NOS. 07-1651, *ET AL.* (CONSOLIDATED)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PIEDMONT ENVIRONMENTAL COUNCIL, *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

PETITION OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION FOR REHEARING *EN BANC*

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APRIL 2, 2009

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 35 and Circuit Rule 35, Respondent Federal Energy Regulatory Commission ("FERC" or "Commission") hereby petitions for rehearing *en banc* of *Piedmont Environmental Council v. FERC*, Nos. 07-1651, *et al*., 2009 U.S. App. LEXIS 2944 (4th Cir. Feb. 18, 2009).

In *Piedmont*, a 2-1 majority (Circuit Judge Michael writing for the majority, joined by District Court Judge Voorhees sitting by designation) reversed FERC's interpretation of its jurisdiction under Federal Power Act § 216(b)(1)(C)(i), 16 U.S.C. § 824p(b)(1)(C)(i), thereby significantly constraining FERC's authority to

site critical transmission facilities in national interest electric transmission corridors designated by the Department of Energy.[1] The necessity to address deficiencies in the nation's transmission grid is well-recognized; notably, in his February 24, 2009 Remarks to the Joint Session of Congress,[2] President Obama stated the intention to double the nation's supply of renewable energy and "lay down thousands of miles of power lines that can carry new energy to cities and towns across this country." The statute in question was enacted to allow limited federal siting authority when the transmission facilities in question are of national significance. 2009 U.S. App. LEXIS 2944 at *52 (J. Traxler, dissenting) (citing legislative history). Since enactment of the statute, and indeed since submission of this appeal, the issue of transmission siting has become only more significant and more profoundly national in scope.

The *Piedmont* majority's rejection of FERC's statutory interpretation further contradicts this Circuit's and the Supreme Court's precedent applying *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), under which courts defer to an agency's permissible interpretation of ambiguous statutory language. That the statute at issue is, at a minimum, ambiguous is well illustrated

[1] The Commission does not seek *en banc* rehearing of any other determinations reached in *Piedmont*. This petition is filed on majority vote of the Commission, with Commissioner Kelly dissenting.

[2] Available at http://www.nytimes.com/2009/02/24/us/politics/24obama-text.html.

by the conclusion of Circuit Judge Traxler in dissent that FERC's broader interpretation of its siting authority was the *only* reasonable interpretation of the statute. As two judges of this Court have found that the relevant statutory text is clear, but in diametrically opposed directions, one favoring petitioners and one favoring the Commission, logically there must be an ambiguity for which *Chevron* deference is appropriate. Given the critical nature of FERC siting authority in corridors where national interests are implicated, and the ambiguity of the statutory language at issue, which should result in deference to FERC's permissible interpretation under *Chevron*, FERC requests *en banc* review of the *Piedmont* decision. Fed. R. App. P. 35(b)(1).

I. *PIEDMONT* SIGNIFICANTLY CURTAILS FERC'S ABILITY TO ADDRESS CRITICAL INFRASTRUCTURE DEFICIENCIES IN NATIONAL INTEREST CORRIDORS.

As both the *Piedmont* majority and dissent acknowledged, the statute at issue, 16 U.S.C. § 824p, was enacted in 2005 in response to Congressional concerns about the capacity and reliability of the nation's electric transmission grid, which, as a result of traditional state control over transmission siting and construction, is an "interconnected patchwork of state-authorized facilities." 2009 U.S. App. LEXIS at *7.

> To avoid future blackouts and provide our industry and consumers with the reliable electricity they need, we need to invest in critical transmission infrastructure; provide limited Federal siting authority of transmission lines to ensure the transmission of national interest lines,

> and avoid the most significant areas where we had gridlock; [and] streamline the permitting of siting for transmission lines to assure adequate transmission. . . . We need all these parts of the Energy bill.

2009 U.S. App. LEXIS 2944 at *40 (J. Traxler, dissenting) (quoting 150 Cong. Rec. S3732 (daily ed. April 5, 2004) (statement of Sen. Domenici, Chairman of the Senate Energy Committee at time of passage of the Energy Policy Act of 2005)).

To address this situation, Congress authorized the Secretary of Energy to designate areas with electric transmission constraints as national interest electric transmission corridors. 16 U.S.C. § 824p(a). Congress authorized FERC to take over the siting of facilities in such national interest corridors from state siting authorities under certain enumerated circumstances, *see* 16 U.S.C. § 824p(b)(1)-(6), including when a state has "withheld approval for more than 1 year" after the filing of an application for a permit. 16 U.S.C. § 824p(b)(1)(C)(i).

The *Piedmont* majority reversed FERC's determination in the challenged orders[3] that FERC's authority under 16 U.S.C. § 824p(b)(1)(C)(i) -- to act when a state "withholds approval" -- includes the authority to act when a state *denies* a permit application. 2009 U.S. App. LEXIS 2944 at *15. The *Piedmont* interpretation significantly impairs FERC's authority to site facilities in national interest corridors, as the interpretation permits any state, by outright denying a

[3] *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Order No. 689, 71 Fed. Reg. 69,440 (Dec. 1, 2006), FERC Statutes & Regulations, Regulations Preambles ¶ 31,234 (2006) (Rulemaking Order), *reh'g denied*, 119 FERC ¶ 61,154 (2007) (Rehearing Order).

permit to site or construct transmission facilities, to derail the multi-state transmission projects necessary to assure reliability in the national interest corridors, regardless of how important that project may be to the national interest and relieving congestion on the interstate grid. *See* March 12, 2009 Testimony of FERC Chairman Jon Wellinghoff Before the Committee on Energy and Natural Resources of the United States Senate, Hearing on Legislation Regarding Electric Transmission Lines, at 5-6.[4] Thus, the panel majority's ruling "is a significant constraint on the Commission's already-limited ability to approve appropriate projects to transmit energy in interstate commerce." *Id*. at 6.

The need for such infrastructure development is, if anything, even more prominent today. As President Obama stated in his January 20, 2009 Inaugural Address[5]: "The state of our economy calls for action: bold and swift . . . . We will build the roads and bridges, the electric grids and digital lines that feed our commerce and bind us together." In particular, transmission infrastructure development is necessary for the delivery of renewable power, such as solar and wind power, to bring the power from the remote areas in which it is most

[4] Available at http://www.ferc.gov/EventCalendar/Files/20090312100013-03-12-09-testimony.pdf.

[5] Available at http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html.

efficiently produced, to the metropolitan areas where it is most needed. Wellinghoff Testimony at 2.

II. UNDER *CHEVRON*, FERC'S PERMISSIBLE INTERPRETATION OF THE STATUTE SHOULD RECEIVE DEFERENCE.

The *Piedmont* majority's rejection of FERC's statutory interpretation is contrary to the Supreme Court's and this Circuit's caselaw on the proper application of *Chevron*. Under *Chevron*, "[a] federal court need not defer to an agency's construction of its governing statute if the construction violates an unambiguous statutory command; but deference is appropriate if the statute is ambiguous or unclear on the point in issue and the agency's interpretation is based on a permissible construction of the statute." *Mowbray v. Sullivan*, 914 F.2d 593, 598 (4th Cir. 1990). *Chevron* overturned a court of appeals decision in which the "basic legal error" was the adoption of a judicial definition of a statutory term where Congress had not "commanded that definition" in the statute. 467 U.S. at 842. The court may not substitute its own construction for the agency's reasonable interpretation. *A. T. Massey Coal Co. v. Barnhart*, 472 F.3d 148, 167 (4th Cir. 2006). Rather, where there is statutory ambiguity, "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 980 (2005).

A. The *Piedmont* Interpretation is Not Compelled by the Statute and Therefore Does Not Suffice As a Basis to Reject FERC's Reasonable Interpretation under *Chevron*.

Refusing *Chevron* deference to FERC's statutory interpretation based upon the purported plain language of the statute, the *Piedmont* majority found that "withheld approval for more than one year" could not be interpreted to include a state's *denial* of a siting permit. 2009 U.S. App. LEXIS 2944 at *15. The majority opinion does not support the conclusion it purports to draw.

The statute does not define the range of state actions that constitute withholding approval. Rulemaking Order P 26, JA 235. Such statutory silence '"normally creates ambiguity.'" *Kentuckians for The Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 441 (4th Cir. 2003) (quoting *Barnhart v. Walton*, 535 U.S. 212, 218 (2002)). "By failing to define the phrase, Congress left an interpretative gap that [the agency] may fill." *Maryland Dept. of Health and Mental Hygiene v. Centers for Medicare and Medicaid Services*, 542 F.3d 424, 434 (4th Cir. 2008) (citing *Chevron*, 467 U.S. at 843-44). For example, in *American Forest and Paper Ass'n v. FERC*, 550 F.3d 1179, 1181 (D.C. Cir. 2008), issued after briefing and argument in this appeal, the court upheld FERC's interpretation of another section of the Energy Policy Act of 2005 (on the purchase obligations of electric utilities), finding that Congressional silence as to the issue at hand rendered

the statute ambiguous, and therefore "a prototypical case for an agency's gap-filling role under *Chevron*."

The *Piedmont* majority acknowledged that the term "withhold" means "to desist or refrain from granting, giving or allowing," and that "deny" and "withhold" are synonyms for "refusal." 2009 U.S. App. LEXIS 2944 at *15-16 (referencing dictionary and thesaurus sources). This recognition is fully consistent with FERC's interpretation that "withheld approval" includes the denial of approval. The majority, however, found FERC's interpretation precluded when the phrase "withheld approval" is considered in the context of the phrase "for more than one year." *Id*. In that context, the majority found that the phrase could *only* refer to approval that has been held back "continuously" for more than one year, which would exclude the "finite act" of denying an application. *Id*.

This is hardly a definition of "withheld approval" commanded by Congress as required under *Chevron* step one. 467 U.S. at 842. To the contrary, the *Piedmont* majority's opinion "established at most that the language may bear the interpretation they desire – not that it cannot bear the interpretation adopted by the [agency]." *Sullivan v. Everhart*, 494 U.S. 83, 91-92 (1990). As the dissent found, applying the common meaning of the word "withhold" – "[t]o keep back, decline to grant" – "yields a straightforward rule that a state has 'withheld approval for more than 1 year' when one year after approval has been sought, the state still has

not granted it, regardless of the reason." 2009 U.S. App. LEXIS at *44. "Under the common meaning of the words "withhold" and "approval," approval is withheld, *i.e.*, not granted, every day that no decision is issued granting approval, and it continues to be withheld on the day an application is denied (as well as every day that such a denial is not reconsidered)." *Id*. at *45. The presence of a dictionary definition of the relevant term supporting the agency's view indicates at a minimum that the statute is open to interpretation. *Nat'l RR Passenger Corp. v. Boston & Maine Corp*., 503 U.S. 407, 418 (1992) (where there were alternative dictionary definitions of the statutory term, each making some sense under the statute, that fact indicated that the statute was open to interpretation).

In essence, the majority's analysis disregards the word "approval" in the statute. "Withheld approval" is the default, not "withheld action" or "withheld decision." Denial is the opposite of approval. If, 366 days after filing, the application has been denied, the state has withheld approval for more than one year. As FERC explained in the challenged orders, there is no inconsistency in the use of the temporal component. State rejection might, upon further consideration, become state approval, and *vice versa*. Rather, the one-year time period indicates when FERC can commence its pre-filing process, Rehearing Order P 38, JA 487, and FERC retains discretion to allow state processes to be completed beyond the one-year period, Rulemaking Order P 31, JA 239.

Indeed, the dissent concluded that "[t]here is no other reasonable way to interpret those words;" "the language of the statute, when considered in the context of the statute's purpose and other provisions in the statute, is susceptible to only one interpretation, the one that FERC adopted." 2009 U.S. App. LEXIS 2944 at *41. The fact that the dissent reached this conclusion on the plain meaning of the statutory language is in itself suggestive, at a minimum, of ambiguity. No writing is unambiguous if '"susceptible of two reasonable interpretations.'" *World-Wide Rights Ltd. Partnership v. Combe Inc*., 955 F.2d 242, 245 (4th Cir. 1992) (quoting *American Fidelity & Casualty Co. v. London & Edinburgh Ins. Co*., 354 F.2d 214, 216 (4th Cir. 1965)); *Bear Brand Hosiery Co. v. Tights, Inc*., 605 F.2d 723, 726 (4th Cir. 1979) (same). Courts have recognized that conflicting statutory interpretations may evidence ambiguity. *Saintha v. Mukasey*, 516 F.3d 243, 253 (4th Cir. 2008) ("The possibility that a subsection of that statute could perhaps lead another decisionmaker to a different conclusion only reinforces the ambiguity of the statute" and does not render the agency's interpretation impermissible so as to overcome the "substantial deference" the agency is owed). *See also Dewsnup v. Timm*, 502 U.S. 410, 416 (1992) (the contrasting positions of the parties and *amici* with regard to interpretation of the statute demonstrates that the relevant statute "do[es] embrace some ambiguities"); *Local Union 1261 v. Fed. Mine Safety & Health Review Comm'n*, 917 F.2d 42, 46 (D.C. Cir. 1990) (differing Commission

interpretations over time and split among the Commissioners in the decision under review indicates ambiguity); *Bankwest v. Fidelity & Deposit Co. of Md*., 63 F.3d 974, 978 (10th Cir. 1995) ("The fact that judicial opinions have interpreted identical policy provisions differently may demonstrate ambiguity."); *Thinking Machines Corp. v. Mellon Fin. Servs. Corp*., 67 F.3d 1021, 1025 (1st Cir. 1995) (the "collision of viewpoints" among courts interpreting the statute "underscores the obvious;" that the text is unclear).

B. The Statutory Context Supports FERC's Interpretation.

In ascertaining the meaning of the statute, the court must look not only to the specific statutory language, but also "the language and design of the statute as a whole." *Sullivan*, 494 U.S. at 89. Here, the *Piedmont* majority concluded that FERC's interpretation was not supported by the statutory context because, in the majority's view, the other circumstances under which FERC could exercise siting authority were "limited grants of jurisdiction" (*see* 16 U.S.C. § 824p(b)(1)(A)-(C)), and the "withheld approval" clause should be similarly limited in interpretation. 2009 U.S. App. LEXIS 2944 at *19-20. "[I]f Congress had intended to take the monumental step of preempting state jurisdiction *every time* a state commission denied a permit in a national interest corridor, it would surely have said so directly." *Id*. at *20.

This statement is contrary to the *Piedmont* majority's *rejection* of petitioners' arguments that a "clear" statement of Congressional intent was required because of a presumption against the preemption of the states' historic siting powers. *Id*. at *14. "[A]s the Supreme Court made clear" in *New York v. FERC*, 535 U.S. 1, 18 (2002) (upholding another FERC rulemaking concerning transmission rates and services under the Federal Power Act), a presumption against preemption does not apply "when Congress has conferred authority upon a federal agency to act in an area of preexisting state regulation, and there is simply a question about the scope of that authority." 2009 U.S. App. LEXIS 2944 at *14. Thus, the question is simply one of Congressional intent, guided by *Chevron*. *Id*. Accordingly, the lack of a "clear" statement relied on by the majority panel is of no consequence in interpreting the statute.

To the contrary, as the dissent concluded, "only FERC's interpretation makes sense in the context in which the language is used and the context of the statute as a whole." *Id*. at *54. The subsection granting FERC siting authority when a state has "withheld approval for more than one year" (16 U.S.C. § 824p(b)(1)(C)(i)), is immediately followed by 16 U.S.C. § 824p(b)(1)(C)(ii), which gives FERC siting authority when a state has *granted* approval but "conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate

commerce or is not economically feasible." The dissent agreed with FERC that it is unreasonable to assume that Congress would deny FERC the authority to "trump" the state's permitting decision when the state's outright denial of a permit thwarts the statutory purpose, but would permit FERC to assert authority when the state approves the permit but imposes such onerous conditions that the statutory purpose is also thwarted. 2009 U.S. App. LEXIS 2944 at *47-48.

C. The Statutory Purpose Supports FERC's Interpretation.

FERC's interpretation is also supported by the statutory purpose, as found by the dissent. In construing a statute, the court must "'look to the provisions of the whole law, and to its object and policy.'" *Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs*, 480 F.3d 278, 293 (4th Cir. 2007) (quoting *United States Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 455 (1993)).

Here, FERC's interpretation is in accord with the statutory purpose of assuring that critical transmission facilities are sited in national interest corridors. 2009 U.S. App. LEXIS 2944 at *47 (J. Traxler, dissenting) (FERC has authority to assure that a state does not frustrate the goal of significantly reducing transmission congestion in a national interest corridor). The legislative history further evidences Congressional intent that FERC be able to preempt state siting authorities when it is determined that a high voltage line is of national significance. *Id*. at *51-53 (discussing legislative history). In contrast, the *Piedmont* majority's interpretation

would permit an individual state to thwart the statutory goal of reducing congestion in national corridors merely by denying a siting permit, which "makes no sense" in light of the purpose of the legislation. *Id*. at *48. Under this interpretation, a state can deny a critical piece of infrastructure "for purely local reasons," *id*. at *50, with no opportunity for backstop federal review of whether the project is in the national public interest. Congress intended to permit FERC to exercise jurisdiction when a state denies a permit that is necessary to ensure reliability of the national transmission grid, not just to exercise jurisdiction when a state has not ruled on the application one way or another for a certain period of time. *Id*. at *53.

Broadly construing FERC's authority does not, moreover, as the court majority believes, render state review of siting applications "futile." *Id*. at *19. Under the statute, states may impose conditions on any siting permit so long as the conditions are economically feasible and would not prevent significant reduction of congestion. *See* dissent, *id*. at *51 (citing FPA § 216(b)(1)(C)(ii)). Further, FERC takes state determinations into consideration in making its own permitting decisions. *Id*. at *50-51. The state decision and state-compiled record become part of the FERC record and are considered "to the maximum extent possible." Rulemaking Order P 42, JA 244, PP 124-25, JA 283; Rehearing Order P 39, JA 487. Thus, a state may deny a permit for legitimate reasons that may, in turn, cause the Commission to deny the permit. If, in an individual case, FERC has not

adequately addressed a state concern arising from a state proceeding, that is a matter that can be raised on judicial review from that individual siting case.

Accordingly, in order to preserve FERC's authority to assure adequate transmission in national interest corridors, and to recognize FERC's authority under *Chevron* to interpret a statutory provision that is -- as demonstrated by the conflicting perspectives of the Judges of this Court -- ambiguous, FERC respectfully requests that the Court grant *en banc* review.

CONCLUSION

For the reasons stated, FERC respectfully requests that the Court grant *en banc* rehearing of its February 18, 2009 decision to the extent requested.

Respectfully submitted,

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Piedmont Environmental Council, et al. v. FERC **Docket No. RM06-12**
4th Cir. Nos. 07-1651, *et al.*

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 35(b)(2), I certify that the Petition of Respondent Federal Energy Regulatory Commission for Rehearing *En Banc* contains 15 pages, not including the tables of contents and authorities and the certificate of compliance.

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4th Cir. Nos. 07-1651, *et al.*

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I hereby certify that on April 2, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, and I mailed the foregoing document by First-Class Mail, postage prepaid, to all case participants, at the following addresses:

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