

# PIEDMONT ENVIRONMENTAL COUNCIL V. FERC

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## I. INTRODUCTION

Over the last decade, new policies have driven substantial growth in demand for electric power from renewable resources.<sup>1</sup> Electric transmission faces increased attention due to the need to connect these new resources to customers. Responding to perceived state-level obstacles to new transmission projects, Congress created federal backstop authority to site transmission lines.<sup>2</sup> However, in *Piedmont Environmental Council v. FERC*, the Fourth Circuit limited federal power to preempt state decisions by explicitly preserving the right of states to reject proposed projects.<sup>3</sup> The legislative and judicial discussion up until the Fourth Circuit's decision regarded transmission as an economic and reliability issue. However, in petitions for certiorari to the Supreme Court and in congressional proposals to reverse the effect of *Piedmont*, discussion shifted to renewable energy. The introduction of renewable energy reframed the public debate and judicial argument regarding electric transmission, resulting in a rhetorical advantage for developers and complex new dilemmas for environmental advocates.

## II. BACKGROUND

The 2005 Energy Policy Act ("EPAAct") established the first significant federal authority to issue permits to site electric transmission lines. States traditionally controlled the siting process, often delegating the authority to state agencies with strong incentives, and sometimes explicit instructions, to favor in-state interests.<sup>4</sup> In 2002, the U.S. Department of Energy ("DOE") began exploring a role for the Federal Energy Regulatory Commission ("FERC") to exercise backstop authority when dealing with "national interest transmission bottlenecks."<sup>5</sup> Additionally, the California energy crisis in 2001 and the large-scale blackout in the Northeast in 2003 brought renewed

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<sup>1</sup> Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the "Public Interest" in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. (forthcoming 2010) (discussion draft at 4), available at [http://www.nrel.gov/analysis/pdfs/rossi\\_brown.pdf](http://www.nrel.gov/analysis/pdfs/rossi_brown.pdf).

<sup>2</sup> *Piedmont Env'tl. Council v. FERC*, 558 F.3d 304, 325 (4th Cir. 2009) (Traxler, J., dissenting), cert. denied, 130 S. Ct. 1138 (2010).

<sup>3</sup> *Id.* at 320 (majority opinion).

<sup>4</sup> Brown & Rossi, *supra* note 1, at 4.

<sup>5</sup> U.S. DEP'T. OF ENERGY, NATIONAL TRANSMISSION GRID STUDY 59 (2002), available at <http://www.ferc.gov/industries/electric/indus-act/transmission-grid.pdf>. This study appears to have been a direct precursor to the 2005 EPAAct, using the same terms such as "backstop" and "national interest." *Id.* at 58–59.

public attention to electric reliability.<sup>6</sup> Responding to concerns that the system of state-controlled siting was insufficient to ensure reliability, Congress expanded federal siting authority in the 2005 EPAct.<sup>7</sup>

The 2005 EPAct added section 216 to the Federal Power Act (“Section 216”), authorizing DOE to designate National Interest Electric Transmission Corridors, and granting FERC authority to site transmission lines within those corridors in specific situations enumerated by the statute.<sup>8</sup> Among other circumstances, Section 216 permits FERC to site a transmission line if the state entity tasked with siting electric transmission has “withheld approval for more than 1 year after the filing of an application.”<sup>9</sup> Pursuant to Section 216, FERC issued a Notice of Proposed Rulemaking to implement backstop siting.<sup>10</sup> FERC initially declined to define what constitutes withholding approval.<sup>11</sup> After several parties raised this issue in comments, FERC responded in the final rule stating explicitly that a denial of a permit constitutes withholding the permit.<sup>12</sup> FERC Commissioner Kelly dissented, noting that of the fifty-one comments on the proposed rule, “no one opined, let alone argued, that the Commission has jurisdiction if a State denies a permit.”<sup>13</sup> FERC denied rehearing.<sup>14</sup>

Piedmont Environmental Council (“PEC”) filed a petition for review of FERC’s decision in the Court of Appeals for the Fourth Circuit.<sup>15</sup> The New York State Public Service Commission (“NYPSC”) sought review in the Second Circuit, while Minnesota Public Utilities Commission (“MNPUC”) and Citizens Against Regional Interconnect (“CARI”) sought

<sup>6</sup> For a discussion of the California crisis and Northeast blackout, see Jim Rossi, *The Political Economy of Energy and Its Implications for Climate Change Legislation*, 84 TUL. L. REV. 379, 412–16 (2009) (suggesting that insufficient transmission arguably caused neither the California crisis nor the Northeast blackout).

<sup>7</sup> *Piedmont*, 558 F.3d at 321 (Traxler, J., dissenting) (citing 150 CONG. REC. S3732 (daily ed. Apr. 5, 2004) (statement of Sen. Domenici)).

<sup>8</sup> 16 U.S.C. § 824p (2006). Pursuant to Section 216, DOE issued a final designation of two corridors in October 2007, one in the Southwest and one in the Mid-Atlantic. National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992 (Oct. 5, 2007).

<sup>9</sup> 16 U.S.C. § 824p(b)(1)(C)(i).

<sup>10</sup> Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors, 71 Fed. Reg. 36,258 (proposed June 16, 2006) (codified at 18 C.F.R. pts. 50 & 380 (2009)).

<sup>11</sup> See Final Rule, Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,444 (Dec. 1, 2006) (“Numerous commenters request that the Commission define the criteria it would use to determine that a State has withheld approval . . .”).

<sup>12</sup> *Id.* (determining that “withholding approval includes denial of an application”).

<sup>13</sup> *Id.* at 69,476 (Kelly, Comm’r, dissenting).

<sup>14</sup> Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 119 FERC ¶ 61,154 (May 17, 2007) (order denying rehearing).

<sup>15</sup> *Piedmont*, 558 F.3d at 312. PEC is an advocacy organization opposed to some transmission projects on the basis of land use protection, aesthetics, and the potential for new transmission to enable the expansion of coal-fired generation. See Rose Jenkins, *Higher Power: Will New Energy Infrastructure Force Land Trusts to Protect the Climate at the Expense of the Land?*, SAVING LAND (Land Trust Alliance, Washington, D.C.), Fall 2009, at 24, 25–27.

review in the District of Columbia Circuit.<sup>16</sup> The petitions filed in the Second and D.C. Circuits were transferred to the Fourth Circuit and consolidated with PEC's petition.<sup>17</sup>

### III. THE FOURTH CIRCUIT

The Fourth Circuit reversed and remanded FERC's decision.<sup>18</sup> Writing for the majority,<sup>19</sup> Judge Michael held that the phrase "withheld approval for more than 1 year" excludes the explicit denial of an application.<sup>20</sup> The court determined that its review was governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>21</sup> requiring the court to first ask if Congress has spoken clearly to the issue, and second, if Congress has not spoken clearly, whether the agency interpretation is permissible under the statute.<sup>22</sup> The court explained that "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" govern the court's inquiry into the clarity of the statute.<sup>23</sup> The court explained that by all three measures, the statute unambiguously indicates that "withheld" does not include "denied," obliging the court to resolve the issue at Step 1 of *Chevron*.<sup>24</sup>

First defining the term "withheld," the court noted that the term can only be understood within its specific context in the phrase "withheld approval for more than 1 year."<sup>25</sup> The court reasoned that the specific context indicates that the statute requires continuous withholding for the year, rather than the "final act" of denying the application.<sup>26</sup> The court further explained

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<sup>16</sup> *Piedmont*, 558 F.3d at 312. NYPSC and MNPUC are state siting authorities in New York and Minnesota, respectively. Unsurprisingly, state siting agencies prefer to maintain final authority, and are skeptical of FERC authority, often wary of "the gap between local customers and federal bureaucrats." ROBERT WASSERSTROM & SUSAN REIDER, *ELECTRIC TRANSMISSION AND CARBON REDUCTION: A SURVEY OF ENVIRONMENTAL LEADERS AND STATE REGULATORS* 6–9 (2010), available at <http://www.powermag.com/Assets/File/POWERnews/PN012710-TerraEnergyTransmissionStudy.pdf>. CARI is an advocacy organization that opposes some transmission projects, including the New York Regional Interconnect. Elizabeth Cooper, *Court Ruling Hailed by NYRI Opponents*, *UTICA OBSERVER-DISPATCH*, Feb. 18, 2009, <http://www.uticaod.com/news/x598677458/Court-ruling-hailed-by-NYRI-opponents>.

<sup>17</sup> *Piedmont*, 558 F.3d at 312. Petitioner CARI also challenged FERC on National Environmental Policy Act ("NEPA") grounds. *Id.* This comment will not discuss CARI's challenge or the Fourth Circuit's ruling on NEPA issues. For discussion of NEPA issues related to *Piedmont*, see generally GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, 2 *PUBLIC NATURAL RESOURCES LAW* § 17:5 (2d ed. 2010).

<sup>18</sup> *Piedmont*, 558 F.3d at 320.

<sup>19</sup> Judge Michael was joined by Judge Voorhees, United States District Judge for the Western District of North Carolina, sitting by designation. *Id.* at 309.

<sup>20</sup> *Id.* at 315.

<sup>21</sup> 467 U.S. 837 (1984).

<sup>22</sup> *Piedmont*, 558 F.3d at 312 (citing *Chevron*, 467 U.S. at 842–43).

<sup>23</sup> *Id.* at 312–13 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

<sup>24</sup> *Id.* at 313–15.

<sup>25</sup> *Id.* at 313.

<sup>26</sup> *Id.*

that denial “within one year ends the application process, and there is nothing about a terminated process that would continue for more than one year.”<sup>27</sup>

The court then considered section 216(b)(1) of the EPA Act as the “broader context of the statute as a whole.”<sup>28</sup> Section 216(b)(1) lists five independently sufficient criteria permitting FERC to exercise backstop siting authority, one of them being when a state withholds approval for a year.<sup>29</sup> The court concluded that each circumstance granted FERC a limited right, and that reading “withheld” to include denials “renders it completely out of proportion with the four other jurisdiction-granting circumstances.”<sup>30</sup> The court elaborated that the authority sought by FERC was quite expansive, and if Congress had sought to create such authority, it would have done so clearly.<sup>31</sup> Based on this analysis, the court determined that the congressional intent was clear, and the court’s review under *Chevron* was complete at Step 1.<sup>32</sup>

Judge Traxler concurred in part and dissented in part.<sup>33</sup> His dissent asserted that FERC correctly interpreted section 216(b)(1).<sup>34</sup> Like the majority, Judge Traxler concluded that Congress spoke clearly in the statute, permitting him to decide the case at Step 1 of *Chevron*; however, he reached the opposite result. He also added, *arguendo*, that if the statute were not clear, at the very least FERC’s interpretation was reasonable and therefore should be accorded deference under *Chevron* Step 2.<sup>35</sup>

Judge Traxler applied the same three-part analysis used by the majority, analyzing first the language itself, then the specific context, and finally the statute as a whole.<sup>36</sup> Beginning with the language itself, Judge Traxler reasoned that a state withholds a permit if at the end of the year the state does not grant the permit, regardless of the reason the permit is not granted.<sup>37</sup> Discussing the specific context of the language, Judge Traxler wrote that a denial itself would not constitute withholding for more than one year; rather, the denial would be one event within the year, and the failure to reverse the

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 313, 315. Section 216(b)(1) constitutes a list of the situations where FERC has backstop siting authority, which function in the alternative. The remainder of section 216(b) enumerates other conditions that must be met to authorize backstop siting when any one of the situations in section 216(b)(1) arises. The remainder of Section 216 constitutes the complete statute governing federal siting of interstate transmission lines. See 16 U.S.C. § 824p (2006).

<sup>29</sup> *Id.* § 824p(b)(1).

<sup>30</sup> *Piedmont*, 558 F.3d at 314.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 315.

<sup>33</sup> *Id.* at 320 (Traxler, J., dissenting). Judge Traxler concurred in Parts III, IV, and V of the decision, *id.*, which collectively constitute the NEPA issues raised by CARI. See *id.* at 315–19 (majority opinion).

<sup>34</sup> *Id.* at 320 (Traxler, J., dissenting).

<sup>35</sup> *Id.* at 326.

<sup>36</sup> *Id.* at 322.

<sup>37</sup> *Id.* (citing FUNK & WAGNALLS STANDARD DICTIONARY 936 (1980)).

denial by the end of the year would complete the withholding.<sup>38</sup> Considering the statute as a whole, Judge Traxler compared the withholding provision to the provision immediately following it, which grants FERC backstop siting authority in circumstances where states have imposed project-killing conditions.<sup>39</sup> Judge Traxler concluded that Congress intended to trump state siting decisions in a broad range of circumstances where FERC found the state action inappropriate, including a denial of a permit.<sup>40</sup>

Judge Traxler buttressed his argument by considering the purpose of the statute through an exploration of the legislative history.<sup>41</sup> His account of the background of the case noted the role of DOE's 2002 National Transmission Grid Study and discussions of the expansive power of the statute in the Senate records.<sup>42</sup> He also discussed a House Committee Report where both majority and dissenting members held in common an understanding of Section 216 as granting federal authority to override state refusal to site transmission lines.<sup>43</sup> Based on this analysis, Judge Traxler concluded that only FERC's interpretation comports with congressional intent.<sup>44</sup>

#### IV. PETITION FOR CERTIORARI

On petition for certiorari to the United States Supreme Court, emphasis on renewable energy supplanted the Fourth Circuit's analysis of statutory text and legislative history. Prior to the decision in *Piedmont*, and in the text of the Fourth Circuit's decision, renewable energy is scarcely mentioned, and never plays a central role in decision making.<sup>45</sup> Rather, the court, litigants, and policy makers focused on reliability and economic efficiency.<sup>46</sup> After the decision, renewable energy became an essential component of petitioners' and respondents' arguments. As certified intervenors at the Fourth Circuit, four energy industry trade associations and three companies ("industry parties") initiated the discussion of transmission for renewable resources in

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<sup>38</sup> *Id.* at 323.

<sup>39</sup> *Id.* (citing 16 U.S.C. § 824p(b)(1)(C)(i), (ii) (2006)).

<sup>40</sup> *Id.* at 323–24.

<sup>41</sup> *Id.* at 325 ("Although it is not determinative, [FERC's interpretation] is also buttressed by the applicable legislative history.").

<sup>42</sup> *Id.* at 321; *see also supra* note 5.

<sup>43</sup> *Id.* at 325.

<sup>44</sup> *Id.* at 326.

<sup>45</sup> Neither Judge Michael's opinion nor Judge Traxler's dissent makes any reference to renewable energy. Parties only offered two references to renewable energy in any of the briefs to the Fourth Circuit. First, CARI mentioned renewable energy tax credits from other segments of the 2005 EPAct to illustrate that the Act covered many subjects. Brief of Petitioner Communities Against Reg'l Interconnect at 7, *Piedmont*, 558 F.3d 304 (No. 07-1651), 2007 WL 4359905. Second, Edison Electric Institute et al. described the relationship of the American Wind Energy Institute to the litigation. Brief of Intervenors/Respondents Edison Elec. Inst. et al. at 5, *Piedmont*, 558 F.3d 304 (No. 07-1651), 2008 WL 471567. Neither of these references argued that the role of renewable energy should impact the outcome of the decision.

<sup>46</sup> *See, e.g., Piedmont*, 558 F.3d at 321 (Traxler, J., dissenting) (discussing legislative history).

their joint petition for a writ of certiorari to the Supreme Court.<sup>47</sup> The industry parties referred twice to renewable energy as a reason the 2005 EAct sought to expand transmission.<sup>48</sup> Former FERC Commissioners Joseph T. Kelliher, Elizabeth Anne Moler, Patrick Henry Wood, and James T. Hoecker (“former Commissioners”) filed a brief as amici curiae, emphasizing that renewable energy “has become even more important [to] national energy and environmental polic[y]” since 2005.<sup>49</sup> The former Commissioners provided substantial evidence that renewable energy is now a national goal, and argued that the 2005 EAct should be read in accordance with national energy policies, even if the policy developed after the enactment of the statute.<sup>50</sup>

As respondents, PEC, NYPSC, and MNPUC argued that although renewable energy is an important policy, there was no urgent need to grant certiorari because Congress was considering transmission for renewable resources in the American Clean Energy and Security Act.<sup>51</sup> FERC, represented by the Solicitor General, argued that the Fourth Circuit’s ruling was incorrect, but nonetheless that the Court should deny certiorari.<sup>52</sup> In arguing that the Fourth Circuit’s decision was erroneous, FERC highlighted the need to connect renewable resources.<sup>53</sup> Only the U.S. Chamber of Commerce, filing as amicus curiae, rested its argument primarily on economic and relia-

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<sup>47</sup> See Petition for Writ of Certiorari at ii, *Edison Elec. Inst. v. Piedmont Envtl. Council*, 130 S. Ct. 1138 (2010) (No. 09-343), 2009 WL 3022142. The trade associations were the Edison Electric Institute, the American Public Power Association, the National Rural Electric Cooperative Association, and the American Wind Energy Association; the energy companies were Allegheny Power, Trans-Allegheny Interstate Line Co., and San Diego Gas & Electric Co. *Id.* The same parties, along with Southern California Edison and PPL Electric Utilities Corp., were intervenors at the Fourth Circuit. *Id.*

<sup>48</sup> *Id.* at 6, 11. Neither underlying source cited by the industry parties suggests that renewable energy played any part in the legislative history of the 2005 EAct. Petitioners first cited 16 U.S.C. § 824p(a)(2), (4) (2006) to support the specific claim that DOE corridor designations should be based on renewable energy concerns. Petition for Writ of Certiorari, *supra* note 47, at 6. However, there is no mention of renewable energy in all of 16 U.S.C. § 824p. Petitioners’ second reference stated that “[i]n the years leading up to the EAct 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*.” Petition for Writ of Certiorari, *supra* note 47, at 11 (citing U.S. DEP’T OF ENERGY, *supra* note 5, at xi) (emphasis added). There is no reference to renewable energy on that page of the study. U.S. DEP’T OF ENERGY, *supra* note 5, at xi. In fact, in the 108 pages of the study, there are only five references to renewable energy; two are references to the name of an agency consulted for the study, two relate to transmission pricing policy, and one refers to how dispatchers should calculate the output from renewable energy generators. See *id.* at v, 40, 81.

<sup>49</sup> Brief of Amici Curiae the Honorable Joseph T. Kelliher et al. in Support of Petition for Writ of Certiorari at 9, *Edison Electric*, 130 S. Ct. 1138 (No. 09-343), 2009 WL 3420493.

<sup>50</sup> See *id.*

<sup>51</sup> H.R. 2454, 111th Cong. (2009); see Brief in Opposition at 29, *Edison Electric*, 130 S. Ct. 1138 (No. 09-343), 2009 WL 3420492.

<sup>52</sup> Brief for the Fed. Energy Regulatory Comm’n in Opposition at 6–7, *Edison Electric*, 130 S. Ct. 1138 (No. 09-343), 2009 WL 4862143.

<sup>53</sup> *Id.* at 14.

bility considerations.<sup>54</sup> On January 19, 2010, the Supreme Court denied the petition for certiorari.<sup>55</sup>

## V. PROPOSED LEGISLATION

The legislative reaction to *Piedmont* reflects the rhetorical shift between the Fourth Circuit and the petitions for certiorari. Shortly after the Fourth Circuit decided *Piedmont*, Congress reacted with proposals to reverse the effect of the decision.<sup>56</sup> However, these proposals did not take the most obvious route of changing “withheld” to “withheld or denied” within the statute. Rather, the proposed legislation included new regulatory designs aimed at expanding renewable resources.<sup>57</sup> However, Congress failed to pass energy legislation in 2009, and a comprehensive energy bill appears unlikely in the near term.<sup>58</sup>

## VI. ANALYSIS

Although the *Piedmont* decision itself inhibits new transmission, the more substantial development in the law is the argumentative and rhetorical shift from reliability to renewable energy that will benefit developers and burden environmental advocates. On the surface, an increased focus on renewable energy appears pro-environment because it may help expand renewable power. This is certainly true. Paradoxically, this development also

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<sup>54</sup> Brief of Amicus Curiae The Chamber of Commerce of the U.S. in Support of Petitioners at 5–11, *Edison Electric*, 130 S. Ct. 1138 (No. 09-343), 2009 WL 3417602. The U.S. Chamber of Commerce also argued that the decision ran afoul of *Chevron* deference. *See id.* at 11–14.

<sup>55</sup> *Edison Electric*, 130 S. Ct. 1138. Although *Piedmont* only has binding effect in the Fourth Circuit, it may already be deterring transmission projects in other states. *See, e.g.*, PHILLIP WEINBERG ET AL., N.Y. PRACTICE SERIES, ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 15:13 (2009) (describing potential application of *Piedmont* to siting in New York). To date, FERC has received only one petition for backstop siting under Section 216, filed by Southern California Edison after the Arizona Corporation Commission rejected the proposed Devers–Palo Verde 2 transmission line. Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1022, 1037 (2009). Three months after the Fourth Circuit decision in *Piedmont*, Southern California Edison cancelled the Arizona segment of the project, citing economic concerns. *Edison Drops Plan for Power Line in Arizona*, L.A. TIMES, May 16, 2009, at B2. While FERC, as a government agency, is not estopped from challenging court holdings, Southern California Edison, as an intervenor, may arguably be estopped from challenging *Piedmont* in subsequent litigation. *See United States v. Mendoza*, 464 U.S. 154, 157–59 (1984).

<sup>56</sup> *See, e.g.*, Chris Newkumet & Craig Cano, *Wellinghoff Looks to New Transmission Bill as Court Rejects EPA Act Interpretation*, PLATTS: INSIDE FERC, Apr. 27, 2009, at 12.

<sup>57</sup> For descriptions and analysis of proposed legislation to modify or reverse the effect of *Piedmont*, see generally Tara Benedetti, Recent Development, *Running Roughshod? Extending Federal Siting Authority over Interstate Electric Transmission Lines*, 47 HARV. J. ON LEGIS. 253, 261–64 (2010); John Noor, Recent Development, *Herding Cats: What To Do When States Get in the Way of National Energy Policy*, 11 N.C. J.L. & TECH. 145, 162–66 (2009).

<sup>58</sup> *See* John M. Broder & Clifford Krauss, *Advocates of Climate Bill Scale Down Their Goals*, N.Y. TIMES, Jan. 27, 2010, at A4 (discussing prospects for energy legislation).

reshuffles the rhetorical positions of various litigants in ways that advantage transmission developers and fossil fuel generators. Advocates of new transmission now have a claim to the environmental high ground. Non-governmental environmental advocates and government agencies tasked with representing environmental interests (“environmental advocates”) will need to develop and maintain expertise to determine when transmission actually supports renewable energy. Even when proposed transmission projects do serve renewable resources, environmental advocates will face difficult choices between local land use-oriented concerns and global emissions-related concerns.<sup>59</sup> *Piedmont* transfers the role of ultimate arbiter from the federal government to states,<sup>60</sup> but does not change this dynamic.

### A. *Evaluating the New Argument for Transmission*

Industry parties are correct in their claim that interconnecting some renewable energy will require new electric transmission. Many renewable sources of electric power, such as strong winds and consistent sunlight, are often located in remote areas, far from electric power consumers.<sup>61</sup> Additionally, renewable resources produce power on an intermittent basis, requiring alternate sources of power to be connected to the same consumers as a backup supply.<sup>62</sup> Various industry parties stand to make impressive financial gains from developing this infrastructure for renewable energy.<sup>63</sup>

However, these arguments present an incomplete picture. First, critics challenge the general proposition that transmission is needed for renewable power. Some consumer and environmental advocates suggest that remote renewable resources are a poor energy source, and that rooftop solar photovoltaic cells are a preferable source of power.<sup>64</sup> Rooftop solar has the potential to avoid the need for transmission because it is located at the point of consumption.<sup>65</sup> Some advocates also argue that policies expanding interconnections will decrease the pressure to implement energy efficiency programs, even though energy efficiency offers the most cost-efficient and

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<sup>59</sup> See Brown & Rossi, *supra* note 1, at 26–27 n.136.

<sup>60</sup> Debbie Swanstrom & Meredith M. Jolivet, *DOE Transmission Corridor Designations & FERC Backstop Siting Authority: Has the Energy Policy Act of 2005 Succeeded in Stimulating the Development of New Transmission Facilities?*, 30 ENERGY L.J. 415, 449 (2009) (“As a practical matter, [*Piedmont*] gives the states the ability to avoid federal preemption entirely by simply denying an application outright (rather than taking too long to act or conditioning an approval excessively).”).

<sup>61</sup> Joseph P. Tomain, “*Steel in the Ground*”: *Greening the Grid with the iUtility*, 39 ENVTL. L. 931, 935–36 (2009).

<sup>62</sup> See Steven Ferrey, *Restructuring a Green Grid: Legal Challenges to Accommodate New Renewable Energy Infrastructure*, 39 ENVTL. L. 977, 987 (2009).

<sup>63</sup> See, e.g., Anthony Rubenstein, Editorial, *Pickens’ ‘Clean’ Secret*, L.A. TIMES, July 29, 2008, at A17.

<sup>64</sup> David R. Baker, *Solar Power Debate: Is Bigger Better?*, S.F. CHRON., Jan. 4, 2010, at A1. Advocates of rooftop solar suggest their proposals have more merit, and meet more opposition, because distributed generation on rooftops threatens the traditional utility model. *Id.*

<sup>65</sup> *Id.*

environmentally friendly policies available.<sup>66</sup> Additionally, concerns weighing against electric transmission persist, including habitat loss, invasive species,<sup>67</sup> and wildfires.<sup>68</sup>

Second, critics express concern that particular new transmission lines will not be used to expand access to renewable power, but rather to expand access to fossil fuel-fired power plants.<sup>69</sup> If constructed, transmission lines connecting high-emissions generators to customers will undermine policies aimed at reducing greenhouse gas emissions. Increasing transmission connections between coastal population centers and the coal-rich areas of West Virginia, Ohio, and western Pennsylvania would cause an increase in the emissions from comparatively cheap coal by displacing generation from cleaner and more expensive plants located closer to customers on the Atlantic coast.<sup>70</sup> Many existing coal plants currently run below their maximum levels because of limited transmission, and could increase their power generation, producing the greenhouse gas emissions equivalent to adding nine million cars to the road.<sup>71</sup> New transmission would also serve to circumvent existing air quality standards because many of these coal-fired plants pre-date, and therefore are exempt from, the Clean Air Act.<sup>72</sup> Expanded generation from coal would also create demand for more coal mining, an environmentally destructive process in and of itself.<sup>73</sup> Activists label this scenario as “coal in green clothing.”<sup>74</sup>

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<sup>66</sup> See WASSERSTROM & REIDER, *supra* note 16, at 12 (noting criticism of “wires only” solutions).

<sup>67</sup> See Jenkins, *supra* note 15, at 25.

<sup>68</sup> See, e.g., Randal C. Archibold, *Damaged Power Lines Blamed for Wildfires*, N.Y. TIMES, Sept. 3, 2008, at A17.

<sup>69</sup> Although there are proposals to limit power shipped over new lines to power from renewable resources, this would be a legal fiction of questionable efficacy. Electric power cannot be segregated between lines; “any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce.” New York v. FERC, 535 U.S. 1, 7 (2002).

<sup>70</sup> JOHN ROGERS, CHRIS JAMES & ROBIN MASLOWSKI, UNION OF CONCERNED SCIENTISTS, IMPORTING POLLUTION: COAL’S THREAT TO CLIMATE POLICY IN THE U.S. NORTHEAST 9, 11 (2008), available at [http://www.ucsusa.org/assets/documents/clean\\_energy/importing-pollution\\_report.pdf](http://www.ucsusa.org/assets/documents/clean_energy/importing-pollution_report.pdf).

<sup>71</sup> *Id.* at 11–12.

<sup>72</sup> *Id.* at 7–8. See also WASSERSTROM & REIDER, *supra* note 16, at 12 (characterizing activists’ arguments). Some activists suggest that a similar situation exists in southern California, where the proposed Sunrise Powerlink may be used to facilitate expanding gas-fired plants in Mexicali, Mexico, beyond the effective reach of many American environmental regulations. Marla Dickerson & Marc Lifsher, *They Call It Green Power’s Evil Twin; Transmission Towers Loom Large in a Desert Project Feud that the PUC Will Resolve*, L.A. TIMES, Dec. 18, 2008, at A1.

<sup>73</sup> See, e.g., SHIRLEY STEWART BURNS, BRINGING DOWN THE MOUNTAINS: THE IMPACT OF MOUNTAINTOP REMOVAL ON SOUTHERN WEST VIRGINIA COMMUNITIES (2007).

<sup>74</sup> Jenkins, *supra* note 15, at 26.

### B. *The New Positions of Old Adversaries*

Industry parties' changed position may be best described as a new source of ideological currency. While protecting wildlife from new construction offers little profit, the transition to a low-carbon economy provides numerous opportunities for business.<sup>75</sup> Policies to expand transmission will not only help generators connect new renewable resources, they will also assist with the original goals of the 2005 EPAct, namely expanding electric reliability by connecting more sources of power to customers. In this way, industry parties have not needed to change their policy preferences at all, but have gained an ideological allegiance between their self-interest and a viable conception of the public interest.

Responding to transmission projects framed as interconnecting renewable resources will pose substantial challenges for environmental advocates. This task involves, first, a challenging decision about when to oppose transmission projects, and second, a rhetorical challenge in advocating against new transmission branded as "green." Major environmental groups already hire experts with utility experience.<sup>76</sup> These organizations will need to either continue hiring experts or develop their own expertise to convince siting authorities and the public that some projects are environmentally harmful.<sup>77</sup> These judgments will be complicated by the potential for transmission that will carry both renewable and fossil-fuel generated power, as well as lines needed to provide reserve power to back up intermittent resources like wind. Even when the projects are for clean energy, environmental advocates still face a dilemma in the choice between combating climate change and protecting local habitat.<sup>78</sup>

### C. *Expectations in Future Litigation*

Litigation will most likely persist in the model illustrated by the *Piedmont* petitions for certiorari. Industry parties can be expected to make use of their ideological windfall, arguing that they are advancing green power. Sometimes this will be an accurate characterization; other times it will not. State agencies will continue both to face pressures from their constituents to protect the local environment, and to oppose federal authority.<sup>79</sup> The high-profile focus on climate change is unlikely to recede,<sup>80</sup> and climate change

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<sup>75</sup> See, e.g., John M. Broder, *Gore's Dual Role: Advocate and Investor*, N.Y. TIMES, Nov. 2, 2009, at A1.

<sup>76</sup> WASSERSTROM & REIDER, *supra* note 16, at 11.

<sup>77</sup> To be clear, I am not suggesting that this change happened as a result of the *Piedmont* decision. Rather, because of the abrupt rhetorical shift between arguments at the Fourth Circuit and certiorari stages, *Piedmont* offers a potent illustration of this transition.

<sup>78</sup> See Brown & Rossi, *supra* note 1, at 26–27 n.136.

<sup>79</sup> WASSERSTROM & REIDER, *supra* note 16, at 3; cf. Brown & Rossi, *supra* note 1, at 31–32 (arguing that the parochial interests in electric siting are no longer suitable restraints).

<sup>80</sup> See Michael P. Vandenbergh, Brooke A. Ackerly & Fred E. Forster, *Micro-Offsets and Macro-Transformation: An Inconvenient View of Climate Change Justice*, 33 HARV. ENVTL. L.

policy will have localized costs, including environmental costs, resulting from policies targeted at global benefits. Given this alignment of costs and benefits, it is unsurprising that governments over the broadest jurisdiction would prioritize the global problem, climate change, while governments at narrower jurisdictions may remain skeptical of the national policies, and continue to oppose them.<sup>81</sup> *Piedmont* shifted the decision down to narrower jurisdictions,<sup>82</sup> so opponents of transmission may be more successful, but state agencies will still have to negotiate balancing the same interests.

It will be interesting to see how environmental advocates like PEC resolve their newfound dilemma. The high-profile nature of climate change already has pushed some environmental groups to support new transmission.<sup>83</sup> However, environmental advocacy groups often draw support from people mobilized around environmental issues particularly visible at the local level,<sup>84</sup> including residents concerned about viewshed.<sup>85</sup> The increased priority for renewable power and resulting calls for new transmission will force environmental advocates first to resolve this conflict internally, and then to make their chosen case persuasively. While this dilemma is not an enviable situation, it is the price environmentalists must pay for their success advancing renewable power to the level of a national priority.

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REV. 303, 305–08 (2009) (explaining magnitude of climate change problem and difficulty resolving it).

<sup>81</sup> Cf. Stephen M. Gardiner, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Corruption*, 15 ENVTL. VALUES 397, 399–401 (2006) (discussing difficulties of aggregating interests across groups).

<sup>82</sup> Swanstrom & Jolivet, *supra* note 60, at 449.

<sup>83</sup> See WASSERSTROM & REIDER, *supra* note 16, at 11.

<sup>84</sup> See, e.g., Jenkins, *supra* note 15, at 25.

<sup>85</sup> WASSERSTROM & REIDER, *supra* note 16, at 12.

