No. 13-787

IN THE
Supreme Court of the United States

STATE OF MISSOURI, *EX REL.* KCP&L GREATER MISSOURI OPERATIONS COMPANY,
Petitioner,

v.

MISSOURI PUBLIC SERVICE COMMISSION AND DOGWOOD ENERGY, LLC,
Respondents.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, Western District

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

EDWARD H. COMER
HENRI D. BARTHOLOMOT
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-5000

JOHN S. MOOT
Counsel of Record
KARIS ANNE GONG
CHRISTOPHER R. HOWLAND
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
John.Moot@skadden.com

Attorneys for Amicus Curiae

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

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 intent to file this brief was provided to the Petitioner and the Respondents. Petitioner KCP&L Greater Missouri Operations Company has consented to the filing of this brief. Respondents Missouri Public Service Commission (Missouri Commission) and Dogwood Energy, LLC have 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 fifty 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.

In providing electricity to retail customers nationwide, EEI's members rely on a broad array of electricity generation, transmission, and distribution facilities and must recover the costs of these facilities, including in this case their transmission costs, in their rates.

Today the electric utility industry is undergoing a significant and expensive transformation as a number of generating plants retire and new generating plants are built in locations that tend to be farther removed from consumers. This places increased reliance on transmission infrastructure, further highlighting the importance of being able to recover transmission costs.

In this case, where the total cost of electricity from a Mississippi plant (the Crossroads plant) was lower than the total cost of any other option, taking transmission into account, the Missouri Commission held that Petitioner had prudently chosen to obtain power from the Mississippi plant. However, the Missouri Commission refused to allow Petitioner to recover the cost of transmitting the power from that plant to customers in Missouri. These transmission costs—which amount to at least $5,000,000 annually for approximately 20 years—had previously been approved by the Federal Energy Regulatory Commission (FERC) as "just and reasonable." The Missouri Commission's decision, upheld by the Missouri courts, treated the transmission costs as optional, but they are not.

As a result, the Missouri Commission and courts created, in essence, a loophole to the filed rate doctrine and a brand new exception to the Supremacy Clause. Given the recurring nature of this issue, EEI is concerned with the risk that the Missouri decisions pose for the recovery by EEI's members nationwide of billions of dollars of costs incurred in connection with the interstate transmission of electricity, particularly in light of the industry's growing reliance on long-distance transmission to deliver electricity from re-

newable sources of energy and new plants operating near new low cost sources of natural gas.

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

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Respectfully submitted,

JOHN S. MOOT
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
John.Moot@skadden.com

Attorney for Edison Electric Institute

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Administrative Materials

Statutes

Books, Articles, and Presentations

BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Whether a State violates the filed rate doctrine and the Supremacy Clause when it traps federally-approved transmission charges for an interstate electricity purchase that the State itself found prudent.

INTEREST OF *AMICUS CURIAE*[1]

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 fifty 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.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

EEI has an interest in this case because the case presents a recurring issue that is associated with billions of dollars of investment by EEI members. EEI members routinely engage in integrated resources planning, which evaluates the costs of relying on locally-generated electric power versus power generated further from customers. A utility's decision as to which generating sources to use focuses on identifying the lowest total cost of generating, transmitting, and distributing the electricity that its customers need. This necessarily takes into account factors such as anticipated fuel supply and transportation/transmission cost options, as well as reliability and other factors.

State utility commissions typically have a significant voice in the process, as they must ultimately approve retail rates to recover the costs. But the Federal Energy Regulatory Commission (FERC) plays an important and exclusive role in approving the interstate transmission and wholesale power component of those rates.

Ultimately, all the prudently incurred costs of providing electricity must be recovered from retail customers, with States passing through FERC-approved transmission and wholesale rates, or electric utilities cannot continue to depend on energy sources that involve interstate transmission and interstate wholesale purchases. The end result of disallowing recovery of transmission costs, as the Missouri Public Service Commission (Missouri Commission) and courts have done here, will be higher costs to electricity consumers, as utilities will have to depend on local generating plants even if their total costs are more expensive than more remote plants.

The evaluation of local versus distant power sources is becoming increasingly important as regional markets expand, new low cost sources of natural gas are developed, and federal and state policymakers encourage purchases from new plants and distant renewable energy resources. EEI's members cannot maintain their financial health, and thereby deliver reliable and economic service to consumers, if FERC-approved transmission costs for interstate trade are disallowed, or "trapped," by State utility commissions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Missouri Commission held that importing generation from another State was prudent because it saved local consumers money, even after taking transmission costs into account. But the Commission excused those customers from paying for the interstate transmission necessary to deliver that power. Pet. App. 67a, 78a. The Missouri Court of Appeals affirmed, holding that Missouri can deny recovery of FERC-approved transmission costs any time it objects to the "concept" of paying those costs. *Id.* at 17a.

Missouri's transparent attempt to "trap" federally-approved costs by prohibiting their recovery in retail rates is unlawful and undermines FERC's comprehensive regulation of interstate wholesale electric markets. FERC has long required that transmission-related services be unbundled (*i.e.*, sold separately) from generation in order to facilitate open access for transmission customers and competitive electricity markets. See *New York* v. *FERC*, 535 U.S. 1 (2002).

Recognizing the inherently interstate nature of the grid, FERC has also supported regional electric markets operated by independent entities and required new transmission investment to be planned on a regional basis. These reforms share a common purpose: to achieve a more efficient use of generation resources over the Nation's interstate transmission grid.

This comprehensive federal regulatory scheme will be destroyed, however, if States are allowed to cherry-pick which FERC-regulated costs they pass on to consumers. And the fabric of regional electricity markets will be irreparably torn if States can access lower-cost generation from another State—such as wind generation from locations far from densely populated areas or low cost natural gas developed at new gas fields—but refuse to pass through to consumers the cost of transmitting that energy. Interstate trade cannot survive in a market where customers can purchase goods from another State without paying the costs of transporting them.

The disruption associated with Missouri's newly-minted loophole in the filed rate doctrine is particularly severe given the enormous investment challenges presently confronting the electric utility industry. The electric utility industry faces unprecedented transmission capital investment demands over the next decade to replace aging infrastructure, to comply with environmental regulations, to enhance the reliability and security (physical and cyber) of the grid, and to integrate renewable resources and new natural gas plants. These investments are critical to interstate trade and to the integration of a cleaner fleet of generation resources. These invest-

ments cannot be made in a regulatory climate that permits a State to disallow transmission charges whenever it objects to the "concept" of paying for interstate transmission.

The Missouri loophole is also uniquely positioned to spread like a virus to other States. Just as electric utilities must routinely evaluate their generation purchase options by comparing a broad range of sources, including out-of-state purchases, state public service commissions must routinely consider whether to grant recovery of the associated costs of those options. Any exception to the filed rate doctrine created by one State to shed unwanted costs will necessarily attract a following from other States. The so-called "*Pike County*" exception to the filed rate doctrine—an intermediate State court decision that was subsequently adopted almost uniformly by other States—is the perfect example. See *Pike Cnty. Light & Power Co.* v. *Pa. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983).

This Court, recognizing this danger, has intervened three times to overturn collateral state courts' attacks on FERC's exclusive jurisdiction. *Entergy La., Inc.* v. *La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003); *Miss. Power & Light Co.* v. *Miss. ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986). The Court should do so here before Missouri's novel theory is adopted by other States and thereby inflicts irreparable damage on the Nation's interstate wholesale electricity markets.

ARGUMENT

KCP&L Greater Missouri Operations Company (the Company) sought recovery of the generation and transmission costs of importing electricity from a plant in Mississippi because that was the most economic option for its customers. The imports from the Mississippi plant included a FERC-approved transmission charge that was more expensive than the transmission cost for the local supply options. But the option was economic because the total cost of power from the plant, including generation and transmission costs, was less than the total cost of the local supply options. Pet. 6.

The Missouri Commission agreed that the Mississippi plant was the right choice for local consumers (*id.* at 7; Pet. App. 67a, 75a-77a). Nonetheless, the Commission disallowed the FERC-approved transmission costs because it deemed them "excessive" and "not just and reasonable." *Id.* at 63a-64a, 78a.

The Missouri Court of Appeals affirmed. The Missouri court refused to apply the uniform rule against trapping FERC-approved costs because, notwithstanding the plain text of the Missouri Commission's order, the court found the Commission's disallowance "had nothing to do with whether the transmission rates * * * [were] just and reasonable." Pet. App. 16a. Rather, according to the court, the Missouri Commission merely objected to "the *concept* of requiring ratepayers to pay for any Crossroads transmission costs in the first place," not "the *amount* of Crossroads transmission costs." *Id.* at 17a (emphasis added).

This Court should grant the petition for writ of certiorari because Missouri has carved a loophole in the filed rate doctrine that will eviscerate FERC's comprehensive regulation of interstate transmission and unravel interstate electricity markets.

I. Missouri's Decision Collaterally Attacks the Foundation of Interstate Electricity Markets: the Transmission Necessary to Deliver Interstate Generation

The foundation for interstate electricity markets is FERC's requirement that every public utility provide nondiscriminatory transmission access to generators on an unbundled basis. "In the bad old days, utilities were vertically integrated monopolies" that "bundled" their services, such that "consumers paid a single price for generation, transmission, and distribution." *Midwest ISO Transmission Owners* v. *FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (Roberts, J.). "Competition * * * was not prevalent." *New York*, 535 U.S. at 5.

FERC transformed this structure in 1996 when it issued its landmark rule ordering every public utility to provide open access transmission service to "ensure that customers have the benefits of competitively priced generation." *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,635-36, 31,652 (1996). The indispensable element of Order No. 888 was the requirement that transmission be "unbundled" for wholesale generation sales—*i.e.*, "requiring each utility to state separate rates for its wholesale generation, transmission, and ancillary services, and

to take transmission of its own wholesale sales and purchases under a single general tariff applicable equally to itself and to others." *New York*, 535 U.S. at 11; see also Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,654. This ensured that utilities could no longer "refuse to deliver energy produced by competitors or to deliver competitors' power on terms and conditions less favorable than those they apply to their own transmissions." *New York*, 535 U.S. at 8-9.

While Order No. 888 opened the interstate grid to competition, FERC soon found that "independent regionally operated transmission grids [would] enhance the benefits of competitive electricity markets." *Regional Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 30,993 (1999). FERC thus encouraged every public utility to join a regional transmission organization (RTO) or justify its failure to do so. *Id.* at 31,033-34. "[B]y improving efficiencies in the management of the grid, improving grid reliability, and removing any remaining opportunities for discriminatory transmission practices, the widespread development of RTOs will improve the performance of electricity markets in several ways and consequently lower prices to the Nation's electricity consumers." *Id.* at 31,025. FERC has since adopted numerous reforms to strengthen these regional markets, finding it "has a duty to improve the operation of wholesale power markets" because "National policy has been, and continues to be, to foster competition in wholesale electric power markets." *Wholesale Competition in Regions with Organized Elec. Mkts.*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 at 30,580 (2008).

FERC has also required every region to adopt transmission planning and cost allocation rules that recognize the interconnected nature of regional electric markets. See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011); *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at 30,956 (2007). These regional transmission planning reforms were designed, in significant part, to reflect the unique challenges presented by the need to deliver renewable energy from wind-rich areas to distant population centers. See, *e.g.*, *Ill. Commerce Comm'n* v. *FERC*, 721 F.3d 764, 771 (7th Cir. 2013), petition for cert. pending, No. 13-445 (filed Oct. 7, 2013). FERC has even required that every region engage in coordinated transmission planning with each adjoining region to identify cost-effective solutions to manage power flows crossing inter-regional lines. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at 31,357.

FERC has also increased its oversight of the interplay between its exclusive jurisdiction over interstate electricity markets and its exclusive jurisdiction over the interstate natural gas pipeline system. The intersection of interstate electric and natural gas markets is growing because of the increasing importance of natural gas as a source of electricity production and, hence, the critical role played by natural gas pipelines in supporting electric grid reliability. See U.S. Energy Info. Admin., *Annual Energy Outlook 2014 Early Release Overview*, at 14 & fig. 13 (Dec. 16, 2013), http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2014).pdf (showing electricity generation from natural gas as a percentage of total generation

increased from approximately 16% in 2000 to 30% in 2012, and is expected to account for 35% of generation by 2040).

Recognizing this, FERC has approved multiple recent reforms designed to ensure better coordination of interstate natural gas and electricity markets. See, *e.g.*, *Commc'n of Operational Info. Between Natural Gas Pipelines and Elec. Transmission Operators*, Order No. 787, FERC Stats. & Regs. ¶ 31,350 at 31,962 (2013) (authorizing "interstate natural gas pipelines and public utilities that own, operate, or control" interstate transmission "to share non-public, operational information with each other for the purpose of promoting reliable service or operational planning on either the public utility's or pipeline's system."); *ISO New England Inc.*, 143 FERC ¶ 61,065 (2013) (approving proposal to alter New England energy market bidding deadlines to improve coordination between the gas and electric markets).

These landmark reforms fall within FERC's *exclusive* jurisdiction. The Federal Power Act grants FERC "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). Congress thereby drew a "bright line easily ascertained, between state and federal jurisdiction," *FPC* v. *S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964), such that "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." *Miss. Power & Light*, 487 U.S. at 374; see also *id.* at 377 (Scalia, J., concurring) ("It is common

ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.").

Missouri therefore had no power to disallow the FERC-approved transmission charges incurred by the Company to deliver power from Mississippi. Under the filed rate doctrine, "the right to a reasonable rate is the right to the rate which [FERC] files or fixes, and * * * except for review of [FERC's] orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." *Mont.-Dakota Utils. Co.* v. *Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951). The necessary corollary to this rule is that States may not trap FERC-approved costs: "interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Entergy*, 539 U.S. at 47 (quoting *Nantahala*, 476 U.S. at 962). Therefore, "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." *Nantahala,* 476 U.S. at 966. "Such a 'trapping' of costs is prohibited." *Id.* at 970.

Missouri's action not only conflicts with the filed rate doctrine by forcing the Company to absorb FERC-approved costs, but undermines FERC's comprehensive regulation of the field of interstate transmission. FERC cannot effectively regulate the interstate grid or interstate electricity markets—its policies in both areas being designed to benefit consumers in *all* affected states—if individual states are free to skew investment decisions towards local sources of power by rejecting FERC-approved costs. "[U]nbundled interstate transmissions of electric en-

ergy have never been 'subject to regulation by the States.'" *New York*, 535 U.S. at 21 (quoting 16 U.S.C. 824(a)). Rather, when it comes to interstate transmission arrangements, "[o]nly FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the [Federal Power Act] and achieve the coordinated approach to regulation found necessary in *Attleboro*." *Appalachian Power Co.* v. *Pub. Serv. Comm'n*, 812 F.2d 898, 905 (4th Cir. 1987); see also *Pub. Utils. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). "[W]hen Congress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'" *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 580 (1981) (quoting *Mo. Pac. R.R. Co.* v. *Stroud*, 267 U.S. 404, 408 (1925)). The Missouri loophole unlawfully erects a strong new barrier to interstate trade to replace those that FERC has labored for the last two decades to eradicate, and the consequence will be a return to the costly inefficiencies that such barriers produce.

II. The Threat to Interstate Trade Posed by the Missouri Loophole Is Enormous

The benefits to consumers and the environment from FERC-regulated interstate electricity markets will be lost if the very transmission infrastructure costs necessary to support those markets cannot be recovered in retail rates. Electric utilities continually evaluate generation options by comparing the cost of locally-generated power with the cost of power that they can generate or purchase elsewhere—a comparison that necessarily must take into account differences in transmission costs. See Susan F. Tierney & Todd Schatzki, Nat'l Ass'n of Regulatory Comm'rs,

Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices, at 40-43 (July 2008) (*Competitive Procurement*). If an out-of-state generation resource is determined to be more economic even if it involves additional transmission costs, consumers will benefit from the electric utility importing power from an out-of-state resource. Yet Missouri has now replaced that rational cost comparison with a parochial (and ultimately self-defeating) rule that allows consumers to take advantage of out-of-state resources without paying the costs of delivering them.

Interstate trade cannot occur in such an environment, and the dangers posed by the Missouri loophole could not be greater given the enormous challenges facing the electric utility industry. "The electric industry in North America is on the brink of one of the most dynamic periods in its history." N. Am. Elec. Reliability Corp., *Special Report: Accommodating High Levels of Variable Generation*, at iv (Apr. 2009).[2] The industry is expected to invest over $150 billion between 2012 and 2020 to replace aging infra-

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[2] The North American Electric Reliability Corporation is certified as the Electric Reliability Organization for the United States pursuant to 16 U.S.C. 824o(c). See *N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062 (2006). As the certified Electric Reliability Organization, it is responsible for "oversee[ing] the reliability of the United States' portion of the interconnected North American Bulk-Power System" and "developing and enforcing the mandatory Reliability Standards." *Rules Concerning Certification of the Elec. Reliability Org.*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 at 30,111 (2006).

structure and construct a modern, cleaner fleet of generation resources. See, *e.g.*, Gregory Aliff, Deloitte Ctr. for Energy Solutions, *The Math Does Not Lie: Factoring the Future of the U.S. Electric Power Industry*, at 4 (2012) (*The Math Does Not Lie*). Investor-owned electric utilities plan to invest more than $51.1 billion in new transmission projects alone through 2023. EEI, *Transmission Investment: Adequate Returns and Regulatory Certainty Are Key*, at 6 (June 2013).

A significant portion of this investment is to interconnect renewable resources located far from load centers and new natural gas generation. Dan Eggers et al., Credit Suisse, *The Transformational Impact of Renewables,* Americas/U.S. Equity Research, Electric Utilities, at 35 (Dec. 20, 2013) ("Renewables (and wind in particular) are often built in locations far from population centers" and therefore "require more transmission infrastructure investment to deliver the renewables to market."); Matthew L. Wald, *Wind Energy Bumps Into Power Grid's Limits*, N.Y. Times, Aug. 27, 2008, at A1 ("Achieving [a 20% renewable energy quota] would require moving large amounts of power over long distances, from the windy, lightly populated plains in the middle of the country to the coasts where many people live. * * * The grid's limitations are putting a damper on such projects already."); Johannes Pfeifenberger, The Brattle Group, *Transmission Investment Trends and Planning Challenges*, at 6 (Aug. 8, 2012), http://www3.eei.org/meetings/Meeting%20Documents/2012-08-06-TransmissionWholesaleMarketsSchool-Pfeifenberger.pdf (projecting $50-100 billion in nationwide incremental transmission needed to integrate renewables).

One of the immense challenges posed by this new fleet of generation resources is the need to expand the interstate transmission grid to reach the optimal sites for locating renewable energy resources. Consequently, every affected region is, using FERC's regional planning reforms, considering how to meet the challenge of integrating remote generation in the most cost-effective fashion for consumers. The Midwest regional grid operator has already approved over $5 billion in transmission facilities to reach "the best sites in its region for wind farms that will meet the region's demand for wind power." *Ill. Commerce Comm'n*, 721 F.3d at 771; see Midcontinent Indep. Sys. Operator, Inc., *MISO 2013 Transmission Expansion Plan*, at 16, 19 (2013). The Southwest Power Pool has already approved approximately $1.4 billion in transmission projects designed to facilitate the addition of new renewable and non-renewable generation. Sw. Power Pool, *2013 SPP Transmission Expansion Plan Report*, at 4, 18 (Jan. 29, 2013). And the regional planner serving all the Western States has identified thousands of line miles in new transmission projects that can allow the region to more economically meet its renewable portfolio standards. Scott Haase et al., Nat'l Renewable Energy Lab., *Western Region Renewable Energy Markets: Implications for the Bureau of Land Management*, Technical Report NREL/TP-6A20-53540, at 28-30 (Jan. 2012).

Missouri's cherry-picking theory of preemption, however, places these extraordinary regional efforts at risk because it allows States to pick and choose the cheapest *generation* resource without regard to the cost of *transmission* to deliver it. The issue of who should pay for these new regional transmission projects is, by definition, contentious: transmission "cost

allocation and reform is one of the most difficult issues facing transmission service providers and regional transmission organizations." *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 at P 2 (2010), order on reh'g, 137 FERC ¶ 61,074 (2011). It should therefore not be surprising that, in most regions that have implemented FERC's reforms, there have been disputes—often among affected States—over how the interstate transmission grid costs to reach such remote resources should be allocated. *Ill. Commerce Comm'n*, 721 F.3d 764 (considering State challenges to the Midwest region's cost allocation method); *Ill. Commerce Comm'n* v. *FERC*, 576 F.3d 470 (7th Cir. 2009) (considering State challenges to the Mid-Atlantic region's cost allocation method). These disputes fall within FERC's exclusive jurisdiction to resolve. But Missouri has now provided the States with a ready escape hatch: if they say that they disagree with the "concept" of paying FERC-allocated transmission costs, they can disallow them and still realize the benefits of importing low cost power from remote resources. Ultimately, this will lead to decisions not to use cheaper, more environmentally friendly remote resources, because utilities will not employ resources if they cannot recover the associated costs.

A similar problem is presented by the locational trade-offs presented by other generation resources, such as new natural gas-fired generation. Natural gas-fired generation is estimated to comprise between 40% and 80% of new supply additions over the next thirty-five years. U.S. Energy Info. Admin., *Annual Energy Outlook 2013 With Projections to 2040*, at 72 (Apr. 2013). The cost of developing these resources differs significantly based on location, partic-

ularly with respect to proximity to natural gas pipelines and proximity to the high-voltage electric grid. Indeed, one of the reasons that the Crossroads plant was the lowest cost resource for the Company was because it was situated on a gas pipeline that had access to less expensive gas. Pet. App. 62a ("[T]he average delivered cost of natural gas to Crossroads was about half the average delivered cost of natural gas to [the location of a potential alternative plant in Missouri]."). Consumers will benefit if these tradeoffs are considered rationally, not through parochial state decisions that—as in this case—cherry-pick the energy benefits that come from being close to a natural gas pipeline yet disallow the cost of electric transmission service.

The Missouri loophole also threatens much more than efficient generation resource procurement. FERC regulates a slate of transmission-related services that are unbundled, including congestion charges to reflect the value of transmission when the system is constrained, line losses associated with transporting energy long distances, and "ancillary" services necessary to balance the grid on a moment-to-moment basis. See *Black Oak Energy, LLC* v. *FERC*, 725 F.3d 230 (D.C. Cir. 2013); *Sacramento Mun. Util. Dist.* v. *FERC*, 616 F.3d 520, 524 (D.C. Cir. 2010) (locational marginal energy prices include "(i) the cost of generation; (ii) the cost of congestion; and (iii) the cost of transmission losses"); Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,705 (requiring unbundling of ancillary services that are needed to "maintain[] reliability within and among control areas affected by the transmission service").

All these charges are prey to Missouri's "buffet-style ratemaking." Pet. 14, 29. Consider just two prime examples. First, congestion charges have long been controversial. See, *e.g.*, *Sacramento Mun. Util. Dist.* v. *FERC*, 474 F.3d 797 (D.C. Cir. 2007); *Sacramento Mun. Util. Dist.* v. *FERC*, 428 F.3d 294 (D.C. Cir. 2005). States now have a ready option to trap them. Using the very same theory adopted by Missouri, a State could find that an electric utility was prudent in purchasing lower-cost generation from outside a constrained area, but nonetheless disallow the congestion charges required to deliver that energy across the constraint because the State disagreed with the concept of recovering those costs.

Second, transmission line loss charges are susceptible to the same theory. See generally *Black Oak Energy*, 725 F.3d at 235 (noting controversy over the over-recovery of transmission losses). These charges represent an unavoidable cost of delivering power over long distances due to resistance (*i.e.*, Ohm's law). "[L]osses are a function of 'the amount of the current flowing on the wire[,] * * * the resistance it encounters,' and the distance it travels." *Id.* at 234 (quoting *Sithe/Independence Power Partners, L.P.* v. *FERC*, 285 F.3d 1, 2 (D.C. Cir. 2002)). Using Missouri's theory, however, a State could find that purchasing generation from an out-of-state source was reasonable, but disallow the cost of transmission losses associated with transporting that energy.

Finally, there is nothing unique in Missouri's rate recovery *procedures* that would stop its preemption theory from spreading to other States. Although FERC has exclusive jurisdiction over unbundled charges for interstate transmission and wholesale

generation, state public service commissions determine whether and when these charges can be recovered from retail customers. See, *e.g.*, David Boonin, Nat'l Regulatory Research Inst., *Aligning a Utility's Interests with the Public Interest in Cost-Effective Purchased Power Transactions* (Apr. 6, 2009), http://www.nrri.org/pubs/electricity/NRRI_purchased_power_alignment_tools_apr09-05.pdf. This state-level review can, as here, focus primarily on various generation resource options. See *Sw. Elec. Power Co.*, Application for Certification of a Contract for the Purchase of Capacity, La. Pub. Serv. Comm'n Docket No. U-29702 (July 24, 2006) (considering the cost of transmission services to deliver various generation options); *Sw. Elec. Power Co.*, Petition for Declaratory Order, Ark. Pub. Serv. Comm'n, Docket No. 12-008-U (Feb. 8, 2012) (considering the cost of delivery from third-party purchase power alternatives).

But that review need not be so specific for the Missouri loophole to come into play. The costs of new generation, as well as every other cost (including FERC-approved transmission costs), are routinely considered in "rate cases" in which the States review the reasonableness of *all* charges. See, *e.g.*, Regulatory Assistance Project, *Electricity Regulation in the US: A Guide* § 9.2 (Mar. 2011) (*Electricity Regulation*), www.raponline.org/document/download/id/645; Karl McDermott, EEI, *Cost of Service Regulation in the Investor-Owned Electric Utility Industry*, at 8-12 (June 2012) (*Cost of Service Regulation*). The temptation to "trap" costs approved by another regulator (FERC) in these cases is obvious and growing every day: the enormous capital investments being made by the industry are creating a spiral of ever-increasing electricity rates to consumers. *The Math*

Does Not Lie at 9. Even in States that use selective "riders" to allow recovery of charges outside the normal rate case process, *Cost of Service Regulation* at 39; *Electricity Regulation* at 69-72, utilities must still take initial action in the state commissions to request approval to recover FERC-jurisdictional charges from retail consumers. The Missouri loophole can therefore spread to every State and infect any ratemaking procedure.

EEI is not contending that States have no authority over decisions made by their jurisdictional electric utilities that relate to interstate markets. For example, in exercising jurisdiction over retail sales, a State may lawfully establish procedures for considering the most economic generation resource to serve retail customers (*e.g.*, through competitive solicitations or integrated resource planning). See *Electricity Regulation* at 73-76 (describing integrated resource planning to review investments before they are made); *Competitive Procurement* at 10-46 (describing competitive solicitations for new resources). It can also be assumed that a State might consider the prudence of the quantity of a FERC-regulated power purchase. *Nantahala*, 476 U.S. at 972 ("Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*."). What the States may not do, however, is what Missouri did here: find that an out-of-state generation resource is economic, but cherry-pick out the FERC-regulated costs for disallowance. "Such a 'trapping' of costs is prohibited." *Id.* at 970.

CONCLUSION

FERC's regulation of interstate markets cannot succeed, and the transformational changes confronting the electric utility industry cannot be successfully managed, if states are free to disallow FERC-approved charges any time they disagree in "concept" with them. The Court should grant the petition for writ of certiorari.

Respectfully submitted,

EDWARD H. COMER
HENRI D. BARTHOLOMOT
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-5000

JOHN S. MOOT
Counsel of Record
KARIS ANNE GONG
CHRISTOPHER R. HOWLAND
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
John.Moot@skadden.com

Attorneys for Amicus Curiae

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