No. 09-

IN THE
Supreme Court of the United States

EDISON ELECTRIC INSTITUTE; AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; AMERICAN WIND ENERGY ASSOCIATION; ALLEGHENY POWER; TRANS-ALLEGHENY INTERSTATE LINE CO.; AND SAN DIEGO GAS & ELECTRIC CO.,
Petitioners,

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Concerned that states' refusals to approve proposals to construct and modify electric transmission lines was threatening the capacity, reliability, and security of our Nation's electric grid, Congress expanded the powers of the Federal Energy Regulatory Commission (FERC) in comprehensive landmark energy legislation known as the Energy Policy Act of 2005. As is relevant here, that Act added Section 216 to the Federal Power Act (codified at 16 U.S.C. § 824p), giving FERC the authority to issue permits for the construction or modification of electric transmission facilities in "National Interest Electric Transmission Corridors" whenever a state commission lacks the authority to issue a permit or to consider the interstate benefits of proposed facilities; attaches conditions that render a permit ineffective at reducing congestion or economically infeasible; or has "withheld approval for more than 1 year after the filing of an application" for a permit.

The question presented is whether – consistent with FERC's conclusion through notice-and-comment rulemaking – the phrase "withheld approval for more than 1 year" gives FERC the authority to issue permits to construct or modify transmission facilities in National Interest Corridors not only when state commissions fail to act on applications, but also when they deny them.

PARTIES TO THE PROCEEDINGS

The petitioners in the consolidated cases in the Fourth Circuit were Piedmont Environmental Council, Communities Against Regional Interconnect, Public Service Commission of the State of New York, and Minnesota Public Utilities Commission. These entities are respondents here.

FERC was the respondent in the Fourth Circuit.

Intervenor-respondents in the Fourth Circuit included Edison Electric Institute, American Public Power Association, National Rural Electric Cooperative Association, American Wind Energy Association, Allegheny Power, Trans-Allegheny Interstate Line Co., and San Diego Gas & Electric Co. These entities are petitioners here. PPL Electric Utilities Corp. and Southern California Edison Company, members of petitioner Edison Electric Institute, were also individual intervenor-respondents in the Fourth Circuit, but do not petition in their own names here.

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6, the parties who are petitioners state as follows:

Edison Electric Institute, American Public Power Association, American Wind Energy Association, and National Rural Electric Cooperative Association are non-governmental, incorporated national trade associations. None of the four

associations has parent companies or publicly held stock.

Allegheny Power is the trade name for Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company, all of which are wholly owned subsidiaries of Allegheny Energy, Inc., a publicly held Maryland corporation. No other publicly held company owns 10% or more of the stock of any of the Allegheny Power companies.

Trans-Allegheny Interstate Line Company (TrAILCo) is a wholly owned subsidiary of Allegheny Energy Transmission, LLC, which is a wholly owned subsidiary of Allegheny Energy Inc. No other publicly held company owns 10% or more of TrAILCo stock.

San Diego Gas & Electric Company (SDG&E) is a subsidiary of Enova Corporation, which in turn is a wholly owned subsidiary of Sempra Energy, a publicly held California corporation. No other publicly held company owns 10% or more of SDG&E stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Edison Electric Institute, American Public Power Association, National Rural Electric Cooperative Association, American Wind Energy Association, San Diego Gas & Electric Company, Allegheny Power, and Trans-Allegheny Interstate Line Company respectfully petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion (App. 1a) is reported at 558 F.3d 304. The pertinent FERC order (App. 52a) and order denying rehearing (App. 246a) are reported, respectively, at 71 Fed. Reg. 69,440 (2006) and 119 FERC ¶ 61,154 (2007).

JURISDICTION

The Fourth Circuit issued its opinion on February 18, 2009. App. 1a. Applicants and FERC filed timely petitions for rehearing en banc, which that court denied on April 20, 2009. App. 50a. By means of orders entered July 13 and August 7, 2009, Chief Justice Roberts extended the time to file this Petition for Writ of Certiorari up to and including September 17, 2009. *See* 09-A46. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

This case involves Section 1221 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594

(2005), codified in relevant part as Section 216 of the Federal Power Act, 16 U.S.C. § 824p ("Section 216"). Regulations implementing the relevant portion of Section 216 are codified at 18 C.F.R. § 50.6(e)(3)(i). These provisions are set forth in App. 293a and 308a.

STATEMENT OF THE CASE

Prior to 2005, state governments held the exclusive authority to grant permits for the construction of electric transmission lines within their jurisdiction. Faced, however, with a national demand for electricity that was quickly outpacing construction of new transmission lines, Congress took several steps in the Energy Policy Act of 2005 ("EPAct 2005" or "the Act") to ensure that our Nation's grid would have sufficient capacity, security, and reliability to support twenty-first century requirements. To that end, EPAct 2005 added Section 216 to the Federal Power Act, giving FERC the authority to issue permits for the construction or modification of electric transmission facilities in "National Interest Electric Transmission Corridors" whenever a state commission lacks the authority to issue a permit or to consider interstate benefits of the facilities, attaches conditions that render a permit ineffective at reducing congestion or economically infeasible, or – as is most relevant here – has "withheld approval for more than 1 year after the filing of an application" for a permit. FERC issued rules construing that "federal backstop" provision as giving the Commission the power to issue permits when state entities failed to act on applications or simply denied them. But a divided

Fourth Circuit invalidated the rules in part, holding that construing the phrase "withheld approval" to include denials contravened the plain language of EPAct 2005.

1. Background for EPAct 2005. During the first part of the twentieth century, most electric systems were confined to state-franchised service territories where one utility company was given the exclusive rights to generate, deliver, and sell electricity. Most of these systems were intrastate in nature and served somewhat limited geographic areas, with transmission links to other such systems that were used for exchanging power reserves. *See New York v. FERC*, 535 U.S. 1, 5 (2002).

In 1935, Congress ushered in our modern system of federal energy regulation. In Part II of the Federal Power Act in 1935, 16 U.S.C. § 824 *et seq.*, Congress gave FERC jurisdiction to regulate the transmission and sales of electric energy in interstate commerce. While this Act allowed FERC to regulate some areas that were previously under exclusive state control, *see New York*, 535 U.S. at 6, it did not give FERC authority over the States with respect to granting siting permission for transmission lines.

Beginning in 1978, Congress enacted a second wave of legislation aimed at ensuring the availability of reasonably priced electricity and increasing accessibility to nontraditional sources of electric energy. This legislation increased competition in electric markets in part by allowing some customers to choose their own power suppliers, which might be

far removed geographically from the points of consumption. This legislation, combined with complementary FERC actions, improved technology, and the ordinary forces of economic expansion, increased the power flow over the Nation's power lines at a great pace. This, in turn, accelerated demand for long interstate transmission lines to link the sources of power with load centers where it was consumed. *New York*, 535 U.S. at 7-9.

As years passed, however, and as state governments continued to retain exclusive authority (subject only to minor exceptions) to issue permits for the construction of transmission lines, it became increasingly apparent to many experts and governmental entities that the construction of transmission lines was not keeping up with demand and that this situation represented a serious problem. *See, e.g.*, U.S. Dep't of Energy, *National Transmission Grid Study*, at xi (May 2002). Electric utilities were experiencing lengthy delays in obtaining permits from states to site transmission facilities – a situation often exacerbated by the need to obtain permits from several states. A consensus eventually emerged that in order to "avoid future blackouts" and to provide the U.S. economy with reliable electricity, 150 Cong. Rec. S3732 (daily ed. Apr. 5, 2004), federal legislation was needed to improve procedures for siting and permitting transmission lines and that such legislation "should be implemented immediately." *National Transmission Grid Study* at 58-59.

2. EPAct 2005. Congress enacted EPAct 2005 to address the urgent need for improved siting and permitting procedures – and, ultimately, the mounting need for reliable and reasonably priced electricity in the twenty-first century. Central to this effort was Congress's desire to address the "[s]iting challenges, including lack of coordination among the states, [that] impede[d] improvement of the electric system." S. Rep. No. 109-78, at 8 (2005).

Title XII of the Act is entitled "Electricity." Subtitle B of the Title, entitled "Transmission Infrastructure Modernization," addresses the siting of interstate electric transmission facilities, transmission system finance, and advanced transmission technologies and contains the statutory section at issue in this case.[1] That subtitle added a new Section 216 to the Federal Power Act, codified at 16 U.S.C. § 824p, thereby establishing an integrated program to promote the siting and permitting of critical electric transmission facilities

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[1] Other subtitles of Title XII addressed other critical transmission issues. Subtitle A requires mandatory reliability standards for the nation's electric system; Subtitle C requires nondiscriminatory access to transmission lines, permits federal utility participation in transmission organizations, and protects certain transmission contracts; and Subtitle D requires incentive-based rates for transmission infrastructure to promote reliable and economically efficient transmission, attract new investment, and encourage new interconnection and transmission upgrades. Other sections within other titles of EPAct 2005 also encouraged transmission construction. Section 368, for instance, expedites designation of energy rights-of-way on federal lands, and Section 1308 shortens the depreciation period for transmission facilities.

while taking into account competing political interests in that process.

Section 216 begins by directing the United States Department of Energy to designate as "National Interest Electric Transmission Corridors" critical areas where actions are needed to relieve transmission congestion in interstate commerce and to improve reliability. Among the considerations that the Department shall consider in designating National Interest Corridors are whether "the energy independence of the United States would be served by the designation;" whether "the designation would be in the interest of national energy policy," such as the policy of enhancing domestic, renewable sources of energy; and whether "the designation would enhance national defense and homeland security." 16 U.S.C. §§ 824p(a)(2) & (4).

Section 216(b) of the Federal Power Act then creates what is known as federal backstop siting authority for transmission facilities within these National Interest Corridors. That is, the subsection authorizes FERC, under certain circumstances, to issue construction permits for electric transmission facilities within the corridors. This federal authority arises in three circumstances, the third of which is at issue here: (1) when the state in which the facilities would be located does not have authority to approve the siting of the facilities or to consider the interstate benefits expected to be achieved by the facilities; (2) when the applicant for a state permit would be disqualified by the state because the applicant does not serve end-use customers in the state; or (3) when a state entity has authority to act

on an application, but the state "(i) withheld approval for more than 1 year after the filing of an application" or one year after the National Interest Corridor designation; or a state "(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." 16 U.S.C. §§ 824p(b)(1)(A)-(C).

3. FERC's Rules Implementing Section 216. Shortly after the enactment of EPAct 2005, the Department of Energy designated two National Interest Corridors. The Mid-Atlantic Area National Corridor includes New Jersey and the District of Columbia, as well as parts of New York, Pennsylvania, Maryland, Virginia and West Virginia. The Southwest Area National Corridor includes parts of California and Arizona. The Department flagged four other "congestion areas of concern" that it is closely monitoring with an eye toward the possibility of designating them as National Interest Corridors as well. U.S. Dep't of Energy, *National Electric Transmission Congestion Report*, 72 Fed. Reg. 56,992, 56,995, 57,027-28 (Oct. 5, 2007), *petition for review filed, The Wilderness Society, et al. v. U.S. Dep't of Energy*, No. 08-71074, *et al.* (9th Cir.).

After notice-and-comment procedures, FERC promulgated regulations implementing Section 216. *See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities,* App. 52a. As is relevant here, FERC interpreted the statutory phrase "withheld approval for more than

one year" to include a state's denial of a permit. App. 70a.

A number of parties filed petitions at FERC asking for rehearing, arguing that the "withheld approval" phrase confers federal permitting authority only when a state has failed to issue any decision for more than one year. In response, FERC issued an Order on Rehearing, 119 FERC ¶ 61,154 (2007), reaffirming its position and explaining that interpreting the phrase "withheld approval" to include denials is the most common-sense reading of the statute. App. 252a ¶ 11. FERC also maintained that its interpretation furthered the underlying goals, purpose, and intent of the statute to facilitate siting of needed facilities in National Interest Corridors and was supported by the Act's legislative history. App. 258a-259a ¶ 19-20.

4. Federal Appellate Proceedings. The Federal Power Act affords any party aggrieved by a FERC final order sixty days to file a petition for review in a federal court of appeals challenging that order. 16 U.S.C. § 825*l*(b). Accordingly, as in *New York v. FERC*, 535 U.S. 1, the Public Service Commission of the State of New York timely petitioned for review of FERC's orders regulating electric transmission in the Second Circuit. The Minnesota Public Utilities Commission petitioned for review in the D.C. Circuit. The state commissions argued that FERC's interpretation of Section 216 would fundamentally and immediately alter the way that the commissions carry out their responsibilities for transmission siting because it would render their denials of permits subject to federal review. Communities

Against Regional Interconnect (CARI) and Piedmont Environmental Council (PEC), community interest organizations opposed to at least two applications for transmission lines that are currently pending in the Mid-Atlantic Area National Corridor, also petitioned for review of FERC's rules. CARI filed in the D.C. Circuit, and PEC filed in the Fourth Circuit.

Because the first petition was filed in the Fourth Circuit, the other three petitions were transferred to that court, where all four petitions were consolidated. Sixteen states from across the country filed an *amicus* brief in support of the petitions. The petitioners in this Court – four major trade associations, two utility companies, and a transmission company, who together represent entities that are responsible for generating, transmitting, or distributing most of the electricity consumed in the United States – intervened in support of FERC. In addition, two other utilities, PPL Electric Utilities Corporation and Southern California Edison Company (SCE), both members of petitioner Edison Electric Institute, also intervened. SCE had an application to build a transmission line in the Southwest Area National Corridor denied by the Arizona Corporation Commission after EPAct was enacted. Other petitioners and entities and entities represented by petitioner trade associations have applications to build transmission lines in National Interest Corridors pending right now before state commissions. Still others are planning to file or to support such applications.

A divided panel of the Fourth Circuit invalidated FERC's rules implementing Section 216

to the extent they confer federal backstop authority when a state commission denies a permit. The majority acknowledged that this dispute is governed by the two-step analysis contained in *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), under which a court first consults the plain meaning of the statute and defers to the agency's view if the statute is ambiguous. But in the majority's view, the plain meaning of the statutory phrase "withheld approval" is limited to situations in which a state fails to act and thus excludes denials of permits. App. 22a-23a. Finding the language clear, the majority gave no deference to FERC's interpretation under *Chevron,* thus explicitly stopping the *Chevron* analysis at step one of *Chevron's* two-step construct. App. 23a.

Judge Traxler dissented in relevant part, reaching exactly the opposite conclusion concerning the plain meaning of Section 216 and FERC's rule interpreting the section. In Judge Traxler's view, the statutory phrase "withheld approval" "is susceptible to only one interpretation, the one that FERC adopted." App. 38a. That interpretation "yields a straightforward rule that a state has 'withheld approval for more than 1 year' when one year after approval has been sought, the state still has not granted it, regardless of the reason." App. 41a. That interpretation also, in the dissent's view, accords with the statute's purpose of "ensur[ing] that a state does not frustrate the goal of significantly reducing transmission congestion in a national interest corridor." App. 43a. Finally, the dissent asserted that, "even assuming *arguendo* that the statute's meaning were not plain," FERC's

interpretation was at the very least reasonable and thus entitled to deference under *Chevron*. App. 49a.

Both FERC and petitioners sought rehearing en banc, with FERC arguing that the Fourth Circuit's decision "significantly curtails FERC's ability to address critical infrastructure deficiencies in National Interest Corridors." Pet. of Resp't Fed. Energy Regulatory Comm'n for Reh'g En Banc at 3, *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) (No. 07-1651). But the Fourth Circuit denied the petitions without comment.

REASONS FOR GRANTING THE WRIT

I. This Case Involves A Statute That Is Critical To National Energy Policy.

The statutory language at issue in this case is an integral part of major federal legislation aimed at addressing an urgent issue of national significance. Indeed, nothing less than the reliable and secure operation of the Nation's electric grid, and the provision of electricity to millions of Americans, are at stake.

In the years leading up to the EPAct 2005, energy policy experts repeatedly emphasized an increasingly "urgent" problem: American consumers continue to require more and more electricity, and energy producers are working hard to develop the next generation of renewable energy. U.S. Dep't of Energy, *National Transmission Grid Study*, at xi (May 2002). Yet "growth in electricity demand and investment in new generation facilities have not been matched by investment in new transmission

facilities." *Id.*; *see also* H.R. Rep. No. 109-215, at 171 (2005) ("Investment in electric transmission has not kept pace with electricity demand. . . . Legislation is needed to address the issues of transmission capacity, operation and reliability."). Indeed, "[b]illions of dollars need to be invested in the national transmission grid to ensure reliability and to allow markets to function." S. Rep. No. 109-78, at 8 (2005).

The inadequacy of our Nation's electric grid imposes concrete consequences for American consumers – businesses and individuals alike. "Today, congestion in the transmission system impedes economically efficient electricity transactions and in some cases threatens the system's safe and reliable operation." U.S. Dep't of Energy, *Considerations for Transmission Congestion Study and Designation of National Interest Electric Transmission Corridors*, 72 Fed. Reg. 5660 (Feb. 2, 2006). And, according to the electric reliability organization that FERC has certified to ensure the reliability of the country's electric system, "more transmission [is] needed to maintain bulk system reliability and integrate new generation," and "each peak season puts more and more strain on the transmission system." North American Electric Reliability Corp., *2008 Long-Term Reliability Assessment* 15-16 (Oct. 2008); *see also* North American Electric Reliability Corp., *Order Certifying North American Electric Reliability Corp. as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC § 61,060 (2006).

EPAct 2005 was created, in the words of Senator Domenici, the Chairman of the Subcommittee on Energy and Natural Resources, "[t]o avoid future blackouts and provide our industry and consumers with the reliable electricity they need." 150 Cong. Rec. S3732 (daily ed. Apr. 5, 2004). After concluding that "[s]iting challenges, including lack of coordination among the states, impede improvement of the electric system," S. Rep. No. 109-78, at 8 (2005), Congress inserted Section 216 into the Act to "streamline the permitting of siting for transmission lines to assure adequate transmission." 150 Cong. Rec. S3732 (daily ed. Apr. 5, 2004) (statement of Sen. Domenici).

"[S]ection 216(a), as well as other provisions of the EPAct, evince concern about the need to strengthen transmission infrastructure throughout the Nation." U.S. Dep't of Energy, *Draft National Interest Electric Transmission Corridor Designations,* 72 Fed. Reg. 25,838, 25,844 (May 7, 2007) (footnote omitted). Section 216 focuses federal oversight on "National Interest Electric Transmission Corridors" – areas that implicate "the energy independence of the United States," "national energy policy," and even "national defense and homeland security." *Id.* at 25,838 (*quoting* 16 U.S.C. 824p §§ (a)(4)(C)-(E)). When a state is unable or unwilling to issue a permit for new transmission facilities within such corridors, Section 216 gives FERC the authority to do so.

II. The Fourth Circuit's Decision Does Violence To The Language Of The Statute And The Context In Which It Occurs.

A state commission that does not want to allow a proposed interstate transmission line to cross its territory has three basic ways to defeat it. The commission can deny the application outright, impose conditions that make the proposal impractical, or delay the permitting process so long that the applicant gives up. The Fourth Circuit did not dispute that Section 216 gives FERC federal backstop authority to prevent local commissions from frustrating proposed projects in the latter two of these three situations – prolonged delays and unreasonable conditions. A majority of the Fourth Circuit, however, held that FERC had no justification for interpreting Section 216 to give it the first (and most obvious) kind of backstop authority – the authority to act when a state has denied an application. FERC lacks such authority, in the Fourth Circuit's view, even if a state's denial is completely unreasonable and thwarts national energy policy.

The majority's analysis cannot withstand scrutiny. Section 216 allows FERC to act when a state commission has "withheld approval for more than 1 year after the filing of an application" for a permit. That phrase is most naturally read – or at least is reasonably read – to include denials as well as failures to act.

A. The Fourth Circuit held the statutory phrase "withheld approval [of an application] for

more than 1 year" plainly cannot encompass a denial of an application. The words "withheld" and "for one year," according to the majority, imply "continuous" action, a concept inconsistent with the "finite act of denying an application within the one-year deadline." App. 17a. According to the Fourth Circuit, therefore, Section 216 grants FERC jurisdiction only to ensure that states make "a timely and straightforward decision on every permit application in a national interest corridor." App. 20a. If a state commission does so, FERC lacks any authority whatsoever, even if the local decision is indefensible based on the evidence presented and completely thwarts national energy policy.

Neither the text nor the purpose of the statute requires such a counterintuitive result. As Judge Traxler noted, "[a]pplying the common meaning of the word 'withhold' yields a straightforward rule that a state has 'withheld approval for more than 1 year' when one year after approval has been sought, the state still has not granted it, regardless of the reason." App. 41a. Put another way, although a denial initially occurs on a discrete day, a state commission that continues to adhere to a denial at the end of a year has withheld – *i.e.,* refused to grant – approval for that year. Just as one might say that this Court "has held for over 50 years that states may not establish 'separate-but-equal' schools," even though the actual holding was a discrete decision in 1954, one can comfortably say that a state commission has "withheld approval for more than 1 year" when the failure to approve stems from a denial of an application on a particular day.

The majority was able to reach the contrary conclusion only by substituting the word "action" for "approval." The Fourth Circuit's opinion states: "The phrase, read as a whole, means that *action* has been held back continuously over a period of time (more than one year)." App. 17a (emphasis added). But withholding "approval" is not the same as withholding "action." If Congress had meant withholding "action" as the trigger for backstop authority, it would have said withholding "action." It did not. It said that withholding "approval" was the trigger. Therefore, a proper reading of the actual words of the statute refutes the meaning that the Fourth Circuit gives them.

Furthermore, "in expounding a statute, [courts should not be] guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). Courts, in other words, must "consult the Act, viewing it as a 'symmetrical and coherent regulatory scheme,'" *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)), with the goal that the statutory scheme remain "coherent and consistent," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Interpreting "withheld approval" to include denials complements the object and policy of the other provisions of Section 216 and EPAct 2005 generally, while excluding denials thwarts their object and policy and renders the regulatory scheme

incoherent. Section 216(b) indisputably gives FERC siting authority within a National Interest Corridor when a state commission has "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." 16 U.S.C. § 824p (b)(1)(C)(ii). It is illogical to assume, as the Fourth Circuit's opinion does, that EPAct 2005 would give FERC the authority to review permits so strenuously encumbered with unreasonable conditions that they are, in effect, a denial of an application, and yet deny the same authority when permits are denied outright. More generally, it is illogical to assume that Congress would have created such a broad loophole in the federal backstop authority deemed essential to ensure that the Nation's energy grid is updated to meet twenty-first century demands.

The Fourth Circuit sought 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." App. 21a. Yet, it could be entirely appropriate for a state to condition a project on terms that are economically onerous, depending on the circumstances of the particular proposal. All Section 216 is designed to do is to trigger federal oversight in such situations. Conversely, transparency and traditional powers are little solace when a state unjustifiably thwarts a reasonable and economical proposal to address the national demand for increased electric capacity and

reliability. Section 216, in short, is directed toward reviewing the substance of state permitting decisions in National Interest Corridors, not the procedures that lead to them.

The Fourth Circuit also protested that it would be "futile" for a state commission to do its "normal work" if FERC could override its denial of a permit. App. 20a. To the contrary, state entities retain full authority to decide significant routing and other important conditions in response to siting requests. If routing and conditions that a state commission imposes relieve congestion in a National Interest Corridor and do not render the project economically infeasible, then the state's decision will stand. Further, even if a state denial triggers FERC backstop authority, states have the statutorily-granted opportunity to give input to FERC, *see* 16 U.S.C. § 824p(d), and in fact, FERC could well agree with the state's denial after its rigorous review process. 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." App. 45a-46a. (Traxler, J., dissenting).

Finally, what limited legislative history there is supports FERC's interpretation of the statute. The House Report on the bill that became EPAct 2005 explained that applicants may obtain permits from FERC when, after one year, "a state . . . is unable *or refuses* to site the line." H.R. Rep. No. 109-215, at 261 (2005) (emphasis added). Similarly, the Senate Report notes that the bill addresses the "[s]iting

challenges, including lack of coordination among the states," that were preventing needed transmission lines from being constructed. S. Rep. No. 109-78, at 8 (2005). Even the dissenting members to the legislation acknowledged that the siting provisions preempted state decisions about "whether new or expanded lines should be built." H.R. Rep. No. 109-215, at 494.

B. At the very least, FERC's interpretation of Section 216 is a reasonable construction of the phrase "withheld approval." As the Fourth Circuit acknowledged, FERC's interpretation of this statutory phrase, as the result of notice-and-comment rulemaking, is entitled to deference under the principles enunciated in *Chevron,* 467 U.S. 837. App. 16a. 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 ambiguous, the court's inquiry must continue to *Chevron* step two. In that circumstance, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" in charge of implementing the statute. *Id.* at 843.

The upshot of *Chevron* is that an entity challenging the agency's interpretation of a statute must prove that the agency's "interpretation is unreasonable." *National Cable & Telecomms. Ass'n v. Gulf Power*, 534 U.S. 327, 333 (2002); *Verizon Commc'ns, Inc. v. FCC,* 535 U.S. 467, 501, 510-20 (2002). This is an "uphill battle." *See Verizon,* 535 U.S. at 498. The agency's interpretation does not need to be the best, the most reasonable, or even the

most plausible reading of the statute. So long as it is "sufficiently reasonable" to fall within the realm of legitimate constructions of the statute, the agency's reading controls. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (internal citations omitted); *see also Chevron*, 467 U.S. at 843 n.11; *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009).

The Fourth Circuit dissent's well-reasoned analysis of Section 216 – reading the statute directly contrary to the majority – demonstrates that the phrase "withheld approval for more than 1 year" can reasonably (if not definitively) be interpreted as encompassing denials of applications. App. 34a-49a (Traxler, J., dissenting). Such a "collision of viewpoints underscores" that "the text is unclear." *In re Thinking Machines Corp.*, 67 F.3d 1021, 1025 (1st Cir. 1995). Indeed, as Justice (then Judge) Ginsburg noted for the D.C. Circuit, "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).

This is certainly not such an unusual case. Neither the phrase "withheld approval for more than 1 year" nor any overarching statutory context or purpose clearly renders FERC's and the Fourth Circuit dissent's reading of the statute implausible. To the contrary, interpreting the words "withheld approval" to include denials accords with dictionary definitions of the term "withheld" as "declin[ing] to grant." App. 41a (Traxler, J., dissenting) (quoting

Funk & Wagnalls Standard Dictionary 936 (1980)). And construing the words in that manner best effectuates congressional intent to create federal backstop authority in electric transmission corridors of national significance.

III. Without Review By This Court Now, The Fourth Circuit's Erroneous Interpretation Of this Vital Legislation Will Become The Law Of The Land.

This Court's review of the Fourth Circuit's construction of this important legislation is necessary now. Recognizing the critical need for new transmission lines in certain areas of the country, the Department of Energy has already designated two multistate National Interest Corridors and has indicated that it is considering designating four more. *See* U.S. Dep't of Energy, *National Electric Transmission Congestion Report*, 72 Fed. Reg. 56,992, 56,995 (Oct. 5, 2007). Federal policymakers and industry participants alike need to know whether FERC has true backstop permitting authority in these areas. A utility company must invest millions of dollars, years of time, and substantial staff resources to prepare, present, and pursue a transmission siting application. Many utility companies, therefore, that have been considering filing permit applications are closely watching the outcome of this case. If the Fourth Circuit's decision stands, and state commissions continue to be allowed – as before EPAct 2005 – to deny such applications without triggering any review by a body taking a broader regional or

national perspective, some of these applications may not even be filed.

Not only does the Fourth Circuit's decision nullify a critical element of a new federal law, but there will not be another opportunity for a different court to interpret this significant statute. The Fourth Circuit's interpretation arose on consolidated review of four facial challenges in three courts of appeals to an agency rulemaking. *See* 28 U.S.C. § 2112(a)(5) (providing for consolidation and a single, nationally binding decision whenever petitions are filed in multiple courts challenging the same agency rule). The specific statute in the Federal Power Act that enabled these challenges provides that any court of appeals reviewing the legality of a FERC order shall have the "exclusive" power "to affirm, modify, or set aside such order in whole or in part," and that any judgment setting aside a FERC rule "shall be final, subject [only] to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28." 16 U.S.C. § 825*l*(b). The statute also contains a sixty-day statutory time limit for seeking judicial review. *Id.* That time has now run. Accordingly, no other entity may challenge FERC's interpretation of Section 216, and FERC cannot enforce it anywhere anyway, because the Fourth Circuit has "reverse[d] FERC's interpretation." App. 23a, 33a; *see also Atlantic City Elec. Co. v. FERC,* 329 F.3d 856, 858-59 (D.C. Cir. 2003).

This Court should not let the Fourth Circuit's decision become the law of the land without at least a full review on the merits. Indeed, this Court has

granted certiorari to review FERC rules governing federal/state jurisdiction over electric transmission issues even when a court of appeals has upheld FERC's new rules. *See New York v. FERC*, 535 U.S. 1 (2002). The situation here, in which a court of appeals has nullified FERC's rules, is even more pressing.

Indeed, this Court regularly has granted certiorari in cases in which federal courts of appeals have invalidated important new regulations implementing federal statutes. In such situations, the usual criterion of a circuit conflict becomes irrelevant. *See, e.g., FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009); *Winter v. Natural Resource Defense Council, Inc.*, 129 S. Ct. 365 (2008); *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004); *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case should be no different.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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