

119 FERC ¶ 61,154
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Regulations for Filing Applications
for Permits to Site Interstate
Electric Transmission Facilities

Docket No. RM06-12-001

ORDER DENYING REHEARING

(Issued May 17, 2007)

1. On November 16, 2006, the Commission issued a Final Rule in this proceeding.¹ In the Final Rule, the Commission implemented new regulations in accordance with section 1221 of the Energy Policy Act of 2005 (EPAct 2005) to establish filing requirements and procedures for entities seeking to construct electric transmission facilities. The regulations also provided for the coordination of the processing of requests for federal authorizations and for conducting an environmental review in association with a proposal to construct or modify electric transmission facilities in national interest electric transmission corridors (national corridors).
2. Several parties requested rehearing of the Final Rule.² The primary focus of the requests for rehearing is the scope of the Commission's jurisdiction under new Federal

¹ *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Order No. 689, 71 Fed. Reg. 69,440 (Dec. 1, 2006), FERC Stats. & Regs. ¶ 31,234 (2006)(Final Rule).

² Communities Against Regional Interconnection (CARI), Edison Electric Institute (EEI), Iowa Utilities Board (Iowa UB), Maine Public Utilities Commission and the Maine Public Advocate (jointly Maine PUC), Minnesota Public Utilities Commission and Minnesota Department of Commerce (jointly Minnesota PUC), National Association of Regulatory Utility Commissioners (NARUC), National Rural Electric Cooperative Association (NRECA), New York Public Service Commission (New York PSC), Piedmont Environmental Council (Piedmont).

Power Act (FPA) section 216(b)(1)(C)(i). That section provides that the Commission may issue a permit for the construction of electric transmission facilities in a national corridor if it finds that a state commission or other entity that has authority to approve the siting of the facilities has “withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later;” Specifically, parties contest the Commission’s determination that the phrase “withheld approval” can reasonably be interpreted to include a state’s lawful denial of an application to site transmission facilities.

3. Other aspects of the Final Rule that were raised on rehearing include, among others: (1) the Commission’s determination to address its jurisdiction over a proposed project when it issues an order on the merits of an application; (2) the Commission’s policy not to commence its pre-filing process until one year after a complete application is filed with the state; (3) the weight that will be given an independent agency’s determination of the need for a project; (4) the extent of authority delegated to the Commission by DOE; and (5) various NEPA-related issues.

I. Background

4. Section 1221 of EAct 2005 adds a new section 216 to the FPA providing for federal siting of electric transmission facilities under certain circumstances. Section 216 requires that the Secretary of the Department of Energy (DOE or Secretary) identify transmission constraints and designate certain constrained areas as national corridors. Section 216(b) provides that the Commission may issue permits to construct or to modify electric transmission facilities in a national corridor under certain circumstances.

5. In addition to responsibilities assigned to the Commission by statute, DOE delegated to the Commission its lead agency responsibilities for the purpose of coordinating all applicable federal authorizations and related environmental review and preparing a single environmental review document for facilities within the Commission’s siting jurisdiction.³ With respect to such projects, the Commission will establish prompt and binding intermediate milestones and ultimate deadlines to help ensure that all federal permits are issued, and reviews are completed, within a year, or as soon as practicable thereafter.

6. FPA section 216(c)(2) requires that the Commission issue rules specifying the form of, and the information to be contained in, an application for proposed construction or modification of electric transmission facilities in national corridors, and the manner of

³ Department of Energy Delegation Order No. 00-004.00A.

service of notice of the permit application on interested persons. To that end, the Commission issued a Notice of Proposed Rulemaking (NOPR) on June 16, 2006, seeking comments on the Commission's proposal to comply with section 216.⁴ After considering comments on the NOPR, the Commission issued its Final Rule implementing those regulations in a new Part 50 of existing subchapter B of its regulations. The procedures also required certain modifications to other existing regulations, including the Commission's regulations implementing the National Environmental Policy Act of 1969 (NEPA) in Part 380.

II. Discussion

A. Withheld Approval/Denying Applications

7. As stated, section 216(b)(1)(C), provides that the Commission may issue a permit for the construction of electric transmission facilities in a national corridor if it finds that a state commission or other entity that has authority to approve the siting of the facilities has "withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; . . ."

8. In the Final Rule, the Commission noted that section 216(b)(1)(C) did not explicitly define the full range of state actions that are deemed to be withholding approval. In response to requests that the Commission determine if a state's lawful denial of a request to site an electric transmission facility would be deemed to be withholding approval, the Commission stated that a reasonable interpretation of the language in the context of the legislation did indeed support a finding that withholding approval includes such a denial.

9. CARI, Piedmont, Minnesota PUC, and New York PSC request rehearing of the Commission's determination that the phrase "withheld approval" can reasonably be interpreted to include a state's lawful denial of an application to site transmission facilities.⁵

⁴ *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 71 Fed. Reg. 36,258 (June 26, 2006); FERC Stats. & Regs. ¶ 32,605 (2006).

⁵ We note that agencies from only two states, New York and Minnesota, question the Commission's finding that it may assert jurisdiction over a proposed facility if a state denies an application. Further, NARUC did not seek rehearing on this issue.

1. **The Commission's Interpretation of the Phrase "Withheld Approval" and the Effect of the Phrase "for more than 1 year"**

10. On rehearing, CARI, Piedmont, Minnesota PUC, and New York PSC argue that when "withheld approval" is read in the context of "withheld approval for more than 1 year," it cannot mean "deny" because that interpretation would render the phrase "for more than 1 year" superfluous. Piedmont argues that while "withheld" and "denied" can be synonyms as used in certain contexts, "context is king" in construing a statute.⁶ CARI asserts that the Commission's attempt to use dictionary definitions of the terms "withhold" and "deny" does not support its interpretation. It states that the Commission's approach is backwards, as though Congress actually used the term "denial" in the statute rather than "withheld." CARI argues that the term carefully chosen by Congress was "withheld," and based both on the common dictionary definitions and the canons of statutory interpretation, that term clearly does not include a valid, formal administrative denial appealable to a state court.

11. We find the parties' arguments unpersuasive. The Commission continues to believe that a reasonable interpretation of the language of the legislation supports a finding that a state's withholding approval includes a state's denial of an application.⁷ The parties argue that the concept of a state having "denied approval for more than 1 year" is nonsensical, and thus, the word "withheld" cannot be interpreted to include "denied." However, that argument ignores the fact that the term as used in the EPAct 2005 is inclusive, comprising "denying" approval as well as "refraining" or "holding back" from granting approval. The parties "nonsensical" reading can only be rendered by reading "withheld approval" to only mean "deny," while the Final Rule interprets it to mean both "deny" and "failure to act." We believe the most common sense reading of "withheld approval for more than 1 year" encompasses any action – whether it is a failure to act or an outright denial – that results in an applicant not having received state approval at the end of one year.

⁶ *Citing Wachovia Bank v. United States*, 455 F.3d 1261, 1268 (11th Cir. 2006)("we do not read words . . . in isolation" but instead "in context" and "try to make them and their near and far kin make sense together, have them singing on the same note, as harmoniously as possible").

⁷ *Perrin v. United States*, 444 U.S. 37, 42 (1979)(finding a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning).

12. As noted in the Final Rule, the transmission siting language first appeared in legislation considered in the House of Representatives in 2003. That measure (H.R. 6) allowed the Commission to exercise jurisdiction where a state entity with transmission siting authority “has withheld approval, conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce and is otherwise not economically feasible, or delayed final approval for more than one year after the filing of an application seeking approval”⁸ The report language accompanying the above legislative text states, “The section provides that for such lines, persons may obtain a permit from FERC and exercise eminent domain if, after one year, a State is unable or refuses to site the line.”⁹ The Commission stated that the fact that this precursor to the transmission siting provision of EAct 2005 distinguished “withholding approval” from “delaying final approval for more than one year” and was interpreted to include a state “refusing to site a line” supports its conclusion that “withholding approval” was intended to mean something beyond a failure to act.

13. Piedmont and CARI contend that the Commission cannot rely on an earlier proposed bill which was never enacted to support its interpretation that Congress meant something more than mere delay or failure to act when it retained the term “withheld approval” and dropped “delayed final approval” in the enacted version. CARI contends that there is no legislative history indicating why the language was changed or if the issue was ever addressed, and as such, no significance should be attributed to it. Piedmont agrees that a state’s inability to site a transmission line or refusal to act because of political opposition or lack of time and experience would trigger the Commission’s jurisdiction under section 216. It argues, however, that neither inability nor refusal to act is the same as a state or local decision to deny approval made in a timely fashion.

14. CARI also points to Senate Report 109-78 which states that EAct 2005 would authorize the Commission “to issue siting permits if a State withholds approval inappropriately,” in contending that it is clear that the conditional jurisdiction granted to the Commission applies only when a state is unable to act, refrains from acting through delay, or inappropriately refuses to act. CARI argues that Congress did not intend to give the Commission preemptive and appellate jurisdiction when a state licensing entity appropriately exercises its authority to determine the approval or denial of a license application.

⁸ H.R. 6, 108th Cong. § 16012 (2003).

⁹ H.R. Rep No. 108-65 (April 6, 2003).

15. The Commission acknowledges, as do the parties seeking rehearing, that there is no definitive legislative history on point. However, we continue to believe that our interpretation of the phrase “withhold approval” to include denial of an application is reasonable. The Congressional Budget Office’s cost estimate for EPAct 2005 suggests a similar interpretation, stating:

Section 1221 would authorize FERC to issue construction permits for electric transmission facilities in “interstate congestion areas” when a state has not acted on or has rejected a permit request.¹⁰

2. The Commission’s Jurisdictional Basis

16. The Minnesota PUC and New York PSC argue that Congress carefully carved out a limited role for the federal government in the area of transmission siting. They contend that section 216(b)(1) gives the Commission jurisdiction to site electric transmission facilities in five specific situations and that the Commission’s interpretation of section 216(b)(1)(C)(i) would add a sixth basis for jurisdiction, allowing the Commission to approve the siting of transmission facilities under federal law in instances where the state has lawfully denied an application. The parties argue that this situation was never contemplated by Congress.

17. Section 216(b)(1) sets forth three categories of circumstances which will give rise to Commission jurisdiction to act on a proposal to site transmission facilities. Section 216(b)(1)(A) covers instances where a state does not have authority to site the proposed facilities or to consider interstate benefits expected to be achieved. Section 216(b)(1)(B) covers instances where the applicant does not qualify to use the siting authority of the state. Section 216(b)(1)(C) covers a third category of circumstances – those where a state has the authority to site the proposed facilities and the applicant is qualified to avail itself

¹⁰ H.R.Rep. No. 109-215, at 227 (2005). In addition, a July 2005 report prepared by the Minority Staff Special Investigations Division of the Committee on Government Reform states that:

Under section 1221 of H.R. 6, DOE may designate “interstate congestion areas” within which state and local authority to deny or condition a transmission line permit request is severely limited. If a state denies a permit, places certain conditions on a permit, or has not acted on a permit within one year for any reason, including lack of information provided by the applicant, DOE can step in and issue the permit. Staff of H. Commission on Government Reform- Minority Staff Special Investigations Division, 109th Cong., *Energy Bill Preempts States and Localities* 3 (Comm. Print 2005).

of that authority, but where the state, for whatever reason, has failed to authorize the facilities within a one-year period. Under section 216(b)(1)(C), the Commission has jurisdiction to act not only where the state has delayed granting authorization, including, as we have interpreted it, explicitly denying authorization, but also where the state has granted authorization, but has conditioned its approval in a manner which would fail to relieve transmission congestion. There is no definitive legislative history regarding Congress's choice of the word "withheld," but, the underlying purpose of section 216 is to facilitate the process of siting critical regional transmission lines and facilities, ensuring adequate capacity and increased reliability on the electric transmission grid.¹¹ Thus, the Commission's interpretation of the term "withheld approval" in the context of the statute furthers the goals, purpose, and intent of the statute.

3. Congress's Use of the Phrase "does not act" Elsewhere in EAct 2005

18. In support of its interpretation of the term "withheld approval," the Commission pointed out that in amending FPA section 203 in section 1289 of EAct 2005, Congress specifically used the language "does not act," to define the consequences leading to a merger application being deemed approved. The Commission reasoned that Congress's use of the different phrase "withheld approval" in section 1221 indicated an affirmative expression of a different intent. Piedmont argues that sections 203 and 216 deal with fundamentally different subject matter and regulatory processes, and, therefore, the inconsistency of the language should be given no weight.

19. Despite the fact that sections 203 and 216 address different regulatory situations, the Commission has an obligation to construe the legislation as a whole in such a manner as to give every word some operative effect. Interpreting the phrase "withheld approval" to mean the same as "does not act" would fail to do this. Further, we note that section 216(h)(6)(A) also uses the phrase "fails to act" in reference to other federal approvals. The Commission believes it is reasonable to conclude that if Congress had simply meant "failure to act" in the context of section 216, it would have used that language as, in fact, it did in section 216(h)(6)(A) in establishing procedures available when an agency "has

¹¹ In Representative Todd Tiahrt's speech in the House of Representatives on April 21, 2005 in support of EAct 2005 he states:

H.R. 6 will improve our Nation's electric transmission capacity and reliability. By providing for expedited siting processes on both Federal and private lands, transmission lines will be able to be more efficiently and quickly placed so power can be transmitted across the county. 151 Cong. Rec. E796 (2005).

failed to act” on a request for a federal authorization required for a transmission facility. Instead, Congress used the phrase “withheld approval,” which we interpret it to encompass both deny and failure to act.

20. Congress provided a specific mechanism for states to prevent the Commission’s jurisdiction from attaching in that it granted consent in section 216(i) for three or more states to enter into interstate compacts. In such an instance, the “Commission shall have no authority to issue a permit for the construction . . . of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary makes . . . the finding described in subsection (b)(1)(C).” This is an example of Congress using very clear language to carve out a situation in which the Commission shall not have authority to permit siting of transmission facilities in the face of states having denied an application and lends credence to the Commission’s position that if Congress had not intended the Commission to have jurisdiction to site a transmission facility in the face of a denial of such authorization under other circumstances, it could have plainly said so.

4. Preemption

21. CARI, Piedmont, and Minnesota PUC urge the Commission to promulgate a narrow construction of the word “withheld,” citing the principle of statutory construction known as the “presumption against preemption.” The presumption recognizes that preemption of state law is an “extraordinary power in the federalist system.”¹² The parties state that the Supreme Court has explained that when Congress legislates “in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”¹³ CARI argues that because the phrase “withheld approval” is ambiguous, the Commission must overcome a presumption against federal preemption.

22. The “presumption against preemption” cited by parties arises when there is a controversy concerning not the scope of the federal government’s authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, the existence of the federal authority.¹⁴ We are not concerned here with the validity of any state law or regulation. Rather, the parties are disputing the scope of the authority granted the Commission in section 216 to act in certain circumstances. Such a

¹² *Citing Gregory v. Ashcroft*, 501 U.S. 452, 460 (1996).

¹³ *Citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Metronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

¹⁴ *New York v. FERC*, 535 U.S. 1, 17-18 (2002).

case does not involve a “presumption against preemption.” Instead, it calls for an examination of the statute to determine what powers Congress has conferred upon the agency, without any presumption one way or the other.¹⁵

23. While the Commission has had broad authority over the transmission of electric energy in interstate commerce,¹⁶ traditionally, authority to site transmission facilities was left in the hands of the states. However, in enacting section 216, Congress affirmatively granted the Commission jurisdiction to site electric transmission facilities in a national corridor in any instance where the conditions enumerated in section 216(b) are met, clearly preempting the exclusive jurisdiction formerly held by the states. As discussed above, there is substantial textual and contextual support for the Commission’s reasonable determination that a state’s denial of a transmission application is within the meaning of withholding approval in section 216(b)(1)(C). Both section 216(b)(1)(A) and (B) are preemptive, so there is no question section 216(b)(1) is preemptive. We believe that if Congress had intended to limit the scope of its grant of authority in instances where a state has denied an application, it would have explicitly done so.

B. Jurisdictional Determination

24. In the Final Rule, the Commission indicated that while the language in section 216 would allow for simultaneous state and Commission siting processes where the states have the requisite authority, the Commission does not plan to commence its pre-filing process until one year after the relevant state application has been filed. On rehearing, CARI reiterates their argument that the Commission lacks authority to conduct its pre-filing process before it receives jurisdiction under the statute. CARI contends that section 216(b) provides for a grant of conditional, sequential authority, not parallel or overlapping jurisdiction.

25. NARUC requests that the Commission adopt procedural rules that will provide an opportunity for a state siting authority to obtain a Commission ruling on whether the prerequisites set out in section 216 for federal jurisdiction have been met before the pre-filing process begins. It contends that the Commission’s ability to initiate the pre-filing process under its siting authority in cases arising under section 216 (b)(C) is contingent upon the resolution of issues concerning the action or inaction of the state agency with original jurisdiction.

26. Similarly, Maine PUC contends that it is inefficient for the Commission to address its jurisdiction in a final order on the merits of a proposed project because a lengthy proceeding could take place only to have the Commission ultimately reject the

¹⁵ *Id.* at 18.

¹⁶ 16 U.S.C. § 824(a) (2005).

application before it for want of jurisdiction. Maine PUC also asserts that the proposed process might result in the Commission's beginning the permitting process without proper authority. Maine PUC states that a more efficient approach is to have the Commission make a threshold, on the record, determination of jurisdiction. It argues that if there are disputed questions of fact or law as to whether the one-year period has elapsed or whether a state-imposed condition makes the project "not economically feasible," such questions can and should be definitively settled before the pre-filing information gathering process commences. Maine PUC concludes that the pre-filing process should be bifurcated: first, the Commission should establish whether it has jurisdiction; and if it does, then it should proceed to gather information.

27. FPA section 216 authorizes the Commission to issue permits to construct electric transmission facilities in national corridors if the Commission finds that the proposed facilities meet the requirements of section 216(b)(1) through (6). As we discussed in the Final Rule, the language of section 216 allows the Commission to issue a construction permit one year after the state siting process has begun and requires the Commission to render its decision one year after an application is filed with it. We believe we will need to develop a complete record before we can reach a determination concerning the findings required under section 216(b)(1), including a finding concerning the Commission's jurisdiction over the proposed project.

28. In essence, the filed application is the applicant's assertion that the Commission has jurisdiction over the proposed project and authority to issue a permit to construct the facility. The Commission will review all the evidence before it and determine if the proposal meets all the requirements under section 216(b). If, based on that evidence, the Commission determines that the applicant has not demonstrated that the Commission has jurisdiction under section 216(b)(1), the Commission will dismiss the application. If all the requirements of section 216(b)(1) have been met, the Commission will assert jurisdiction and, make a determination on the merits of the proposed project. The Commission does not need jurisdiction to review an application for a proposed project to determine if, in fact, it has jurisdiction to act on the application.

29. CARI also argues that the authority delegated to the Commission by DOE in section 216(h)(4)(C) to coordinate federal authorizations may not be held by the Commission before it has jurisdiction to authorize a proposed project. CARI asserts that until a national corridor is designated and the other statutory criteria in section 216(b) are met, the Commission has no authority over electric transmission facilities and would be acting beyond the authorization conferred under the governing statute.¹⁷

¹⁷ *Citing Houston Oil & Refining, Inc. v. FERC*, 95 F.3d 1126, 1136 Fed. Cir. 1996)(An agency is but a creature of statute that has no greater authority than that conferred under the governing statute).

30. FPA section 216(b) sets forth a series of findings the Commission must make before issuing a construction permit for electric transmission facilities in a national corridor. We agree that while the Commission cannot issue a permit to construct a proposed electric transmission facility until it determines that the statutory criteria in section 216(b) have been met, there is no requirement in section 216 that the Commission make findings regarding certain of the criteria before proceeding with its review of an application for such a permit in its entirety. Moreover, the time limits imposed by the statute preclude a general practice of considering and ruling on the jurisdictional aspects of an application before initiating our review of the merits of the proposal. If in a particular proceeding a state agency deems it necessary for the Commission to make a jurisdictional determination prior to issuing an order on the merits of the application, it can file a petition requesting a declaratory order or rule to terminate a controversy or remove uncertainty under section 385.207(a)(2) of the Commission's regulations.

C. Complete Application

31. CARI contends that the Commission's Final Rule ignores the statutory language by failing to require in our regulations that the state application be determined complete under state law before the one-year state review period begins. It argues that without such a regulation, siting applicants could effectively subvert the primary siting authority reserved to the state by submitting a deficient application to the state, and then, after a year, seek federal authority to construct the transmission facility. CARI concludes that this clearly was not the intent of Congress in granting the Commission its conditional preemptive authority over electric transmission facility siting in national corridors.

32. CARI asserts that while the Commission recognized that an applicant might not provide complete information to a state in the hopes of frustrating the state's ability to act within one year, the Commission failed to explain how it expects to determine if the applicant has acted in good faith. CARI argues that the Commission ignored the clear language and intent of section 216(b) and is acting outside its statutory authority by not requiring that the one-year clock start only upon the state application being deemed complete by the state licensing authority.

33. NARUC and Maine PUC encouraged the Commission to include a specific provision in its regulations stating that the federal pre-filing process will not commence until one year after the relevant state applications have been filed with the proper state body. Maine PUC states that while the Commission's intent is clear from the order, it is not clearly articulated in the Commission's regulations. It contends that the Commission's regulations should provide the same direction given in the Final Rule.

34. The Commission does not believe it is necessary to codify its stated policy concerning the potential overlap of federal/state review of transmission applications in the regulations. The Commission's regulations require that the applicant file information concerning the status of the applicant's filings before state agencies at various points during the pre-filing process. Specifically, section 50.5(b)(3) requires that the applicant provide such information for the pre-filing consultation and section 50.5(c)(5) requires that the applicant file information concerning the state proceeding with its initial pre-filing request. Finally, under section 50.6(e)(3)(i), the applicant must file evidence that the state withheld approval for more than one year after the filing of an application seeking approval under applicable law.

35. If an issue arises in a given proceeding concerning the one-year state review process, the Commission will address that issue as appropriate. For example, if questions arise during pre-filing concerning the adequacy of the applicant's effort to site the facility at the state level and Commission staff determines that more processing at the state level is appropriate, it will not hesitate to suspend the pre-filing process while the state process continues.

36. Additionally, as stated in the Final Rule, the Commission believes that it is incumbent on project sponsors and states to work together to site facilities at the state level, as this would be the most expeditious way to site the facilities.¹⁸ To that end, the Commission will make its Dispute Resolution Service available if parties to a state siting proceeding desire assistance to facilitate the resolution of issues at the state level.

D. Simultaneous Processes

37. EEI urged the Commission to permit simultaneous filings to avoid wasteful duplication of effort and to expedite the entire process. It contends that by postponing commencement of the Commission's pre-filing process, the Final Rule poses the likelihood of serious delay in the Commission's review and approval of needed new transmission facilities. EEI argues that given Congress' clear desire for expeditious action, the Commission should reconsider allowing the pre-filing process to occur simultaneously with the state pre-filing, application, and post-filing processes, so as to avoid unnecessary duplication of efforts by applicants and others involved. At a minimum, EEI requests that the Commission ensure that Commission staff give full credit for outreach, information gathering, and analyses already completed in front of other federal and state agencies, to the maximum extent possible, in order to avoid duplication of effort and to speed the siting of needed new transmission facilities in national corridors.

¹⁸ Final Rule at P 115.

38. The Commission believes that its approach of respecting state jurisdiction by providing the states with one full year to consider siting applications prior to the initiation of the Commission's pre-filing process is consistent with Congress's desire to recognize the states' traditional authority to site electric transmission facilities under their applicable laws. Moreover, the Commission anticipates that most states will want the opportunity to also participate in the Commission's process. Thus, simultaneous proceedings could place an undue burden on a state's resources. The Commission believes that the states should be given a meaningful opportunity to fully process siting applications at the state level before federal proceedings on those projects commence.

39. As stated in the Final Rule, the Commission will consider all activities an applicant has conducted prior to approaching the Commission to commence pre-filing. During pre-filing, the Commission will review the work an applicant has done at the state level, the amount of community outreach an applicant has conducted, and the results of that outreach in determining what further activities may be needed to process an applicant's application for a permit.¹⁹ Further, the Commission will review all filings made in conjunction with any state proceedings to ensure, to the maximum extent possible, that the information developed in state proceedings can be used as appropriate before the Commission.²⁰

E. Not Economically Feasible

40. The Iowa UB seeks clarification that if the Commission considers siting a transmission line after a state commission has denied authorization for the proposed line, the Commission will give significant weight to legitimate, state-specific policies and requirements that caused the state to deny authorization. Further, the Iowa UB seeks clarification that the Commission does not interpret the language in the section 216(b)(1)(C)(ii) allowing Commission proceedings when the state "conditioned its approval in such a manner that the proposed construction or modification ... is not economically feasible" to mean that if a state condition results in *any* cost increase, it will be preempted. Instead, it contends that reasonable costs for meeting important state policy goals should be acceptable to the Commission.

41. In reviewing a request for a permit to site electric transmission facilities, the Commission will consider the record in its entirety, including any actions and findings made in the state proceeding. If an applicant is claiming federal jurisdiction based on section 216(b)(1)(C)(ii), the applicant will have to show not merely that there would be

¹⁹ Final Rule at P 95.

²⁰ *Id.* at P 124.

an increase in costs occasioned by state-imposed conditions, but that the increase in costs would render the project “not economically feasible.” In determining whether that is, in fact, the case, the Commission will give due weight to all the evidence in the record on that issue. We note that the statute does not distinguish costs related to “policy goals.” However, the Commission will consider whether conditions proposed by a state are required by the public interest.

F. Public Interest Conditions

42. In the Final Rule, the Commission stated that it “will impose appropriate conditions necessary to avoid adverse economic, competitive, environmental, and other effects on the relevant interests from the construction of a new project, and will approve the project only where the public benefits to be achieved outweigh the adverse effects.”²¹ EEI contends that this language could inappropriately be construed to suggest that the permit applicant has some obligation to make whole every affected party. It requests that the Commission clarify that there is no obligation to make whole every affected party, *e.g.*, compensating a generator whose revenue decreases due to the elimination of a constraint.

43. Protecting the public interest involves balancing the often-competing interests of individual parties which would be affected by a proposed project. The Commission will address the public interests considerations of each project on a case-by-case basis. However, the Commission does not anticipate imposing an obligation that all entities possibly affected by a proposed transmission facility be made whole.

G. RTO/ISO Oversight

44. In the Final Rule the Commission agreed that determinations by an independent agency, such as an independent system operator (ISO) or regional transmission organization (RTO), should be given due weight in an assessment of whether a particular facility is needed to protect or benefit customers. Thus, the Commission determined that it will consider any such independent determination as a factor in determining whether the statutory criteria have been met.

45. Piedmont contends that, in many instances, no weight is due the determination by an independent agency concerning the need for a proposed facility. It argues that the fact that a proposed electric transmission facility is being overseen by an ISO or RTO should not change the allocation of the burden of proof, since the existence of ISO or RTO oversight neither attests to whether an electric transmission facility is needed nor establishes whether a specific electric transmission facility is the optimal solution to a

²¹ *Id.* at P 42.

transmission system need. Piedmont states that the burden of proving that the criteria for eligibility for construction permits and eminent domain under section 216(b) have been met should remain on the applicant.

46. The burden of proving that a construction permit should be issued for a proposed transmission facility rests upon the applicant. As stated, while the Commission will give the determination of an independent entity, such as an RTO, due weight in our assessment of whether a particular facility is needed to protect or benefit customers, we reiterate that such a determination will be merely one factor in the Commission's evaluation.

H. Joint Transmission Planning

47. NRECA reiterates its argument that the Commission should require applicants to demonstrate that they have conducted a truly open and inclusive joint transmission planning process before beginning the pre-filing process. It states that under FPA section 217(b)(4), the Commission is required to exercise its authority in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities (LSEs) and enables LSEs to secure firm transmission rights on a long-term basis. It asserts that the Commission must recognize that a transmission upgrade does not serve the public interest as required under section 216(b)(3) unless it furthers the long-term transmission needs of all LSEs. Thus, NRECA concludes that the goals of section 217(b)(4) can only be met in the section 216 process if applicants for permits under section 216 have been required to participate in a truly open and inclusive joint planning process with all affected LSEs before beginning the pre-filing process.

48. NRECA also argues that the Commission must interpret and implement section 216 consistent with its statutory obligations under sections 205 and 206 that require that the Commission ensure that public utilities provide transmission service under rates and terms and conditions that are just and reasonable and not unduly discriminatory or preferential. It surmises that if a transmission plan is unjust, unreasonable, or unduly discriminatory and preferential under section 205 and 206 because it was developed without an open and inclusive process when included LSE transmission customers from the very beginning, it follows that the transmission plan is inconsistent with the public interest under section 216(b)(3). Therefore, NRECA concludes that the Commission must require applicants for permits under section 216 to demonstrate that they have conducted truly open and inclusive joint transmission planning processes before beginning the pre-filing process.

49. Further, NRECA states that the Commission will fail to determine under section 216(b)(5) and (6) that the proposed facility is consistent with sound national energy policy and will maximize to the extent reasonable and economical, the transmission capabilities of existing towers or structures, if it does not require the applicant to use an open and inclusive joint transmission planning process prior to initiating the pre-filing

process. It contends that without the full input of LSEs and transmission owners before pre-filing, the applicant cannot obtain the full scope of information required to design a transmission project that meets these criteria. It argues that a mere consultation process during pre-filing is too little, too late, to ensure that the statutory standards are met.

50. Finally, NRECA states that while the Final Rule summarized its concerns that the Commission should require joint transmission planning, it did not adequately respond to them. NRECA states that the Commission's comments that it expects that the applicant will conduct outreach activities at the planning level prior to commencing the Commission's pre-filing process does not specify a joint planning process as part of the outreach activities. NRECA contends that such vague guidance by the Commission could be interpreted in widely different ways by stakeholders and could jeopardize the Commission's efforts regarding efficient transmission planning.

51. While the Commission encourages applicants for proposed electric transmission facilities to conduct an open and inclusive joint transmission planning process, we will not require such participation as a pre-condition to proposing to construct facilities. The Commission addressed the regional planning requirement in section 217 in Order No. 890, where it required public utility transmission providers to amend their open-access transmission tariffs to require coordinated, open, and transparent transmission planning on both a local and regional level.²² The Commission also created a rebuttable presumption that projects resulting from regional planning qualify for incentive rate treatments.²³ We disagree that pre-filing is "a mere consultation process" that is "too little, too late." The purpose of pre-filing is to seek input from all interested individuals so that those comments can be incorporated into the applicant's plan for consideration by the Commission. In reviewing an application for a proposed facility, the Commission will review all planning activities the applicant conducted as part of its application process and will take that information into consideration in determining if the proposed facility is in the public interest.

²² See *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,226 (March 15, 2007), FERC Stats & Regs., ¶ 31,241, P 435 (2007)(requiring amendments to open access transmission tariffs to require coordinated, open, and transparent transmission planning on both a local and regional level).

²³ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 Fed. Reg. 43,294 (July 31, 2006), FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*. Order No. 679-A, FERC Stats. & Regs. ¶ 30,901, PP110-11 (2007).

I. DOE Lead Agency

52. EEI contends that the Final Rule does not adequately reflect that applicants seeking siting approval are likely to have sought federal authorization from other federal agencies prior to filing with the Commission. It states that, on its face, DOE's delegation of lead agency responsibility the Commission appears to be effective only upon the filing of an application to site electric transmission facilities in a national corridor and that the Commission's Final Rule appears to have reflected that interpretation. EEI argues that, in practice, applicants seeking a permit from the Commission are likely to have sought authorizations from other federal agencies prior to filing an application with the Commission, in which case EEI concludes that DOE will have performed the lead agency function to that point. EEI states that the Final Rule does not adequately reflect this scenario, thereby increasing the likelihood that the lead agency process will not be effectively and timely implemented.

53. EEI requests that the Commission work closely with DOE to revise the delegation order to more fully delegate lead agency responsibility to the Commission for all transmission facilities in national corridors. EEI also requests the Commission avoid a duplication of efforts to the maximum extent possible by actively participating in the DOE lead agency process and by giving full credit for work completed under that process prior to the applicant seeking a permit from the Commission.

54. As stated in the Final Rule, the Memorandum of Understanding (MOU) entered into by the Commission, DOE, and several other federal agencies, establishes a framework for early coordination of all applicable federal authorizations that will be required to site an electric transmission facility.²⁴ The Commission anticipates working with DOE and the other agencies at the onset of any process to site electric transmission facilities in national corridors. The Commission has conferred and is working with DOE to assure that both agencies will be sufficiently prepared to expedite their respective responsibilities related to the review of any facilities appropriately proposed.

J. Minor Modifications

55. EEI requests that the Commission allow minor modifications to an approved transmission facility to address operational needs during the life of that facility, without having to obtain further Commission, or other approvals. As stated in the Final Rule, the Commission's jurisdiction is limited to the issuance of a permit to construct or modify facilities upon the making of certain findings.²⁵ Section 216 does not confer Commission

²⁴ Final Rule at P 107.

²⁵ *Id.* at P 220.

jurisdiction over the operation or maintenance of those facilities. Thus, any subsequent modifications made after the facilities are constructed and operational will be subject, at least initially, to applicable state law.

K. NEPA Issues

1. Affected Landowner

56. CARI contends that the Commission violated section 216(d) and NEPA when it arbitrarily and capriciously restricted the range of impacts to be evaluated for a project to those within a quarter-mile and narrowly defined the definition of “affected landowner” to property owners within 50 feet of the proposed facility. It argues that while the quarter-mile and 50-foot designations might be appropriate for natural gas pipeline projects that are underground, these geographic boundaries have no relevance with respect to a 190-mile long and 160-foot high overhead electric transmission project that has visual, noise, socioeconomic, and other impacts not associated with natural gas pipelines or smaller transmission lines. CARI claims that a fair definition of the area of impact should begin with a minimum of one-half mile and require an evaluation of the impact beyond that point depending on the facility.

57. CARI argues that NEPA requires that a federal agency evaluate the environmental impacts of a proposed action and any adverse environmental effects that cannot be avoided should the proposal be implemented. It asserts that the Council on Environmental Quality (CEQ) implementation regulations explain that the Environmental Impact Statement (EIS) shall provide a full and fair discussion of significant environmental impacts and define effects to include both direct effects that occur at the same time and place, as well as indirect effects, which may occur later in time or farther removed in distance, but are still reasonably foreseeable. CARI contends that the Commission gave no reasoning for arbitrarily and capriciously cutting off review of a facility’s land use impacts or notifying only those landowners within a quarter of a mile.

58. As we stated in the Final Rule, these are minimum filing requirements and each project will have its own unique issues that will need to be considered on a case-by-case basis.²⁶ The regulations set forth the starting point for the Commission’s review and analysis. As additional interests or concerns are identified in an individual proceeding, the Commission will expand the scope of its review as appropriate. Thus, the Commission’s review of the impact of the proposed facility is not limited to the information initially filed by the applicant. Through the pre-filing and environmental scoping processes, Commission staff will define the scope of its analysis based on the specific facts and circumstances raised in each individual case. Further, we note that the

²⁶ *Id.* at P 130.

definition of affected landowners is for purposes of notice of the project, not an assessment of the impacts.

2. Non-Transmission Alternatives

59. In the Final Rule, the Commission stated that in light of the specific facts raised by individual projects, the applicant will be required to address a variety of alternatives, including, where appropriate, alternatives other than new transmission lines. On rehearing, CARI contends that nothing in the regulations requires the siting applicant to discuss reasonable non-wire or non-transmission alternatives, or any alternatives other than those the applicant itself considered. It argues that section 380.16(k) of the Commission's regulations does not require consideration of any more than the alternatives to which the applicant has given serious consideration. It claims that this allows the applicant to improperly limit the alternatives analysis and does not comply with the Commission's mandate under NEPA. CARI states that the Commission's passing remark that alternatives other than new transmission lines may be considered where appropriate does not take the place of a regulation which properly mandates that such an evaluation take place.

60. Section 380.16(k) of the Commission's regulations requires an applicant to file a resource report describing alternatives to the proposed project and comparing the environmental impacts of such alternatives to those of the proposal. In the Final Rule, we explained that "in light of the specific facts raised by the individual projects, the applicant will be required to address a variety of alternatives in the resource reports, including, where appropriate, alternatives other than new transmission lines. Moreover, reasonable alternatives can be identified by Commission staff or other stakeholders at various points during the proceeding for consideration in the NEPA process."²⁷

61. During the pre-filing and application processes, Commission staff will work with the applicant and stakeholders to define issues in each proceeding, including the development of appropriate alternatives. As required by NEPA, the Commission's environmental review of a proposal will include the detailed examination of all reasonable alternatives to the proposed action.²⁸ The public will have the opportunity to

²⁷ See Final Rule at PP 177-79.

²⁸ In natural gas pipeline proceedings, the Commission also regularly explores not only major route alternatives, but also various minor route variations that reduce the impact of the proposed facility. It is not unlikely that in an electric transmission proceeding the Commission, on a case-by-case basis, would analyze similar variations of a proposed facility.

participate and file comments - which can include suggested alternatives of any kind - throughout this review. When the Commission acts on an application, it will consider the entire record, including the NEPA document and all filings made by participants.

62. Because the facts of each case will dictate which alternatives merit detailed consideration, we are hesitant to include in our regulations specific requirements that applicants study and report on particular types of alternatives in every case. However, we are confident that the requirement that applicants address a variety of alternatives, coupled with our robust, public NEPA and application review process, will ensure that any and all reasonable alternatives receive full consideration.

3. Socioeconomic Impacts

63. In the NOPR, the Commission proposed that the applicant would be required to conduct a property value impact analysis for the proposed transmission line for properties adjacent to or abutting the right-of-way of proposed transmission lines. In the Final Rule, the Commission determined that given the speculative nature of these analyses and the time and resources the applicant would need to dedicate towards completion of this study, the Commission did not believe such a requirement is consistent with the purpose of EPCA 2005. The Commission stated that it will consider such information when provided in making a determination on the project, but such information will not be required.²⁹

64. On rehearing, CARI asserts that the Commission erred by deleting the property value impact analysis from the Final Rule. It contends that NEPA and its implementing regulations require an evaluation of all socioeconomic impacts where they are interrelated with the project's impacts to the physical environment, regardless of whether such analysis causes delay or whether there are various methodologies for such analysis. Further, it states that to the extent socioeconomic impacts are interrelated with natural or physical environmental impacts, the agency must make reasonable efforts to acquire relevant information concerning such impacts.³⁰ CARI asserts that by removing the property value impact analysis from its new regulations, the Commission violates both the letter and spirit of NEPA and its implementing CEQ regulations.

65. CARI also contends that the Commission erred by failing to require evaluation of the rate impact on consumers as a cognizable socioeconomic impact. It argues that as

²⁹ *Id.* at P 158

³⁰ *Citing Tongass Conservation Society v. Cheney*, 924 F.2d 1137, 1144 (D.C. Cir. 1991).

part of the socioeconomic impact analysis, the Commission is required to evaluate the effect of the proposed project and the alternatives on the cost of electricity to consumers.

66. Under NEPA “an agency must make reasonable efforts to acquire relevant information concerning socioeconomic impacts, when economic or social and natural or physical environmental effects are interrelated.”³¹ NEPA does not require that an agency:

examine the economic consequences of its actions. The theme of § 102 [of NEPA] is sounded by the adjective “environmental”: NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word “environmental” out of its context and give it the broadest possible definition, the words “adverse environmental effects” might embrace virtually any consequence . . . that some one thought “adverse.”³²

67. While the Commission excluded the property value analysis as a filing requirement from the Final Rule, it did not specifically foreclose such an analysis from its socioeconomic impact analysis. The Commission will address all issues raised in a request for a permit on a case-by-case basis. Further, cost recovery and the effect on customer rates is purely an economic issue that is not part of the Commission’s NEPA review of a proposed project. Recovery of costs associated with a particular transmission project will be addressed by the Commission or other ratemaking authorities as appropriate.

³¹ *Id.* (finding that the Navy’s consideration of socioeconomic impacts was not inadequate for failure to prepare a survey conducted over several months of visitors, tourists, and other traveling to the areas for recreational fishing or other activities).

³² *Association of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, at 1186 (9th Cir. 1997), *citing Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). *See also, Montana v. United States EPA*, 137 F.3d 1135, 1142(9th Cir. 1998)(finding that even if the tribal water quality standards program might affect property values, such a speculative and purely economic interest does not create a protectable interest in litigation concerning a statute that regulates environmental, not economic, interest); *Portland Audubon Soc’y v. Hodel*, 886 F.2d 302, 302 (9th Cir. 1989)(finding that an adverse economic impact does not create a significant protectable interest in litigation under NEPA).

4. Environmental Analysis of Final Rule

68. The Commission stated that no environmental consideration is raised by the promulgation of a rule that is procedural in nature or does not substantially change the effect of legislation or regulations being amended. The proposed regulations implement the procedural notice and filing requirements for applications to construct electric transmission facilities. Therefore, the Commission determined that an Environmental Assessment or EIS was not required.

69. On rehearing, CARI contends that the Final Rule implemented substantive revisions to the Commission's NEPA regulations that may directly impact the environment. It claims that the Commission has restricted project alternatives and impacts to be evaluated for proposed transmission facilities that may be built in national corridors. It argues that the restrictions on the range of information to be evaluated is not merely a matter of procedure, but rather affects the substance of the NEPA analysis. CARI claims that the mere fact that an environmental review may also take place at a later time, such as when a particular project is proposed, does not preclude an environmental review at the time a regulation is promulgated.³³

70. The cases cited by CARI both address situations where there was a project with ground disturbance. The Commission did not restrict the alternatives or impacts that it will look at in an environmental analysis of each proposed project. It simply listed minimum filing requirements and will, in fact, do a complete analysis for every proposed project. The Final Rule does not authorize any construction of facilities that will cause ground disturbance and thus, no environmental analysis is required.

5. CEQ Consultation

71. CARI argues that CEQ regulations require that the Commission first consult with the CEQ so that it may review the proposed revisions for compliance with NEPA.³⁴ They

³³ See CARI's rehearing request at 32, citing *Sierra Club v. Untied States*, 255 F.Supp.2d 1177, 1186 (D.Colo. 2002) and *Scientists' Institute for Public Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973).

³⁴ 40 C.F.R. § 1507.3 (“[E]ach agency shall as necessary adopt procedures to supplement these regulations. . . . Each agency shall consult with the Council while developing its procedures and before publishing them in the Federal Register for comment. . . . The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. . . . Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.”).

assert that there is no indication in the NOPR or the Final Rule that the Commission has consulted with the CEQ to determine whether the revisions comply with NEPA. It contends that in the absence of such consultation with the CEQ, the Commission's issuance of the Final Rule, in which it revised its NEPA implementing requirements, is unlawful and the regulations must be withdrawn or stayed until the required consultation occurs.

72. Section 1507.3 of CEQ's regulations generally pertains to consultations with CEQ when agencies develop their initial NEPA regulations. Here, where we are developing regulations to implement EPCRA 2005, not NEPA, consultation with CEQ is not necessary. Moreover, CEQ signed the MOU establishing a framework for early coordination of all applicable federal authorizations relating to the siting of transmission facilities and we will continue to work with CEQ and other agencies where appropriate.

The Commission orders:

All requests for rehearing are denied.

By the Commission. Commissioner Kelly dissenting in part
with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Regulations for Filing Applications
for Permits to Site Interstate
Electric Transmission Facilities

Docket No. RM06-12-001

(May 17, 2007)

KELLY, Commissioner, *dissenting in part*:

My dissent from the underlying order in this proceeding explains why I believe the majority's finding that "withheld approval for more than one year" includes a state's lawful denial of a permit flies in the face of the plain language of section 216 of EAct 2005. On rehearing, the parties also cite to the plain language in challenging the majority's interpretation, yet the majority responds, without more, that it finds "the parties' arguments unpersuasive." The majority does note that the parties' argument "ignores the fact that the term as used in the EAct 2005 is inclusive, comprising 'denying' approval as well as 'refraining' or 'holding back' from granting approval." In my view, such circular reasoning—"we say it is so therefore it must be so"—is simply not reasoned decisionmaking.

To shore up its interpretation, the majority makes much of what it deems to be the underlying purpose of section 216, that is, "to facilitate the process of siting critical regional transmission lines and facilities, ensuring adequate capacity and increased reliability on the electric transmission grid." Notwithstanding that the majority cites as the basis for this statutory purpose a speech given by a congressional representative four months before the passage of EAct 2005, the majority in any event fails to demonstrate how pre-empting states when they lawfully deny permits will further this asserted purpose. As I noted in my previous dissent, I believe that states, as well as applicants, will act in good faith in processing requests for permits. Indeed, given the consequences of unlawfully denying a permit application, states would have a significant incentive to act in good faith in processing them, which, I am confident, would ultimately result in a more efficient and effective state transmission siting process.

It is not reasonable to conclude that Congress's intent in enacting section 216 was to ensure the construction of transmission lines at the expense of a thoughtful, timely, and reasoned state determination, even where such a determination is the denial of a permit. As I noted in my previous dissent, states have always had exclusive, plenary jurisdiction over transmission siting, and the plain language of section 216 affirms the states' important role by carefully

carving out only a limited role for the federal government in the area of transmission citing.³⁵

The majority has not cited any additional legislative intent to pre-empt states from lawfully denying permit applications; in fact, the majority rightly acknowledges that there is no “definitive legislative history on point.” The majority does try and bolster its interpretation by comparing the statutory language at issue to that of new FPA section 203(a)(5), however, I agree with petitioners that such comparison offers no support, because, as the majority also acknowledges, sections 203 and 216 address different regulatory situations.

When all is said and done, the majority has failed to demonstrate that Congress intended to pre-empt the states when they lawfully deny permit applications. It cites *New York v. FERC* for the proposition that in the instant case, there should be no “presumption against pre-emption” because there is no conflicting state law or regulations but, rather, there is a question over “the scope of the authority granted the Commission in section 216 to act in certain circumstances.” However, *New York v. FERC* involved clear statutory language under the Federal Power Act that “unambiguously” and with no “limitation” authorizes the Commission to assert jurisdiction over interstate electricity transmissions.³⁶ Such sweeping pre-emptive authority is not the case here.

Even assuming, *arguendo*, that, as the majority asserts, there should be no presumption against preemption, the majority fails to address the fact that a court will *not* find federal pre-emption “in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”³⁷ Instead, the majority concludes that it has “substantial textual and contextual support” for its “reasonable” interpretation, and that “if Congress had intended to limit the scope of its grant of authority in instances where a state has denied an application, it would have explicitly done so.” The majority’s reasoning is backward and fails to meet the high burden established by the courts.

³⁵ As one of the parties in this proceeding notes, support for such a limited role is bolstered by, *e.g.*, S. Rep. No. 109-078, at 48 (2005)(explaining that section 216 “provides limited federal backstop siting authority...for electric transmission lines”).

³⁶ *New York v. FERC*, 535 U.S. 1 (2002).

³⁷ *Id.* at 18 (court has “to be certain that Congress has conferred authority on the agency” when controversy concerns scope of federal authority to preempt state law); *See also Gregory v. Ashcroft*, 501 U.S. 452 (1991) (for a court to find federal pre-emption, it must be “unmistakably clear” that Congress intended to do so).

Finally, I am troubled by the majority's dismissive attitude toward the parties' challenges over the determination that "withheld approval" can reasonably be interpreted to include a state's lawful denial of a permit application. In noting that "agencies from *only two states*" question the Commission's jurisdictional finding, and that "NARUC did not seek rehearing," the majority implies that the legitimacy of a challenge is determined by the number of challengers and by whom the challengers are. This is anathema to the way the Commission should conduct business, that is, by determining the legitimacy of a challenge based solely on its merits. Yet, in this order, the majority suggests that the parties may not be "significant enough" to warrant meaningful consideration of the merits of their challenges. It no doubt states the obvious to note that entities choose to file, or not to file, challenges to Commission findings based on any number of factors, such as financial resources, internal or external political pressures, or understanding of Commission proceedings.

For all of the reasons stated above, as well as those set forth in my November 16, 2006 statement in this proceeding, I respectfully dissent.

Suedeem G. Kelly