Federal Energy Regulatory Commission
November 16, 2006
Open Commission Meeting
Statement of
Commissioner Suedeen G. Kelly

Item C-2: Regulations for Filing Applications for Permits to Site Transmission Facilities (RM06-12-000)

o This past June, when we issued a NOPR in this proceeding, I noted my support for the proposed rule, and emphasized that only certain, limited circumstances would give rise to our backstop authority. I added that, in considering a permit application, the Commission would ensure that all stakeholders, including affected states, will have an opportunity to provide input into the process.

o I emphasized opportunities for "affected states" because, as I have said on a number of occasions, this rule should be respectful of state jurisdiction. Unfortunately, in one critical area, it is not.

o In particular, the final rule states that the Commission's permitting authority is triggered when, among other things, a state lawfully <u>denies</u> a permit application. I could not disagree more with this interpretation. It flies in the face of well-established principles of statutory interpretation, not to mention a common-sense reading of the provision at issue. Most significantly, it preempts the state permitting process.

o States have always had exclusive, plenary jurisdiction over transmission siting. In 2005, Congress passed EPAct, which, for the first time, carefully carves out a limited role for the federal government in the area of transmission siting. EPAct amended the FPA to give the Commission the authority to site electric transmission facilities in five specific situations. The majority's interpretation of section 216(b)(1)(C)(i) would add a sixth situation: the Commission would have jurisdiction to approve the siting of a transmission line pursuant to federal law where a state has lawfully denied a permit under state law.

o The statutory provision at issue provides that the Commission may issue a permit for the construction of an electric transmission line if the State having the authority to site the line has

> (i) withheld approval for more than 1year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric corridor, whichever is later.

o The majority says this also means that the Commission can issue a permit for the construction of an electric transmission line if the State has *denied* the permit application. That interpretation is just not supported by the statutory language.

o The fundamental rule of statutory interpretation is to give the language at issue its plain and unambiguous meaning. To that end, words will be interpreted as taking their ordinary, contemporary, common meaning. The language at issue here is not, as the majority asserts, "withheld approval." Rather, it is "withheld approval for more than 1 year after the filing of an application." When "withheld approval" is read in context (as required by another fundamental rule of statutory construction) it cannot mean "deny," because otherwise the provision would give the Commission jurisdiction when a state has "denied approval for more than 1 year after the filing of an application." This is nonsensical.

o The authority to lawfully deny a permit is critically important to the states for ensuring that the interests of local communities and their citizens are protected. What the Commission does today is a significant inroad into traditional state transmission siting authority. It gives states 2 options: either issue a permit—or we'll do it for them. Obviously, this is no choice. This is preemption.

o Courts have long presumed that Congress does not cavalierly preempt state law. Indeed, courts should not find federal preemption unless Congress has been unmistakably clear of its intent to do. There is no evidence to show it was Congress' intent to preempt the state permitting process.

o To the contrary, I find it inconceivable that Congress would have specified in painstaking detail in section 216(b)(1) five circumstances that give rise to Commission jurisdiction, yet failed to have specified state denial of a permit as a sixth one. If Congress had intended to take away the States' authority to lawfully deny a permit, surely it would have said so in unmistakable terms.

o Like me, I suspect many will be surprised by the Commission's decision today. We have received 51 letters commenting on the proposed rule, including many that delved into minute details of the rule; yet no one has opined, let alone argued, that the Commission has jurisdiction if a State denies a permit.

o Indeed, there is evidence beyond the plain meaning of the statute that Congress did not intend to give the Commission the authority to override a State's denial of a permit application. In 216(b)(1)(A)(ii), Congress told the states that they cannot retain jurisdiction to site transmission facilities unless they have the authority to "consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State." It makes little sense that Congress would have said, on the one hand, a state has the authority to review a permit application if it takes these factors into account, but on the other hand, it doesn't really matter if the state takes these factors into account, because if it doesn't approve the permit, it loses jurisdiction to the Commission.

o I realize that the majority is concerned that the goal of section 216 to encourage transmission facilities will be frustrated if our backstop authority does not extend to denials of permits. However, I believe that states—as well as applicants—will act in good faith in processing requests for permits. Moreover, Congress included the requirement that states must have the authority to consider the interstate benefits of applicants' proposals. Accordingly, states will be required to look beyond their borders in considering whether to approve or deny permit applications. If the state does not adequately take these benefits into account and denies the siting request, then applicants will have a remedy in court.

o In all other respects, I support this rule. It provides extensive opportunities for stakeholder involvement, and requires careful consideration of the public interest. It also makes clear that the Commission's mere consideration of an application does <u>not</u> mean we are making a jurisdictional call, much less that we will approve a proposed project. In fact, once an application is before us, anyone can raise issues over our jurisdiction, as well as the merits of the proposal itself.

o Of course, it is my expectation and belief that states, applicants, and stakeholders

will work collaboratively in the state permitting process, so that the Commission will rarely have to make jurisdictional calls in the first place. However, it should provide a level of comfort to the states to know that, if and when an application is before us, they can weigh in on our jurisdictional determinations.

o Thanks to staff's hard work, the final rule sets forth with great clarity a process that will ensure that reasonable siting requests are considered and that critical transmission lines are built, thus enhancing system reliability. For these reasons, I am pleased to vote out this rule. However, to the extent that under this rule, state denial of a permit gives rise to Commission jurisdiction, I respectfully dissent.