Nos. 07-1651, *et al.* (consolidated)

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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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF THE ISSUES

1. Whether the Commission reasonably interpreted § 216 of the Federal Power Act (FPA), 16 U.S.C. § 824p, newly enacted in the Energy Policy Act of 2005 (EPAct 2005), which provides for federal jurisdiction where a state "withholds approval" of transmission facility siting for more than one year, to include state denials of siting authority.

2. Whether the Commission fulfilled the requirements of the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321 *et seq*., in promulgating regulations governing applications for transmission siting under EPAct 2005,

where the orders promulgating the regulations approved no projects and thus had no environmental consequences, and full environmental reviews will be conducted of any proposed transmission projects to be sited under those regulations.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

I. STATEMENT OF THE CASE

On August 8, 2005, Congress enacted EPAct 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005). Section 1221 of EPAct 2005 adds a new § 216 to the FPA, providing for Federal siting of electric transmission facilities under certain circumstances, including where a state has "withheld approval" for more than one year of a proposed transmission project in a national corridor suffering critical transmission constraints. 16 U.S.C. § 824p(b)(1)(C)(i). In the challenged orders, the Commission issued procedural regulations for the filing of siting applications, and interpreted the scope of its jurisdiction where a state has "withheld approval" to include situations where the state denied approval. *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), JA 217, *reh'g denied*, 119 FERC ¶ 61,154 (2007) (Rehearing Order), JA 475.

Petitioners contended that the phrase "withheld approval" does not provide for federal jurisdiction where a state denies siting authorization under state law. The Commission found to the contrary that its interpretation was reasonable, supported by the statutory context and legislative history, and best effectuated the purpose and intent of the statute.

In addition, petitioner Communities Against Regional Interconnect (CARI) asserted that the Commission's orders violated NEPA. The Commission reasonably found NEPA inapplicable to the challenged orders because the orders merely establish minimum filing requirements for siting applications, and in no way approve or prejudge actions of any kind affecting the environment, nor in any way limit the scope of the environmental analysis that will be undertaken for proposed projects.

This consolidated appeal followed.

II. STATEMENT OF FACTS

A. The Need for Federal Siting of Electric Transmission Facilities.

Nearly five decades ago, domestic energy demand began exceeding domestic supply. S. Rep. No. 109-78 at 6 (2005) (Senate Report). That trend has increased over the years, and projections suggest that the disparity will continue to grow. *Id*. One means of addressing this disparity is to assure access to existing domestic resources. *Id*. at 7-8.

A particular area of concern is the adequacy of the electric transmission grid. The nation's electric system is an extensive, interconnected network of power lines that transport electricity from generator to consumer. *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors*, Notice of Proposed Rulemaking, 115 FERC ¶ 61,334 P 1 (2006) (Proposed Rulemaking). However, the system was built by utilities over the last 100 years primarily to serve local customers and maintain system reliability. *Id*. Due to a doubling of electricity demand and generation over the past three decades and the emergence of competitive wholesale electricity markets, the need to transfer large amounts of electricity across the grid has increased significantly. *Id*. *See also, e.g.*, *New York v. FERC*, 535 U.S. 1, 7-8 (2002) (discussing the technological, operational and regulatory developments over past decades). This increase in regional electricity transfers saves billions of dollars for electricity consumers, but significantly increases load on the transmission system. *Considerations for Transmission Congestion Study and Designation of National Interest Electric Transmission Corridors* (Department of Energy), 71 Fed. Reg. 5660 (Feb. 2, 2006) (DOE Considerations).

Investment in new transmission facilities has not kept pace with the need to increase transmission system capacity and maintain system reliability. Proposed Rulemaking P 1, JA 15. The blackout of August 2003 highlighted the need to

bolster the nation's electric transmission system. *Id*. "Today, congestion in the transmission system impedes economically efficient electricity transactions and in some cases threatens the system's safe and reliable operation." DOE Considerations at 5660. The Department of Energy estimates that this congestion costs consumers several billion dollars per year by forcing wholesale electricity purchasers to buy from higher-cost suppliers. *Id*.

B. Federal Transmission Siting Under EPAct 2005.

In enacting EPAct 2005, Congress specifically expressed concern regarding insufficient investment in transmission infrastructure.

> Investment in electric transmission has not kept pace with electricity demand. Moreover, transmission system reliability is suspect as demonstrated by the blackout that hit the Northeast and Midwest in August of 2003. Legislation is needed to address the issues of transmission capacity, operation and reliability.

H.R. Rep. No. 109-215 at 171 (2005) (House Report). *See also* Senate Report at 8 (recognizing that "[b]illions of dollars need to be invested in the national transmission grid to ensure reliability and to allow markets to function"). Congress further recognized that a significant factor contributing to this inadequate investment was difficulty in siting new transmission facilities, particularly with regard to obtaining state regulatory approval for such siting. *See* Senate Report at 8 ("Siting challenges, including a lack of coordination among States, impede the improvement of the electric system"); House Report at 171 ("state regulatory

approval delays siting of new transmission lines by many years"). While the Commission has broad authority under the FPA over the transmission of electric energy in interstate commerce, *see* FPA § 201(a), 16 U.S.C. § 824(a), traditionally authority to site transmission facilities was left in the hands of the states. Rehearing Order P 23, JA 483.

The new FPA § 216 enacted in EPAct 2005 addressed the concerns arising from state siting approvals by providing for federal siting authority under certain circumstances. *See* Rehearing Order P 17, JA 481 ("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"). Section 216 requires the Secretary of the Department of Energy to identify transmission constraints, and to designate certain constrained areas as national interest electric transmission corridors (national corridors). FPA § 216(a). Once a national corridor is designated, under § 216(b)(1), the Commission may issue permits to construct or modify electric transmission facilities in that corridor upon making a number of required findings. FPA § 216(b).

The Commission must first find that the state in which the facilities are to be sited lacks adequate authority for the siting, § 216(b)(1)(A); that the applicant does not qualify to apply for siting approval in the state, § 216(b)(1)(B); or that:

> (C) a State commission or other entity that has authority to approve the siting of the facilities has --
>
> (i) 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; or
>
> (ii) 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 Commission must also find that the proposed project: (1) will be used to transmit electric energy in interstate commerce; (2) is consistent with the public interest; (3) will significantly reduce transmission congestion in interstate commerce and protect or benefit consumers; (4) is consistent with sound national energy policy and will enhance energy independence; and (5) will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures. FPA §§ 216(b) (2)-(6); Rulemaking Order P 37, JA 241.

C. The Challenged Orders

FPA § 216(c)(2) directed the Commission to issue rules specifying the form of, and the information to be contained in, an application for construction or modification of electric transmission facilities in national corridors. On June 16, 2006, FERC issued the Proposed Rulemaking, proposing regulations to fulfill this statutory requirement. JA 13-87. After considering comments on the Proposed Rulemaking, the Commission issued the Rulemaking Order, implementing filing requirements and procedures for entities seeking permits to construct or modify

electric transmission facilities under the circumstances set forth in § 216. Rulemaking Order P 1, JA 221.

The primary focus on rehearing of the Rulemaking Order was the scope of the Commission's jurisdiction under FPA § 216(b)(1)(C)(i) to act when a state has "withheld approval for more than 1 year." Rehearing Order P 2, JA 475 (quoting FPA § 216(b)(1)(C)(i)). Specifically, parties contested the Commission's determination that "withheld approval" can reasonably be interpreted to include a state's denial of an application to site transmission facilities. *Id*.

The Commission found that its interpretation of "withheld approval" was the most common-sense reading of the statute. Rehearing Order PP 8, 11, JA 477-78. This interpretation moreover: (1) furthers the underlying goals, purpose and intent of the statute to facilitate siting of needed facilities in national corridors, *id*. P 17, JA 481; (2) is supported by the legislative history, *id*.; and (3) is consistent with the structure and language of the statute as a whole. *Id*. P 19, JA 481.

Additionally, on rehearing, the Commission rejected arguments that it was required to prepare an environmental assessment or impact statement because the rulemaking merely established procedures for the future filing of permit applications and in no manner approved actions of any kind affecting the environment. Rehearing Order PP 68, 70, JA 496. The Commission also rejected arguments that its application regulations violated NEPA by unduly limiting

consideration of the environmental impacts of proposed projects. *Id*. The regulations simply established minimum initial filing requirements; the Commission will perform a complete environmental analysis for every project proposal it receives. *Id*.

SUMMARY OF ARGUMENT

The primary focus on appeal is the scope of the Commission's jurisdiction under FPA § 216(b)(1)(C)(i), which provides for Commission jurisdiction where a state has "withheld approval for more than 1 year." Petitioners and amici contest the Commission's determination that "withheld approval" can reasonably be interpreted to include a state's denial of an application to site transmission facilities, asserting that the provision can only be interpreted to apply to state *delays* in permitting that exceed one year.

The Commission found that its interpretation of "withheld approval" was the most common-sense reading of the statute, as in common parlance withheld can mean denied as well as delayed. This interpretation moreover is consistent with the structure and language of the statute. The companion subsection to FPA § 216(b)(1)(C)(i), subsection (C)(ii), provides for federal jurisdiction where a state approves siting but so conditions the approval as to effectively scuttle the project. Given federal authority to override state siting authorizations where a state *effectively* denies siting, the Commission reasonably concluded that the statute

would not deny the Commission authority to intervene where a state *expressly* denies siting. Moreover, the contemporaneously-enacted language in FPA § 216(h)(6)(A) and § 203(a)(5), 16 U.S.C. § 824b, evidences that Congress knew how to say "fails to act" or "does not act" when that is what was meant.

The Commission's interpretation also furthers the purpose of the statute to facilitate the siting of critical transmission facilities. The legislative history clearly evidences Congressional concern with the urgent need for investment in transmission infrastructure, and the acknowledgement that such investment often is frustrated by state approval processes. The Commission's interpretation assures that the siting of critical transmission facilities in national corridors is not frustrated by individual state denials of siting permits.

For their part, petitioners assert inapplicable canons of construction. The Commission's interpretation does not render the phrase "for more than one year" superfluous, as the term "withheld" means delay as well as deny, and the phrase "for more than one year" plainly applies to delay. Likewise, the Supreme Court has held that the "presumption against preemption" does not apply in cases such as this concerning the scope of Congress' exercise of authority to displace state action.

Thus, while traditionally authority to site transmission facilities was left to the state, Congress in FPA § 216 affirmatively granted the Commission

jurisdiction to site transmission facilities in a national corridor when the conditions enumerated in § 216(b) are met. 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 § 216(b)(1)(C). Because the Commission is charged with administering the electric transmission siting provisions of the EPAct, the Court substantially defers to the Commission's construction of any ambiguous language in the statute, if the Commission's construction is based on a permissible construction of the statute.

Arguments that the Rulemaking Order violated NEPA similarly are unavailing. The Commission's regulations set forth only the minimum initial informational requirements for filing applications, and in no way limit the environmental analysis that ultimately will be performed with respect to proposed projects. The Commission expressly recognized its obligation to perform a full environmental analysis of any proposed transmission project under NEPA.

Nor was the Commission obligated to prepare an environmental impact statement and consult with the Council for Environmental Quality. NEPA procedures do not apply to federal actions that do nothing to alter the physical environment, such as the orders here which merely establish procedures for the filing of permit applications. Further, no "programmatic" environmental impact statement could be prepared at this time because the projects that ultimately may

be sited pursuant to the statute are unknown, as no applications for any such projects have yet been filed with the Commission.

ARGUMENT

I. STANDARD OF REVIEW

Where Congress has expressly delegated authority to the agency to "'elucidate a specific provision of the statute by regulation,'" the Court is "obliged" to accord the regulations "'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Elm Grove Coal Co. v. Director, Office of Workers' Compensation Programs*, 480 F.3d 278, 293 (4th Cir. 2007) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). Because the Commission is charged with administering the electric transmission siting provisions of the EPAct, the Court "substantially defer[s]" to the Commission's construction of any ambiguous language in the Act, as long as the Commission's construction "'is based on a permissible construction of the statute.'" *Mackenzie Medical Supply, Inc. v. Leavitt*, 506 F.3d 341, 346 (4th Cir. 2007) (quoting *Chevron*, 467 U.S. at 843). Thus, if "'Congress has not directly addressed the precise question at issue,'" the Court may not substitute its own construction of the statute. *Elm Grove*, 480 F.3d at 292 (quoting *Chevron*, 467 U.S. at 843). "'Rather, if the statute is silent or ambiguous with respect to the

specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Id*. (quoting *Chevron*, 467 U.S. at 843).

The States contend that no deference is due to an agency interpretation of its own jurisdictional limitations. Amicus Br. 13 (citing *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Northern Illinois Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844, 846-47 (7th Cir. 2002)). As this Court found, however, in *rejecting* the holding in *Northern Illinois*, "the Supreme Court has never held that *Chevron* should not apply to interpretations of statutory provisions that delimit agencies' jurisdiction." *Equal Employment Opportunity Commission v. Paul Hall Center for Maritime Training and Education*, 394 F.3d 197, 201 (4th Cir. 2005). To the contrary, several Supreme Court decisions have afforded deference to agency interpretations of jurisdictional provisions. *Id*. (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-47 (1986)). *Louisiana* is inapposite as it involved the FCC's attempt through implied preemption to assert jurisdiction over states that had been expressly denied by Congress.

The States also contend that *Chevron* deference is precluded where the agency interpretation "threatens to alter the federal-state balance," citing what the States call the "clear-statement rule." Amicus Br. 12-13 (citing *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001); *University*

of Great Falls v. NLRB, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002)). *See also* Piedmont Br. 14, 29 (citing *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 539 (2002)).[1] The "clear statement rule" applies where an administrative interpretation of a statute "invokes the outer limits of Congress' power," thereby potentially raising serious constitutional questions. *Solid Waste*, 531 U.S. at 172-73. *See also Raygor*, 534 U.S. at 543 (the "clear statement principle of statutory construction" applies when Congress "'intends to alter the 'usual constitutional balance between the States and the Federal Government.'"); *University of Great Falls*, 278 F.3d at 1340-41 (ordinary *Chevron* deference is "trumped" by the avoidance of constitutional questions).

The agency interpretation in *Solid Waste* raised the issue of whether Congressional authority under the Commerce Clause could extend to intrastate waters that provided migratory bird habitats. 531 U.S. at 173-74. In *Raygor*, the interpretation at issue raised the question of whether federal supplemental jurisdiction over nonconsenting state defendants abrogated the state sovereign immunity guaranteed by the Eleventh Amendment. 534 U.S. at 541-42. Here, however, no constitutional questions are presented by the Commission's interpretation, as Congress clearly possesses constitutional authority under the

[1] *American Bar Ass'n v. Federal Trade Commission*, 430 F.3d 457, 467-72 (D.C. Cir. 2005), also cited by Piedmont, *see* Piedmont Br. 14, 29, in fact applied *Chevron* and therefore does not support this argument.

Commerce Clause to confer jurisdiction over the siting of transmission lines used in interstate commerce. *See, e.g.*, CARI Br. 19 ("Admittedly, CARI does not dispute that Congress may entirely preempt the States' authority in a field of regulation in interstate commerce, including the transmission of power.")

Judicial review of FERC orders by this Court is governed by FPA § 313(b), 16 U.S.C. § 825*l*(b), which provides that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 512 (4th Cir. 1992). Thus, the scope of the Court's review of FERC action is narrow. *Appomattox River Water Authority v. FERC*, 736 F.2d 1000, 1002 (4th Cir. 1984). "This Court may set aside the FERC's order only if we find it to be arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law, or unsupported by substantial evidence." *Id*. (citations omitted). Where Congress has entrusted regulation to the Commission, "[a] presumption of validity . . . attaches to each exercise of the Commission's expertise." *Atlantic Seaboard Corp. v. FPC*, 397 F.2d 753, 755 (4th Cir. 1968). *See also Central Electric Power Coop., Inc. v. Southeastern Power Administration*, 338 F.3d 333, 337 (4th Cir. 2003) ("Given the expertise of agencies in the fields they regulate, a presumption of regularity attaches to administrative actions.").

II. THE COMMISSION REASONABLY INTERPRETED FPA § 216, NEWLY-ADDED BY EPACT 2005.

A. The Term "Withheld" Is Reasonably Interpreted to Include Both Failure to Act and Denial.

FPA § 216(b)(1)(C)(i) provides Commission jurisdiction over the siting of transmission facilities in a national corridor where a State has "withheld approval for more than one year . . . ." Rulemaking Order P 30, JA 238. The statute does not explicitly define the full range of state actions that are deemed to constitute withholding approval. Rulemaking Order P 26, JA 235; Rehearing Order P 8, JA 477. The Commission found that a reasonable interpretation of the language in the context of the legislation supports a finding that "withheld approval" includes denial of an application, as well as the temporal failure to issue an approval. Rulemaking Order P 26, JA 235; Rehearing Order P 8, JA 477.

If an applicant seeks state siting approval pursuant to applicable law, and the State does not *grant* the application within one year, approval is withheld, regardless of whether the State takes a specific action denying it. Rulemaking Order P 30, JA 238. The term "withhold" in this context thus means to refrain from granting approval, and, conversely, the term "deny" is synonymous with "withhold." *Id*. Webster's Third New International dictionary defines "withhold" as "to desist or refrain from granting, giving, or allowing." The same dictionary defines "deny" as "to refuse to grant: WITHHOLD" [caps in original]. "Denial,"

similarly, is defined as "refusal to grant . . . : rejection of something requested." *Id*. *See, e.g., ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 959 (D.C. Cir. 2007) (referring to dictionary definition in construing ordinary meaning of statutory language entrusted to FERC to administer). Furthermore, Roget's International Thesaurus 4th Ed., Section 776 ("Refusal") at paragraph 776.4 lists "deny, withhold, hold back . . ." as synonyms. Rulemaking Order P 30, JA 238.

Petitioners contend that the "ordinary meaning" of "withhold" is a temporary suspension, or refusal to act, rather than a total or final denial or rejection. Piedmont Br. 19; CARI Br. 27-28. However, the Commission found that the term "withheld" can be reasonably interpreted to encompass *both* a temporal failure to grant as well as an outright denial or refusal. Rehearing Order P 11, JA 478 (adopting "most common sense" interpretation).

Indeed, courts have interpreted the terms "withhold" or "withheld" to include denying or refraining from granting. *See, e.g., State of Ohio v. Wengatz*, 471 N.E.2d 185, 187 (Ohio Ct. App. 1984) (construed according to "the rules of grammar and common usage," the statutory term "withhold" includes the meaning "to refrain from granting, giving or allowing"); *Hicks v. Connecticut*, 109 S.W. 2d 811, 813 (Ky. 1937) ("One of the general definitions of 'refuse' is to 'withhold'"). This can be seen, for example, in the interpretation of the common statutory and contractual provision that approval or consent not be "unreasonably withheld,"

which routinely is interpreted to include not only the failure to consent but also the outright denial of consent. *See, e.g., Rey v. Lafferty*, 990 F.2d 1379, 1382, 1394 (1st Cir. 1993) (assessing whether appellee's *rejection* of proposed products was unreasonable in violation of agreement on licensing ancillary products providing that "approval shall not be unreasonably withheld"); *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hospital Service District No. 1*, 426 F.3d 738, 741 (5th Cir. 2005) (lessor's *denial* of consent to assignment of lease was "withholding consent" under the lease); *Amber Refining, Inc. v. Occidental Oil and Gas Co*., 961 F.2d 225, 234 (Temp. Emer. Ct. App. 1992) (Department of Energy *rejection* of settlement agreement violated agreement that consent not be "unreasonably withheld").[2]

[2] *See also, e.g., Burger King Corp. v. Ashland Equities, Inc*., 217 F. Supp. 2d 1266, 1276 (S.D. Fla. 2002) (*denial* of consent to sale triggered provision of franchise agreement providing consent could not be "unreasonably withheld"); *Syndia Corp. v. Gillette Co*., 2002 U.S. Dist. LEXIS 6310 **33-34 (N.D. Ill. 2002) (provision in agreement that allows withholding of consent has been interpreted as providing that good faith must be exercised in *denying* permission); *Charter Communications, Inc. v. County of Santa Cruz*, 133 F. Supp. 2d 1184, 1201 N.D. Cal. 2001) (County's *denial* of consent to change in control of cable franchise triggered provision of franchise agreement under which the County's consent was required for the transfer but it could not be "unreasonably withheld"); *Rochester Lincoln-Mercury v. Ford Motor Co*., 2000 U.S. Dist. LEXIS 7085 *6 (D.N.H. 2000) ("Ford's breach of contract occurred, if at all, when it (allegedly) unreasonably withheld its consent to plaintiffs' proposed sale of the franchise to RLM. *That denial* was unambiguously communicated to plaintiffs in December of 1995."); *Broome v. Biondi*, 17 F. Supp. 2d 211, 220 (S.D.N.Y. 1997) (lease providing that "any consent to subletting may not be unreasonably withheld . . . ." was triggered by board *denial* of sublease).

Thus, as commonly understood the term "withheld" can encompass both a temporal failure to grant as well as an outright denial or refusal. Rehearing Order P 11, JA 478. Accordingly, *at best*, petitioners' arguments evidence nothing more than that the statutory language is ambiguous. 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)). Because the Commission is charged with administering the electric transmission siting provisions of the EPAct, amending the FPA, the Court "substantially defer[s]" to the Commission's construction of any ambiguous language in the Act, if the Commission's construction "'is based on a permissible construction of the statute.'" *Mackenzie Medical Supply*, 506 F.3d at 346 (quoting *Chevron*, 467 U.S. at 843).

B. Section 216(b)(1)(C)(i) Must Be Interpreted in the Context of the Entire Statute, Which Supports the Commission's Interpretation.

Statutory interpretation requires that statutory language be read in its proper context and not viewed in isolation. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). "[B]ecause the 'meaning of statutory language, plain or not, depends on context,'" the Court must consider "'not only the bare meaning of the word but also its placement and purpose in the statutory scheme.'" *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319 (4th Cir. 1998) (quoting

Bailey v. United States, 516 U.S. 137, 145 (1995)). *See, e.g., United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd*., 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is comparable with the rest of the law.")

Accordingly, subsection 216(b)(1)(C)(i) cannot be interpreted in isolation, but must be read in its statutory context. Section 216(b)(1)(C) provides siting authority where the Commission finds that a state has either: (i) "withheld approval for more than 1 year" after application or designation as a national corridor, whichever is later; or (ii) "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."

Thus, the companion subsection to (C)(i), subsection (C)(ii), allows federal jurisdiction where a state *authorizes* siting but so conditions the permit that it fails to "significantly reduce" the transmission constraint that caused its designation as a critical path in the first instance, or renders the project "not economically feasible." FPA § 216(b)(1)(C)(ii). Given the express federal authority to override state siting *authorizations* that nevertheless impede critical facility siting, the Commission reasonably concluded that the statute would not leave the Commission without

authority to intervene where a State expressly has denied an application to site critical facilities:

> Since Congress has provided the Commission with the authority to intervene in circumstances where a State has issued an authorization which will potentially prevent a project from going forward, it would not be reasonable to interpret the statute in such a manner that would leave the Commission without authority to intervene in instances where a State has expressly denied an application.

Rulemaking Order P 28, JA 236.

The express grant of jurisdiction over onerous state approvals in fact undermines petitioners' contentions that Congress was *only* concerned with preventing undue delay in state siting reviews. *See, e.g.*, CARI Br. 23 ("Nothing in the plain language of the FPA or its legislative history suggests a need for or the authorization of federal intervention in an area historically reserved for State action, *so long as the States act in a timely fashion*.") (emphasis added); Piedmont Br. 20 ("Section 216 recognizes traditional State authority and authorizes FERC intervention *where a State does not timely act* on a permit application. . . .") (emphasis added). In providing jurisdiction over onerous state approvals in subsection (C)(ii), Congress clearly was concerned with the *substance* of state action. Accordingly, as subsection (C)(i) must be read in harmony with subsection (C)(ii), there is no reason to believe that, in enacting subsection (C)(i), Congress was not similarly concerned with the substance of state refusals to grant siting authority.

Indeed, parties and amici struggle to explain why Congress would intentionally *allow* federal intervention in the event of onerous state approvals that scuttle critical projects in national corridors, and yet intentionally *bar* federal review where the state outright denies the application, achieving the same result. The parties speculate that perhaps Congress was concerned with the accountability of the state to its citizens for its decision to scuttle the national corridor project. *See* Amicus Br. 19 ("An outright denial is a transparent decision for which a State is accountable to its citizens unlike an approval with onerous conditions. Congress may have wanted to encourage this transparency by making outright denials immune to reversal by FERC and to discourage nominal approvals with conditions."); Piedmont Br. 24 (speculating that Congress' intent was to "allow[] federal intervention when a State seeks to frustrate new transmission *and avoid accountability*") (emphasis added).

As evidenced by the lack of any citation accompanying these speculations, there is no support whatsoever in the statute or legislative history for the supposition that Congress intended to bar federal oversight over individual state rejections of national corridor projects -- in frustration of the express Congressional purpose to *facilitate* the siting of such projects in the national interest -- in deference to an individual state's "accountability to its citizens." On the other hand, there is as discussed below *ample* evidence that Congress intended

to provide for supplemental federal siting authority to assure that transmission projects necessary in the national interest were not frustrated by the inability to obtain state approval. *See* Sections II (C) and (D) *infra*.

Piedmont asserts that the Commission's interpretation improperly infers a broad grant of jurisdiction where Congress granted siting authority to the Commission "only upon the occurrence of five specific triggers, not including timely permit denials under State law." Piedmont Br. 23. This assertion assumes away the central issue in this case – whether one of the "specific triggers," "withheld approval," is properly interpreted to include state permit denials. As the Commission found, under section 216(b)(1)(C)(i), the Commission has jurisdiction to act both where the state has delayed granting authorization and where the state has explicitly denied it. Rehearing Order P 17, JA 480.

The language in FPA § 216(h)(6)(A) and § 203(a)(5), 16 U.S.C. § 824b(a)(5), contemporaneously enacted in EPAct 2005, further supports the Commission's interpretation, as Congress evidenced that it knew how to say "fails to act" or "does not act" when that is what was meant. Rulemaking Order P 27, JA 236; Rehearing Order P 18, JA 481. The Commission has an obligation to construe a statute in such a manner as to give every word some operative effect. Rulemaking Order P 27, JA 236 (citing *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 167 (2004)); Rehearing Order P 19, JA 481. The Commission

reasoned that Congress' use of the different phrase "withheld approval" in § 216(b)(1)(C)(i) indicated an affirmative expression of a different intent. Rehearing Order P 18, JA 481. Interpreting the phrase "withhold approval" to mean "does not act" fails to recognize Congress' contemporaneous use of different words to express its intent. Rulemaking Order P 27, JA 236. Where Congress "'includes particular language in one section of a statute but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007) (quoting *Clay v. United States*, 537 U.S. 522, 528 (2003)).

While Piedmont asserts that § 203 (dealing with merger appeals) concerns a different subject matter than § 216, Piedmont Br. 27, the Commission is still obligated to construe the statute as a whole to give every word some operative effect. Interpreting the phrase "withheld approval" to mean the same as "does not act" fails to do this. Rehearing Order P 19, JA 481. Moreover, § 216(h)(6)(A) is, of course, part of § 216, and also uses the phrase "failed to act" in reference to other federal approvals. *Id*.

Additionally, in § 216(i), Congress provided an express mechanism for states to defeat federal control over siting decisions, including denials, by granting consent in section 216(i) for three or more states to enter into interstate compacts. Rehearing Order P 20, JA 482. In that instance, the statute expressly provides that

"'the Commission shall have no authority to issue a permit for 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).'" *Id*. (quoting FPA § 216(i)).

While the States assert that this section "says nothing about whether FERC may overrule timely State denials when the compact disagrees or in the absence of a compact," Amicus Br. 20, the plain language of the statute provides that FERC will not have siting authority where there is a compact "unless" the three or more states disagree. As the Commission found, the express provision that FERC may *not* override the denial of a permit by a compact further supports the conclusion that FERC *may* override a denial by an individual state outside a compact. Rehearing Order P 20, JA 482. "This is an example of Congress using very clear language to carve out a situation in which the Commission shall not have the authority to permit siting of transmission facilities in the face of states having denied an application." *Id*. This provision therefore further supports the Commission's position that, if Congress had not intended the Commission to have jurisdiction to site a transmission facility in the face of state denial of such authorization under other circumstances, Congress could have plainly said so. *Id*.

This does not "improperly infer jurisdiction from Congress' failure to explicitly deny it." Piedmont Br. 25. *See also* Amicus Br. 12. The Commission's

assertion of jurisdiction is based upon the *affirmative* award of jurisdiction in 216(b)(1)(C)(i), where a state has "withheld approval" for more than one year, which is reasonably interpreted to include denial of a permit. In the context of the broader statute, Congress knew how to express the intent that states be given veto power over siting authorizations. The absence of any such limitation on the Commission's express authorization to assert jurisdiction in the event that approval is withheld is *further* evidence that Congress intended the express authorization in § 216(b)(1)(C)(i) to include state denials of siting permits. *See, e.g.*, *Patterson v. Shumate*, 504 U.S. 753, 758 (1992) (finding that "applicable nonbankruptcy law" includes federal as well as state law because "[t]he Code reveals, significantly, that Congress, when it desired to do so, knew how to restrict the scope of applicable law to 'state law' and did so with some frequency.")

Piedmont points to the express reference to denial in both §§ 216(h)(6)(A) and 203(a)(5) as evidence that § 216(b)(1)(C)(i), which does not use the term "denied" or "deny," cannot therefore include a state's denial of an application. Piedmont Br. 26-28. *See also* CARI Br. 27; Amicus Br. 17-18. Again, this argument assumes away the point, amply demonstrated above, that the term "withheld approval" reasonably and in common parlance can encompass denial of approval. In essence, Congress did use the term "deny" by using the broader term

"withheld" which encompasses denial as well as delay. Rehearing Order P 17, JA 480.

C. The Commission's Interpretation Best Effectuates the Statutory Purpose of Facilitating Siting of Critical Transmission Facilities in National Corridors.

In determining the meaning of a statute, the Court looks "'not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). Here, the Commission reasonably concluded that "the Commission's interpretation of the term 'withheld approval' in the context of the statute furthers the goals, purpose, and intent of the statute." Rehearing Order P 17, JA 480.

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." *Id.* This purpose is evident from the legislative history, which demonstrates Congressional concern with the urgent need for investment in transmission infrastructure, which often is frustrated by state approval processes. Congress recognized that "[i]nvestment in electric transmission has not kept pace with electricity demand," and that, "[m]oreover, transmission system reliability is suspect as demonstrated by the blackout that hit the Northeast and Midwest in August of 2003." House Report at 171. However,

while "[b]illions of dollars need to be invested in the national transmission grid to ensure reliability and to allow markets to function," "[s]iting challenges, including a lack of coordination among States, impede the improvement of the electric system." Senate Report at 8. *See also* House Report at 171 (contributing to these problems is the fact that "state regulatory approval delays siting of new transmission lines by many years.")

The Commission's interpretation of the term "withheld approval" furthers the statutory purpose of facilitating the siting of critical transmission facilities in national corridors. Rehearing Order P 17, JA 480. Conversely, petitioners' interpretation would permit individual states to veto transmission projects in national corridors without any ability of federal agencies to override such a determination, frustrating the statutory purpose.

Petitioners cite to Commissioner Kelly's partial dissent, *see* JA 391-94, for the proposition that, under the Commission's interpretation, states have no choice other than to approve siting or lose their authority, which petitioners argue equates to complete preemption. Piedmont Br. 32; CARI Br. 21. However, rather than preempting state siting authority entirely in this circumstance, in enacting FPA § 216, Congress recognized states' traditional siting authority by providing states a full year to site critical facilities pursuant to their own laws. Rulemaking Order P 21, JA 232; Rehearing Order P 38, JA 487. This preserves the state's ability to

condition and control the circumstances of the siting, insofar as those conditions do not render the project economically infeasible or ineffective to reduce interstate transmission congestion. *See* FPA § 216(b)(1)(C)(ii). Only if the state fails to exercise its own authority within the year may the Commission then exercise jurisdiction. Rulemaking Order P 22, JA 233.

Congress also provided states a specific mechanism to prevent Commission jurisdiction from attaching at all, by granting consent in section 216(i) for three or more states to enter into interstate compacts. Rehearing Order P 20, JA 482. *See* FPA § 216(i) ("the Commission shall have no authority to issue a permit for 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))."

Moreover, the filing of an application with the Commission does not mean that valid state concerns are no longer considered. Consideration of an application by the Commission does not equate to a jurisdictional determination or Commission approval of the proposed project. Rulemaking Order P 32, 485. Anyone who questions the Commission's jurisdiction over the proposed project, the timing of the exercise of that jurisdiction, or the merits of the proposal can raise those matters in its intervention or protest. *Id*.

The Commission also cannot exercise siting authority over national corridor projects unless the Commission makes a number of additional findings. Under 216(b) (2)-(6), the Commission must find that the project: (1) will be used for the transmission of electric energy in interstate commerce; (2) is consistent with the public interest; (3) will significantly reduce transmission congestion in interstate commerce and protect or benefit consumers; (4) is consistent with sound national energy policy and will enhance energy independence; and (5) will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures. FPA §§ 216(b) (2)-(6); Rulemaking Order P 37, JA 241.

Affected states are fully able to comment on any of these public interest considerations. If formal applications are filed with FERC, FERC must provide each state in which the transmission facility is located, as well as any affected Federal Agency, Indian tribe, private property owner and other interested persons, a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit application. *See* FPA § 216(c); Rulemaking Order P 45, JA 246. Additionally, under FPA § 216(h)(3) and its delegated authority, [3] the Commission needs to coordinate the Federal

[3] FPA § 216(h)(2) designated the Department of Energy as lead agency to coordinate all Federal authorizations needed to construct proposed electric transmission facilities in national corridors. The Secretary of Energy delegated to the Commission the Department's lead agency responsibilities to coordinate applicable Federal authorizations and related environmental review and to prepare

authorization and review process with any Federal agencies, Indian tribes, multistate entities and state agencies that are responsibility for conducting separate permitting and environmental reviews of the facilities. Rulemaking Order P 45, JA 246.

Thus, under the statute, upon an individual state's failure to approve transmission siting in a critically constrained national corridor, the Commission can step in to provide siting authority *only* if it *further* finds that the transmission project will significantly reduce congestion, and is consistent with sound energy policy, energy independence, and the public interest. Accordingly, as limited by the statute, the Commission's siting authority intrudes on state siting authority *only so far as necessary* to assure that transmission projects in the national interest are sited as required in national corridors.

D. The Legislative History Supports the Commission's Interpretation.

The Commission found that legislative history also supports its interpretation of the statute. Rulemaking Order P 29, JA 237. Transmission siting language first appeared in legislation considered in the House of Representatives in 2003, as § 16012 of H.R. 6. Rulemaking Order P 29, JA 237; Rehearing Order P 12, JA 479. Section 16012 allowed the Commission to exercise jurisdiction where

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a single environmental review document for facilities within the Commission's siting jurisdiction. Department of Energy Delegation Order No. 00-004.00A.

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 . . . ." Rulemaking Order P 29, JA 237; Rehearing Order P 12, JA 479 (quoting H.R. 6 § 16012, 149 Cong. Rec. H3130 (April 10, 2003)). The report language accompanying the above legislative text stated that it afforded FERC jurisdiction "if, after one year, a State is unable or refuses to site the line." Rulemaking Order P 29, JA 237; Rehearing Order P 12, JA 479 (quoting H.R. Rep. No. 108-65 at 170 (April 6, 2003)).

The Commission found that this legislative history supports the conclusion that "'withholding approval' was intended to mean something beyond a failure to act," given that this precursor to the EPAct 2005 transmission siting provision: (1) distinguished "withholding approval" from "delaying final approval for more than one year" and (2) was interpreted to include a State "refusing to site a line." Rulemaking Order P 29, JA 237; Rehearing Order P 12, JA 479.

While petitioners contend that this precursor to the EPAct 2005 transmission siting provision is not properly considered, Piedmont Br. 35; CARI Br. 26-27, as Piedmont acknowledges, Piedmont Br. 36, "[i]n analyzing legislative history, it is

proper to conduct a thorough examination of the entire history of the legislation, from introduction to passage." *United States v. Hayes*, 482 F.3d 749, 756 (4th Cir. 2007). This is not legislation on which Congress failed to act. *See* CARI Br. at 26-27.

The current language of § 216(b)(1)(C) came out of the Conference Committee on H.R.6 in 2003. In House Conference Report No. 108-375, the two jurisdictional bases in § 16012 of H.R.6 -- "withheld approval" and "delayed final approval for more than one year" -- became a single basis -- "withheld approval for more than 1 year." H.R. Rep. No. 108-375 at 264 (2003). Following the 2003 Conference Committee modification, the statutory language at issue here remained unchanged until enactment in § 1221 of the EPAct (codified as FPA § 216).

Piedmont contends that alteration in the language "suggests that Congress decided that withholding approval alone – what the majority equates with denial – is not in itself a basis for preempting traditional State authority over the siting of electric transmission facilities." Piedmont Br. 35-36. For its part, CARI contends that this could mean that "the House recognized the duplicative language and took it out." CARI Br. 27.

The problem with both these arguments, however, is that, if Congress meant the statutory language to refer to nothing more than "delay for one year," the Conference Committee would simply have stricken "withheld approval" and left

the statutory language as "delayed final approval for more than one year." As the Commission found, the fact that the "withheld approval" language was retained demonstrates that something in addition to delay was intended. Rulemaking Order P 29, JA 237; Rehearing Order P 12, JA 479.

Piedmont also complains that the legislative history relied on by the Commission did not address the statutory language as enacted. Piedmont Br. 35. However, legislative history *after* the statutory language was modified *continued* to state that the statutory language applied where a state has *rejected* a permit request. House Report 109-215 -- addressing in § 1221 the same statutory language as ultimately enacted[4] -- listed § 1221 as an "explicit preemption of state and local authority" that "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." House Report at 227 (emphasis added). *See also* House Report at 261 (continuing to describe § 1221 as providing FERC siting jurisdiction where "after one year, a state, or other approval authority, is unable *or refuses* to site the line"). Thus, even after the statutory language was amended to

[4] On April 13, 2005 the House Committees on Energy and Commerce, Ways and Means, and Resources ordered reported comprehensive national energy policy bills under their respective jurisdictions. The bill ordered reported by the Energy and Commerce Committee, including in its § 1221 the same statutory language at issue here, *see* House Report at 112, was introduced as H.R. 1640 on April 14, 2005 by Chairman Joe Barton and subsequently was reported on July 29, 2005 in H. Rept. No. 109-215.

read "withheld approval for more than 1 year" the legislative history *still* indicated that such language would apply where a state "has rejected" a permit request or "refuses" to site transmission facilities in national corridors.

For their part, petitioners point to an isolated statement in the Senate Report that EPAct 2005 authorizes the Commission "to issue siting permits if a State withholds approval inappropriately." Piedmont Br. 36. *See also* CARI Br. 28. Petitioners apparently interpret this reference as excluding from Commission jurisdiction instances where the state withholds approval "appropriately" *under its own state law*. CARI Br. 28; Piedmont Br. 36. However, a state can withhold approval inappropriately under the statute by failing to take *interstate* benefits into account. *See* FPA § 216(b)(1)(A).

The Commission acknowledged, as did the parties seeking rehearing, that the legislative history is not definitive, but continued to find its interpretation of the phrase "withheld approval" to include denial of an application was reasonable, particularly where the underlying purpose of § 216 is to facilitate the process of siting critical regional transmission lines and facilities. Rehearing Order PP 15, 17, JA 480. Indeed, the same Senate Report on which petitioners rely goes on to emphasize that "billions of dollars need to be invested in the national transmission grid to ensure reliability and to allow markets to function," but "[s]iting challenges, including a lack of coordination among States, impede the improvement of the

electric system." Senate Report at 8. Given this express concern with siting challenges caused by a lack of coordination among states, it seems improbable that the Senate was at the same time expressing an intent to preserve the rights of individual states to unilaterally derail critical infrastructure projects in national corridors.

E. The Principles of Statutory Construction Relied on by Petitioners to Avoid the Commission's Reasonable Interpretation Are Inapplicable.

Petitioners rely on several canons of statutory construction in an effort to avoid the Commission's reasonable interpretation of the statute. That reliance is unavailing as the canons relied upon are inapplicable here.

Piedmont argues that, in this context, "withheld approval" cannot mean "deny" because that interpretation would render the phrase "for more than one year" superfluous. *See* Piedmont Br. 20-22. *See also* Amicus Brief 15-18. Piedmont asserts 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." Piedmont Br. 22.

As the Commission found, however, that argument ignores the fact that the language used in EPAct 2005 is inclusive, comprising "refraining" or "holding back" from granting approval as well as "denying" approval. Rehearing Order P 11, JA 478. Piedmont's "nonsensical" reading requires reading "withheld

approval" to *only* mean "deny," while the Commission interprets it to mean *both* "deny" and "failure to act." *Id*. As "withhold" has multiple meanings, including "delay" which would incorporate the "for more than one year" language, petitioners' surplusage argument fails. *Id*. *See, e.g.*, *Patterson*, 504 U.S. at 762-63 (although two provisions of the bankruptcy code excluded certain ERISA plans from bankruptcy estates, the overlap did not render the second provision surplusage because the second provision applied much more broadly than the first).

Rather, 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. Rehearing Order P 11, JA 478. While Congress could have preempted state siting authority entirely in this circumstance, in enacting FPA § 216 Congress recognized the states' traditional authority to site electric transmission facilities under their applicable laws. *Id*. P 38, JA 487. The statute provides states a full year to site critical facilities pursuant to their own authority. Rulemaking Order P 21, JA 232. If the state fails to do so, the Commission may then exercise jurisdiction. *Id*. P 22, JA 233.

Petitioners further contend that their limited construction of "withheld approval" is dictated by the so-called "presumption against preemption" of traditional state authority. *See* CARI Br. 19 (citing *Rice v. Santa Fe Elevator*

Corp., 331 U.S. 218, 230 (1947)); Piedmont Br. 17 (same). *See also* Amicus Br. 11-12.

The "presumption against preemption" arises when there is a controversy concerning whether a given state authority conflicts with, and thus has been displaced by, the existence of the federal authority. Rehearing Order P 22, JA 482 (citing *New York*, 535 U.S. at 17-18). The presumption does *not* apply, however, where the controversy concerns the scope of the federal government's exercise of authority to displace state action. *Id*. (citing *New York*, 535 U.S. at 17-18). Consequently, in *New York*, the presumption was inapplicable because "the question presented does not concern the validity of a conflicting state law or regulation." *New York*, 535 U.S. at 18.

Similarly, here, there is no concern regarding the validity of any state law or regulation, and, therefore, this is the type of preemption question presented in *New York*: whether FERC is acting within the scope of its Congressionally-delegated authority in FPA § 216. Rehearing Order P 22, JA 482; *New York*, 535 U.S. at 18. Instead of involving a "presumption against preemption," this case involves the interpretation of the statute "to determine whether Congress has given FERC the power to act as it has," which involves no presumption "one way or another." *New York*, 535 U.S. at 18; Rehearing Order P 22, JA 482.

Piedmont contends *New York* is inapplicable because "this case necessarily involves a conflict between State and Federal Law;" "[t]he State's ability to deny a permit is the *quintessential* expression of the State's ability to regulate." Piedmont Br. 32 (emphasis in original). This fails to distinguish *New York*, of course, as *any* preemption case necessarily involves the intersection of state and federal law. In *New York*, for example, the issue was FERC's alleged intrusion into the traditionally state-regulated retail area to exercise jurisdiction over unbundled retail transmission. 535 U.S. at 16-17. As the Supreme Court in *New York* made clear, however, the presumption against preemption does not apply when the only issue presented is the determination of the Congressional intent as to the scope of federal power. *New York*, 535 U.S. at 17-18.

Piedmont further cites *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 401 (D.C. Cir. 2004) and *Domtar Maine Corp. v. FERC*, 347 F.3d 304, 309 (D.C. Cir. 2003) for the proposition that, "where Congress specifically lists areas over which a Federal agency has authority, the agency may not interpret its authority more broadly." Piedmont Br. 15. Here, however, the Commission has not attempted to go outside of the Congressional list of circumstances under which the Commission may exercise siting authority. Rather, the issue is the proper scope of one item on the Congressional list, the authority to undertake siting authority where the state has "withheld approval."

Thus, while traditionally authority to site transmission facilities was left in the hands of the states, in enacting § 216, Congress affirmatively granted the Commission jurisdiction to site electric transmission facilities in a national corridor in any instance where the conditions enumerated in FPA § 216(b) are met. Rehearing Order P 23, JA 483. 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 scope of the Commission's siting authority newly-added in FPA § 216(b)(1)(C). *Id*. Because the Commission is charged with administering the electric transmission siting provisions of EPAct 2005, the Court "substantially defer[s]" to the Commission's construction of any ambiguous language in the Act, if the Commission's construction "'is based on a permissible construction of the statute.'" *Mackenzie*, 506 F.3d 341, 346 (quoting *Chevron*, 467 U.S. at 843). As the Commission's interpretation is clearly permissible, as demonstrated above, deference should be afforded the Commission's construction of the statute.

III. THE COMMISSION'S REGULATIONS DO NOT RESTRICT FULL EVALUATION OF THE ENVIRONMENTAL IMPACTS OF PROPOSED FACILITIES.

FPA § 216(c)(2), 16 U.S.C. § 824p(c)(2), directed the Commission to issue rules specifying the form of, and the information to be contained in, an application for construction or modification of electric transmission facilities in national

corridors, and the manner of service of notice of the permit application on interested persons. In the Rulemaking Order, the Commission promulgated the required regulations, including regulations governing the environmental information to be included with the application. Rulemaking Order P 130, JA 285.

CARI asserts that the Commission's application regulations arbitrarily and capriciously restrict the evaluation of the environmental impact of proposed facilities in violation of NEPA. CARI Br. 36-47. Specifically CARI urges that the Commission improperly restricted: (1) the definition of affected landowners and the evaluation of land use impacts, *id*. 36-39; (2) the consideration of non-transmission alternatives, *id*. 40-42; and (3) the consideration of socioeconomic impacts on property values and consumer costs, *id*. 43-47.

However, the filing requirements are intended only to provide the basic initial application information that the Commission will require with respect to a generic project, recognizing that each project will have unique issues that will be considered on a case-by-case basis. Rulemaking Order P 130, JA 285. Thus, the filing requirements are only the starting point for Commission review and analysis, and the Commission's review of the impact of a proposed facility is in no way limited to the information initially filed by the applicant. Rehearing Order P 58, JA 492.

Furthermore, NEPA's mandate to the agencies is procedural, rather than substantive. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). Thus, although NEPA makes environmental considerations part of an agency's mission, it does not require the agency to promulgate specific rules. *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1045 (D.C. Cir. 1979) (rejecting petitioners' arguments that the SEC should have adopted their proposed environmental rules, finding that, under NEPA, "the agency, in our view, was under no obligation to adopt rules identical to or even similar to those sought by appellees.") Rather, where, as here, Congress has expressly delegated authority to the agency to "'elucidate a specific provision of the statute by regulation,'" the Court is "obliged" to accord the regulations "'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Elm Grove*, 480 F.3d at 293 (quoting *Chevron*, 467 U.S. at 844). As discussed below, CARI fails to make the required showing with regard to any of the challenged regulations.

A. Land Use Impacts

Under the Commission's regulations, both the obligation to provide notice and the obligation to report on land use impacts are cabined by a geographical limitation of a quarter-mile. *See* 18 C.F.R. § 50.4(c), JA 339; 18 C.F.R. § 380.16(j), JA 379. Although CARI does not dispute that some geographical

limitation is reasonable, CARI complains that "the fair definition of the area of impact should begin with a minimum of one half mile." CARI Br. 38. *See also* Amicus Br. 25-30 (complaining that notice provided to affected homeowners is too restrictive). These claims are without merit.

1. Definition of Affected Landowner

The definition of affected landowner concerns the applicant's obligation to provide notice of the project. Rehearing Order P 58, JA 492. *See* FPA § 216(d) (requiring that "affected" private property owners be given "a reasonable opportunity" to present their views). In its regulations, the Commission defined affected landowners to include only owners of property on or abutting a proposed right-of-way. 18 C.F.R. § 50.1, JA 335. However, in 18 C.F.R. § 50.4(c)(1), JA 339, the Commission added the requirement that the applicant notify all landowners with a residence within a quarter mile of the construction right-of-way. Rulemaking Order P 53, JA 250. The Commission found that, between the definition of affected landowner and the expanded quarter mile notification requirement, a sufficient group of individuals will be notified of the proposed project. *Id.*

CARI argues that the area of required notification should be larger because potential overhead electric transmission projects may have impacts greater than natural gas pipelines. CARI Br. 38. The Commission, however, expressly

considered this in adding the quarter-mile notification requirement, which does not exist under the Commission's natural gas pipeline regulations, 18 C.F.R. § 157.6(d)(2)(ii). Rulemaking Order PP 55-56, JA 251-52. The Commission required notification of all landowners within a quarter mile of the proposed right-of-way, rather than just those on or abutting a proposed right-of-way, precisely because electric transmission lines can be seen from greater distances, unlike gas pipelines which are generally buried underground. *Id*. P 57, JA 252. Therefore, more surrounding landowners should be directly notified by the applicant than is required in gas pipeline cases. *Id*.

Furthermore, stakeholders do not need to be an affected landowner or live in a residence within a quarter mile of the proposed site to participate in the Commission's proceedings. Rulemaking Order P 54, JA 251. Under the definition of stakeholder in 18 C.F.R. § 50.1, any interested entity or person may file comments as a stakeholder and participate in the Commission's process. *Id*. Thus, even if a specific landowner is not included in the definition of affected landowner, it can still participate as a stakeholder. *Id.*

2. Identification of Land Use Impacts in Application Materials.

Section 380.16(j) of the Commission's NEPA regulations requires applicants to provide a resource report describing "the existing uses of land on, and (where specified) within 0.25 miles of, the edge of the proposed transmission line right-of-

way and changes to those land uses that will occur if the project is approved." 18 C.F.R. § 380.16(j), JA 379. CARI contends that this improperly limits consideration of land use impacts in violation of the NEPA requirement that all adverse environmental effects be considered. CARI Br. 38-39 (citing 42 U.S.C. § 4332(C)).

The Commission, however, is required to conduct a full environmental analysis of a proposed electric transmission project under NEPA. Rulemaking Order P 130, JA 285. The Commission's filing requirements under Part 380 of its regulations simply specify the basic initial information the Commission will need for a generic project. *Id*. The Commission's review of the impact of a proposed facility is not limited to the information initially filed by the applicant. Rehearing Order P 58, JA 492. The scope of review of each project will be expanded as necessary to address the unique issues raised by the project. *Id*.

B. Socioeconomic Impacts

Section 380.16(g) of the Commission's regulations requires that the applicant provide information concerning the impact of the proposed project on the towns and counties in the vicinity of the project. Rulemaking Order P 150, JA 293; 18 C.F.R. § 380.16(g), JA 376. In the Proposed Rulemaking, the Commission proposed that the applicant be required to conduct a property value impact analysis

for properties adjacent to or abutting the right-of-way of proposed transmission lines. Rehearing Order P 63, JA 494; Rulemaking Order P 152, JA 294.

After considering the comments made in response to this proposal, *see* Rulemaking Order PP 154-56, JA 295-96, the Commission found that the property value impact analysis should be eliminated. *Id*. P 157, JA 296; Rehearing Order P 63, JA 494. Requiring such information could significantly delay the development of transmission projects, which is contrary to the national interest. Rulemaking Order P 157, JA 296. The Commission also was concerned with the accuracy of such studies and the fact that no uniform methodology is available to calculate the impact of transmission lines on property values. *Id*. In many cases, such studies could be highly speculative and inaccurate while providing limited beneficial information to the public. *Id*.; Rehearing Order P 63, JA 494. The Commission also found that there is no particular rationale why such a study should be required when it is not required for other infrastructure projects before the Commission (natural gas pipelines, liquefied natural gas terminals, hydroelectric projects) or generally required at the state level. Rulemaking Order P 157, JA 296. Given the speculative nature of these reports and the time and resources the applicant would need to dedicate toward completion of this study, the Commission did not believe requiring such reports in all cases is consistent with the purpose of EPAct 2005. Rulemaking Order P 158, JA 296; Rehearing Order P 63, JA 494.

CARI asserts that the Commission erred in excluding the property value impact analysis requirement because NEPA requires an evaluation of all socioeconomic impacts where they are interrelated with the project's impacts to the physical environment. CARI Br. 44 (citing *Tongass Conservation Society v. Cheney*, 924 F.2d 1137, 1144 (D.C. Cir. 1991)). However, the Commission only excluded the property value analysis as an initial filing requirement. Rehearing Order P 67, JA 495. It did not foreclose such an analysis from the socioeconomic impact analysis. *Id*. The Commission will address all issues raised in a request for a permit on a case-by-case basis. *Id*.

As for cost recovery and the effect on customer rates, CARI Br. 45-47, those are purely economic issues that are not part of the Commission's NEPA review of a proposed project. Rehearing Order P 67, JA 495. The "'purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions.'" *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002) (quoting *Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993)). NEPA does not require that an agency:

> examine the economic consequences of its actions. The theme of [NEPA] § 102 [42 U.S.C. § 4332] 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 someone thought "adverse."

Rehearing Order P 66, JA 495 (quoting *Association of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1186 (9th Cir. 1997) (citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983)). *See also Montana v. 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*, 866 F.2d 302, 302 (9th Cir. 1989) (finding that an adverse economic impact does not create a significant protectable interest in litigation under NEPA). Accordingly, recovery of costs associated with a particular transmission project will be addressed by the Commission or other ratemaking authorities as appropriate on a case-by-case basis. Rehearing Order P 67, JA 495.

C. Assessment of Non-Transmission Alternatives

Section 380.16 of the Commission's regulations requires that an applicant submit an environmental report with its application that includes 11 resource reports. 18 C.F.R. § 380.16, JA 365. Resource Report 9 concerns alternatives, and requires that the applicant describe alternatives to the project and compare the environmental impacts of those alternatives to the proposal. *See* § 380.16(k), JA 384. CARI contends that this regulation unduly restricts the range of alternatives

to be considered, because "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." CARI Br. 40.

The Commission declined to specify in the regulations requirements that applicants study and report on particular types of alternatives in every case, because the facts of each individual project will dictate what alternatives merit detailed consideration. Rehearing Order P 62, JA 494. Nevertheless, the requirement in the regulations that applicants address a variety of alternatives, *coupled with* the Commission's robust public NEPA and application review process, ensure that any and all reasonable alternatives receive full consideration. *Id*.

In the pre-filing process, an applicant must submit a preliminary report that will allow Commission staff to discern reasonable alternatives. Rulemaking Order P 176, JA 304. As the Commission conducts its site visits and reviews the comments submitted during the scoping period, alternatives will be considered. *Id*.; Rehearing Order P 61, JA 493. Once the applicant reaches a decision regarding its final proposed route, it will need to comply with the resource report requirements for that route before it files its application. *Id*.

The Commission's decades-long experience in its hydropower licensing and gas pipeline certification programs is that the range of reasonable alternatives can

best be determined based upon the facts of a specific siting proposal. Rulemaking Order P 179, JA 305. Thus, in light of the specific facts raised by the individual project, the applicant will be required to address a variety of alternatives in the resource reports filed with its application, including, where appropriate, alternatives other than new transmission lines. Rulemaking Order P 179, JA 305; Rehearing Order P 60, JA 493.

Reasonable alternatives can continue to be identified by Commission staff or other stakeholders throughout the NEPA process. Rulemaking Order P 179, JA 305; Rehearing Order P 60, JA 493. Commission staff will work with the applicant and stakeholders to define issues in each proceeding, including the development of appropriate alternatives. Rehearing Order P 61, JA 493.

As required by NEPA, the Commission's environmental review of the applicant's proposal will include the detailed examination of all reasonable alternatives to the proposed action. Rehearing Order P 61, JA 493. The Commission noted that, in natural gas pipeline proceedings, the Commission regularly explores not only major route alternatives, but also various minor route variations that reduce the impact of the proposed facility. Rehearing Order P 61 n. 28, JA 493. *See, e.g., National Committee for the New River, Inc. v. FERC*, 373 F.3d 1323, 1331 (D.C. Cir. 2004) (in environmental impact statement for a pipeline extension, FERC considered "the no-action alternative, system alternatives, major

route alternatives, route variations, interconnection site alternatives, and aboveground-facility-site alternatives."); *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1325-26 (10th Cir. 2004) (discussing FERC exploration of route alternatives for proposed pipeline). In an electric transmission proceeding it is likely that the Commission will similarly, on a case-by-case basis, analyze like variations of a proposed facility. Rehearing Order P 61 n. 28, JA 493. The public will have the opportunity to participate and file comments - which can include suggested alternatives of any kind - throughout this review. Rehearing Order P 61, JA 493. When the Commission acts on an application, it will consider the entire record, including the NEPA document and all filings made by participants. *Id*.

Thus, because the facts of each case will dictate which alternatives merit detailed consideration, the Commission did not specify in the regulations that applicants study and report on particular types of alternatives in every case, as CARI demands. Rehearing Order P 62, JA 494. However, based on the process described above, the Commission reasonably concluded that the requirement in its regulations that applicants address a variety of alternatives, coupled with the robust, public NEPA and application review process, will ensure that any and all reasonable alternatives receive full consideration. *Id*.

IV. THE COMMISSION FULLY COMPLIED WITH ENVIRONMENTAL REQUIREMENTS IN ITS RULEMAKING.

CARI contends that the Commission violated NEPA when it failed to prepare an environmental assessment or environmental impact statement when it issued the Rulemaking Order. CARI Br. 29-34. *See also* Amicus Br. 22-24. CARI further contends that the Commission erred in revising its NEPA implementing regulations without first consulting with the Council on Environmental Quality. CARI Br. 34-36. *See also* Amicus Br. 22 n. 7. Neither contention has merit as demonstrated below.

A. No Environmental Assessment or Environmental Impact Statement Was Required in Issuing the Rulemaking Order.

Under NEPA, an agency must include an environmental impact statement in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C.§ 4332(2)(C). CARI contends that the Commission was required to issue an environmental impact statement in connection with the Rulemaking Order under NEPA and the Council on Environmental Quality's NEPA implementing regulations, which include promulgation of agency rules or plans within the scope of federal "actions." CARI Br. 30 (citing 40 C.F.R. § 1508.18(b)(1)-(3)). *See also* Amicus Br. 23-24.

An agency's determination under NEPA that its actions do not constitute a "major federal action" is reviewed for reasonableness under the circumstances. *Sugarloaf Citizens Ass'n*, 959 F.2d at 512. The Commission here reasonably determined that no environmental assessment or environmental impact statement was required, as its regulations merely implemented the procedural notice and filing requirements for applications to construct electric transmission facilities, and therefore raised no immediate environmental considerations. Rulemaking Order P 236, JA 330; Rehearing Order P 68, JA 496. As CARI acknowledges, procedural regulations are categorically excluded from NEPA requirements under 18 C.F.R. § 380.4(a)(2)(ii). *See* CARI Br. 34. Further, even if the Commission's rulemaking was considered to be substantive, the fact remains that the Commission's orders authorize no projects or actions of any kind, and therefore no disturbance to the environment, which does not trigger NEPA requirements. Rehearing Order PP 68, 70, JA 496.

"Under NEPA, an [environmental impact statement] or an [environmental assessment] is not required unless the contemplated action will affect the environment 'in a significant manner or to a significant extent,' with significance defined in terms of both context and intensity." *County of Seneca v. Cheney*, 12 F.3d 8, 12 (2nd Cir. 1993) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989)). *See also Department of Transportation v. Public*

Citizen, 541 U.S. 752, 763 (2004); *Sugarloaf Citizens Ass'n*, 959 F.2d at 512. Here, because the challenged orders have no environmental impact whatsoever, the Commission correctly concluded that NEPA does not apply. Rulemaking Order P 236, JA 330; Rehearing Order P 68, JA 496. "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment." *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995). "If the purpose of NEPA is to protect the physical environment, and the purpose of preparing an [environmental impact statement] is to alert agencies and the public to potential adverse consequences to the land, sea or air, then an [environmental impact statement] is unnecessary when the action at issue does not alter the natural, untouched physical environment at all." *Id*.

CARI cites to several cases where agencies were required to file environmental impact statements for agency programs. CARI Br. 31-32 (citing *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1087-88 (D.C. Cir. 1973); *Environmental Defense Fund v. Adams*, 434 F. Supp. 403 (D.D.C. 1977)). Those cases are inapplicable here, however, because they involved identifiable projects with an actual impact on the environment. Rehearing Order P 70, JA 496. *Environmental Defense Fund* concerned the environmental impact of a National Airport System Plan, which designated airport projects eligible for subsidization and improvements. 434 F. Supp. at 406.

Similarly, *Scientists' Institute* concerned the environmental impact of new technology the federal agency was developing for its Liquid Metal Fast Breeder Reactor Program. 481 F.2d at 1082.

Here, in contrast, the Commission has not authorized any activity with an environmental impact. Rehearing Order P 70, JA 496. It is, moreover, not even possible to identify the projects that will ultimately be sited under the statute because those projects will not be initiated by the Commission but rather by private parties. Accordingly, the Commission has no basis at this time for any programmatic assessment of environmental impacts. "NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have." *Northcoast Environmental Center v. Glickman*, 136 F.3d 660, 668 (9th Cir. 1998).

In *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the Supreme Court found that Interior was not required to prepare a comprehensive environmental impact statement for development of coal reserves in the Northern Great Plains region. There is no need for a programmatic environmental impact statement where the individual coal development projects in the region were undertaken or proposed by unrelated parties. *Kleppe*, 427 U.S. at 400-01. Indeed, the Court found "nothing that could be the subject of the analysis envisioned by the statute for an impact statement" because "it is impossible to predict the level of coal-related activity that

will occur in the region" and therefore it is "impossible to analyze the environmental consequences." *Id*. at 401-02.

Rather, for actions by the government "to issue a lease, approve a mining plan, issue a right-of-way permit, or take other action to allow private activity at some point," an environmental impact statement is properly included in the specific proposal to take such action. *Kleppe*, 427 U.S. at 399. *See also Northcoast*, 136 F.3d at 670 (where Bureau of Land Management guidelines "neither propose any site-specific activity nor do they call for specific actions directly impacting the physical environment," an environmental impact statement was not required as "[t]here is no reason plaintiffs cannot challenge the sufficiency of an agency [environmental impact statement] when a discrete agency action is called for.") Likewise, here, it is impossible for the Commission to analyze the environmental consequences of projects that have not yet even been proposed. Thus, an environmental review is appropriately performed in connection with actual proposed transmission projects, and the Commission has not restricted the analysis it will perform in reviewing those projects. Rehearing Order P 70, JA 496.

CARI also relies upon *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), *see* CARI Br. 32, which rejected the agency's NEPA implementation regulations because, *inter alia*,

they excluded environmental issues from hearing board consideration unless raised by a party, *id*. at 1117-18, and prohibited examination of water quality problems, which is "perhaps the most significant impact of nuclear power plants." *Id*. at 1122. That case is inapposite here where the Commission has not restricted the alternatives or impacts that it will look at in an environmental analysis of each proposed project. Rehearing Order P 70, JA 496; Rulemaking Order P 130, JA 285. While CARI complains that the Commission's regulations "restricted the project alternatives and impacts to be evaluated," CARI Br. 33, the Commission's regulations, to the contrary, simply list minimum filing requirements. Rehearing Order P 70, JA 496. The Commission will, in fact, do a complete analysis for every proposed project. *Id*.

B. The Commission Was Not Required to Consult with the Council on Environmental Quality Prior to Issuing Its Rulemaking.

CARI argues that the Council on Environmental Quality regulations require that the Commission consult with the Council in revising its NEPA regulations, and that, in the absence of such consultation, the Commission's issuance of its regulations is unlawful and the regulations must be withdrawn or stayed until the required consultation occurs. CARI Br. 34-35 (citing 40 C.F.R. § 1507.3).

CARI fails to state a cognizable claim under the Council's regulations. The Council's regulations specifically provide that "[i]t is the Council's intention that judicial review of agency compliance with these regulations not occur before an

agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in actions affecting the environment), or takes action that will result in irreparable injury." 40 C.F.R. § 1500.3. Here, as discussed above, the Commission's action in setting initial filing requirements has no effect whatsoever on the environment, and thus can cause no injury, irreparable or otherwise, and consequently is not ripe under the Council's own regulations for judicial review.

Moreover, CARI's claim is without merit. Section 1507.3 of the Council's regulations generally pertains to consultations with the Council when agencies develop their initial NEPA regulations. Rehearing Order P 72, JA 496. Here, the Commission was developing regulations as required under the EPAct to specify the form and content of the *applications* to be filed with the Commission for construction permits. Rehearing Order P 72, JA 497. *See* FPA § 216(c). As discussed above, the Commission's filing requirements under Part 380 of its regulations simply require that applicants provide the initial basic information the Commission will need for a generic project. Rulemaking Order P 130, JA 285. The Commission fully recognizes that it is required to, and will, conduct a full environmental analysis of proposed electric transmission projects under NEPA in the permitting process. *Id*.

As the Commission was implementing procedural requirements under the EPAct, not NEPA, consultation with the Council was not necessary. Rehearing Order P 72, JA 497. Moreover, on August 8, 2006, several Federal agencies, including the Council and the Commission, entered into a Memorandum of Understanding on Early Coordination of Federal Authorization and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities. Rulemaking Order P 9, JA 225. The purpose of the Memorandum of Understanding was to establish a framework for early cooperation and participation to enhance coordination of all applicable land use authorizations, related environmental, cultural, and historic preservation reviews, and any other approvals that may be required under Federal law in order to site an electric transmission facility. *Id*. Pursuant to the Memorandum, the Commission has been cooperating with the Council and other agencies where appropriate and will continue to do so. *Id*.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the petitions for review be denied, and that the Commission's rulemaking be upheld in all respects.

REQUEST FOR ORAL ARGUMENT

Because this matter presents important issues of statutory construction in a case of first impression, concerning the Commission's implementation of authority newly-conferred on it by Congress in EPAct 2005, the Commission respectfully requests that oral argument be held in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) because this brief contains 13,515 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in Microsoft Office Word 2003 14-point and Normal.

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