

No. 12-4

IN THE
Supreme Court of the United States

METROPOLITAN EDISON COMPANY, ET AL.,
Petitioners,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

**On Petition for a Writ of Certiorari
to the Commonwealth Court of Pennsylvania**

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF AND BRIEF OF EDISON ELECTRIC
INSTITUTE IN SUPPORT OF PETITIONERS**

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

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Edison Electric Institute (“EEI”) hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* supporting the petition in this case. Timely notice under Rule 37.1(a) of the intent to file this brief was provided to the Petitioners and the Respondent. Petitioners Metropolitan Edison Company and Pennsylvania Electric Company have consented to the filing of this brief. Respondent Pennsylvania Public Utility Commission (“Pennsylvania PUC”) has withheld consent.

EEI is the national association of U.S. shareholder-owned electric utilities, their affiliates, and industry associates worldwide. Its members provide electricity in forty-nine states and the District of Columbia. They generate approximately seventy percent of all electricity generated by electric companies and serve about seventy percent of all retail customers in the nation. They own about sixty percent of transmission lines in the country. EEI members are extensively regulated at both the federal and state levels.

The Pennsylvania PUC’s decision prohibited the Petitioners from passing through to customers approximately \$230 million of transmission line loss charges incurred pursuant to a regional open access

transmission service tariff that had been approved by the Federal Energy Regulatory Commission (“FERC”). The Pennsylvania PUC redefined transmission line losses as a component of electric generation for purposes of sidestepping FERC’s exclusive jurisdiction over the rates and terms of interstate transmission service. EEI is concerned with the risk that this decision poses for the recovery by EEI’s members nationwide of billions of dollars of costs incurred in connection with the interstate transmission of electricity. EEI is also concerned with the threat that the PUC’s decision poses for the transmission businesses in which EEI’s members participate and the interstate markets in which they sell and acquire power for their customers.

In view of its interest and unique perspective on these issues, EEI respectfully requests that the Court grant it leave to participate as *amicus curiae* by filing the accompanying brief in support of the petition for writ of certiorari.

RESPECTFULLY SUBMITTED,

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**BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC
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INTEREST OF THE AMICUS CURIAE¹

The Edison Electric Institute (“EEI”) is the national association of U.S. shareholder-owned electric utilities, their affiliates and industry associates worldwide. Its members provide electricity in forty-nine states and the District of

¹ This brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity other than the *amicus curiae* or its members made a monetary contribution intended to fund the preparation or submission of the brief.

Columbia. They generate approximately seventy percent of all electricity generated by electric companies and serve about seventy percent of all retail customers in the nation. They own about sixty percent of transmission lines in the country. EEI members are extensively regulated at both the federal and state levels.

The Pennsylvania Public Utility Commission’s (“Pennsylvania PUC”) decision² challenged in this case prohibited Metropolitan Edison Company and Pennsylvania Electric Company (“Petitioners”) from passing through approximately \$230 million of transmission line loss charges incurred pursuant to an open access transmission service tariff (“tariff”) of the PJM Interconnection (“PJM”), a regional transmission organization (“RTO”). The Federal Energy Regulatory Commission (“FERC”) approved this tariff. Nevertheless, the Pennsylvania PUC sought to avoid federal jurisdiction by redefining transmission line losses as a component of electric generation.

The \$230 million at stake in this case is significant on its own and as part of the much higher total cost of electric transmission line losses

² Opinion and Order of the Pennsylvania Public Utility Commission and Dissenting Statement of Commissioner Robert F. Powelson, Pa. Pub. Util. Comm’n Nos. M-2008-2036188, et al. (Jan. 28, 2010) (Pet. Br. App. B); Recommended Decision of the Administrative Law Judge, Pa. Pub. Util. Comm’n Nos. M-2008-2036188, et al. (July 24, 2009) (Pet. Br. App. C) (collectively “PUC Decision”).

nationwide. EEI is concerned both with the risk that this decision poses for the recovery by EEI's members nationwide of billions of dollars of costs associated with the transmission of electricity in interstate commerce and with the threat that the PUC's decision poses for the transmission businesses in which EEI's members participate and the interstate power markets in which they sell and acquire power for their customers.

The Pennsylvania PUC's decision portends a significant intrusion by state public utility commissions into FERC's sphere of regulation, interfering with EEI members' recovery of a significant component of the cost of participating in FERC-regulated regional markets and potentially upsetting the regulatory regime for transmission that FERC has put into place at a critical time in the evolution of the electric industry.

SUMMARY OF ARGUMENT

This Court has held that FERC has exclusive jurisdiction over the transmission of electric energy in interstate commerce. Transmission line losses are a significant component of the overall cost of transmission, with the amounts nationwide in the tens of billions of dollars annually. The Pennsylvania PUC Decision threatens to interfere with, if not totally undermine, FERC's efforts to regulate interstate transmission on a consistent and comprehensive basis. This comes at a time when the electric industry is facing critical problems that directly implicate FERC's ability to oversee the

interstate transmission system in the national interest. It also places EEI's members in an untenable position by potentially preventing them from recovering huge amounts they are required to bear under FERC's rules relating to the allocation of cost responsibility for transmission in the interstate markets.

Uniformly, FERC has treated transmission line losses as a component of transmission service. Prior to the PUC Decision, no state decision had held to the contrary. Moreover, the regime for recovering the costs of these losses in RTOs, like the PJM RTO in which the Petitioners participate, assigns cost responsibility for losses on a regional basis. Losses are also integrated into the regional wholesale market design. The RTOs cannot continue to function effectively and efficiently if individual states assert jurisdiction over transmission line losses and attempt to redefine what utility participants in RTOs are allowed to recover in retail rates. The Court's prior decisions prohibit states from such "trapping" of FERC-approved cost allocations, and those decisions are essential to the functioning of multi-state markets for electricity.

The PUC Decision comes at a time when the electric industry is facing considerable challenges. The solutions to the current problems will require FERC to be able to manage the use of the interstate transmission system and to assess fairly cost responsibilities across state lines. The incentives for parochial state behavior are growing, and this case is illustrative of the potential for more wide-spread

state interference with FERC's exclusive jurisdiction -- interference that threatens national electricity policy.

ARGUMENT

A. The Charges for Transmission Line Losses at Issue in This Case Must Be Assessed by RTOs on a Regional Basis

This case arises from a decision by the Pennsylvania PUC to deny the Petitioners the ability to recover in retail rates approximately \$230 million of transmission line loss charges that Petitioners incurred and were required to pay under the FERC-approved transmission tariff of an RTO known as PJM. Although the Pennsylvania PUC acknowledged that the Petitioners incurred these costs under a FERC-approved tariff, it declared the costs to be "generation" costs because transmission line losses reflect additional electricity that must be produced to enable interstate transmission to occur.

The above amount, while quite significant for these two companies, is merely a fraction of the total cost of line losses incurred in the interstate transmission of electricity nationwide each year. The total amount at issue if other state commissions

were to follow the Pennsylvania PUC's lead would be in excess of ten billion dollars annually.³

The Petitioners were required to incur the transmission line loss charges at issue because they are members of a FERC-approved RTO and arrange their deliveries of interstate transmission service under the RTO's tariff that is on file with FERC. RTOs are public utilities that are generally responsible for managing the regional transmission network, providing transmission services, and

³ Transmission and distribution losses combined account for approximately \$25 billion annually. See National Energy Technology Laboratory for the U.S. Dept. of Energy, *Modern Grid Benefits* at 14 (Aug. 2007), http://www.netl.doe.gov/smartgrid/referenceshelf/whitepapers/ModernGridBenefits_Final_v1_0.pdf. Research indicates that approximately 45% of that amount – or \$11.25 billion – can be attributed to transmission losses. See Brendan Cook, Jerrome Gazzano, Zeynep Gunay, Lucas Hiller, Sakshi Mahajan, Aynur Taskan, & Samra Vilgorac, *The Smart Meter and a Smarter Consumer*, 6 Chemistry Central J. 2012, 6 (Suppl 1): S 5 (Apr. 23, 2012), <http://journal.chemistrycentral.com/content/pdf/1752-153X-6-S1-S5.pdf>; see also U.S. Energy Information Administration, *Frequently Asked Questions*, <http://www.eia.gov/tools/faqs/faq.cfm?id=105&t=3> (estimate of the U.S. Energy Information Administration that annual transmission and distribution losses are 7% on average across the U.S); Enrique Santacana, Tammy Zucco, Xiaming Feng, Jiuping Pan, Mirrasoul Mousavi, & Le Tang, *The Power To Be Efficient*, 2 ABB Review 14, 16 (2007), [http://www05.abb.com/global/scot/scot271.nsf/veritydisplay/cb8afe88ca4fc8a8c12572fe004dc64f/\\$file/14-21_2m735_eng72dpi.pdf](http://www05.abb.com/global/scot/scot271.nsf/veritydisplay/cb8afe88ca4fc8a8c12572fe004dc64f/$file/14-21_2m735_eng72dpi.pdf) (“Typical losses are about 3.5 percent in the transmission system and about 4.5 percent in the distribution system”).

administering a regional wholesale power market.⁴ RTOs have been formed under FERC regulation in many parts of the country in order to promote competitive multi-state markets for electricity.

Under FERC-approved tariffs, RTOs assess charges for all components of transmission service, including the cost of “transmission line losses” – the electricity that dissipates as it is transmitted over power lines from the power plant to the customer. As Petitioners discuss, all transmission of electricity results in a certain amount of lost electricity that must be made up and paid for by transmission customers. The RTO’s transmission charges, including the losses component, are established regionally, and then allocated among users throughout the RTO multi-state territory. The FERC-approved transmission charges cannot be broken up into component parts over which individual states assert jurisdiction without unraveling the interstate market structure of the RTO and undermining the essential purposes for which RTOs were created in the first place.

In order to improve the efficiency of these markets, FERC has recently sought to improve the quality of the price signals for transmission line

⁴ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,046 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092, at 31,355-56 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

losses in PJM and other RTOs. To that end, FERC has approved pricing mechanisms that more accurately reflect the incremental cost of transmission line losses. It has accomplished this by authorizing charges for losses based on the marginal cost of transmission line losses rather than average costs.⁵ This change in pricing made the regime for recovering losses consistent with the mechanism used in PJM for determining the spot price of energy, which is based on the marginal cost of supply at different locations on the transmission grid.⁶ The various components of the regional market design are integrated and operate in tandem.⁷

The higher level of loss charges assigned to the Petitioners under this new, marginal cost pricing

⁵ *Atlantic City Electric Co. v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,169 at 61,863 (2006) (“The Commission finds it reasonable to allocate the overcollections to the parties paying network and point to point transmission charges since marginal losses are part of the payment for transmission service”).

⁶ *See Atlantic City Electric Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,169 at 61,477-78 (2006); *see also Atlantic City Electric v. PJM*, 117 FERC at 61,859.

⁷ *Pennsylvania-New Jersey-Maryland Interconnection*, 92 FERC ¶ 61,282 at 61,953 (2000) (stating that PJM’s locational marginal price model “will encourage efficient use of the transmission system, facilitate the development of competitive electric markets and send signals that are likely to encourage efficient location of new generation resources”).

regime provided the genesis for this case. Petitioners sought to recover these higher charges in their retail rates.⁸ The Pennsylvania PUC did not raise concerns about PJM's new regime for recovering the cost of losses when it was filed for approval with FERC, even though the Pennsylvania PUC had a right to intervene and other parties exercised this same right to raise issues that FERC had to resolve.⁹ If the Pennsylvania PUC disagreed with FERC's decision for jurisdictional reasons or because of its impact on utilities that it regulated, it should have raised its concerns in the proceeding in which the PJM tariff change was made. Instead, the Pennsylvania PUC stayed silent until it was asked to approve the recovery of these costs in retail rates. To allow states to use individual retail rate proceedings to determine the recovery of transmission costs incurred under multi-state RTO tariffs would

⁸ Pet. Br. App. at 4a-5a.

⁹ See *Atlantic City Electric v. PJM*, 117 FERC at 61,860. The State of Pennsylvania, through its Office of Consumer Advocate, intervened in the *Atlantic City* proceedings in order "to represent the interests of consumers of utility services in the Commonwealth of Pennsylvania." Motion to Intervene of the Joint Consumer Advocates, FERC Docket No. EL06-55-000, ¶ 1 (Aug. 24, 2006). Pennsylvania never took advantage of its party status to file any comments, briefs, a request for rehearing, or a petition for review to address the effect that FERC's marginal transmission cost mandate would have on Pennsylvania customers, or to argue that they should be categorized, under federal law, as generation charges.

undermine FERC's regulation of multi-state markets.

The Pennsylvania PUC's recharacterization of transmission line losses as a cost of generation is especially pernicious because transmission is considered to be a natural monopoly and thus transmission service rates are heavily regulated by FERC. Generation, by contrast, has been largely deregulated by FERC to foster competition at wholesale, and seventeen states and the District of Columbia have deregulated generation to promote competition at the retail level.¹⁰ Therefore, the instant decision provides a potential vehicle for states to move costs between regulated and unregulated portions of the industry, interfering with the operation of the competitive markets and undermining pro-competition policies by distorting prices paid by consumers.

¹⁰These states comprise the majority of the U.S. population and the majority of states within RTOs: California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, and Rhode Island. See <http://www.eia.gov/todayinenergy/detail.cfm?id=6250#>.

B. The Pennsylvania PUC's Decision Violates Two Different Jurisdictional Decisions of This Court That Are Essential to Preserving FERC's Ability to Regulate Electric Transmission in Interstate Commerce

The Pennsylvania PUC's decision violates the law in two related subject areas on which this Court has spoken decisively in recent years. Each involves the jurisdictional boundary between FERC and state utility commissions that regulate electric service at the retail level. In *New York v. FERC*, the Court affirmed FERC's exclusive jurisdiction over the interstate transmission of electricity, noting the "clear statutory language" in Section 201(b) of the Federal Power Act (16 U.S.C. § 824(b) (2006)) which gives FERC jurisdiction over the transmission of electricity in interstate commerce.¹¹ The Pennsylvania PUC's decision represents an attempt to take over some of FERC's authority that was affirmed in that decision. The PUC Decision seeks to accomplish this shift in jurisdiction by characterizing a significant component of the cost of electric transmission service as a "generation" service. In this way, the Pennsylvania PUC would assert the authority to limit the recovery of these costs despite their inclusion in a FERC-approved tariff.

¹¹ *New York v. FERC*, 535 U.S. 1, 17 (2002).

Separately, in a line of cases beginning with *Nantahala v. Thornburg*,¹² the Court held that states cannot undermine FERC's regulatory authority by prohibiting electric utilities from passing through (at the retail level) costs that the utilities are required to incur under FERC approved rates.¹³ Under the "filed rate doctrine," the charges (or allocations) determined by FERC in connection with the services it regulates under the Federal Power Act must be respected at the state level when setting retail rates, and cannot be "trapped."¹⁴

Pennsylvania's ruling violates both decisions. It redefines what constitutes "transmission in interstate commerce" and then prohibits the Petitioners from passing through to retail customers transmission line loss charges that Petitioners are obligated to bear under the FERC-approved regional transmission regime in effect throughout the PJM RTO. As transmission-owning members of PJM, the Petitioners are required to pay PJM for the losses incurred under the terms of PJM's FERC-approved tariff, and, like other transmission-owning members, the Petitioners recover these costs through their retail rates.

¹² *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

¹³ *Nantahala v. Thornburg*, 476 U.S. 953.

¹⁴ *Id.* at 970-71.

The Pennsylvania PUC's order represents a direct assault on FERC's exclusive jurisdiction over the transmission of electric energy in interstate commerce as determined in *New York v. FERC*, including FERC's ability to establish responsibility for the recovery of transmission costs in a multi-state market. Transmission line losses are a substantial component of the overall cost of transmitting electricity. The importance of those losses is increasing because utilities are relying to a greater extent on power generation located greater distances from their customers; transmission line losses increase with distance.¹⁵ This greater reliance is in large part a byproduct of the very policies that FERC

¹⁵ See n.2 *supra*; Pet. Br. at 28. The importance of maintaining FERC's authority to regulate transmission line losses is highlighted when one considers the relationship between losses and the benefits associated with new investments in transmission facilities pursuant to FERC policies. For example, the economic benefits of reduced losses associated with a single 345 kV transmission project in Wisconsin were sufficient to offset roughly 30% of the project's investment costs. Similarly, in the case of a recently proposed 765 kV transmission project, the present value of reduced system-wide losses equated to roughly half of the project's cost. See WIRES and The Brattle Group, *Report on Employment and Economic Benefits of Transmission Infrastructure Investment in the U.S. and Canada*, at 26 (May 2011) (internal citations omitted), available at www.wiresgroup.com/images/Brattle-WIRES_Jobs_Study_May2011.pdf.

implemented in Order No. 888,¹⁶ which the Court upheld in *New York v. FERC*.¹⁷

Electrical losses have uniformly been considered a component of the transmission of electricity in interstate commerce that FERC regulates. FERC has required every transmission-owning or operating public utility to file a tariff that includes transmission line losses as a component of transmission service. No state challenged FERC's inclusion of charges for transmission line losses in the tariffs required by FERC in its Order No. 888, or PJM's inclusion of losses as a component of transmission service in its transmission tariff that was filed under this same Order.¹⁸ The

¹⁶ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*; Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,635-36, 31,731 (1996) (discussing the unbundling of wholesale generation and transmission services, and the development of RTOs to provide “access to all electricity generators at rates established in ‘a single, unbundled, grid-wide tariff’”), *order on reh'g*, Order No. 888-A, 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 part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁷ 535 U.S. at 11.

¹⁸ See *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, FERC Stats. & Regs. (Continued ...)

Pennsylvania PUC's action here therefore conflicts with the open access regime under which every FERC-regulated public utility operates.

All RTO transmission tariffs include transmission line losses as a component of transmission service. Likewise, all of EEI's members' individual tariffs (outside of RTOs) provide for the recovery of electrical losses as a component of the cost of providing transmission service. Before this case, it seemed undeniable that, where state-regulated utilities participate in an RTO, transmission line losses are a part of the cost of transmission service, and that FERC has jurisdiction to determine the charges for losses on a regional basis within an RTO.

The Pennsylvania PUC is therefore breaking dangerous new ground in disregarding the FERC-approved transmission tariff when the PUC asserts that losses are a cost of generation. If the decision is not overturned, other states may follow suit. It may then become impossible for FERC to ensure that the cost of transmission line losses are established on a regional basis and recovered from RTO participants throughout the region. Further, as discussed below, FERC's jurisdiction over other components of the cost of transmission could be placed at risk.

¶ 31,036, at 31,952 (FERC Pro Forma Tariff, Section 28.5) (1996); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at 31,384 (FERC Pro Forma Tariff, Section 28.5) (2007) (subsequent histories omitted).

**C. The Pennsylvania PUC's Decision
Raises Serious National Energy
Policy Concerns by Interfering With
FERC's Efforts to Manage
Significant Changes in the Electric
Industry**

The different elements of FERC's regulatory regime for the bulk power markets within RTOs are intertwined and are designed to marry the physics of electricity with an effective and efficient commercial regime. This is a complex task. The regime for assessing the cost of transmission line losses cannot simply be omitted without impacting other aspects of the market design. Moreover, the Pennsylvania PUC Decision potentially affects much more than transmission line losses *per se*. Its reasoning could be applied to other components of the cost of transmission, which could be the subject of state public utility commission decisions seeking to re-characterize them as something other than transmission.

If the Pennsylvania PUC is successful here, other states may be emboldened to redefine losses or other FERC-regulated components of the cost of transmission in order to assert jurisdiction in retail rate proceedings. The Pennsylvania PUC's decision therefore threatens to obstruct FERC's efforts to regulate the interstate transmission of electricity on a consistent and comprehensive basis at a critical time in the evolution of the electric industry. The

legal issues raised by the Petition therefore need to be resolved promptly and firmly.

When a state commission pulls at one of the threads of the FERC-approved interstate market design, the fabric of the regional wholesale power market begins to fray. If the Pennsylvania PUC can successfully pull at this thread, other state commissions with retail utilities in PJM or other RTOs may do the same if they are unhappy with the level of loss charges incurred under FERC's rules, and other threads (such as FERC's regime for pricing transmission reliability or congestion on the transmission system)¹⁹ could be pulled by applying the same faulty reasoning that the Pennsylvania PUC applied in this case. Ultimately the entire effort to create a robust, efficient, and reliable interstate wholesale power market will have been undermined.

The Pennsylvania PUC's decision comes at a critical time for the electric power industry. FERC is

¹⁹ "Congestion" on the transmission system refers to the increased costs incurred to supply energy because the transmission system does not have sufficient capacity at particular locations to permit the lowest cost generation to be dispatched. *Pa. Pub. Util. Comm'n v. Metropolitan Edison Co.*, 2006 Pa. PUC Lexis 116 *133-35 (Oct. 31, 2006). FERC has always regulated transmission congestion as a component of transmission service and has adopted region-wide mechanisms for assigning responsibility for congestion costs in RTOs, even though under the Pennsylvania PUC's reasoning congestion costs might inappropriately be characterized as a cost of energy.

continuing to implement a national transmission policy in the face of significant changes designed to promote competition that have occurred in the last two decades.²⁰ More recently, significant changes are also occurring in the fuel mix being used to supply electricity, which in turn causes the transmission system to be used in different ways and to be stressed to accommodate power flows that were not anticipated when the transmission system originally was designed.²¹ For example, as a result of

²⁰ See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, *order on reh'g & clarification*, Order No. 1000-A, FERC Stats. & Regs. ¶ 31,132 (2012) (“Order No. 1000”).

²¹ Recently, in Order No. 764, FERC stated:

[T]he amount of [variable energy resources] is rapidly increasing, reaching a point where such resources are becoming a significant component of the nation’s energy supply portfolio.

...

[H]igher levels of variable generation can alter the operation and characteristics of the bulk power system. Increasing the relative amount of variable generation on a system can increase operational uncertainty that the system operator must manage through operating criteria, practices and procedures.... However, many of these operational protocols were developed for generation resources with a different set of characteristics. *Integration of Variable Energy Resources*, Order No. 764, FERC Stats. & Regs. ¶ 31,331, at 31,535, 31,537 (2012) (internal citations omitted).

environmental policy and changing economics, the electric industry is confronting the need to replace large amounts of older coal-fired generation (that until recently supplied more than 50 percent of the nation's electric energy) with new natural gas and nuclear generation and renewable resources.²²

FERC is also dealing with the rapid advance of new technologies such as wind and large-scale solar generation, which create unique stresses on the transmission system because wind and solar generation are variable (i.e., the amount of energy produced and injected into the transmission system frequently changes) and projects are typically located remotely from urban load centers. The geographic separation of renewable generation from its place of use increases the uses of the interstate transmission grid, which in turn increases transmission line losses, making those losses an even more important component of the total cost of delivered electricity. These changes require a high level of national regulatory oversight over the interstate transmission of electricity that is not subject to disruption at the state level.²³

²² See Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at 31,286-87.

²³ Cf. *id.* at 31,286 (stating that “inadequate transmission planning and cost allocation requirements may be impeding the development of beneficial transmission lines or resulting in inefficient and overlapping transmission development due to a lack of coordination, all of which
(Continued ...)”

Since this Court’s important decision in *New York v. FERC*, FERC has launched several initiatives aimed at creating a comprehensive regulatory structure for the transmission segment of the electric industry. FERC’s initiatives encompass the: (i) terms and conditions under which transmission services are provided; (ii) rates and charges to recover utilities’ investment in the nation’s interstate transmission grid, including the costs of transmission line losses and congestion on the transmission system; (iii) programs to promote investment in an aging transmission infrastructure; (iv) policies to support efficient operation of the transmission system amid increasing integration of variable energy resources; (v) implementation of a reliability regime mandated by Congress; and (vi) rules for operating the transmission grid and sharing costs in the face of growing amounts of variable renewable generation.²⁴

contributes to unnecessary congestion and difficulties in obtaining more efficient or cost-effective transmission service”);

²⁴ See e.g., *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006); *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011); *Integration of* (Continued ...)

Due to the expanding importance of the interstate electric market, difficult and contentious issues of transmission cost responsibility are arising in which the interests of individual states within a market area often differ.²⁵ Several of these transmission initiatives have been controversial, even among EEI's members, and they collectively involve many billions of dollars of costs. These interstate transmission costs are assigned and must be recovered pursuant to FERC-approved tariffs and contracts. FERC must not lose the ability to manage these disagreements over cost responsibility. FERC needs the ability to resolve them on a fair and efficient basis, one that promotes the national interest against the parochial interests of individual states. Decisions like the one at issue in this case, in which one state's commission rejects the share of regional losses assigned to a utility in that state, represent a threat to FERC's ability to exercise its jurisdiction in the national interest.

Variable Energy Resources, Order No. 764, FERC Stats. & Regs. ¶ 31,331 (2012) (subsequent histories omitted).

²⁵ See *Illinois Commerce Comm'n v. FERC*, 576 F.3d 477 (7th Cir. 2009). See also Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at 31,377 ("cost allocation issues are often contentious and prone to litigation because it is difficult to reach an allocation of costs that is perceived as fair, particularly for RTOs and ISOs that encompass several states").

CONCLUSION

Nantahala and its progeny established that states, exercising jurisdiction at the retail level, may not “trap” costs assigned by FERC. This requirement must be enforced vigorously, both to protect the financial integrity of utilities that are subject to FERC-approved charges, and to enable FERC to exercise its jurisdiction over interstate transmission effectively, as *New York v. FERC* contemplated. At a time when FERC is establishing national rules for the efficient operation and expansion of the interstate transmission grid in the face of important industry changes, the Pennsylvania PUC’s decision threatens to undermine FERC’s ability to act in the national interest.

As FERC exercises its jurisdiction over interstate transmission, individual states may be unhappy and prefer that costs be moved to utilities in other states. As this Court has ruled on several occasions, however, once FERC establishes the allocation of costs through tariffs on file with FERC, the states must be required to follow FERC’s cost responsibility decisions. Without this requirement, the regulatory regime fails.

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

Respectfully submitted,

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