of increased energy flows needed to reduce the congestion in the Critical Congestion Area. New York has also been host to one specific proposal which had sought early designation as a National Interest Electric Transmission Corridor, which would then trigger the federal preemption provisions of Section 1221.

What should be made clear to all federal officials who could impact this policy is that local officials and utility companies have been aware of the existence of electric transmission congestion within New York for a very long time. The constraint at a major transmission interconnection outside of Utica has long been known as a bottleneck for moving power from upstate sources to the load in the metropolitan New York City area. This bottleneck is the result of utility systems design as it developed over time. The primary reason why this constraint was never fully alleviated was due to the cross-incentives which existed: Upstate utilities, which owned the systems, were reluctant to make investment in their systems which would only serve to benefit another utility’s downstate customers. Nevertheless, the reliability of the electric systems in New York has not suffered as a result of this particular congestion. The electric systems developed and expanded to meet the needs of New York energy consumers taking into account the amount of power that could be moved along existing lines. Local reliability rules, standards, and even reliability governing bodies have all been put in place to ensure that the system delivers reliable energy services.

In the early era of energy deregulation, and prior to the issuance of the August 2006 DOE Congestion Study, a market-based proposal emerged that would construct an electric transmission line which would, in part, alleviate the downstate New York congestion. Ultimately, this project was not constructed. However, the withdrawal of the project for consideration was not the result of a withholding of the State of New York to render a determination on the proposal, a decision by the state to “overburden” the project’s economic viability due to mitigation requirements, or a denial of the proposal through an administrative review procedure, all of which are reasons that FERC has indicated it would consider disputes about.

In response to a second merchant transmission line proposal, the Assembly Energy Committee held hearings in the affected areas in response to local concerns regarding this proposal. At that hearing the Committee received testimony from your colleague Maurice Hinchey, who was able to speak authoritatively on the dynamics at the federal level which resulted in the provisions of the Energy Policy Act which you are now examining. In that testimony, Congressman Hinchey reiterated his concerns that provisions of the new act were intended to erode state and local jurisdiction over proposed projects, stating that

There has been a very unwholesome affiliation between the regulators and ...those to be regulated. The arms length relationship has essentially disappeared and ...much of [the Energy Policy Act] was written by the regulated community, by the electric industry. This has ... unfortunately resulted in the rerouting of complex regulatory rules without legislative action, sufficient oversight or public understanding. (Transcript, Assembly Public Hearing dated August 17, 2006, pg. 16, lines 2-11.)

Thus, it appears that these federal policies may not have been drafted with the protection of the public interest in mind.

In addition, New York, more than any other state, bore the majority of the burden of the Blackout of August 2003. That service disruption affected virtually the entire state. Due to the nature of the outage, restoration of service in the critical New York City system took over 24 hours, resulting in billions of dollars in lost economic activity. The service disruption traveled across the state along the bulk transmission system, entering the state from a relatively small interconnection in what is known as the “Lake Erie Loop.” The Assembly Energy Committee conducted extensive hearings in the aftermath of this event, seeking explanations for the cause of the event as well as looking at options to make the system more robust and to avoid another catastrophe. In those hearings, the Committee learned that a divergence of opinion existed. One advocacy side stated that increased transmission could provide alternate routes for energy, and thereby lessen the effect of system disturbances. Another advocacy side stated just the opposite: that expanded transmission systems could create an increased vulnerability to ever-more remote disturbances. Despite the divergence of opinion, what became clear is that any expansion of the transmission system – whether wholly intra-state or interstate – must balance all concerns and be determined within the parameters of a defined energy plan.

As an aside, the Energy Policy Act attempted to “correct” the circumstances which permitted the August 2003 Blackout to occur – namely by making voluntary reliability standards mandatory. However, the standards, as proposed, would have represented a significant weakening of the standards which were already in effect in New York. The standards in New York had been developed keeping in mind the need for augmented reliability, most particularly to ensure greater levels of reliability for the critical New York City economy. Thus New York fought hard – and finally won – an exemption from the standards requirement, and was able to keep its long-standing reliability standards in place, and within its own control. I mention this issue concerning reliability standards as it draws a direct parallel with the issue of federal preemption on transmission line siting – that long-standing state policy should not be undercut by federal policies which do not fully appreciate their impact.

I have described the above incidents – avoiding detail on the hundreds of other transmission-related issues and controversies – to impress upon you one very important idea: New York State is well equipped to balance the needs of energy consumers, maintain the reliability of the electric system, and approve the construction of electric transmission lines where they are needed.

In New York, the specter of federal override will lead to unintended, if not unfortunate, results. The state legislature has already seen, what I predict to be, the first of many pieces of legislation that are designed to challenge transmission line proposals, given the newly-created perceived sense of weakness in state decision-making capability.

Chapter 741 of the Laws of 2006 restricts the ability of a “merchant transmission company” in its ability to use state eminent domain power and procedure, a right granted to most companies seeking to provide utility service to the public. More specifically, this new law applies to merchant transmission companies which, among other requirements, “applied for early designation as a national interest electric transmission corridor” pursuant to the “Energy Policy Act of 2005,” and specifically citing the common name of the federal law. This law is currently the subject of a Complaint filed in federal court in New York, the clear and specific reference to the issues being discussed today are a demonstration that local citizens are pressuring state executives and state legislatures to use whatever powers necessary to frustrate access to Section 1221 provisions.

The specter of federal override may also foster deal-making among project proponents and state regulators as a means of avoiding federal intervention. State decision-makers will not want to be seen to have their decisions trumped by Washington regulators, as such will undoubtedly be received negatively by the general public. Thus, deals could be agreed to for specific proposals, even if such proposals would not stand up to the rigor of thorough regulatory review. In New York, this could signal the end of a near 40-year process for transmission line siting and review. The modern era of electric transmission facility siting review was begun with the enactment of Article VII of the Public Service Law, amending and updating earlier versions of administrative procedure governing the same. By all accounts in New York, Article VII is a successful process. Article VII is an administrative review process which assigns the role of the decision-makers, details the requirements of an application for a certificate, identifies appropriate parties for an administrative proceeding, clarifies the standards for decision-making, and provides for judicial review of final determinations. It is a very public, very thorough investigative and review process. And further, the New York Article VII process results in the issuance of certificates to construct transmission lines on a fairly routine basis. As I said earlier, New York has a very successful transmission line siting process.

However, if transmission line project proponents are aware that a determination could be “withheld” or even denied on the merits, the ability to appeal to FERC may prove too attractive. Potential manipulation of the Article VII process may even occur – for example failure to produce all necessary studies through new, creative reading of the statutory requirements. Such potential procedural manipulation could result in failure of a decision to be rendered within the

requisite one-year deadline. It is still unclear whether FERC will look at all these attendant circumstances prior to accepting to review a case

The Energy Policy Act of 2005 is presenting challenges to the states in efforts to craft energy policy. Many times, elements of these emerging state energy policies are the result of the absence of federal government policies and programs to do the same. For example, in New York, and the Northeast more broadly, the Regional Greenhouse Gas Initiative – a regional compact among 10 Northeastern states – has been initiated and is poised to establish a cap-and-trade program to control emissions of carbon dioxide, primarily from electric generating plants. While the possibility that energy prices may increase as a direct result of capping of carbon dioxide, other energy policies are being crafted and implemented to help consumers better control their energy use, thereby reducing their energy costs, and possibly bringing down overall energy prices in the long run. These policies are being implemented even despite this region of the country having the highest average retail electricity prices in the country.

Individual energy policies are only effective when they are implemented as part of a comprehensive energy plan. Outside factors – or possibly wild cards – can only disrupt the orderly implementation of complementary energy programs which have been designed according to the needs of the system, a forecast of prices from which appropriate incentive levels are set, and the market potential for specific technologies in that location.

Last week, New York Governor Eliot Spitzer announced just such a comprehensive energy strategy for New York. This strategy is premised on the achievement of a 15 percent reduction in energy consumption by 2015. The goals of this new policy are to simultaneously lower New York's high cost of energy while expanding the supply of cleaner generation sources. Further, implementation of this policy requires that all resources be enlisted to achieve these goals. This will require a balancing of demand-side options – such as advanced cogeneration systems, energy efficiency, demand reduction programs, smart metering and renewable energy technologies – with supply-side options – such as new central station power plants and long-range, bulk system transmission lines. This balancing will require comprehensive planning, and a renewed focus on the implementation of such an energy plan. New York already has many of the needed programs in place. Now it is time to better coordinate the programs, adjust the incentive levels to foster the smartest development, and to maximize their outcome.

This type of energy plan will also benefit the widest spectrum of economic interests, and not merely give preferred access to very large capitalized corporations. Certainly the policies outlined by Governor Spitzer will provide an opportunity for new transmission lines to be constructed in New York. However, a transmission line which does not comport with the policy goals of the comprehensive energy plan – and is focused solely on maximizing profit opportunities to the project developer – could jeopardize the overall plan. The greatest threat is the potential disruption of demand-side management programs, which are designed according to studied price predictions. Transmission line proposals which do not comport with comprehensive state-level planning should not be given new life through federal government preemptive power.

Rather, the federal government would be better focused on encouraging – if not mandating – interstate energy resource planning. To date, the independent system operators have focused more on maintaining their independence, which has resulted in a degree of balkanization of energy policies and programs. What has perhaps been lost as a result is the ability for the systems to identify the appropriate projects that will foster inter-system exchanges and improve overall system reliability. Without this mutual cooperation, the likelihood of more cross-system Blackouts will increase. A system which does not promote regional planning is more than a case of “good fences making bad neighbors,” but they also make for unreliable neighborhoods.

In conclusion, I would like to thank the Subcommittee for this opportunity to present this testimony and to urge a reversal of the policies embodied in Section 1221 of the Energy Policy Act of 2005. I will be happy to answer any questions the members of the subcommittee may have.