



Federal Energy Regulatory Commission
May 17, 2007
Open Commission Meeting
Statement of
Commissioner Suedeen G. Kelly

Item C-4: Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities (Docket No. RM06-12-001)

"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 siting.

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

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“unambiguously” and with no “limitation” authorizes the Commission to assert jurisdiction over interstate electricity transmissions. Such sweeping pre-emptive authority is not the case here.

Even assuming 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.” 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.

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.”