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

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

The briefs in opposition underscore the need for this Court's review. Like the decisions below, respondents assert that Pennsylvania may disregard the Regional Transmission Organization's (RTO's) implementation of a FERC-approved tariff unless FERC has addressed the issue "unambiguously" and "expressly." PUC Opp. 23-24 (quoting Pet. App. 21a, 22a). Rejecting any deference to PJM's implementation of its federal tariff—including categorization of transmission line losses as transmission costs—respondents declare that "'the way an item is billed by PJM bears no relationship to whether an item is transmission or generation related.'" *Id.* at 31 (quoting Pet. App. 58a). Those holdings invade federal authority

and squarely conflict with *AEP Texas North Co.* v. *Texas Industrial Energy Consumers*, 473 F.3d 581 (5th Cir. 2006). Respondents' effort to distinguish *AEP*, far from eliminating the conflict, broadens it. The filed-rate doctrine, respondents assert, applies only when States review federally tariffed costs for "prudency." That restrictive view of the filed-rate doctrine defies decades of precedent and threatens to nullify it entirely.

Respondents' claim that this case involves only state-law issues without forward-looking significance likewise fails. The decision below did not purport to offer a one-time interpretation of a contract. After construing Pennsylvania's Public Utility Code to allow the State to recategorize line losses as "generation costs," it read the filed-rate doctrine to permit that categorization without regard to an RTO's contrary implementation of its federal tariff. And respondents concede ongoing impact: Line losses in Pennsylvania, they declare, currently must be recovered as generation costs—not transmission costs—a distinction that undermines federal regulatory initiatives and cost recovery alike.

Interstate electricity markets cannot operate effectively when States deem themselves free to adopt cost classifications that contradict the federal scheme. And the narrow view of the filed-rate doctrine adopted below does not merely conflict with other decisions; it also threatens to strip that doctrine and federal regulatory efforts of vitality. If any doubt remains about the significance of the decision below or its impact on federal authority, the Court should ask the Solicitor General to provide the views of the United States. Otherwise, the petition should be granted.

I. THE DECISION BELOW CREATES A CONFLICT ON IMPORTANT QUESTIONS CONCERNING THE SCOPE OF FEDERAL AND STATE AUTHORITY

A. The Decision Conflicts with *AEP*

1. Respondents cannot seriously dispute that the decision below upheld the very action the Fifth Circuit's *AEP* decision forbids: It allowed the Pennsylvania PUC to deny recovery of wholesale costs under a FERC-approved tariff by interpreting the tariff contrary to—and categorizing costs differently than—PJM, the RTO responsible for implementing that federal tariff. Pet. 18-22. Respondents urge that this case is different because, "[u]nlike in *AEP Texas*, there was no prudency review" and no challenge to the underlying tariff. PUC Opp. 25; Intervenors Opp. 28. But there was no prudency review or challenge to the tariff in *AEP* either. The state commission there purported to be *enforcing* the federal tariff and rejecting its misconstruction by a federally regulated entity. Pet. 19. *AEP* holds that a State cannot "enforce its own findings as to the meaning of a filed tariff, in opposition to the conclusions of a FERC-approved agent." 473 F.3d at 586.

Moreover, *AEP* holds respondents' purported distinctions irrelevant: "'[W]hether one characterizes the questions as related to prudence, [tariff] interpretation, or cost allocation, they are clearly matters most appropriately resolved by [FERC] as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules.'" 473 F.3d at 585 n.17 (quoting *Miss. Power & Light Co.* v. *Moore*, 487 U.S. 354, 378 (1988) (Scalia, J., concurring) ("*MP&L*")). Whether the issue is allocating profits among subsidiaries (as in *AEP*) or allocating costs between "generation" and "transmission" (as here), States cannot disregard a federally regulated

utility's implementation of a federal tariff. "If a state disputes a utility's interpretation of a tariff, FERC is the proper forum for resolving the disagreement." *Id.* at 586.

The decision below held precisely the opposite. The Commonwealth Court ruled that the filed-rate doctrine prohibits Pennsylvania from recategorizing wholesale costs only if *FERC itself* has "unambiguously" and "expressly" addressed the issue. Pet. App. 21a, 22a. That court and the PUC deem it irrelevant that "PJM identifies line loss costs as transmission services and bills them as such" under its federal tariff. *Id.* at 18a, 58a. The PUC trumpets that view in this Court: "Absent *clear direction from FERC* on the treatment of line losses for wholesale purposes," the PUC asserts, "the Opinion cannot possibly usurp FERC's jurisdiction." PUC Opp. 19 (emphasis added). And the PUC declares that how "'an item is billed by PJM bears no relationship to whether an item is transmission or generation related.'" *Id.* at 31 (quoting Pet. App. 58a). That conflict itself warrants review.

2. Alternatively, the PUC urges (at 16) that PJM might not bill transmission line losses as transmission costs. That manufactured dispute is neither relevant nor accurate. It is not relevant because that was not the basis of the decision below. Contradicting *AEP*, the court ruled that PJM's construction of its tariff is immaterial unless *FERC itself* has "clearly," "unambiguously," and "expressly" resolved the issue. Any putative dispute about what PJM does would at best be an issue following a remand from this Court. Besides, the ALJ found that "no party dispute[d] the fact that [transmission line] losses are billed by PJM as transmission costs." Pet. App. 106a, 138a. Respondents ignore that

determination and the absence of a contrary finding by the PUC or the court. See *id.* at 18a.

The PUC's claim (at 31) that petitioners "did not present substantial evidence that PJM has classified line losses as transmission-related" fails for the same reasons. It also ignores the record, which includes the ALJ's ruling and PJM's bills. Pet. App. 106a, 138a; R.179a-186a. And respondents' effort to treat this case as involving factual disputes, see PUC Opp. 34-35; Intervenors Opp. 33-34, is incorrect. "Every question of the construction of a tariff is deemed a question of law." *Great N. Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 290 (1922). The question here is whether Pennsylvania may decide for itself whether federal "transmission line loss" charges are "generation" or "transmission" costs, without regard to how PJM implements its federal tariff absent an "unambiguous[]" FERC ruling on that question.

The PUC urges (at 26) that, because "PJM's OATT contains both generation and transmission costs," the mere inclusion of line-loss charges in the tariff does not mean PJM classifies line losses as transmission costs. PJM's tariff does contain both generation and transmission costs. But it *separates* the two—as FERC requires. See Pet. App. 58a-59a. And PJM has classified line losses as transmission costs in *implementing* the tariff, *billing* respondents for line losses *as transmission costs* under the tariff. See Pet. 14, 20-21, 30. The PUC and the Commonwealth Court seek to "enforce [their] own findings as to the meaning of a filed tariff in opposition to the conclusions" reached by PJM. *AEP*, 473 F.3d at 586. That is what *AEP* and the filed-rate doctrine proscribe.

3. Finally, the PUC suggests that FERC disagrees with *AEP*, declaring that FERC "will not get involved in cost classification and the potential recovery of items in retail rates." Opp. 26-27; see Intervenors Opp. 24-26. But the cited decisions—*Exelon Corp.* v. *PPL Electric Utilities Corp. & PJM Interconnection L.L.C.*, 117 FERC ¶61,176 (2006), and *Virginia Electric & Power Co.*, 125 FERC ¶61,391 (2008) ("*VEPCO I*"), order on reh'g, 128 FERC ¶61,026 (2009) ("*VEPCO II*")—merely indicate that FERC will not resolve issues that *may* impact retail recovery where those issues are *not necessary* to the issue *properly before* it. Neither suggests that, if a state commission disagrees with an RTO's implementation of a federal tariff, FERC will not adjudicate the complaint. FERC regularly resolves such complaints. See, *e.g.*, *Md. Pub. Serv. Comm'n* v. *PJM Interconnection, L.L.C.*, 123 FERC ¶61,169 (2008); *Md. Pub. Serv. Comm'n* v. *PJM Interconnection, L.L.C*, 124 FERC ¶61,276 (2008), reh'g denied, 127 FERC ¶61,274 (2009), aff'd, 632 F.3d 1283 (D.C. Cir. 2011).

In *Exelon*, for example, FERC approved a settlement between two PJM utilities. The intervenors opposed the agreement's characterization of certain charges as "transmission related." 117 FERC ¶61,176, at 61,876. FERC declined to address that issue because, unlike here, the "characterization of these payments d[id] not affect the substantive obligations of the parties under the settlement." *Ibid.* While FERC acknowledged that "issues involving potential recovery of costs from retail customers are within the province of the state," *ibid.*, it nowhere suggested that disputes over the implementation of a federal tariff would be turned away.

VEPCO is further afield. There, FERC ruled that a utility's costs in joining an RTO were "properly recover-

able as wholesale costs." *VEPCO I*, 125 FERC ¶61,391, at 62,845. FERC declined to address whether a Virginia "rate freeze prevent[ed] the pass through of these costs in retail rates" because, FERC noted, that was *not relevant* to the issue before it, which was *setting* the federal rate. *VEPCO II*, 128 FERC ¶61,026, at 61,112. Far from suggesting that the retail rate freeze did not "implicat[e] federal preemption," PUC Opp. 27, FERC warned that any state decision refusing recovery of federal costs would entitle the aggrieved utility to institute litigation "'armed with principles of federal preemption and the Supremacy Clause.'" *VEPCO I*, 125 FERC ¶61,391, at 62,845 n.35 (quoting *Midwest ISO Transmission Owners* v. *FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004) (Roberts, J.)); *VEPCO II*, 128 FERC ¶61,026, at 61,107 & n.10. Dispelling any doubt, FERC cited *Pacific Gas & Electric Co.* v. *Lynch*, 216 F. Supp. 2d 1016, 1038 (N.D. Cal. 2002), which held that California's retail rate freeze was "intrinsically inconsistent with the FERC-mandated regime for wholesale prices" and therefore preempted if it denied recovery of FERC-approved wholesale costs. The claim that FERC will not adjudicate a complaint that a federal utility has misapplied its federal tariff thus defies *AEP* and FERC precedent alike.

B. Respondents Confirm the Issue's Importance

Whether the filed-rate doctrine can be confined to state actions that "directly conflict" with an "unambiguous" ruling by FERC, as held below, is important. As the petition explains (at 22-30), that rule invites state intrusion into federal regulation and threatens to upset carefully calibrated federal pricing regimes. Respondents offer virtually no response. Nor do respondents reconcile the decision below with *Entergy Louisiana, Inc.* v. *Louisiana Public Service Commission*, 539 U.S.

39 (2003). There, this Court explained that "the 'view that the pre-emptive effect of FERC jurisdiction turns on whether a particular matter was actually determined'" by FERC "has been 'long rejected.'" *Id.* at 50 (quoting *MP&L*, 487 U.S. at 374). Thus, "[i]t matters not whether FERC has spoken to the precise classification" under the tariff, "but only whether the FERC tariff dictates how and by whom that classification should be made." *Ibid.* Where (as here) the tariff does so, the state commission's "second-guessing" of the FERC-regulated entity's interpretation "is pre-empted." *Ibid.*

Seeking to sidestep *Entergy*, the PUC urges that the filed-rate doctrine "is not implicated by the Opinion because the court below did not conduct a prudency review on the reasonableness of a FERC-approved rate and did not challenge the cost allocation method employed by PJM to calculate line losses." PUC Opp. 17; see Intervenors Opp. 26-27. But the notion that the filed-rate doctrine is limited to "prudency" review or "cost allocation" methods defies decades of precedent. Because FERC has jurisdiction to regulate "any rule, regulation, practice, or contract *affecting*" transmission and wholesale electric rates, 16 U.S.C. §824e(a) (emphasis added), the filed-rate doctrine extends beyond direct challenges to rates or their prudency, *AEP*, 473 F.3d at 585 n.17; pp. 3-4, *supra*, and is "not limited to 'rates' *per se*," *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986). It preempts state contract actions, *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 578-579 (1981), and even efforts to regulate the securities of regulated entities, *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). It likewise "turns away" "antitrust actions," "[RICO] actions," and "state tort actions." *Wah Chang* v. *Duke Energy Trading & Mktg., LLC*, 507 F.3d

1222, 1225-1226 (9th Cir. 2007). The PUC's contrary view of the doctrine's scope makes the need for review clearer still.

Nor does the so-called *Pike County* exception so "limit[]" the filed-rate doctrine's "purview." PUC Opp. 29; see Intervenors Opp. 26-27. Under that putative exception (also created by the Commonwealth Court), a state PUC can deny full recovery of federal rates if the utility can choose whether or where to buy power and the PUC determines that the utility's decision to purchase at the federal rate was "imprudent" in light of available alternatives. See *Pike Cnty. Light & Power Co.* v. *Pa. Pub. Util. Comm'n*, 465 A.2d 735, 738-739 (Pa. Commw. Ct. 1983); *Ky. W. Va. Gas Co.* v. *Pa. Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988); *Pub. Serv. Co. of N.H.* v. *Patch*, 167 F.3d 29, 35 (1st Cir. 1998). In noting (but not approving) *Pike County*, this Court has characterized it as addressing the power to deny recovery only where the utility "had the legal right to refuse to buy that power." *MP&L*, 487 U.S. at 373-374; *Nantahala*, 476 U.S. at 972. But that offers no support to the PUC's claim (at 17) that the filed-rate doctrine applies only to "a prudency review on the reasonableness of a FERC-approved rate" or a "challenge [to] the cost allocation method employed." That is not the law. And no one claims that petitioners had any choice about whether or where to purchase transmission here.

The PUC's claim (at 31) that petitioners waived any argument based on *Entergy* below is baseless. Petitioners explicitly demanded respect for PJM's classifications, Pet. C.A. Br. 27-28, 34 (July 9, 2010), as the ALJ and the Commonwealth Court recognized, Pet. App. 18a, 106a. But the court below refused to give them any weight. Whether petitioners cited *Entergy* rather than *Nanta-*

hala—which *Entergy* simply followed, see 539 U.S. at 49—is thus irrelevant. Besides, the PUC and Commonwealth Court passed squarely on preemption, holding that the PUC's classifications were not preempted because "FERC's opinions have not expressly stated that line loss costs are transmission costs," and thus "there is no direct conflict between the [PUC's] Order and FERC." Pet. App. 22a. "It suffices for [this Court's] purposes that the court below passed on the issue presented." *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

II. THE DECISION BELOW UPENDS A FEDERAL REGULATORY SCHEME BY RECLASSIFYING TRANSMISSION LINE LOSSES AS GENERATION COSTS

Respondents do not dispute that it is generally accepted—as reflected in treatises and the views of engineers and economists alike—that the "'replacement'" of line losses "'is a cost of providing transmission.'" Pet. 33 (quoting S. Stoft, *Power System Economics: Designing Markets for Electricity* 419 (2002)); Electrical Engineers, Scientists, and Economists Br. 4-6. And the impact of Pennsylvania's erroneous decision to recategorize transmission line losses as "generation costs" is vast. It upends a federal regulatory scheme, defeats FERC's efforts to calibrate pricing signals, and distorts energy purchases and infrastructure development alike. Respondents' attempt to recharacterize this as a one-time dispute over an expired rate-freeze is belied by their own submissions.

A. The Decision Below Permanently Recategorizes Costs in Defiance of Federal Law

Far from being a dispute over a one-time settlement agreement, PUC Opp. 2, 5-6, 17, 33-35; Intervenors Opp. 5-10, 16-23, this case concerns Pennsylvania's permanent

recategorization of federal wholesale costs. The decision below does not resolve the categorization of "line losses" charged under federal tariffs as a contract issue. The decision recites the Pennsylvania Code's definition of "transmission costs" and then proceeds to rule that—despite the filed-rate doctrine and PJM's categorization—Pennsylvania can allocate "transmission line losses" to "generation" rather than "transmission." Pet. App. 16a-24a. Pennsylvania can do so, the court held, because FERC's "decisions * * * do not *unambiguously* state that [transmission line losses] are transmission-related." *Id.* at 21a (emphasis added); see *id.* at 25a. That is a holding regarding the scope of federal and state authority—not the construction of a contract.[1] The claim that petitioners "agreed" to categorize transmission line losses as generation costs, Intervenors Opp. 13, is irrelevant for the same reason. It is also false.[2] Indeed, when

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[1] Respondents invoke a half-paragraph of contract discussion in which the court addresses whether its decision traps federal costs. See, *e.g.*, PUC Opp. 16 (citing Pet. App. 24a), 32-34. But that discussion played no role in the court's analysis of FERC precedent or the filed-rate doctrine. See Pet. App. 20a-24a. And the court's trapped-costs discussion simply assumes (based on its earlier discussion of the filed-rate doctrine and FERC precedent) that the PUC permissibly classified line losses as generation rather than transmission costs. Nowhere does the decision suggest that state law would produce the same result if Pennsylvania must respect PJM's allocation under its federal tariff; supposed "ambiguity" in FERC's rulings is insufficient; and federal law categorizes line losses as transmission-related. Respondents' state-law theory thus fails. See *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983) (review precluded only where "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state-law] grounds").

[2] Petitioners did not "agree[ ]" that line losses are generation costs "under the Restructuring Settlement." Intervenors Opp. 13. The settlement does not mention, much less categorize, transmission line

FERC required PJM to implement marginal line losses in *Atlantic City*, petitioners argued that such "[l]osses are a component of transmission service." *Comments of Jersey Central Power & Light Co., Metropolitan Edison Co., and Pennsylvania Electric Co.* at 4, FERC Docket No. EL06-55-002 (Aug. 29, 2006). Respondents participated in that proceeding, but never suggested otherwise.

Respondents likewise err in claiming that, following the rate caps' expiration (see Pet. 14 n.3), the decision ceased to have forward-looking impact. The decision below permanently recategorizes ongoing costs. Respondents thus concede that utilities seeking to recover line losses now and in the future must do so "through a *generation-related* rate mechanism." Intervenors Opp. 6 (emphasis added); see PUC Opp. 2, 14 (line losses "collected as part of the Companies' generation rates").

As *amicus* EEI explains (at 10), the forward-looking impact of that recategorization is significant. In States with competitive markets and unbundled rates (about half the States), transmission costs are rate-regulated and thus generally recoverable; generation costs, however, are competitive and may not be fully recovered. Moreover, differential treatment among States within a single, multistate market significantly distorts purchasing and infrastructure development decisions. See Pet. 22-28. Acknowledging the impact, the PUC (at 8) agrees

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losses. Indeed, the only citation Intervenors offer for petitioners' supposed "agreement" to that categorization is to a page of *Intervenors' own brief* before the PUC where they *argue* that point. *Ibid.* (citing R.1175a). Intervenors' argument that petitioners "historically" viewed line losses as generation costs is likewise unfounded. Its primary support is again the same page of its own brief below. *Id.* at 33 (citing R.1175a). And its remaining citations to Pet. App. 47a-49a fare no better, as review of those pages makes clear.

that "PJM dispatches generators by considering the effects of losses," directly affecting which generators sell electricity and where facilities will be built. And as EEI (at 5-6) and the Energy Association of Pennsylvania (at 11-12) explain, even the financial impact—over $230 million in this case alone—is staggering.[3]

The rationale below, moreover, reaches far beyond particular cost categories. If States are free to disregard the implementation of FERC tariffs and their cost allocations absent an "express" and "unambiguous" on-point FERC ruling, the filed-rate doctrine will cease to safeguard FERC's "exclusive authority" to "regulate the transmission and sale at wholesale of electric energy in interstate commerce." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982). FERC cannot anticipate every eventuality in its rulings, particularly if participants—like the PUC here—intervene but do not bother raising them. See p. 12, *supra*; *MP&L*, 487 U.S. at 357 (noting State's failure to raise before FERC the issue later claimed to be ambiguous). The uniformity critical to integrated wholesale markets would suffer. If each State could "enforce its own findings as to the meaning of a filed tariff, in opposition to the conclusions of a FERC-approved agent, the conflicting interpretations would undermine FERC's ability to ensure that a filed rate is uniform across different states." *AEP*, 473 F.3d at 585-586. Again, if there is any doubt about the significance of the impact on the federal regime, the

[3] Pennsylvania asserts that "the line losses, plus carrying charges," are "approximately $48.8 million." PUC Opp. 13, 36 n.16. But that figure covers only 9 months of a multi-year period. Pet. App. 5a; *id.* at 50a.

Court should ask the Solicitor General to provide the views of the United States.[4]

B. The Decision Below Illustrates the Danger to Federal Authority

Ultimately, the decision to categorize "*transmission* line losses" as "generation" costs rather than "transmission" costs cannot be defended. The PUC attempts to reconcile its view with *Sacramento Municipal Utility District* v. *FERC*, 616 F.3d 520 (D.C. Cir. 2010), but it concedes that "the D.C. Circuit provided an explanation of the *three* components comprising LMP: *generation*, congestion, *and line losses*." PUC Opp. 20 (emphasis added). The decision below defies that three-part description, compressing LMP into two components on the theory that the third, "line losses," is part of the first, "generation."

The PUC correctly quotes *Sacramento*'s observation that the transmission customer "compensates [the ISO] for lost energy either by providing more energy at the injection point * * * or providing energy in-kind to the transmitting utility," but ignores its import. PUC Opp. 21; see Intervenors Opp. 37. The *transmission* customer pays for line losses because they are "transmission" costs. And the fact that the transmission customer can pay *either* by purchasing more energy from the same

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[4] The PUC argues that Pennsylvania's bar on retroactive ratemaking, and its requirement that costs be sought at the earliest opportunity, will preclude recovery in any event. PUC Opp. 39-41. But the decision below concededly did not rest on those grounds, *id.* at 40 n.22, which are without merit. The federal tariff—which put everyone on notice of the change—took effect on June 1, 2007; the costs were sought in 2008 at the first opportunity permitted by law; and the decision below affects rates after those dates. Enforcing the federal rate here thus is not retroactive. See, *e.g.*, *Pub. Serv. Co. of Colo.* v. *FERC*, 91 F.3d 1478, 1488-1491 (D.C. Cir. 1996).

generator "at the injection point," *or* by providing "energy-in-kind" purchased elsewhere, is equally fatal. No one would say the cost of *generating energy at one power plant* includes the cost of purchasing power from *another plant* to cover transmission losses.[5]

Despite respondents' claims, PUC Opp. 23-24; Intervenors Opp. 35-36, FERC has been unequivocal on this issue. Pet. 33-34 & n.7. "When energy is transmitted from a point of receipt to a point of delivery," FERC has explained, "some of the energy is lost due to resistance on the wires." *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, 100 FERC ¶61,138, at P267 (2002). Those "transmission losses are a cost of transmission." *Ibid.*; *Atl. City Elec. Co.* v. *PJM Interconnection, L.L.C.*, 117 FERC ¶61,169, 61,863 (2006) ("*Atl. City II*") ("[M]arginal losses are part of the payment for transmission service."). "*Marginal line losses*," FERC notes, "are no different than any *other* cost included in LMP, the system-wide *energy cost* and *congestion cost*. *All three* of these costs combine to produce the

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[5] The PUC states (at 21) that, because the D.C. Circuit referred to the generation component of LMP as "the baseline cost of serving load," 616 F.3d at 524, the "actual cost must include something in addition to it." That is correct. Generation is the baseline cost, while transmission and congestion provide the other costs of "serving load," *i.e.*, getting energy to the user. But that does not suggest that the transmission (or congestion) component is subsumed under generation. For decades, FERC has required "a transmission provider that performs a transmission or purchase and resale function," and seeks to recover more than *de minimis* line losses, to separate the "purchased power price" from incremental transmission costs—including line losses. 18 C.F.R. §35.22; see *Regulations Limiting Percentage Adders in Electric Rates for Transmission Services*, Order No. 84, FERC Stats. & Regs. ¶30,153, 31,037 (1980).

correct marginal energy price at each node." *Black Oak Energy, L.L.C.* v. *PJM Interconnection, L.L.C.*, 122 FERC ¶61,208, 62,184 (2008) (emphasis added); Order No. 888-B, 62 Fed. Reg. 64,688, 64,696-64,697 (Dec. 9, 1997) ("Real Power Loss Service is * * * a part of the cost of transmission" and "not covered under the definition of 'supplementary power.'"); see also FERC Br. 19, *Wis. Pub. Power, Inc.* v. *FERC*, 493 F.3d 239 (D.C. Cir. 2007) (No. 04-1414) (a "public utility that purchases energy must pay for these losses *as part of its transmission rate*" (emphasis added)).

The PUC attempts to find ambiguity by quoting the decision below, which in turn quotes FERC decisions stating that line losses "'send the proper price signals about the cost of obtaining generation'" and "'ensure[] that each customer pays the proper marginal cost price for the power it is purchasing.'" Pet. App. 21a-22a (quoting *Atl. City II*, 117 FERC ¶61,169, at 61,862; and *Atl. City Elec. Co.* v. *PJM Interconnection, L.L.C.*, 115 FERC ¶61,132, 61,478 (2006)). But the PUC overlooks the key term: The cost of "*obtaining* generation" is not the same thing as the cost of "generation" itself. The former includes transmission (a cost of "obtaining" the generation), while the latter (generation itself) does not. Pet. 34 n.7. If that sort of chop-quotation were sufficient to deem FERC's position ambiguous, then little of FERC's exclusive authority could remain exclusive.

Respondents cannot deny that transmission line losses are caused by transmission, not by generation; electricity used at the generating facility would suffer no transmission line losses at all. But respondents insist that line losses are generation costs because they are replaced by generating more electricity. That is senseless: A diesel tanker-truck's use of fuel in delivering a load of diesel to

a fueling station obviously is a transportation cost. And it does not become a refining cost simply because one buys more fuel to replace the amounts consumed. Pet. 2-3, 34. Respondents quibble with the analogy, PUC Opp. 22; Intervenors Opp. 35, but their analogy points the same way. If produce spoils as trucks transport it to market, PUC Opp. 22, the spoilage is a cost of transportation: It occurs because of transportation and varies with distance. It is not a cost of growing produce in the first instance. Respondents' analogies, like their efforts to countermand FERC's rules and the RTO's determinations under federal tariffs, cannot be sustained.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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