

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities Docket No. RM06-12-000

(November 16, 2006)

KELLY, Commissioner, *dissenting in part*:

Section 216(b)(1)(c)(i) of the Federal Power Act provides that the Commission may issue a permit for the construction of an electric transmission line if the State having the authority to site the line has

(i) withheld approval for more than 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 majority finds that this language also means that the Commission can issue a permit for the construction of an electric transmission line if the State has *denied* the permit application. I believe the majority's interpretation flies in the face of the plain language of the statute, the purposes of the statute, well-established principles of statutory interpretation and supporting case law, and inappropriately preempts the States in the process.

When interpreting a statute, there is an understanding that Congress says what it means and means what it says therefore, the court will first determine whether the language at issue has a plain and unambiguous meaning.¹ To that end, words will be interpreted as taking their ordinary, contemporary, common meaning.²

The word "withhold" is variously defined as "to refrain from giving, granting, or permitting" (American Heritage Dictionary), "to hold back...keep from action—to desist or refrain from granting, giving, or allowing" (Webster's

¹ *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S.Ct. 1942, 1947 (2000).

² *Perrin v. United States*, 444 U.S. 37, 42 (1979).

Dictionary), and “to omit to disclose upon request; as, to withhold information” (Black’s Law Dictionary). In my view, it defies common sense to insert the concept of “reject” or “deny” into this universally acknowledged definition.

Moreover statutory provisions must be read in context.³ The language at issue here is not, as the majority asserts, “withheld approval.” Rather, it is “withheld approval for more than 1 year after the filing of an application.” When “withheld approval” is read in its appropriate context, it simply cannot mean “deny,” because otherwise the provision must be read to mean that the Commission would have jurisdiction when a state has “denied approval for more than 1 year after the filing of an application.” This reading is nonsensical; yet to read it as the majority does would render the phrase “for more than one year” superfluous. As noted in *Cooper Industries, Inc. Aviall Services*--the very opinion the majority cites for the notion that it must give every word in a statute some operative effect--any reading that would render part of a statute entirely superfluous is something a court should be “loath to do.”⁴

States have always had exclusive, plenary jurisdiction over transmission siting.⁵ In 2005, Congress passed EAct, which, for the first time, carefully carves out a limited role for the federal government in the area of transmission siting. EAct amended the FPA to give the Commission the authority to site electric transmission facilities in five specific situations.⁶ The majority’s interpretation of Section 216(b)(1)(C)(i) would add a sixth situation: the Commission would have jurisdiction to approve the siting of a transmission line pursuant to federal law where the State has lawfully denied an application pursuant to state law.

³ *Bailey v. United States*, 516 U.S. 137, 145 (1995)

⁴ *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

⁵ FPA section 201(a) confers to the Commission jurisdiction over the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce, and notes that such regulation extends “only to those matters which are not subject to regulation by the States.” *See also New York v. FERC*, 535 U.S. 1, 24 (2002) (“FERC has recognized that the States retain significant control over local matters”), citing Order No. 888 at 31,782 & n. 543, FERC Stats. & Regs., Regs. Preamble, Jan. 1991-June 1996, ¶ 31,036, 31,632, 61 Fed. Reg. 21540 (1996) (“Among other things, Congress left to the States authority to regulate generation and transmission siting”).

⁶ *See* Section 216(b)(1) subsections (A)(i), (A)(ii), B, (C)(i), (C)(ii).

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

Courts “have long presumed that Congress does not cavalierly pre-empt” state law.⁷ Indeed, courts should not find 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.”⁸ In short, courts must start with the “basic assumption that Congress did not intend to displace state law.”⁹

There is no evidence to counter this “presumption against pre-emption.” To the contrary, I find it inconceivable that Congress would have specifically listed in section 216(b)(1) a number of circumstances that will trigger Commission jurisdiction, yet fail to include on that list denial of a permit. If Congress had intended to take away the States’ authority to lawfully deny a permit, surely it would have said so in unmistakable terms.

Like me, I suspect that many will be surprised by the majority’s interpretation. The Commission received 51 letters commenting on the proposed rule, including many that delved into minute details of the rule. Yet, no one opined, let alone argued, that the Commission has jurisdiction if a State denies a permit.

Indeed, there is evidence beyond the plain meaning of the statute that Congress did not intend to give the Commission the authority to override a State’s denial of a permit application. In Section 216(b)(1)(A)(ii), Congress told the States that they cannot retain jurisdiction to site transmission facilities unless they have the authority to “consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State.”

⁷ *Meditronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

⁸ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *See also 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).

⁹ *Building & Construction Trades Council v. Associated Builders*, 507 U.S. 218 (1993).

It makes little sense that Congress would have said, on the one hand, the State has the authority to review a permit application if it takes these factors into account, but on the other hand, it doesn't really matter if the State takes these factors into account because if the State doesn't approve the permit, it loses jurisdiction to the Commission.

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

For these reasons, I respectfully dissent.

Suedeem G. Kelly