

No. 12-4

In The
Supreme Court of the United States

METROPOLITAN EDISON COMPANY AND
PENNSYLVANIA ELECTRIC COMPANY,

Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent.

**On Petition For A Writ Of Certiorari To The
Commonwealth Court Of Pennsylvania**

**MOTION FOR LEAVE TO FILE AS *AMICUS*
CURIAE AND BRIEF OF *AMICUS CURIAE*
ENERGY ASSOCIATION OF PENNSYLVANIA
IN SUPPORT OF PETITIONERS**

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August 1, 2012

**MOTION FOR LEAVE TO FILE
A BRIEF AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

Pursuant to this Court's Rule 37.2, the Energy Association of Pennsylvania moves for leave to file the accompanying brief as *amicus curiae*. This brief is submitted in support of the petition for writ of certiorari filed by petitioners Metropolitan Edison Company and Pennsylvania Electric Company.

The Energy Association sought the parties' consent and provided each party with more than ten days notice of its intent to file an *amicus curiae* brief. Petitioners Metropolitan Edison Company and Pennsylvania Electric Company, as well as the Pennsylvania Office of Small Business Advocate, a party below, consented to Energy Association's filing of an *amicus curiae* brief. Respondent Pennsylvania Public Utility Commission and the Pennsylvania Office of Consumer Advocate, Penelec Industrial Customer Alliance, and Met-Ed Industrial Users Group, parties below, refused consent.

The Energy Association seeks leave to file the accompanying *amicus curiae* brief to assist this Court in its review of the petition for writ of certiorari. The Energy Association's brief examines the petition in the context of utility and energy issues of national and industry-wide scope and importance. The *amicus* brief explains how the petition implicates broad federalism, regulatory, economic and utility issues such as: (1) the permissible limits of state regulatory jurisdiction over public utilities and the interstate

energy market; (2) the ability of public utilities to recover the prudent and reasonable costs associated with providing reliable and affordable public utility service; and (3) the central importance of the consistent design of regional wholesale energy markets and uniform operation of transmission assets.

The petition raises issues of national importance that directly affect not only Energy Association members and their customers, but also the national wholesale energy market and all other utilities and entities that actively participate in this interstate energy market.

The Energy Association brings unique expertise and perspectives to these issues. The Energy Association's members include natural gas and electric public utilities operating in the Commonwealth of Pennsylvania that collectively deliver energy to more than 8.3 million customers. Energy Association members are subject to and have extensive experience with the dual, and occasionally conflicting, state and federal regulatory jurisdictions over energy public utilities.

As regulated utilities with enormous investments in electric transmission and distribution systems, Energy Association members have a deep interest in ensuring appropriate cost recovery of their investments. Energy Association members also are active participants in the regional wholesale energy markets and thus have a substantial interest in maintaining the uniform and consistent federal and state regulation of these interstate markets.

The Energy Association believes that its members' experience with the dual federal and state regulatory jurisdictions and with the interstate wholesale energy markets will provide an additional, valuable, and unique viewpoint on the issues presented in the petition for writ of certiorari. Specifically, the Energy Association supports the petitioner's arguments by highlighting the national importance and impact of this Court's disposition of the pending petition for writ of certiorari.

For the foregoing reasons, the Energy Association respectfully requests that this Court grant it leave to file the accompanying *amicus curiae* brief.

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INTEREST OF AMICUS CURIAE¹

Amicus curiae, the Energy Association of Pennsylvania, respectfully submits this brief in support of the petitioners, Metropolitan Edison Company and Pennsylvania Electric Company, urging that this Court grant the petition for writ of certiorari to review the judgment of the Commonwealth Court of Pennsylvania in *Metropolitan Edison Company and Pennsylvania Electric Company v. Pennsylvania Public Utility Commission*; *William R. Lloyd, Jr., Small Business Advocate v. Pennsylvania Public Utility Commission*, 22 A.3d 535 (Pa. Cmwlth. 2011) (hereinafter, "*Met. Ed.*"). Energy Association urges in particular that this Court grant the petition and address the first question presented in the petition: Whether the Federal Power Act and filed rate doctrine permit a state public utility commission to deny recovery of Federal Energy Regulatory Commission ("FERC") mandated charges by classifying those costs differently

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel of record for both petitioners and respondent were timely notified of the intent to file this brief. Petitioners and the Pennsylvania Office of Small Business Advocate, a party below, consented in letters filed concurrently with the petition; respondent and the Pennsylvania Office of Consumer Advocate, Penelec Industrial Customer Alliance, and Met-Ed Industrial Users Group, parties below, refused consent.

from the entity responsible for administering the federal tariff on the ground that the tariff and FERC's orders do not "unambiguously" or "explicitly" foreclose the State's chosen classification.

The Energy Association is a trade association whose members include the natural gas and electric public utilities operating in the Commonwealth of Pennsylvania.² Collectively, the Energy Association's members deliver energy to more than 8.3 million residential, commercial, and industrial customers within the Commonwealth of Pennsylvania. The Energy Association is an advocate for its members on policy issues before the Pennsylvania General Assembly, FERC, the Pennsylvania Public Utility Commission, and various other state and federal governmental agencies. In addition to its advocacy role, the Energy Association helps its members better serve their customers by acting as a clearinghouse for information on best practices within the industries. The Energy Association and its members have a

² The Energy Association's members include: Citizens' Electric Co.; Columbia Gas of PA; Duquesne Light Company; Equitable Gas Company, LLC; Metropolitan Edison Co.; National Fuel Gas Distribution Corp.; PECO Energy Company; Pennsylvania Electric Co.; Pennsylvania Power Co.; Peoples Natural Gas Company LLC; Philadelphia Gas Works; Pike County Light & Power Co.; PPL Electric Utilities Corporation; UGI Central Penn Gas, Inc.; UGI Penn Natural Gas, Inc.; UGI Utilities, Inc. – Electric Utility Division; UGI Utilities, Inc. – Gas Division; Valley Energy, Inc.; Wellsboro Electric Co.; and West Penn Power Co. The Energy Association files this brief on behalf of its electric public utility members, with the exception of Duquesne Light Company, which is not joining in this brief.

unique and substantial interest in the issues raised by the instant petition for certiorari.

The members of the Energy Association are subject to the regulatory jurisdiction of both the Pennsylvania Public Utility Commission and FERC. The petition for a writ of certiorari seeks review of the decision in *Met. Ed.* that, if left unreviewed, raises serious questions and uncertainty concerning the limits of state regulatory commissions' authority to interfere with federal decisions concerning interstate public utility service. As utilities regulated at both the state and federal level, Energy Association members will be directly impacted by this Court's disposition of the pending petition.

As regulated utilities with enormous investments in their electric transmission and distribution systems, Energy Association members have a substantial interest in ensuring appropriate cost recovery. Energy Association electric utility members own and operate approximately 15,000 miles of transmission lines and over 132,000 miles of distribution lines, in addition to poles, substations, transformers, conductors, circuits, and related hardware. This Court's disposition of the pending petition will have a significant impact on the ability of Energy Association members to recover the prudent and reasonable costs associated with providing reliable and affordable public utility service to the public.

Finally, the members of the Energy Association, as well as their customers, have a substantial interest

in the uniform and consistent regulation of the regional wholesale market. The consistent design of regional wholesale markets and uniform operation of transmission assets provides utilities and their consumers with access to lower-priced energy than would otherwise be available. The petition for a writ of certiorari seeks review of the decision in *Met. Ed.* that, if left unreviewed, would permit states to fracture the United States' regional wholesale energy markets by creating inconsistent treatment of federally regulated costs among the states. This Court's disposition of the pending petition for a writ of certiorari will have a significant impact on the uniform and consistent regulation of the regional wholesale energy market.

The Energy Association urges this Court to take into account the legal and policy considerations advanced in this brief in support of the petition for a writ of certiorari. The petition raises issues of national importance that will not only directly impact the members of the Energy Association and their respective customers, but also will impact the wholesale energy market and other utilities and entities that actively participate in these markets. For the reasons explained below, as well as those set forth in the petition, the Energy Association respectfully urges this Court to grant the petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

- I. **The decision in *Met. Ed.* is contrary to the principles of federal preemption, the filed rate doctrine, and FERC's exclusive jurisdiction over the resale and transmission of wholesale energy in interstate commerce.**

The North American power grid is comprised of numerous, interconnected transmission facilities owned by different local transmission companies that have been integrated to provide competitive, reliable, and cost effective service to the public. In the United States, the regulatory jurisdiction over the electric industry is divided between state and federal authorities. The bifurcated regulatory jurisdiction over the electric industry originated in a series of decisions from this Court beginning in the 1920s that limited the states' power to regulate interstate transactions under the Commerce Clause of the United States Constitution. *See generally, Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) (and cases cited therein). Under this dual scheme of regulatory jurisdiction, the individual states are empowered to regulate essentially all retail and local distribution services, while the federal government, through FERC, has exclusive jurisdiction to regulate the sale and transmission of wholesale electric energy in interstate commerce.

FERC's exclusive jurisdiction over the sale and transmission of wholesale electric energy in interstate commerce was codified in the Federal Power Act

enacted in 1935.³ 16 U.S.C. §§ 824-824(m). Sections 205 and 206 of the Federal Power Act expressly authorize FERC (formerly the Federal Power Commission) to regulate rates for the interstate and wholesale sale and transmission of electricity. *Id.* §§ 824d-e. The Act creates a “bright line easily ascertained” between the two, mutually-exclusive jurisdictions of the state and federal government. *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 216 (1964).

It is well established that if a public utility is subject to FERC jurisdiction, state regulation of the same operational aspect is preempted as a matter of law. The principles of federal preemption require a state regulatory agency to accept and pass through in retail rates all cost items deemed by FERC to be just and reasonable. This feature of the “filed rate doctrine” has repeatedly been upheld by this Court.⁴ The filed rate doctrine prohibits state regulatory commissions from tampering, directly or indirectly, with wholesale market operations approved by FERC

³ Similarly, under the Natural Gas Act enacted in 1936, 15 U.S.C. §§ 717-771(z), FERC has exclusive jurisdiction over all transportation of natural gas in interstate commerce, with limited exceptions. See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Northern Natural Gas Co. v. State Corporation Comm’n of Kansas*, 372 U.S. 84 (1963) (discussing FERC’s exclusive jurisdiction under the Natural Gas Act).

⁴ See *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 573 (1981); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 375 (1988); *Entergy La., Inc. v. Louisiana Pub. Serv. Comm’n*, 539 U.S. 39, 47 (2003).

orders or operating pursuant to FERC-approved tariffs.⁵

In December 1996, FERC adopted Order No. 888, which encouraged the creation of Regional Transmission Organizations (“RTOs”) to address important operational and reliability issues and eliminate any residual discrimination in transmission services.⁶ The Commission found that RTOs would increase the efficiency of wholesale markets by preventing discrimination by requiring all public utilities to offer non-discriminatory open access transmission service.

FERC approved PJM Interconnection, LLC (“PJM”) as the provider of transmission service in the

⁵ This Court has explained that the “filed rate doctrine requires ‘that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commission determining intrastate rates.’ [quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986)]. When the filed rate doctrine applies to state regulators, it does so as a matter of federal preemption through the Supremacy Clause. [citing *Ark. La. Gas Co.*, at 581-82].” *Entergy*, 539 U.S. at 47.

⁶ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS v. FERC*), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

PJM RTO region, which currently consists of all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia. As the independent grid operator, PJM coordinates the electric power market and the movement of electricity within the PJM RTO region.

To be compliant with FERC Order No. 888, the owners and operators of transmission facilities in the PJM region filed with FERC an open access transmission service tariff, called the PJM Open Access Transmission Tariff ("OATT"). Each owner and operator of transmission facilities in PJM is a signatory to the PJM OATT. By the terms of the tariff, the responsibility to administer the OATT has been delegated to PJM. PJM's rates for providing transmission service to its member utilities are governed by the OATT filed with FERC. *Atl. City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, 61,473, *order on reh'g*, 115 FERC ¶ 61,169 (May 1, 2006).

As explained in the petition for a writ of certiorari, on May 1, 2006, FERC ordered PJM to change its method for charging the transmission line loss component of its locational marginal pricing.⁷ *Id.* at

⁷ As FERC explained in its May 1, 2006 order, megawatts are lost when power has to be transmitted over transmission lines, *i.e.*, the total megawatt received by customers at the end of a transmission line are less than the total megawatt energy produced. The marginal line loss associated with transmission

(Continued on following page)

61,473. It was undisputed in the proceedings below that FERC stated that transmission line losses are part of the payment for transmission services, and that the recovery of these costs is governed by PJM's FERC-approved OATT.

Despite the fact that the PJM OATT imposed charges on utilities for transmission line losses, the Commonwealth Court of Pennsylvania concluded in *Met. Ed.* that a state regulatory agency could disallow recovery of these federally imposed costs because the OATT and relevant FERC orders were "ambiguous" and did not "expressly state" whether such costs are transmission- or generation-related costs. According to the decision in *Met. Ed.*, a state regulatory agency could be permitted to do whatever it wants, including invade FERC's exclusive jurisdiction over the resale and transmission of wholesale electric energy in interstate commerce, if it can find any plausible ambiguity.

It is well established that the "reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before [FERC] or a court reviewing [FERC's] order." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 375 (1988). If left unreviewed, the decision in *Met. Ed.* will raise serious issues and

between any two points refers to the energy lost in moving energy between those points.

uncertainty regarding federal preemption, the filed rate doctrine, and the permissible limits of states' authority to interfere with and second-guess FERC's exclusive jurisdiction over the resale and transmission of wholesale electric energy in interstate commerce.

II. The decision in *Met. Ed.* raises serious questions and uncertainty regarding public utilities' ability to recover reasonable and prudent costs associated with providing utility service to the public.

FERC has exclusive authority to regulate the interstate transmission of and sale at wholesale of electric energy under the Federal Power Act. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). Electric public utilities recover FERC-approved transmission rates through retail rates for electric service regulated by state commissions like the Pennsylvania Public Utility Commission.

State commissions cannot be permitted to use their jurisdiction over retail electric rates to deny electric public utilities recovery of FERC-approved costs.⁸ Prior to implementing revised retail rates to recover FERC-approved rates, an electric public utility is required to file a separate rate filing with

⁸ See *Entergy La., Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986).

the state commission and obtain state commission approval. As evidenced by this proceeding, the *Met. Ed.* decision would permit state commissions to depart from FERC determinations.

For reasons presented by petitioners, state commission proceedings to recover interstate transmission costs undermines federal pricing policies and policies for infrastructure development, and impedes participation in interstate markets. Indeed, the *Met. Ed.* decision, if left to stand, could lead to litigation over the manner in which electric utilities may recover virtually every interstate transmission cost. Such a result threatens recovery of federally imposed transmission costs.

The breadth of the impact of such a result should not be underestimated. The FERC-approved costs are recovered through retail rates established in and approved by state commissions. As all changes to an electric public utility's rates require state commission approval prior to recovering these costs in retail rates, regulated entities must seek state permission for new and changed FERC-approved costs at regular intervals.

As a result, the implications of the *Met. Ed.* decision – that state commissions are permitted, limited only by the state commission's ability to determine plausible ambiguity, to limit or even deny recovery of federally approved costs – are enormous. If left unreviewed, the *Met. Ed.* decision could affect hundreds of state rate regulation proceedings. This

case alone involved more than \$230 million in transmission costs. If other states follow suit, the impact will quickly be measured in tens of billions of dollars. At a minimum, and as discussed below, the decision in *Met. Ed.* generates massive uncertainty surrounding cost recovery.

III. The decision in *Met. Ed.* permits states to disrupt the uniform and consistent regulation of regional wholesale energy markets.

Operating and planning of transmission service is done on a regional basis with a goal of developing an integrated, reliable, and cost effective regional transmission system and competitive wholesale power market. Competitive wholesale energy markets provide utilities and their consumers with access to lower-priced electricity than would otherwise be available.

The regional operating and planning of transmission service increases the scope of geographic markets, thereby increasing the number of generators that can economically supply customers in a given area, and provides incentives for generation, transmission, and price-responsive demand investments that contribute to the competitive wholesale energy market.

The key to a successful competitive wholesale energy market is a uniform and consistent set of rules across the region. The consistent design of regional wholesale energy markets and uniform operation of

transmission service levels the playing field for all regional market participants. Individual states within the regional market should not be permitted to set up different rules that would fracture the regional market with patchwork regulation and requirements. Such a result essentially would eliminate the purpose and benefits of a regional transmission system and competitive wholesale power market.

If left unreviewed, the decision in *Met. Ed.* will create significant uncertainty in the uniform and consistent regulation of the regional transmission system and competitive wholesale energy markets. Such uncertainty would undermine the industry's ability to obtain financing for needed infrastructure investments. Indeed, financial institutions cannot responsibly lend where cost recovery is subject to excessive regulatory uncertainty.⁹ Moreover, subjecting interstate electric utilities to fifty different state determinations regarding cost recovery, based on nothing more than ambiguity, could harm consumers if, because of the resulting uncertainty, companies become increasingly reluctant to invest.

The decision in *Met. Ed.* will encourage more states, under the guise of ambiguity, to subvert uniform federal regulation of interstate electric

⁹ The impact is not limited to electricity. Similar issues arise in the natural gas field under the Natural Gas Act -- a particularly critical area given the new investments necessary to exploit clean-burning fuel and to upgrade aging pipeline infrastructure.

utilities. Given the numerous and diverse state jurisdictions, such a result would chip away at federal preemption and FERC's exclusive jurisdiction, wreak havoc in the electric industry, create uncertainty and discourage investment in infrastructure.

This Court cannot countenance cases suggesting that states can depart from FERC determinations so long as they can find some purported chink of ambiguity in the interstate federal regulatory armor. That approach will be ruinous for federal pricing systems; ruinous for market participants; and ultimately ruinous for customers as well.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the petition, this Court should grant the petition for a writ of certiorari.

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