

# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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## PUBLIC SERVICE COMMISSION

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December 18, 2006

SENT VIA ELECTRONIC FILING  
Honorable Magalie R. Salas, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1-A209  
Washington, D.C. 20426

Re: Docket No. RM06-12-000 -New York Independent  
System Operator, Inc.

Dear Secretary Salas:

For filing, please find the Petition For Rehearing of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 474-1573.

Very truly yours,

A handwritten signature in black ink, appearing to read 'John L. Favreau', is written over a vertical line.

John L. Favreau  
Assistant Counsel



§ 824p(b)(1)(C)(i)&(ii).

The Final Rule (at ¶26) states that the Commission’s permitting authority is triggered when a state authority denies a siting permit application within one year of filing or NIETC designation. This interpretation of §216(b)(1)(C)(i) is not correct, given Congress’ careful specification of the circumstances that would allow FERC to override state siting decisions. The intent of Congress was to ensure that the construction of transmission facilities would not be unduly delayed, while protecting the rights of states to timely address any environmental and public health and safety concerns. In this context, the only reasonable interpretation of the “withheld approval” provision is that it provides states a limited timeframe (one year) to review the legitimate interests protected under state law. The decision by the Commission claiming jurisdiction even when a state timely and appropriately denies a permit within that year is not supported by the EPAct or Federal Power Act (FPA). It disregards the legitimate state and local health, safety, and environmental concerns associated with the siting of an electric transmission facility. It essentially preempts state site permitting processes protected by Congress, and therefore, is improper and an error of law. NYSPSC respectfully requests that the Commission grant this petition for rehearing on this issue.

**STATEMENT OF ISSUES and SPECIFICATIONS OF ERROR**

In accordance with Order No. 663-A and Rule 713(c)(1), the NYSPSC provides the following statement of issues and specification of errors and requests that the Commission grant rehearing on the Final Rule based on the following error of law:

- 1) The Commission erred by improperly preempting state authority to review electric transmission siting applications by deciding it had jurisdiction**

**to site electric transmission facilities after a state's denial of a siting application within one year from filing or NIETC designation.**

Section 216(b)(1)(C)(i) of the FPA, 16 U.S.C. § 824p(b)(1)(C)(i), specifically provides that the Commission may issue a permit for the construction of an electric transmission line if the State having authority to site the line 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 corridor, whichever is later.”

The Commission found (at ¶¶ 26, 30) that this language means that it can permit the siting of an electric transmission line if the state has *denied* the permit application within one year of filing or NIETC designation. This determination is an error of law because the plain language of the statute does not support this interpretation, as shown by Commissioner Kelly's well-reasoned dissent. The “withholding approval” provision compels states to act promptly in processing an electric transmission siting application. Such a mandate for prompt action recognizes states' legitimate health, safety, and environmental concerns while also recognizing Congress' intent to encourage the construction of transmission facilities in a timely manner. If Congress wanted the Commission to have all permitting authority, even if a state timely and properly denied the siting application, it would have so stated.

The Commission's interpretation contradicts the plain language and purpose of the statute and totally preempts the states in the electric transmission siting process.

**ARGUMENT**

The language at issue here - “withheld approval for more than 1 year after the filing of an application” - is not ambiguous and clearly shows Congress' intent not to

equate it with “deny.” As observed at pg.2 of Commissioner Kelly’s dissent, the relevant language is not, as the Commission asserts, simply “withheld approval.” Rather, the entire phrase, “withheld approval for more than 1 year after the filing of an application,” must be construed. When “withheld approval” is interpreted in its entire appropriate context, it cannot just mean “deny” as concluded at ¶30 of the majority decision. Such a construction reads “for more than 1 year after the filing of an application” out of the context.<sup>1</sup> The Commission’s interpretation would incorrectly give it jurisdiction not only when a state has “withheld approval” for more than 1 year, but also **when a state timely denies approval** within the one year period.

Courts have not found federal pre-emption “in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”<sup>2</sup> The Commission’s interpretation violates this standard. It essentially allows the Commission to preempt virtually **all** state authority in the siting of electric transmission facilities, even though the FPA does not state that the siting of transmission facilities can occur regardless of state law or the state permitting process. Under the Commission’s interpretation, states would only have one choice to avoid FERC jurisdiction -- to approve a siting application within one year without conditions prohibited by

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<sup>1</sup> *Bailey v. United States*, 516 U.S. 137, 145 (1995).

<sup>2</sup> *New York v. FERC*, 535 U.S. 1, 18 (2002)(Court has “to be certain that Congress has conferred authority on the agency” when controversy concerns scope of federal authority to preempt state law); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (*for a court to find federal pre-emption, it must be “unmistakably clear” that Congress intended to do so*); *Louisiana Pub. Ser. Comm’n v. FERC*, 476 U.S. 355 (1986)(federal pre-emption improper when there is a conflict between federal and state law and federal agency acting outside the scope of its statutory authority).

§ 216(b)(1)(C)(ii). The Commission's interpretation will result in effective preemption of state permitting processes because they will be wholly disregarded by siting applicants with dubious projects. Such applicants will submit only the minimum required, assured that once their applications are properly denied, the Commission will still claim jurisdiction. This result was not intended by Congress, which allowed the states to go forward with siting proceedings.

Further evidence of the Commission's error in statutory interpretation can be found in the statute itself. As stated in Commissioner Kelly's dissent at pg.3, Congress explicitly listed in §216(b)(1) a number of circumstances that will trigger Commission jurisdiction, yet failed to include on that list the obvious "denial" of a permit. The Commission's interpretation adds a circumstance never contemplated by Congress.

Congress did not intend to give the Commission the authority to override a state's legitimate and timely denial of a permit application. As the dissent points out, in §216(b)(1)(A)(ii), Congress retained state jurisdiction to site transmission facilities so long as it has the authority to "consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State." The Commission's interpretation would defeat Congress' explicit recognition that states will have the authority to review a permit application, by practically taking such authority away.

Further, the Commission (at ¶27) concludes that if Congress wanted "withheld approval" to mean "does not act," it would have used that phrase, which appears elsewhere in the statute. This conclusion does not respond to the dissent's showing that "withheld approval" does not mean "deny," but merely offers an argument based on language Congress could have used, rather than the words it did use. The Commission's interpretation impermissibly expands the

meaning of “withheld approval” to include timely state action that denies approval.<sup>3</sup> Moreover, the Commission’s comparison does not support its position. The referenced section, FPA §203(a)(5), specifically defines “does not act” as being action that does not “grant or deny” approval. The “withheld approval for more than one year” in §216(b)(1)(C)(i) is akin to the further option permitted to the Commission under §203(a)(5), of tolling the time for action. Such a comparable state failure to act beyond one year is precisely the situation in which the Commission can take jurisdiction under §216(b)(1)(C)(i).

Finally, the Commission (at ¶28) claims that it would not be reasonable to interpret the statute to allow it to have jurisdiction if a state so conditions an approval that a project would never be feasibly constructed, as explicitly provided in §216(b)(1)(C)(ii), but not allow it to have jurisdiction if the state denied a permit. Such a construction would be perfectly reasonable because state courts can expeditiously review state permit denials.<sup>4</sup> The purpose of §216, to encourage the construction of electric transmission facilities, will not be frustrated if the Commission’s authority to permit electric transmission siting does not extend to denials of permits by state authorities for legitimate health, safety and environmental concerns within one year of filing. Section 216 thus provides a procedure whereby the siting process will move forward in an efficient manner, without the forced construction placed on it by the Commission. The Commission apparently interprets the statute in a belief that states will not appropriately rule on siting facility projects, but if that had been Congress’ belief, it would have plainly granted the Commission exclusive jurisdiction to site electric transmission facilities.

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<sup>3</sup> The majority’s further attempt to argue that “withheld approval” is different than “does not act” on the basis of prior version of the statute (at ¶29) also fails because the enacted provision on which it relies would have explicitly allowed a delay of “final approval” beyond one year to trigger FERC jurisdiction. The current statute does not so directly compel state approval.

<sup>4</sup> Congress did explicitly conclude in enacting Section 216(b)(1)(C)(ii) that FERC could review state decisions to grant certificates with onerous conditions.

**CONCLUSION**

The Commission's interpretation of Section 216(b)(1)(C)(i) is improper and an error of law. It allows the Commission to preempt all state authority in the siting of electric transmission facilities when Congress specifically listed the circumstances where FERC could preempt state siting authority and did not include denial of a permit within the listed circumstances. Therefore, the NYSPSC respectfully requests that its petition for rehearing be granted.

Respectfully submitted,



Peter McGowan  
Acting General Counsel  
Public Service Commission  
Of the State of New York

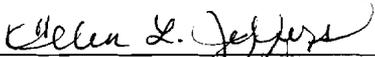
By: John L. Favreau  
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(518) 474-1573

Dated: December 18, 2006  
Albany, New York

CERTIFICATE OF SERVICE

I, Ellen L. Jeffers, do hereby certify that I will serve on December 18, 2006, the foregoing Petition For Rehearing of the Public Service Commission of the State of New York upon each of the parties of record indicated on the official service list compiled by the Secretary in this proceeding.

Date: December 18, 2006  
Albany, New York

  
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Ellen L. Jeffers