No. 07-1651
Consolidated with Nos. 07-1864, 07-1865, 07-1866

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Piedmont Environmental Council, Public Service Commission of the State of New York, Minnesota Public Utilities Commission, and Communities Against Regional Interconnect, Petitioners,

v.

Federal Energy Regulatory Commission, Respondent,

Edison Electric Institute; American Public Power Association; National Rural Electric Cooperative Association; American Wind Energy Association; San Diego Gas & Electric Company; Southern California Edison Company; Allegheny Power; Trans-Allegheny Interstate Line Company; and PPL Electric Utilities Corporation, Intervenors in Support of Respondent.

PETITION FOR REHEARING EN BANC

SUBMITTED BY INTERVENORS IN SUPPORT OF RESPONDENT:

EDISON ELECTRIC INSTITUTE; AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; AMERICAN WIND ENERGY ASSOCIATION; SAN DIEGO GAS & ELECTRIC COMPANY; SOUTHERN CALIFORNIA EDISON COMPANY; ALLEGHENY POWER; TRANS-ALLEGHENY INTERSTATE LINE COMPANY; AND PPL ELECTRIC UTILITIES CORPORATION

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Dated: April 6, 2009

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CORPORATE DISCLOSURE STATEMENT UPDATE

Pursuant to Rules 26.1 and 28(a)(1) of the Federal Rules of Appellate Procedure, the parties submitting this petition for rehearing en banc – comprised of Intervenors Edison Electric Institute ("EEI"), American Public Power Association ("APPA"), National Rural Electric Cooperative Association ("NRECA"), American Wind Energy Association ("AWEA"), San Diego Gas & Electric Company, Southern California Edison Company, Allegheny Power, Trans-Allegheny Interstate Line Company, and PPL Electric Utilities Corporation – have already submitted disclosure statements with the brief they filed at the original briefing stage of this case on January 31, 2008. Since then, their statements have changed as follows:

For EEI, please update the earlier membership list as follows: (a) delete Aquila (purchased by Great Plains), KeySpan (purchased by National Grid), and Nuclear Management Company (absorbed into Xcel); (b) replace Sierra Pacific with NV Energy (new company name), and TXU Corp with Energy Future Holdings Corp. (new name); and (c) add MidAmerican Energy Holdings Company. Also, please replace the table of EEI members with >10% ownership by institutional investors with the following table, which contains information as of December 31, 2008:

EEI members with>10% ownership by institutional investors					
Company Name	Percent Held by 1st Inst. Owner (%)	1st Institutional Owner Name		Percent Held by 2nd Inst. Owner (%)	2nd Institutional Owner Name
AES Corporation	13.71	Legg Mason Capital Management Inc.			
Mirant Corporation	12.72	Paulson & Co. Inc.			
Black Hills Corporation	11.69	Barclays Global Investors NA			
Edison International	11.46	State Street Global Advisors Inc.			
UGI Corporation	11.34	Wellington Management Co. LLP		10.72	Barclays Global Investors NA
NiSource Inc.	10.00	T. Rowe Price Associates Inc.			

For APPA, please update the earlier membership list as follows: (a) delete City of Corona Dept. of Water & Power, Corona CA; El Dorado Irrigation District, Placerville CA; Hagerstown Municipal Light Dept., Hagerstown IN; Kentucky Association of Electric Co-ops, Louisville KY; Monticello Electric Plant Board, Monticello, KY; City of Crane Board of Public Works, Crane MO; Farmington City Light & Power, Farmington MO; New Madrid Municipal Light & Power, New Madrid MO; City of Lebanon, Lebanon OH; Bennettsville Utilities Dept., Bennettsville SC; Brady Electric Department, Brady TX; and (b) add Intermountain Rural Electric Association, Sedalia CO; Jasper Municipal Utilities, Jasper IN; Arcadia Municipal Electric Dept., Arcadia KS; Centralia Municipal Light System, Centralia KS; City of Ellinwood Electric Department, Ellinwood KS; Greensburg Power & Light System, Greensburg KS; Oxford Municipal Electric Dept., Oxford KS; Seneca City Electric, Seneca KS; City of Eaton Rapids, Eaton Rapids MI; and St. Louis Municipal Electric, St. Louis MI; Cameron

Municipal Utilities, Cameron MO; Purcell Public Works Authority, Purcell OK; City of Granbury, Granbury TX; and Village of Pardeeville, Pardeeville WI.

For AWEA, please update the earlier membership list as follows: (a) delete Airtricity, D.H. Blattner, DMI Industries, FPL Energy LLC, Global Energy Concepts, LLC, and PPM Energy; (b) add Blattner Energy, Inc., Broadwind Energy Inc., Coram Energy LLC, CP Energy Group, DNV Global Energy Concepts - DNV-GEC, E. On Climate and Renewables, Earth Turbines, Inc., Gamesa Eolica, McNiff Light Industry, Mesa Power LP, Next Era Energy Resources, Noble Environmental Power, LLC, Nordex USA, Inc., Oak Creek Energy Systems Inc., Ottertail Corporation c/o DMI Industries, Power Company of Wyoming, LLC, Siemens Power Generation, and UniSource Energy Corporation; and (c) please note that the following members have changed their names: American Electric Power is now AEP Wind Energy, Inc., John Deere Credit is now John Deere Renewables, Inc., Mitsubishi Power Systems, Inc. is now Mitsubishi Power Systems Americas, Inc., and M.A. Mortenson Company is now Mortenson Construction.

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PETITION FOR REHEARING EN BANC

Pursuant to Fed. R. App. P. and Circuit Rules 35, Intervenors hereby petition for rehearing en banc of one element of *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009). This case addresses Federal Power Act ("FPA") Section 216, 16 U.S.C. § 824p, which authorizes the Federal Energy Regulatory Commission ("FERC") to exercise jurisdiction over the siting of an electric transmission line in a National Interest Corridor when a state has "withheld approval for more than 1 year." The panel, by a 2-1 majority, held that this does not permit FERC to exercise jurisdiction when a state has denied approval. Intervenors are not seeking rehearing of other issues addressed by this opinion.

I. STATEMENT OF COUNSEL PURSUANT TO FED. R. APP. P. RULE 35(b)(1) AS TO REASONS FOR GRANTING REHEARING EN BANC

This case is uniquely suited for en banc review for two reasons: (1) the Panel's Majority Opinion undercuts national legislation on an issue of exceptional national importance; and (2) the Panel's Majority and Dissenting Opinions reach diametrically opposite views as to the plain meaning of Section 216 and, faced with such clear evidence of ambiguity, the Majority Opinion contravenes *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by failing to defer to the implementing agency's reasonable interpretation.

1. The Majority Opinion interferes with Congressional legislation and effectively nullifies important electric transmission siting authority that the U.S. Congress gave to FERC in the Energy Policy Act of 2005 ("EPAct 2005") through Section 216. Urgently concerned about electric reliability, congestion, security, and cost, Congress gave FERC, under Section 216, the authority to ensure that transmission facilities of critical importance can be built in National Interest Corridors designated by the U.S. Department of Energy ("DOE"). Following a careful review of the statute and legislative history in a notice-and-comment rulemaking, FERC determined that its siting authority to approve a permit where a state has "withheld approval for more than one year" encompasses the ability to review a request where a state has denied a permit. But the Majority substituted its own view, holding that individual states can continue to thwart the construction of nationally important transmission facilities and that FERC has no jurisdiction in the face of such state action. The Majority's decision will substantially impede FERC's ability to implement Congress's transmission goals and will have an immediate and substantial impact on the siting of critical electric transmission lines affecting the entire country.

2. The Majority Opinion also fails to comply with the Supreme Court's *Chevron* precedent. The Majority and the Dissenting Opinions reach opposite conclusions as to the "plain meaning" of the statutory provision at issue here,

which the Dissent interprets the same as FERC, demonstrating that FERC's interpretation is at least a reasonable one. Yet the Majority fails to accord deference to the view of FERC as the agency charged with implementation of the statute. Under *Chevron*, where the statute is thus manifestly ambiguous, FERC's interpretation is entitled to deference and must be adopted as long as that interpretation is reasonable.

II. BACKGROUND

A. The Parties Filing this Petition Are Directly Affected by the Panel's Decision

The Intervenors submitting this petition for rehearing en banc are, or represent, the vast majority of electric utilities and generators across the United States. EEI represents shareholder-owned electric utilities that constitute approximately 70 percent of the U.S. electric power industry. APPA represents the interests of over 2,000 publicly owned utilities. NRECA represents approximately 930 not-for-profit, member-owned rural electric cooperatives. AWEA represents entities that are building wind turbines throughout the country and rely on the availability of transmission lines to deliver their power to customers. This petition is also submitted on behalf of individual utilities in both the Eastern and Western United States. All of the represented entities rely on transmission facilities to meet the Nation's electricity, energy security, and consumer needs. DOE has already designated the first two National Interest Corridors, in the mid-Atlantic and

Southwest areas of the country. But under the Majority Opinion, FERC will be unable to review any facilities vetoed by a single state in these corridors.

B. Congress Established Important National Transmission Objectives in the Energy Policy Act of 2005

Transmission facilities perform a critical function in allowing the nation to meet its energy needs. They bring electric power from where it can be economically generated to where it is needed. The facilities must be of sufficient capacity to ensure that lights stay on and economical power is available to all who want it. Furthermore, as both Presidents Bush and Obama have recognized, the nation needs additional transmission facilities to enable increased reliance on renewable energy resources and to build a smarter electricity grid to carry us into this century.[1] Already, the economic stimulus legislation passed by Congress and signed by President Obama earlier this year provides substantial federal funding to begin the process of upgrading the transmission network.[2]

In a study published in 2002, DOE concluded that transmission facilities in the United States were not being constructed and upgraded as rapidly as necessary to meet the nation's increasing demand for electric power, thus threatening the

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[1] *See, e.g.*, the President's Inaugural Address, available at http://www.nytimes.com/ 2009/01/20/us/politics/20text-obama.html.

[2] Pub. L. No. 111-5 (2009). In particular, Title IV, "Electricity Delivery and Energy Reliability," provides funds to help modernize the grid, enhance energy infrastructure, study renewable energy transmission, and facilitate recovery from disruptions to energy supply.

ability to deliver reliable and economical electric service to homes and businesses. DOE noted that "[t]here is growing evidence that the U.S. transmission system is in urgent need of modernization. The system has become congested because growth in electricity demand and investment in new generation facilities have not been matched by investment in new transmission facilities."[3] A principal reason for this transmission construction deficit was the lengthy siting and permitting process, which left to individual states the siting and permitting of nationally-important interstate transmission lines. This allowed individual states to veto any proposed expansion of transmission capacity within their borders.[4]

In response, Congress passed EPAct 2005 by substantial majorities in both chambers. The statute incorporated a number of provisions aimed at encouraging the development of additional transmission resources, including new FPA Section 216. Section 216(a) authorized DOE to designate as National Interest Corridors critical areas where insufficient interstate transmission capacity was causing harm

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[3] *U.S. Dep't of Energy, National Transmission Grid Study* (May 2002), *available at* www.ferc.gov/industries/electric/gen-info/transmission-grid.pdf, at xi, 58-59; *see also* 150 Cong. Rec. S2732 (daily ed. Apr. 5, 2004) (statement of Sen. Domenici); Prof. Steve J. Eagle, *Securing a Reliable Electricity Grid: A New Era in Transmission Siting Regulation*, 73 Tenn. L. Rev. 1, 12 (2005-2006).

[4] *See* S. Rep. No. 109-78, at 8 (2005) (key siting challenges include lack of coordination among the states); Richard J. Pierce, Jr., *Completing the Process of Restructuring the Electricity Market*, 40 Wake Forest L. Rev. 451, 493 (2005) (the state's veto power over transmission projects "is certain to produce a growing shortage of capacity that will have devastating effects on the price and availability of electricity"). *See also* J.A. 104 (description of siting delays experienced).

to national interests. In turn, Section 216(b) authorized FERC to issue construction permits for electric transmission facilities located within those corridors under certain circumstances, including, *inter alia*, where a state commission "withheld approval for more than 1 year after the filing of an application." 16 U.S.C. § 824p(b)(1)(C).

C. FERC'S Final Rule Under Review in this Case Sought to Implement Those Objectives

FERC's Order No. 689[5] established procedures for FERC's use of its new siting authority. FERC interpreted Section 216(b)(1)(C)(i) – which gives FERC siting jurisdiction when a state authority has "withheld approval for more than 1 year" – to include the situation where a state has denied an application. In adopting this interpretation, FERC examined the statutory language, its context in the broader EPAct 2005, and its legislative history. FERC reaffirmed this view on rehearing. Two state commissions (New York and Minnesota) and two community organizations appealed.

D. The Panel's Divided Opinion Reversed a Key Element of FERC's Final Rule

Judge Michael, joined by Judge Voorhees (sitting by designation), held that FERC's siting authority does not apply in National Interest Corridors designated

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[5] *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Order No. 689, 71 Fed. Reg. 69,440 (2006), FERC Stats. and Regs. ¶ 31,234, *reh'g denied*, 119 FERC ¶ 61,154 (2007) (reproduced at J.A. 217-394).

by DOE where a state commission has denied a permit for any reason. *Piedmont*, 558 F.3d at 313-15, 319-20. The Majority concluded that "Congress's intent is clear" and there is no reason to apply deference to FERC's interpretation under *Chevron*.

Judge Traxler dissented, finding that the statute clearly meant the opposite. Judge Traxler held that FERC's interpretation, which recognized FERC siting jurisdiction when a state denied a permit, "was the only plausible reading of the statute" and the statutory language "plainly has the meaning that FERC adopted." *Id*. at 325, 326 (Traxler, J., dissenting). Further, Judge Traxler stated that, even if the language was not clear, FERC's interpretation was reasonable and should be given deference under the principles of statutory interpretation required by *Chevron*. *Id*. at 326 (Traxler, J., dissenting).

III. ARGUMENT

A. The Majority Opinion Undercuts Congressional Objectives on an Issue of Exceptional National Importance

The Majority acknowledges that Section 216 was Congress's reaction to "increasing concerns . . . about the capacity and reliability of the grid." *Id*. at 310. Permitting of electric transmission lines has historically been performed by state authorities. But, as with natural gas facilities under the Natural Gas Act, 15 U.S.C. § 717 et seq., Congress has the authority under the Commerce Clause of the U.S. Constitution to preempt some or all state permitting authority for electric

transmission lines in interstate commerce. In Section 216, Congress established a framework whereby the federal government would identify critical corridors where transmission was needed most, and states would have the first opportunity to decide the siting issues associated with transmission construction there. If a state could not or would not issue a permit, however, FERC was given authority to review and, if it deems appropriate, to approve a siting permit.

The purpose of Section 216 is evident from its structure. Section 216(a) instructs DOE to designate National Interest Corridors based on, among other things, considerations of important national interests, such as energy independence, energy policy, national defense, and homeland security.[6] Section 216(b) gives FERC siting authority in these corridors in a variety of circumstances, including when a state withholds approval for more than one year, cannot consider interstate benefits, or conditions a permit such that the resulting transmission facilities would not reduce interstate congestion or would be economically infeasible.

The Majority's Opinion effectively nullifies the federal role Congress carefully devised to ensure the construction of critically needed transmission facilities. The Majority holds that under Section 216, a single state can frustrate

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[6] 16 U.S.C. § 824p(a)(2). DOE has issued corridor designations under the statute. *See Dep't of Energy, National Electric Transmission Congestion Report*, 72 Fed. Reg. 56992 (Oct. 2, 2007). Those designations are under review by the Ninth Circuit.

the construction of a critical transmission line by denying a permit. Under the Majority's Opinion, Section 216 can be defeated by a single state commission, even if that commission denies the permit with minimal consideration of important regional or national concerns. This plainly undermines what Judge Traxler called "critical national energy interests that Congress sought to protect with this legislation." *Piedmont*, 558 F.3d at 324. It gives individual states a veto over needed facilities in interstate commerce – precisely what Congress intended to prevent.

B. The Majority Opinion Fails to Accord Deference to FERC as Required by the Supreme Court's Chevron Precedent

The Supreme Court's *Chevron* analysis guides the interpretation of the statute here, as both the Majority and Dissent agree. *Piedmont*, 558 F.3d at 312-13, 321. Under *Chevron* step one, "[i]f the intent of Congress is clear, that is the end of the matter… ." 467 U.S. at 842. But if the intent of Congress is not clear, or is ambiguous, the court's inquiry must continue to *Chevron* step two, and in that circumstance, a reasonable interpretation by the agency charged by Congress with implementation of the statute will be controlling: "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843. *See also Verizon Commc'ns, Inc. v.*

FCC, 535 U.S. 467 (2002) (statutory term "cost" is ambiguous, requiring *Chevron* deference to agency's reasonable interpretation).[7]

The Majority stopped the *Chevron* analysis at step one, finding that Congress's intent was clear and Section 216 did not grant FERC backstop jurisdiction when a state denies a permit. But Judge Traxler's well reasoned dissent demonstrates that Section 216 can reasonably (if not definitively) be interpreted <u>opposite</u> the Majority's construction.

Intervenors agree with Judge Traxler that, "[o]nly FERC's interpretation gives Congress's words their common meaning, and only FERC's interpretation makes sense in the context in which the language is used and in the context of the statute as a whole. ... [T]hat plain meaning is also the one indicated in the applicable legislative history." *Piedmont*, 558 F.3d at 326 (Traxler, J., dissenting).

However, even if this Court en banc does not view the statute as unambiguously giving FERC jurisdiction when a state denies an application, there is at least sufficient ambiguity to proceed to *Chevron* step two. In that event, Judge Traxler's analysis of the statute and legislative history compels the conclusion that FERC's interpretation, reached after a full-scale rulemaking, was at least reasonable and entitled to deference.

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[7] This Court has previously applied *Chevron*. *See, e.g.*, *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 267 (4th Cir. 2001); *First South Prod. Credit Ass'n v. Farm Credit Admin.*, 926 F.2d 339, 345 (4th Cir. 1991).

Under *Chevron*, when the language in a statute has a range of permissible meanings, the agency rather than the court is entitled to choose which meaning best effectuates the objectives of the statute. *See id*. "'The whole point of *Chevron* is to leave the discretion provided by the ambiguities of the statute with the implementing agency.'" *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005) (citation omitted). The agency's interpretation does not need to be the best, the most reasonable, or even the most plausible reading of the statute. *See Chevron*, 467 U.S. at 843 n.11. *Accord Entergy Corp. v. Riverkeeper, Inc.,* No. 07-588, 2009 WL 838242, at *5 (Apr. 1, 2009).

The stark disagreement among the panel members in this case is evidence, at a minimum, that congressional intent was not clearly expressed. As recognized by prior appellate courts: "[W]e observe that it would be unusual for a statute free from ambiguity to be subject to different interpretations by … a closely divided panel[.]" *Local Union 1261, Dist. 22, United Mine Workers v. Federal Mine Safety & Health Review Comm'n*, 917 F.2d 42, 46 (D.C. Cir. 1990). "[T]his collision of viewpoints underscores" that "the text is unclear." *In re Thinking Machines Corp.*, 67 F.3d 1021, 1025 (1st Cir. 1995).

In the face of such ambiguity, under *Chevron*, FERC is entitled to deference as long as its interpretation is reasonable. In fact, as Judge Traxler has noted, FERC gave the statutory language its most common meaning. *Piedmont*, 558

F.3d at 322-23. *See also United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150 (1989) ("When the Department refused to grant Tax Analysts' requests for the district court decisions in its files, it undoubtedly 'withheld' these decisions in any reasonable sense of that term."); *Rey v. Lafferty*, 990 F.2d 1379, 1382, 1294 (1st Cir. 1993) (the phrase "approval shall not be unreasonably withheld" in commercial agreements includes rejections); *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hosp*., 426 F.3d 738, 741 (5th Cir. 2005) (same).

Furthermore, FERC's interpretation makes the statute internally consistent. Section 216(b)(1)(C) gives FERC backstop siting authority if a state grants a permit with conditions that undermine the use or viability of transmission facilities. It is illogical to assume that FERC would have the authority to reconsider permits so strenuously encumbered with unreasonable conditions imposed by the state commission that they are, in effect, a denial of the ability to construct a transmission project, and yet not be able to review an outright denial of the same transmission project. Statutes must be interpreted to make all the provisions consistent, not so as to produce illogical results.[8]

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[8] *See, e.g., United States v. Amaya-Portillo*, 423 F.3d 427, 434 (4th Cir. 2005) ("one provision of a statute should not be interpreted in a manner that renders other sections of the same statute inconsistent, meaningless, or superfluous"); *Trinity Am. Corp. v. EPA*, 150 F.3d 389, 297 (4th Cir. 1998) (rejecting proposed construction of statute that "would be at odds with the clear purpose of the statute" and would create "an illogical result").

The Majority seeks to reconcile this inconsistency by opining that when a state "imposes project-sinking conditions," the state "misuses its authority," whereas when a state denies a permit, it "acts with transparency and engages in a legitimate use of its traditional powers." *Piedmont*, 558 F.3d at 314-15. Nothing in the statute, however, even hints at the notion that Congress intended to withhold FERC's siting authority on the basis that there was a "legitimate" or "transparent" state decision. Nor is there any reason to believe that an unreasonable permit denial is any more "legitimate" than unreasonable permit conditions.

The Majority also says that it would be "futile" for a state commission to do its "normal work" if FERC could override its denial of a permit. *Id*. at 314. But this is not correct. First, the FERC authority only exists with respect to transmission facilities located in National Corridors. Second, state entities retain full authority to conduct proceedings and to decide significant routing and other conditions in response to siting requests, as long as they do so in a reasonable and timely fashion. If the route approved by the state relieves congestion and is not uneconomical, the permit decision is not subject to further federal review. Third, as FERC has made clear, it will carefully consider the legitimate concerns that led a state to deny a construction permit and could well agree with the state's denial. The critical point is that "FERC brings a broader national perspective to siting

proposals in national interest electric transmission corridors," and "Congress clearly intended that FERC would be authorized to act from that perspective." *Id.*

FERC's interpretation of Section 216 is fully consistent with and amply supported by the overall transmission provisions of EPAct 2005 and the statute's goal of addressing impediments to construction of needed facilities. FERC took these factors into account, and this is exactly the kind of policy determination entrusted to an expert agency under *Chevron*.

Finally, the legislative history fully supports FERC's interpretation. *See Piedmont*, 558 F.3d at 325-26 (Traxler, J., dissenting).[9] For example, the House Energy and Commerce Committee Report, addressing identical language, states:

> Section 1221 expedites the construction of critical transmission lines identified by the DOE. The section provides that for such lines, persons may obtain a permit from FERC and exercise eminent domain if, after one year, a state, or other approval authority, is unable *or refuses* to site the line.

H.R. Rep. No. 109-215 at 261 (2005) (emphasis added). Similarly, the Congressional Budget Office explained: "Section 1221 would authorize FERC to issue permits…when a state has not acted *or has rejected* a permit request." *Id.* at 206, 227 (emphasis added). In fact, even those who opposed Section 216(b)(1)(C)

[9] The Majority did not consider legislative history, even though it is one of the "traditional tools" used to ascertain congressional intent under *Chevron*, 467 U.S. at 843 n.9. *See Adams v. Dole*, 927 F.2d 771, 774 (4th Cir. 1991).

understood that it provided for FERC review of state decisions denying a permit. The dissenters from the House Report explained:

> the title includes transmission siting provisions that preempt…state decisions about *whether* new or expanded lines should be built.

Id. at 494 (emphasis added). These and other parts of the legislative history confirm that the intent of the statute was to grant FERC backstop siting authority in the case of a state denial of a siting permit.[10] No legislative history has been presented that supports a contrary view.

In sum, FERC's interpretation is consistent with the language used, the purpose and intent of EPAct 2005, and the statute's legislative history. Therefore, even if the statutory language were considered to be ambiguous, under *Chevron*, FERC's interpretation is a permissible one and controlling as a matter of law.

IV. CONCLUSION

For the reasons set forth herein, Intervenors respectfully request that the Court grant this Petition for Rehearing En Banc and reinstate FERC's interpretation of "withheld approval for more than 1 year."

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[10] Even the association representing state utility commissions recognized that, under the statute, "FERC will have authority to override State decisions on transmission siting." *The Energy Policy Act of 2005: Hearings Before the Subcommittee on Energy & Air Quality of the House Comm. on Energy & Commerce*, 109th Cong. 108 (2005) (testimony of Hon. Marilyn Showalter, NARUC).

Respectfully submitted,

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