Edison Electric INSTITUTE | News

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Brian L. Wolff Named EEI's Chief Strategy Officer

(January 13, 2022) — The Edison Electric Institute (EEI) today announced that Executive Vice President of Public Policy and External Affairs Brian Wolff also has been named EEI's Chief Strategy Officer in recognition of his demonstrated leadership, political acumen, and the creative and focused approach he takes to advancing EEI's public policy priorities on behalf of America's investor-owned electric companies.

"By approving this expansion of Brian's role and his responsibilities, EEI's Board has recognized the ongoing value that Brian delivers on behalf of EEI's member companies," said EEI President Tom Kuhn. "Brian is at the forefront of promoting our industry's clean energy transformation and recently led a delegation of member company executives in Glasgow during the COP26 climate change meetings. He has helped to strengthen the issue management process and advocacy efforts of EEI through his work to advance our strategic priorities and to meet the growing opportunities and challenges facing our industry and the customers and communities we serve," added Kuhn.

In 2021, Wolff was named one of The Hill's top lobbyists and was included on the Washingtonian's list of most influential people. He serves as co-chair of the Stanford Professionals in Energy alumni group and actively supports the University of Arkansas, where he serves on the university's Alumni Board and is a member of the Chancellor's Society. In addition, Wolff serves on the boards of the Public Affairs Institute, Capital Area REACH program, and the Franklin Delano Roosevelt Institute. He is a Presidential Leadership Scholar, having completed this prestigious program in 2018.

Wolff directs EEI's communications and member engagement, customer solutions, government relations, and political and external affairs teams. He also serves as the executive vice president of the Edison Foundation.

About EEI

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for nearly 250 million Americans, and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 70 international electric companies, with operations in more than 90 countries, as International Members, and hundreds of industry suppliers and related organizations as Associate Members.

Edison Electric INSTITUTE

Emily Sanford Fisher

Executive Vice President, Clean Energy, and General Counsel & Corporate Secretary

Emily Sanford Fisher is Executive Vice President, Clean Energy, and General Counsel & Corporate Secretary for the Edison Electric Institute (EEI) in Washington, D.C. EEI is the trade association that represents all U.S. investor-owned electric companies. Emily oversees and coordinates clean energy policy engagement across EEI and across the federal government. She also is responsible for managing EEI's litigation and legal affairs, covering a wide range of energy and environment regulatory and policy issues, at the state and federal level. Both the Office of the General Counsel and the Environment Department at EEI report to her.

Prior to joining EEI in 2008, Emily was a Foreign Service Officer with the U.S. Department of State. She served at the U.S. Embassies in Bangkok, Thailand and Bogotá, Colombia. She also worked at the law firms Dewey Ballantine llp and Dickstein Shapiro llp in Washington, D.C., representing investor-owned electric companies and independent power producers in a range of regulatory proceedings and transactions.

Emily received a B.A. in international affairs with a concentration in economics from the George Washington University and a J.D. from Georgetown University Law Center, where she was the Administrative Editor of The Georgetown Environmental Law Review. She is admitted to practice law in Maryland and the District of Columbia. She was 2014-2017 Co-Chair of the American Bar Association's Committee on Climate Change, Sustainable Development and Ecosystems and is currently one of that group's Vice Chairs for Deep Decarbonization. She serves on the Board of the Energy Bar Association and was appointed to the Energy Systems Integration Group's Advisory Council in 2019.

Emily lives in Washington, D.C. with her husband and son. A proud Washingtonian, she serves on the Advisory Board of CityYearDC, a national service program that brings educational support to D.C. public schools.

Case No. ER-2024-0189
Schedule JG-s2

Statement of the Edison Electric Institute

Submitted to the

Congressional Caucus on Coal

May 25, 2010

"Economic Impacts of Coal"

I am Quinlan Shea, Executive Director, Environment, for the Edison Electric Institute (EEI). EEI is the trade association of U.S. shareholder-owned electric utilities, with international affiliates and industry associates worldwide. The U.S. members of EEI serve 95 percent of the ultimate electricity customers in the shareholder-owned segment of the industry, and represent approximately 70 percent of the total U.S. electric power industry.

I appreciate the opportunity to appear before the Congressional Caucus on Coal to speak on the economic impacts of coal and the electric power sector. Coal and electricity are inextricably linked. Coal comprises close to 50 percent of the U.S. generation portfolio, will continue to be our largest fuel source for electricity generation going forward, and is essential to the growth needed for our national economic recovery. EEI and our member companies are committed to the continued use of this critical resource to generate power to meet future growth in the demand for electricity, and to ensure the continued reliability and affordability of our electric power supply while meeting the nation's environmental and climate goals.

Coal Will Continue to Play a Key Role in Electric Generation Due to Its Reliability, Affordability and Abundant Domestic Supply.

The demand for energy in the United States, particularly electricity, continues to grow. Electricity is essential for powering our homes, businesses and industries. Electricity also is a strong component in our national economic recovery, with many of the jobs that will be created as part of our recovery dependent on electricity in some form. And, in what is likely to be an increasingly carbon-constrained future, electricity will be the fuel of choice, powering computers and other electric appliances, as well as new electrotechnologies, such as electric vehicles and the Smart Grid.

To meet increasing demand, the power sector will continue to rely upon coal due to its reliability, affordability, and abundant domestic supply. We have a far larger supply of domestic coal than of any other fossil fuel used to produce electricity. U.S. coal reserves are estimated to be one quarter of the world's known supply.

The electric power industry's "baseload" coal plants—the large (typically 500 megaWatts and above) plants that operate continuously to meet a market's minimum demand for power—generate about 45 percent of the country's electricity. Baseload coal plants also serve to ensure continued reliability of electric transmission systems. These units are an important component of maintaining adequate reserve margins, and thus have a dual function of providing power and ensuring the reliability and stability of regional transmission grids. Drawing on U.S. coal reserves, these baseload plants ensure that the country enjoys affordable and reliable power.

Coal Is Critical to Meeting Projected Increases in Electricity Demand.

Electricity demand, coal-based generation and gross domestic product (GDP) are all projected to grow at a steady pace to 2035 and beyond. While energy-efficiency improvements have had a major impact in meeting national electricity needs relative to new supply, the demand for electricity continues to increase. According to the Department of Energy's Energy Information Administration (EIA), consumer demand for electricity is projected to increase 30 percent by 2035.[1] *See Appendix, Figure 1*. This projected growth in demand is essential to ensuring continued economic growth, and coal is an essential element in meeting this demand.

Coal is the fuel source for 44.6 percent of the electricity generated in the U.S. today. *See Appendix, Figure 2*. Going forward, EIA's Annual Energy Outlook 2010 projects that coal-fired power plants will continue to supply the largest share of the nation's electricity through 2035, comprising 43.8 percent of the fuel mix in 2035.[2] *See Appendix, Figure 3*. According to EIA's forecast, coal-based generation is projected to grow from 1.81 trillion kiloWatt-hours (kWh) in 2009 to 2.31 trillion kWh in 2035, a 27-percent increase. Between 2009 and 2035, EIA projects 30.6 gigaWatts of new coal-based generation capacity will be built.[3]

[1] *See* U.S. Department of Energy, Energy Information Administration, Annual Energy Review and Annual Energy Outlook 2010, Table A8-Electricity Supply, Disposition, Prices and Emissions (Reference Case) (May 11, 2010).

[2] *See id.*, Tables A8 and A9.

[3] *See id.*, Figure 62.

Most Regions of the Country Are Heavily Dependent on Coal to Generate Electricity.

EIA data demonstrate that coal is critical to electricity generation for the nation, but this does not tell the whole story. The electricity generation mix also differs from state to state and region to region, largely depending on the availability and cost of fuels located there. *See Appendix, Figure 4*. Major changes in the generation mix can have economic and reliability impacts, especially on a regional basis. Coal-based electricity ensures affordable power, which is crucial to the health of the industrial and commercial sectors and the jobs they provide, especially in the four regions that rely on coal for at least 50 percent, and as much as 72 percent, of their electricity. *See Appendix, Figure 5.*

Continued Coal Use and Environmental Performance.

The substantial energy and economic advantages that coal provides in generating electricity must be balanced by environmental compliance and environmental excellence. The power industry is committed to ensuring that future coal use will be accompanied by continued improvements in environmental quality.

Electric companies spend billions of dollars each year on environmental practices, technology and operational measures to protect human health and the environment. As a result, air quality has improved dramatically in recent years. The power sector has reduced its annual emissions of sulfur dioxide (SO_2) by 67 percent—from over 17 million tons in 1980 to about 5.7 million tons in 2009—despite a 72 percent increase in both coal-based and fossil-based electricity generation over the same time period. *See Appendix, Figure 6*. Further progress in reducing SO_2 emissions will come from compliance with the Clean Air Interstate Rule (CAIR)—

Phase 1 began this year—and a revised "transport rule" (related to interstate transport of air emissions from power plants in the Eastern U.S.) to replace CAIR Phase 2, plus likely co-benefits from meeting Maximum Achievable Control Technology (MACT) standards for hazardous air pollutants and revised national ambient air quality standards (NAAQS) for SO_2 and particulate matter.

The power sector has reduced emissions of nitrogen oxides (NO_x) by 72 percent—from 7.0 million tons in 1980 to 2.0 million tons in 2009. Due largely to Phase 1 of CAIR, the electric power sector reduced its NO_x emissions from 3 million tons in 2008 to 2 million tons in 2009. Emissions will be further controlled under the "transport rule" that will replace CAIR Phase 2, plus likely co-benefits from meeting MACT standards for hazardous air pollutants and revised NAAQS for NO_2, ozone and particulate matter.

As we strive to make improvements going forward, there are many environmental issues facing the electric power industry that have implications for our existing fleet of coal-fueled generating units and on decisions whether to build new plants. Within the next two years, the Environmental Protection Agency (EPA) is expected to take action on a number of air, water and waste issues, including:

- The interstate transport rule replacing the Clean Air Interstate Rule to reduce power plant emissions of SO_2 and NO_x in the eastern U.S.
- New MACT standards addressing mercury and other hazardous air pollutants.
- Continued reexamination of National Ambient Air Quality Standards, including ozone, particulate matter, SO_2 and nitrogen dioxide (NO_2).

- More stringent standards for cooling water structures and new effluent discharge guidelines for utilities.
- New standards addressing the disposal of waste from coal combustion.

EPA recently proposed a rulemaking that includes an option to regulate the disposal of waste from coal combustion as "hazardous waste." More than 136 million tons of coal combustion byproducts (CCBs) are generated annually and are currently managed under state regulatory authority. If EPA adopts a hazardous waste approach to addressing CCBs, this could lead to the closure of existing disposal facilities (*i.e.*, ash ponds), result in significant compliance costs—as much as $20 billion annually – and threaten industries that "recycle" coal ash for beneficial uses, such as concrete and wall board.

EEI is working with EPA to make sure that the Agency considers all of the ramifications of a reclassification of CCBs as hazardous waste. EEI also has joined with a broad group of stakeholders—including governors, mayors, state environmental regulatory agencies and ash end-users and recyclers—in support of regulation of CCBs as non-hazardous waste.

Compliance with these regulatory actions noted above could require substantial retrofitting of the existing coal fleet with a suite of costly pollutions controls and will have implications for the siting and permitting of new coal-fueled electric generating facilities. Moreover, these requirements—each of which is being developed at EPA independently, and often without recognition of the potential cumulative impact on the coal fleet (*see Appendix, Figure 7*)—may be difficult to accomplish in the timeframes allowed, due to engineering, labor and materials challenges.

EEI and our member companies are engaged in ongoing dialogs with EPA on all of these environmental challenges to craft regulations and policies that take into account the importance of coal in terms of the reliability and affordability of our national power supply.

Technology development also is a critical factor in maintaining coal as a major part of our generation portfolio while improving environmental performance. Behind the dramatic emissions reductions noted earlier is our industry's commitment to improving the technologies that we use to generate electricity. To maintain coal's viability in a lower-emissions future, the electric power sector continues efforts to develop and deploy advanced clean coal generating technologies. These new plants promise to operate much more efficiently and cleanly than existing conventional coal-fired plants. Examples of new advanced coal technologies include advanced supercritical pulverized coal and integrated gasification combined cycle units. The lead time for building new units, however, is extensive due not only to engineering complexity, but also due to the difficulty in obtaining required preconstruction environmental permits. Even permits for advanced coal technology projects are subjected to challenges that can lead to lengthy and costly construction delays.

We do not have to choose between affordable, reliable electricity and a clean environment. The environmental challenges to continued coal combustion in electricity production are not insignificant, but continued investments in, and deployment of, these advanced coal technologies will help the power sector as it strives to achieve the nation's environmental goals.

The Potential Impacts of An Inflexible Regulatory Regime.

Without proper coordination of EPA regulatory initiatives on air quality, water and coal ash, there is a real danger that the implementation of these rules will result in untenable risks to both the economics and reliability of the electricity generation system, including the near-term retirement or conversion to natural gas of a substantial portion of the coal-fired generation fleet.

For example, requiring control technology retrofits in too compressed a time frame will strain the ability of materials producers and equipment suppliers to deliver goods at acceptable price levels, leading to higher costs for labor and materials. These premiums will lead to higher electricity costs for consumers.

Furthermore, aggressive, inflexible implementation schedules may also lead to outright shortages of materials and labor, which would make it impossible for utilities to comply by regulatory deadlines. Units that cannot meet deadlines would need to be taken offline until retrofits could be completed. This will lead to reliability issues for the overall electric generation system if reliability guidelines, such as minimum reserve margins, cannot be maintained.

There also is a possibility that the permits needed to install new and retrofit control technologies cannot be issued by overburdened state regulators in a timely fashion, jeopardizing a utility's ability to comply with the new requirements.

However, working within the existing regulatory structures, with careful coordination between EPA offices, there may be a more logical, cost-effective, and reliability-sensitive path

forward. This path could achieve the same environmental endpoint, but, properly managed, could avoid or greatly reduce the risks to costs and reliability outlined above. This path would allow for methodical retrofitting of existing coal-fueled generation over a reasonable timeline; allow for continued environmental improvement; minimize the economic impact to consumers; and allow time for new, high-efficiency advanced coal technologies to be permitted and built as replacement generation.

Coal's Continuing Role in a Carbon-Constrained World.

The electric utility industry is committed to working with Congress to achieve greenhouse gas (GHG) legislation that will result in significant emissions reductions across the economy between now and 2050. Under any scenario, these reductions will be expensive, but the wisest, most economic, way to accomplish them in the power sector is through the development and deployment of the full portfolio of climate technologies and measures over the long term. A key component of this full portfolio is advanced coal technologies integrated with carbon capture and storage (CCS). Analysis by the Electric Power Research Institute (EPRI) shows that the price of electricity will increase in a carbon-constrained world, but that the impact on electricity customers is reduced when the full portfolio of options is available for cutting emissions.[4]

Again, technology is the key to meeting environmental goals. To maintain coal's viability in a low-carbon future, our industry is developing advanced coal with CCS capabilities. Demonstration projects, like that at American Electric Power Co.'s Mountaineer Plant in West

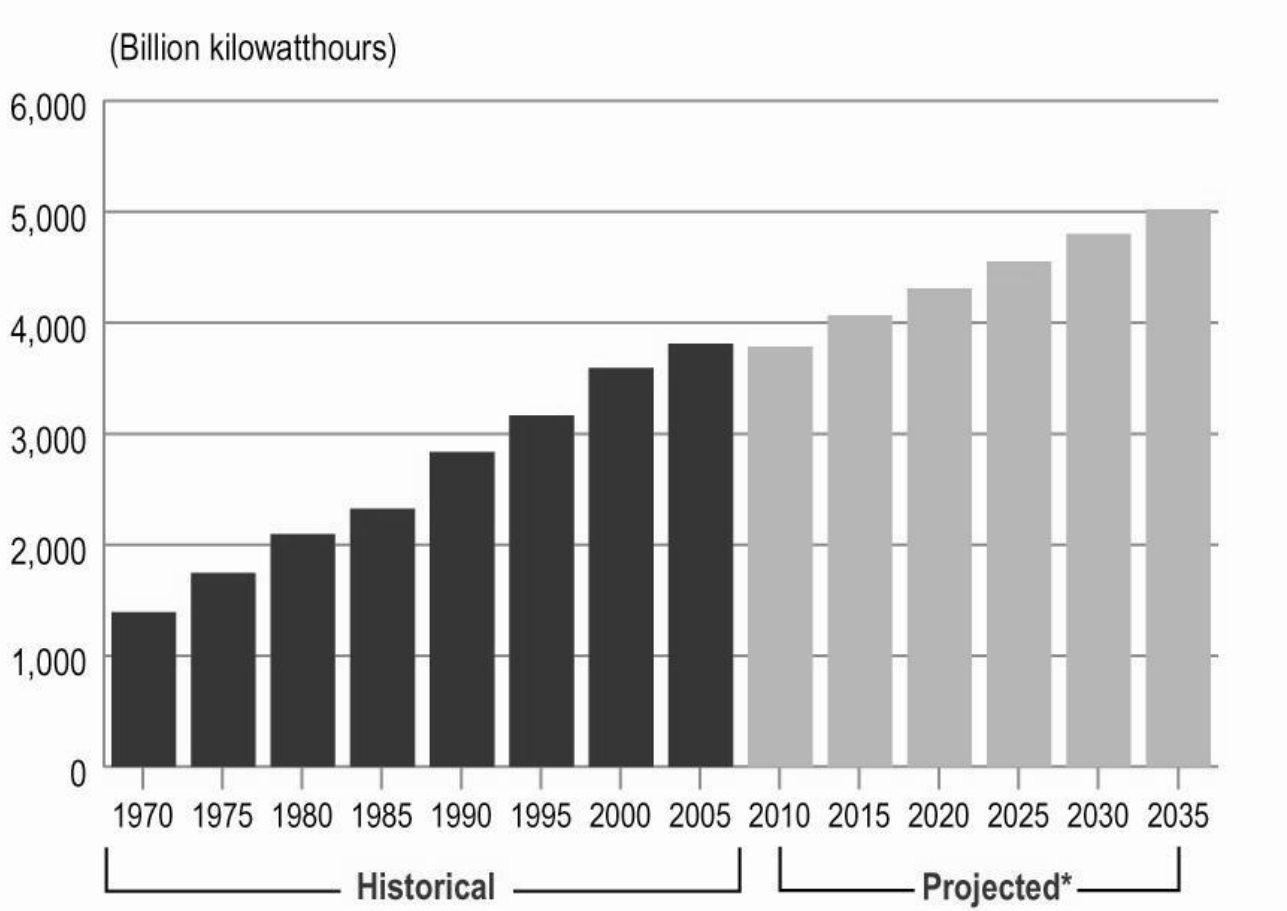
[4] EPRI, The Power to Reduce CO_2 Emissions – The Full Portfolio, Report 1015461 (Aug. 2007), available at http://mydocs.epri.com/docs/public/DiscussionPaper2007.pdf.

Virginia, are critical for demonstrating these technologies at scale and helping to reduce their costs. Additional work needs to be done to address gaps in the legal and regulatory structure for deploying CCS, but steps are being taken to ensure that CCS is ready to be deployed to help reduce emissions from coal-fired generation as early as the 2020-2025 time frame.

Thank you for this opportunity to testify before the Caucus today on the value and economic implications of coal to the electric power sector and the nation.

Appendix

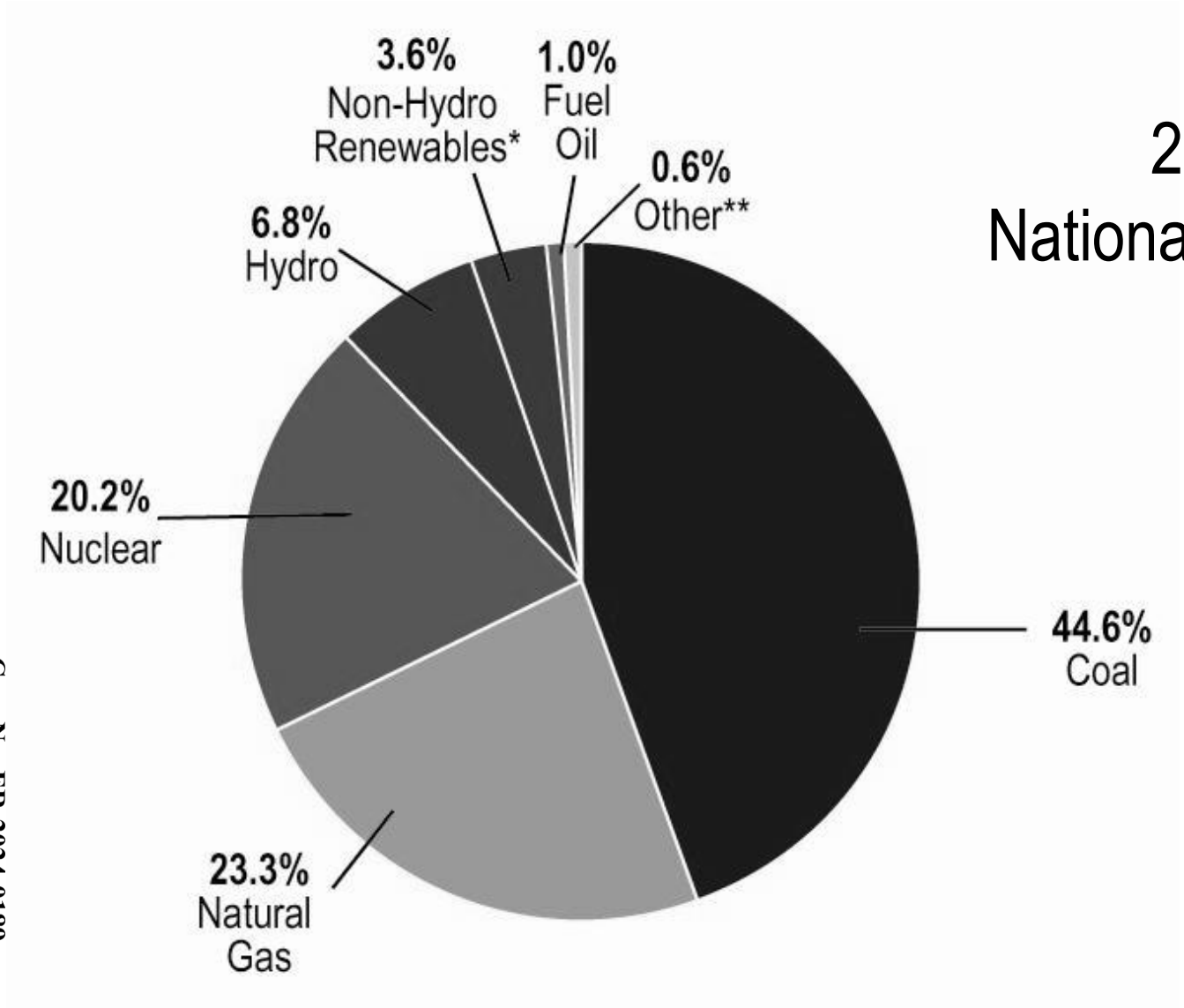
Figure 1: Demand for Electricity Is Projected To Increase 30% by 2035



*Electricity demand projections based on expected growth between 2008 and 2035.

Source: U.S. Department of Energy, Energy Information Administration, Annual Energy Review and Annual Energy Outlook 2010, April 2010, Table A8-Electricity Supply, Disposition, Prices, and Emissions (Reference Case).

Figure 2: Electric Companies Use a Diverse Mix Of Fuels to Generate Electricity



2009 National Fuel Mix

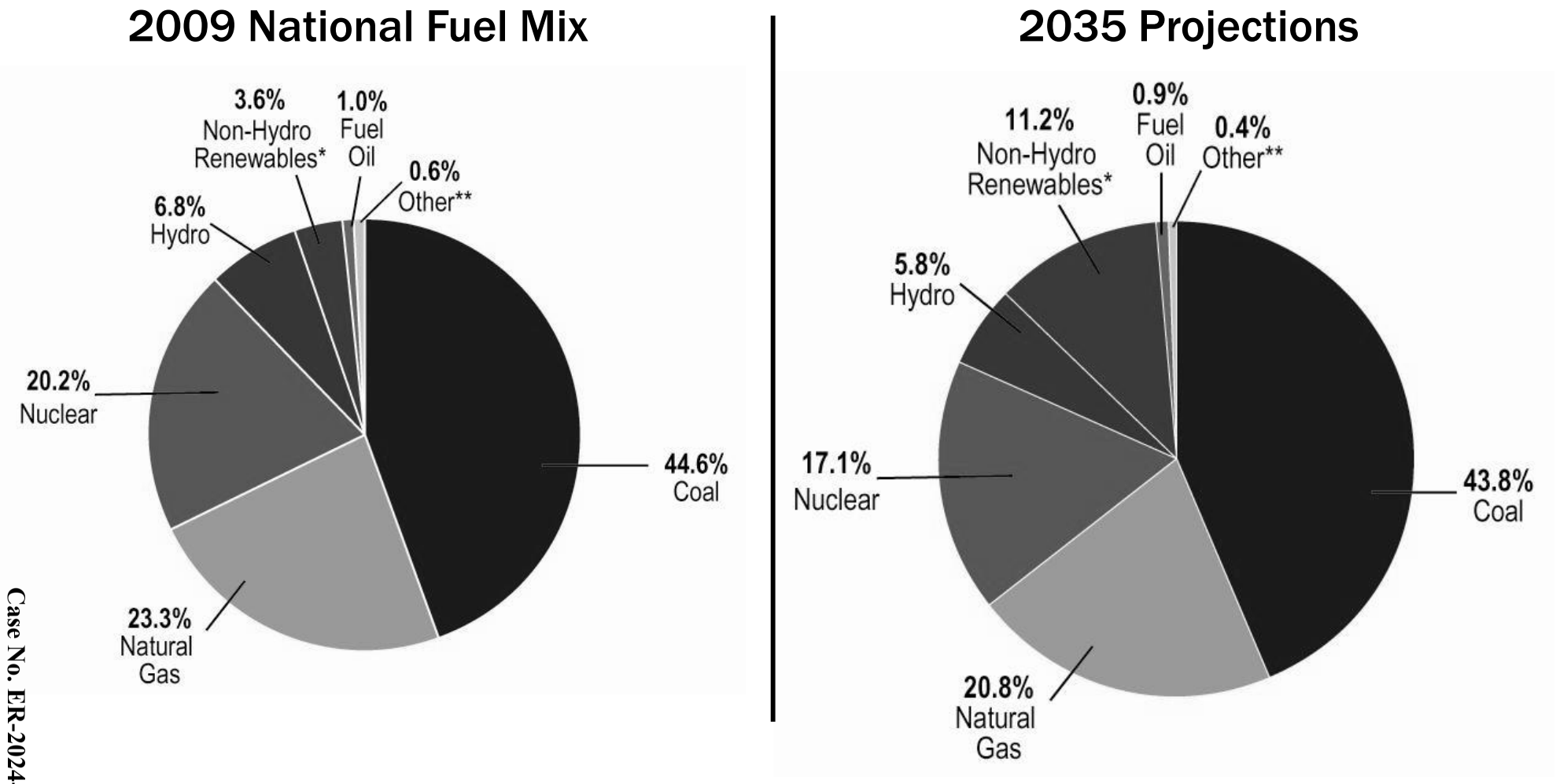
*Includes generation by agricultural waste, landfill gas recovery, municipal solid waste, wood, geothermal, non-wood waste, wind, and solar.

** Includes generation by tires, batteries, chemicals, hydrogen, pitch, purchased steam, sulfur, and miscellaneous technologies.

Sum of components do not add to 100% due to independent rounding.

Source: U.S. Department of Energy, Energy Information Administration, Power Plant Operations Report (EIA-923); 2009 preliminary data.

Figure 3: Current National Fuel Mix Compared To EIA's 2035 Projections



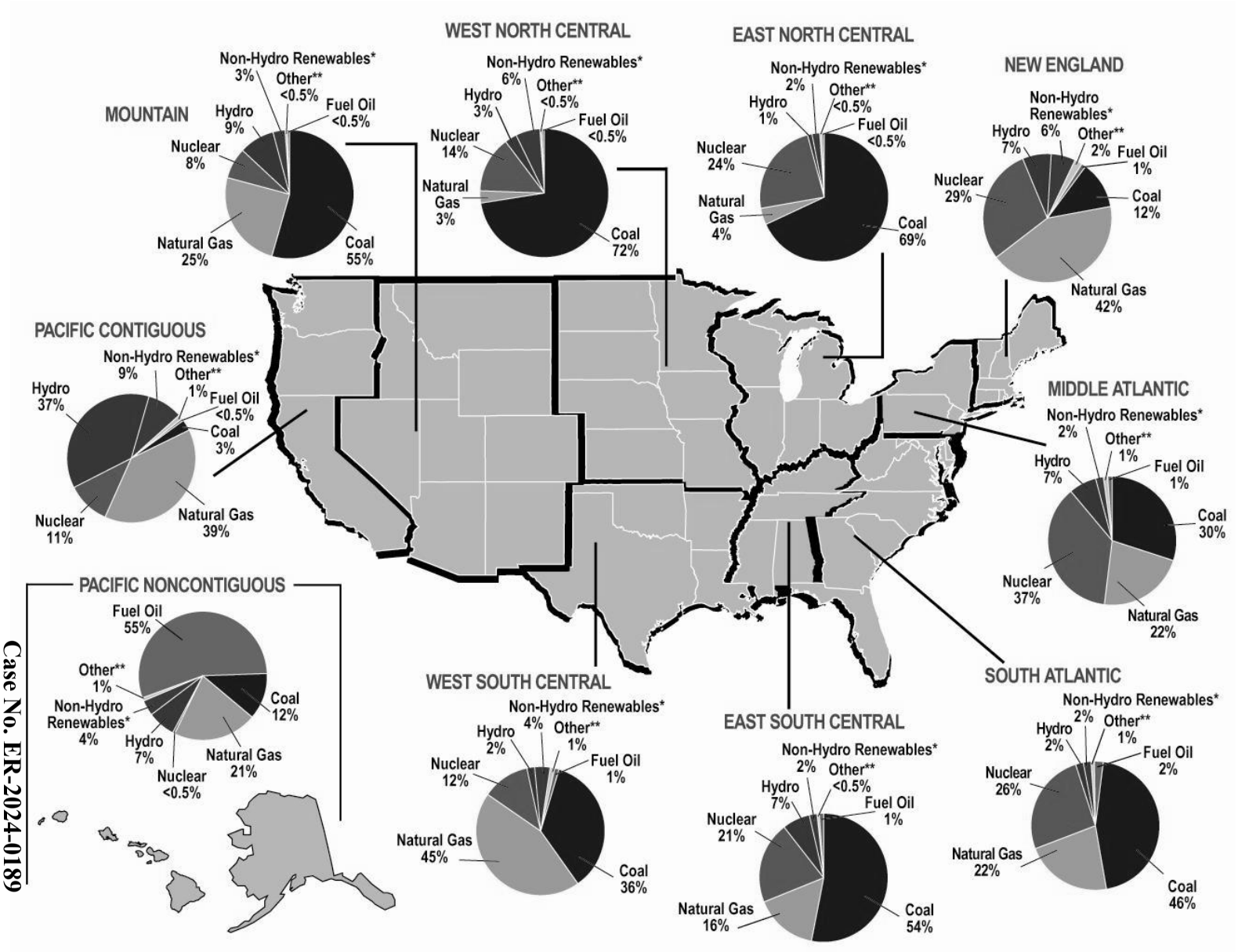
*Includes generation by agricultural waste, landfill gas recovery, municipal solid waste, wood, geothermal, non-wood waste, wind, and solar.

** Includes generation by tires, batteries, chemicals, hydrogen, pitch, purchased steam, sulfur, and miscellaneous technologies. Sum of components do not add to 100% due to independent rounding.

Source 2009 Preliminary: U.S. Department of Energy, Energy Information Administration, Power Plant Operations Report (EIA-923); 2009 preliminary generation data.

Source 2035 Forecast: U.S. Department of Energy, Energy Information Administration, *EIA Annual Energy Outlook 2010, Table A8,* and EEI estimates.

Figure 4: Different Regions of the Country Use Different Fuel Mixes to Generate Electricity



*Includes generation by agricultural waste, landfill gas recovery, municipal solid waste, wood, geothermal, non-wood waste, wind, and solar.

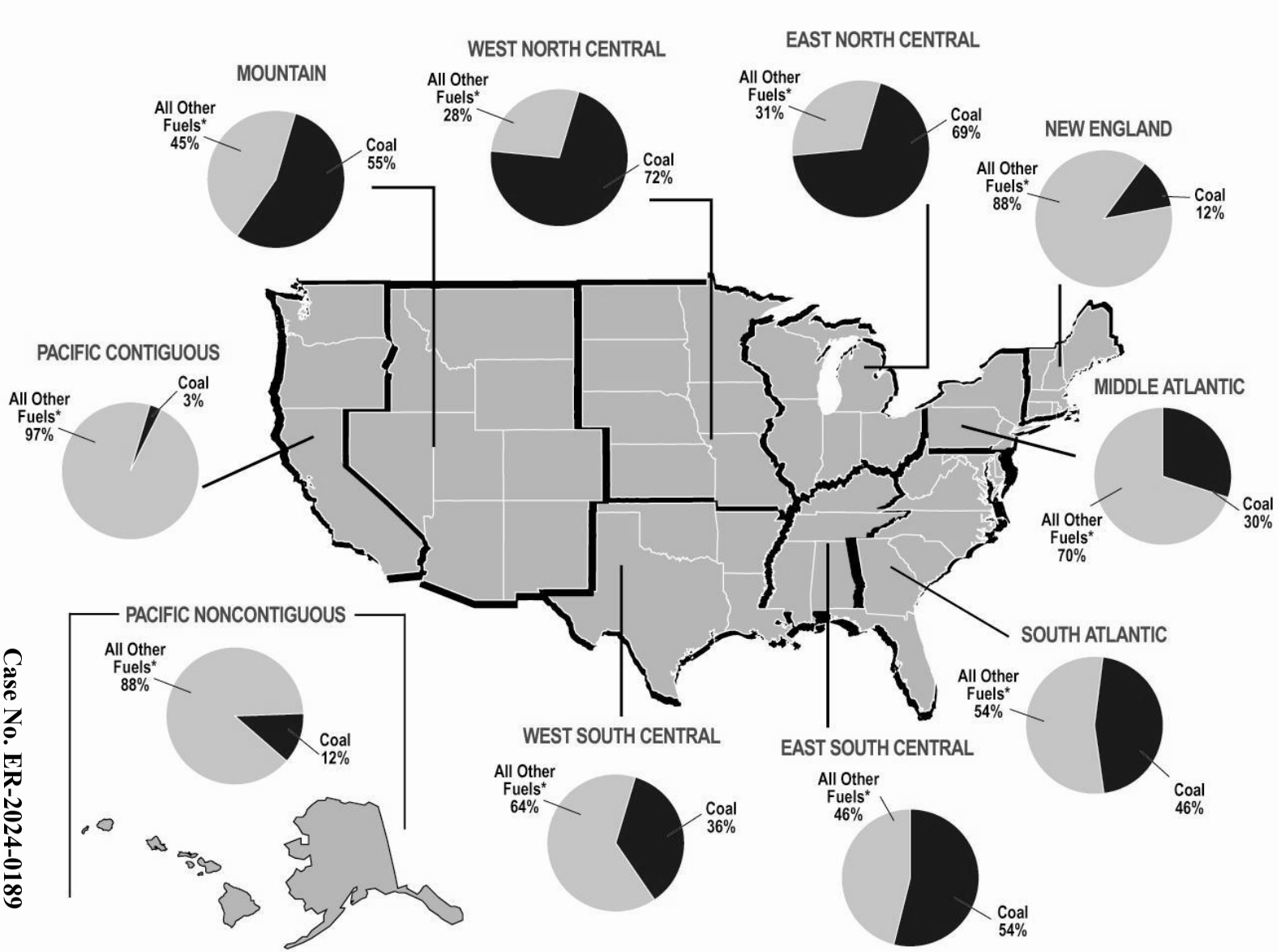
** Includes generation by tires, batteries, chemicals, hydrogen, pitch, purchased steam, sulfur, and miscellaneous technologies.

Sum of components may not add to 100% due to independent rounding.

Source: U.S. Department of Energy, Energy Information Administration, Power Plant Operations Report (EIA-923); 2009 preliminary generation data.

May 2010

Figure 5: Most Regions of the Country Are Heavily Dependent on Coal to Generate Electricity

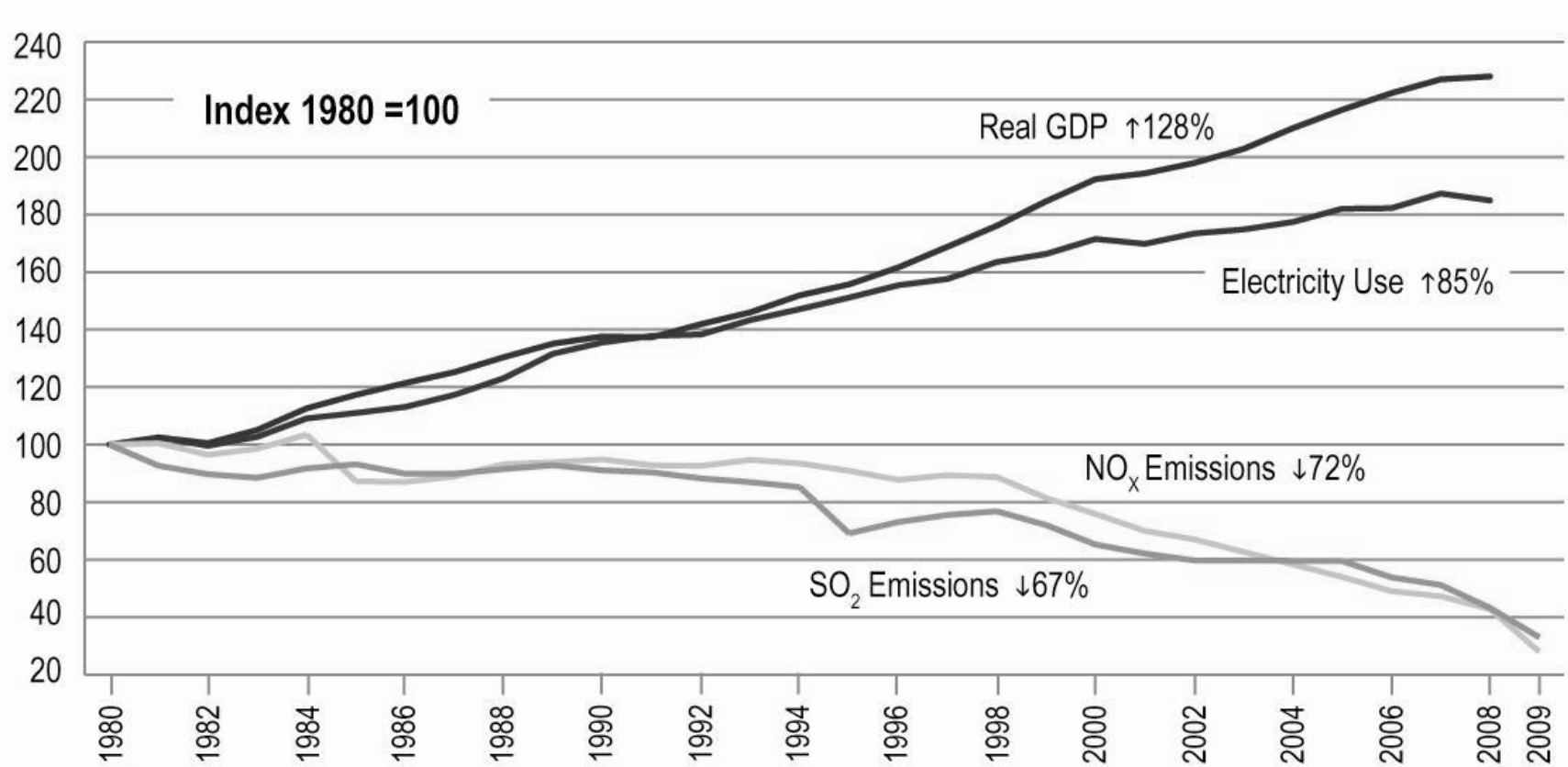


*"All Other Fuels" includes generation by oil, natural gas, nuclear, hydro, non-hydro renewables (*agricultural waste, landfill gas recovery, municipal solid waste, wood, geothermal, non-wood waste, wind, and solar*), and other sources (*tires, batteries, chemicals, hydrogen, pitch, purchased steam, sulfur, and miscellaneous technologies*).

Source: U.S. Department of Energy, Energy Information Administration, Power Plant Operations Report (EIA-923); 2009 preliminary generation data.

May 2010

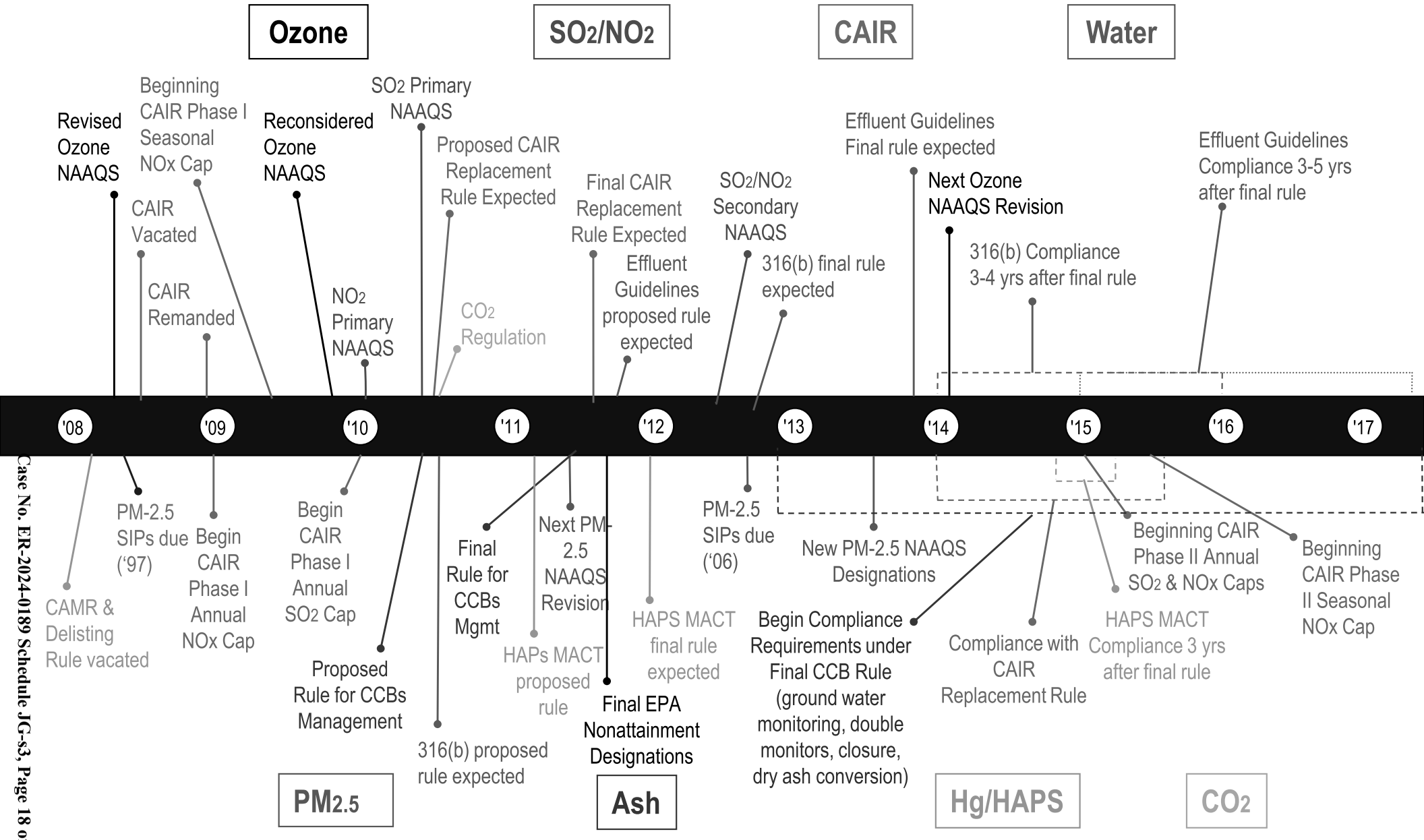
Figure 6: Power Plants Reduce Emissions Despite Increasing Electricity Demand



1980 represents the base year. Graph depicts increases or decreases from the base year.

Sources: U.S. Department of Energy, Energy Information Administration (EIA), U.S. Environmental Protection Agency (EPA), and U.S. Bureau of Economic Analysis.

Figure 7: Possible Timeline for Environmental Regulatory Requirements for the Utility Industry



-- adapted from Wegman (EPA 2003) Updated 2.15.10

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

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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.

Respectfully submitted,

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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-

[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,

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February 3, 2014

KCPL GMO
Case Name: 2016 GMO Rate Case
Case Number: ER-2016-0156

Response to Taylor Jason Interrogatories - MPSC_20160818
Date of Response: 8/26/2016

Question:0445

1) Please provide all invoices from EEI since January 2014 through the present for Kansas City Power & Light Company (KCPL) and KCP&L Greater Missouri Operations Company (GMO). 2) Please provide all correspondences with EEI since January 2014 through the present. 1) Reference GMO's appeal to the Supreme Court of the United States, Case No. 13-787. Did KCPL, GMO, or any of its representatives, request EEI to file an Amicus Brief in support of GMO? Did KCPL, GMO, or any of its representatives assist EEI in developing its Amicus Brief? DR requested by Jason Taylor Jason.taylor@psc.mo.gov.

Response:

1.) Yes, KCP&L requested EEI consider filing an Amicus Brief in Case No. 13-787.
2.) KCP&L did not assist EEI in developing its Amicus Brief.
3.) Please see attachments below to view each EEI voucher from 2014 – current.

Prepared by: Melissa Tye, Corporate Planning and Budget

Attachments:
Q0445_R0370967.pdf
Q0445_R0386604.pdf
Q0445_R0415475.pdf
Q0445_R0425103.pdf
Q0445_R0485020.pdf
Q0445_R0485541.pdf
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No. ____

In the Supreme Court of the United States

EDISON ELECTRIC INSTITUTE, OKLAHOMA GAS AND ELECTRIC COMPANY, AND IDAHO POWER COMPANY,
Applicants,

v.

ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, United States Environmental Protection Agency,
Respondents.

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT

APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING APPELLATE REVIEW

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PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

Applicants are Edison Electric Institute, Oklahoma Gas and Electric Company, and Idaho Power Company. Respondents are the United States Environmental Protection Agency and Michael Regan, in his official capacity as Administrator of the United States Environmental Protection Agency.

The parties to the consolidated proceedings below are:

Petitioners: State of West Virginia; State of Alabama; State of Alaska; State of Arkansas; State of Florida; State of Georgia; State of Idaho; State of Indiana; State of Iowa; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of New Hampshire; State of North Dakota; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Tennessee; State of Texas; State of Utah; Commonwealth of Virginia; State of Wyoming; America's Power; Appalachian Region Independent Power Producers Association; Edison Electric Institute (also an Intervenor); Electric Generators for a Sensible Transition; Idaho Power Company; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO; International Brotherhood of Electrical Workers, AFL-CIO; Midwest Ozone Group; Montana-Dakota Utilities Co.; National Mining Association; National Rural Electric Cooperative Association; Oklahoma Gas and Electric Company; Rainbow Energy Center, LLC; NACCO National Resources Corporation; United Mine Workers of America, AFL-CIO; Westmoreland Mining Holdings LLC; Westmoreland Mining LLC; and Westmoreland Rosebud Mining LLC.

Intervenors: State of New York; State of Arizona; State of Colorado; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of Michigan; State of Minnesota; State of New Jersey; State of New Mexico; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania; State of Rhode Island; State of Vermont; State of Washington; State of Wisconsin; District of Columbia; City and County of Denver; City of Boulder; City of Chicago; City of New York; California Air Resources Board; American Lung Association; American Public Health Association; Clean Air Council; Clean Wisconsin; Consolidated Edison, Inc.; Edison Electric Institute (also a Petitioner); Louisiana Public Service Commission; Natural Resources Defense Council; New York Power Authority; Pacific Gas and Electric Company; Power Companies Climate Coalition; Sacramento Municipal Utility District; and Tennessee Valley Public Power Association, Inc.

Amici Curiae: The Chamber of Commerce of the United States of America; Environmental Defense Fund; Professor Rachel Rothschild; and Sierra Club.

The related proceedings are:

West Virginia v. *EPA,* No. 24-1120 (D.C. Cir.) (lead case), consolidated with: *Ohio* v. *EPA,* No. 24-1121 (D.C. Cir.); *National Rural Electric Cooperative Association* v. *EPA,* No. 24-1122 (D.C. Cir.); *National Mining Association* v. *EPA,* No. 24-1124 (D.C. Cir.); *Oklahoma Gas and Electric Company* v. *EPA,* No. 24-1126 (D.C. Cir.); *Electric Generators for a Sensible Transition* v. *EPA,* No. 24-1128 (D.C. Cir.); *United Mine Workers of America* v. *EPA,* No. 24-1142 (D.C. Cir.); *International Brotherhood of Electrical Workers*

v. *EPA,* No. 24-1143 (D.C. Cir.); *International Brotherhood of Boilermakers* v. *EPA,* No. 24-1144 (D.C. Cir.); *Midwest Ozone Group* v. *EPA,* No. 24-1146 (D.C. Cir.); *Edison Electric Institute* v. *EPA,* No. 24-1152 (D.C. Cir.); *NACCO Natural Resources Corporation* v. *EPA,* No. 24-1153 (D.C. Cir.); *Idaho Power Company* v. *EPA,* No. 24-1155 (D.C. Cir.); *Appalachian Region Independent Power Producers Association* v. *EPA,* No. 24-1222 (D.C. Cir.); *Rainbow Energy Center, LLC* v. *EPA,* No. 24-1226 (D.C. Cir.); *Montana-Dakota Utilities Co.* v. *EPA,* No. 24-1227 (D.C. Cir.); and *Westmoreland Mining Holdings LLC* v. *EPA,* No. 24-1233 (D.C. Cir.).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants submit the following corporate disclosure statement.

Applicant Edison Electric Institute ("EEI") states that it is a national association of investor-owned electric utility companies. It has no parent companies, subsidiaries, or affiliates. EEI has no outstanding shares or debt securities in the hands of the public, and no publicly owned company has a 10% or greater ownership interest in EEI.

Applicant Oklahoma Gas and Electric Company ("OG&E") states that it is a wholly owned subsidiary of OGE Energy Corp., a holding company that is exempt from registration under the Public Utility Holding Company Act of 2005. The Vanguard Group and BlackRock Fund Advisors each has a 10% or greater ownership interest in OGE Energy Corp. No other publicly held company has a 10% or greater ownership interest in OGE Energy Corp. OGE Energy Corp. has no parent company.

Applicant Idaho Power Company states that it is a wholly owned subsidiary of IDACORP, Inc., an Idaho corporation. The publicly traded corporation, IDACORP, Inc., owns 100% of the stock of Idaho Power Company. The Vanguard Group (11.41% as of its most recent filing with the U.S. Securities and Exchange Commission ("SEC") on February 13, 2024), and BlackRock, Inc. (11.8% as of its most recent filing with the SEC on January 23, 2024) hold a 10% or greater ownership interest in IDACORP, Inc. IDACORP, Inc. has no parent company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulatory Authorities

Books

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Applicants Edison Electric Institute ("EEI"), Oklahoma Gas and Electric Company ("OG&E"), and Idaho Power Company ("IPC") request an immediate stay of the United States Environmental Protection Agency's ("EPA") final rule entitled *New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 89 Fed. Reg. 39,798 (May 9, 2024) (the "Final Rule").

INTRODUCTION

Applicants challenge EPA's determination that carbon capture and storage/sequestration ("CCS") has been adequately demonstrated as the best system of emission reduction ("BSER") under Section 111 of the Clean Air Act despite no operating plants anywhere deploying this technology and achieving the 90%-CO_2-capture required by EPA. Applicants support EPA's established authority to regulate greenhouse-gas emissions under the Act. Applicants will also continue to achieve significant carbon emission reductions through their own voluntary efforts. But EPA cannot violate statutory directives in exercising its regulatory muscles. It crossed that line in the Final Rule.

As relevant here, EPA's statutory charge is to set a "standard of performance * * * which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which * * * has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). But rather than analyze the emission-reduction technologies that

"ha[ve] been adequately demonstrated," EPA instead turned to a system still very much in the beginning phases of development—CCS—and declared it as the BSER for large swaths of the power industry. Then, based on application of that theoretical CCS system, EPA set a 90%-carbon-capture standard of performance that has never been "adequately demonstrated" and is not "achievable." EPA's setting of this impossible standard directly contradicts the statutory text and constitutes arbitrary and capricious agency action, which means that Applicants are highly likely to succeed on the merits of their challenge to the Final Rule.

Applicants cannot wait for ultimate vindication, however, because they face imminent and unavoidable irreparable harm. To both comply with the Final Rule's CCS deadlines and bring new, needed power online in time to meet growing demand, companies must spend many millions of dollars and make irreversible choices among compliance options *now*. See App.763 (Declaration of Ryan Adelman); App.777 (Declaration of Erik Bakken); App.794 (Declaration of Matthew Bulpitt); App.808 (Declaration of Robert Burch). These costs cannot be recovered for utilities or their customers if the Final Rule is later vacated. As this Court recently held, incurring significant "nonrecoverable" compliance costs "during the pendency of th[e] litigation" constitutes a "strong argument[]" on "[irreparable] harm[]." *Ohio* v. *EPA*, 144 S. Ct. 2040, 2053 (2024).

The equities and public interest favor a stay as well, as power companies have a demonstrated track record of voluntarily reducing their greenhouse-gas emissions and there is no public interest in enforcing an unlawful regulation.

Further, for the Justices that consider it, there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court w[ould] vote to reverse * * * ." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). The Court has regularly granted certiorari in similarly important Clean Air Act cases over the last decade. See *West Virginia* v. *EPA*, 597 U.S. 697 (2022); *Michigan* v. *EPA*, 576 U.S. 743 (2015); *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489 (2014). The Final Rule's enormous economic implications and profound errors likewise render it an excellent candidate for review.

In sum, it is difficult to imagine a more compelling set of circumstances for a stay pending review.

DECISION BELOW

The D.C. Circuit's order denying Applicants' motion for a stay pending review is unpublished. It is reproduced at App.268-270. EPA's Final Rule is published at 89 Fed. Reg. 39,798 (May 9, 2024) and reproduced at App.001-267.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). It has the authority to grant the requested relief under the Administrative Procedure Act, 5 U.S.C. § 705; the All Writs Act, 28 U.S.C. § 1651; and Supreme Court Rule 23.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 7411(a)(1) provides:

> The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

STATEMENT

I. Statutory And Regulatory Background

Section 111 of the Clean Air Act governs performance standards for "stationary sources" of air pollution. 42 U.S.C. § 7411. It grants EPA the authority to set "standards of performance" for new sources of air pollution and to establish guidelines that States will apply to set "standards of performance" for existing sources of air pollution. *Id.* §§ 7411(b), (d). For both new and existing sources, the standards must be "achievable through application of the best system of emission reduction * * * [that] the Administrator determines *has been adequately demonstrated.*" *Id.* § 7411(a)(1) (emphasis added).

To determine the "best system of emission reduction" that "has been adequately demonstrated," "EPA first identifies the 'system[s] of emission reduction' that are 'adequately demonstrated,' and then determines the 'best' of those systems, 'taking into account' factors including 'cost,' 'non-air quality health and environmental impact,' and 'energy requirements.'" 89 Fed. Reg. at 39,824 (quoting 42 U.S.C. § 7411(a)(1)). Then, once EPA identifies the BSER, EPA and the States set a standard of performance, typically a numeric emission limit or rate that would follow from installing and operating the technology identified as the BSER.

II. EPA's Final Section 111 Rule

The Final Rule makes BSER determinations and sets standards of performance for both existing coal-fired units and new gas-fired units.[1]

For existing units, the Final Rule sets different standards of performance based on their fuel types and enforceable dates for permanently ceasing operation. 89 Fed. Reg. at 39,840-39,841. For existing coal-fired electric generating units that plan to continue operation after January 1, 2039, EPA identifies the BSER as CCS with 90% capture of emitted CO_2. *Id.* at 39,841. Based on that BSER determination, these existing coal-fired units must achieve 90% capture through CCS or an equivalent system of emissions reduction by January 1, 2032. *Id.* at 39,801.[2] For existing coal-fired units that plan to operate on or after January 1, 2032, but will retire before January 1, 2039, EPA identifies the BSER as 40% natural gas co-firing (based on the unit's annual heat input) and mandates that these units achieve 40% co-firing beginning January 1, 2030. *Id.* at 39,841, 39,890. Lastly, existing coal-fired units that plan to permanently cease operating before January 1, 2032 are exempt from any BSER requirements, but still must follow recordkeeping and reporting obligations. *Id.* at 39,801, 40,061.

For new and modified gas-fired units, the Final Rule determines the BSER and sets standards of performance based on their annual capacity factor, *i.e.*, the percentage of their maximum power output that will be produced annually. For "base load" units with a 40%

[1] To be more precise, the Final Rule regulates new gas-fired turbines, but not new gas-fired boilers.
[2] EPA has identified no technology or compliance option other than CCS that sources could use to meet that reduction requirement.

capacity factor or greater, EPA identifies CCS as the BSER and requires all sources in this subcategory to achieve 90% capture through CCS or an equivalent system of emissions reduction by 2032. *Id.* at 39,913, 39,938.[3] For "intermediate load" units that have a capacity factor between 20% and 40%, EPA identifies the BSER as highly efficient simple cycle technology with best operating and maintenance practices. *Id.* at 39,918. For "low load" units that have a capacity factor of less than 20%, EPA identifies the use of lower-emitting fuels as the BSER. *Id.* at 39,917.

III. Procedural History

After filing petitions for review in the D.C. Circuit, Applicants moved to stay the Final Rule pending judicial review on May 24, 2024. The D.C. Circuit denied Applicants' motion on July 19, 2024. App.268-270.

REASONS FOR GRANTING THE APPLICATION

The Court considers four factors when resolving a stay request: (1) likelihood of success on the merits; (2) irreparable harm to the applicant absent a stay; (3) harm to other parties from a stay; and (4) the public interest. *Ohio*, 144 S. Ct. at 2052. All four factors favor a stay. CCS technology is not "adequately demonstrated" and cannot be implemented nationwide to "achiev[e]" 90% capture of emitted CO_2. 42 U.S.C. § 7411(a)(1). Yet, absent a stay, EEI's members[4] will have to begin work *immediately* to comply with the Final Rule's new requirements and spend many millions of dollars to do so *while this litigation is pending*. The equities and public interest favor a stay as well, given power companies'

[3] EPA has identified no technology or compliance option other than CCS that sources could use to meet that reduction requirement.
[4] Both OG&E and IPC are members of EEI.

established record of voluntarily reducing their greenhouse-gas emissions and the lack of a public interest in keeping in force a patently unlawful regulation.

I. Applicants Are Likely To Prevail On The Merits.

EPA's BSER determination stacks error upon error. Its foundational error was to determine the BSER based not on what "has been adequately demonstrated," as Section 111 commands, but rather on "project[ions] [of] the development of a control system at a future time." 89 Fed. Reg. at 39,801. That disregard of its statutory charge caused EPA to exceed its authority under the Act. But at least it helps to explain how EPA erroneously concluded it should mandate a CCS system that has never achieved the required facility-wide 90% CO_2 capture in practice—for either coal- or gas-fired units. Yet even if EPA could cast aside the statutory text and rely on predictions, CCS still would be far from "adequately demonstrated" given the insurmountable barriers to building from scratch all the pieces of a 90%-CO_2-capture CCS system—which includes distinct capture, transport, and storage components—in the seven-and-a-half-year timeframe the Final Rule demands. In this way, EPA's BSER determination combines a breach of statutory authority with arbitrary and capricious action. The outcome is a high likelihood that Applicants will succeed on the merits of their challenge to the Final Rule.

A. EPA impermissibly based its standards on what may be possible in the future rather than on what "has been adequately demonstrated" now.

1. Standards of performance under Sections 111(b) and (d) must "reflect[] the degree of emission limitations achievable through the application of the best system of emission reduction which * * * the Administrator determines *has been adequately demonstrated*." 42 U.S.C. § 7411(a)(1) (emphasis added). Here, however, because EPA is

unable to show that CCS *has been* adequately demonstrated today for either coal- or gas-fired units, it pivots to claiming authority to "reasonably project the development of a control system at a future time and establish requirements that take effect at that time." 89 Fed. Reg. at 39,801; see also *ibid.* ("BSER can be forward-looking in nature and take into account anticipated improvements in control technologies."); *id.* at 39,830 n.202 (arguing that EPA may "make a projection regarding the way in which a particular system will develop to allow for greater emissions reductions in the future"); *id.* at 39,831 (defending the propriety of making a "projection of what that particular system may be expected to achieve going forward"); *id.* at 39,878 n.610 ("EPA may extrapolate based on its findings and project technological improvements in a variety of ways.").

But the question—as set forth in the statute's plain text—is not what technology may be developed in the future; it is what "*has been* adequately demonstrated" today. 42 U.S.C. § 7411(a)(1) (emphasis added). Contemporaneous dictionaries confirm the already evident meaning of that text. "Demonstrate" means "to show clearly," "to prove or make clear by reasoning or evidence," or "to illustrate or explain esp. with many examples." *Webster's Seventh New Collegiate Dictionary* 220 (1970); see also *Webster's New World Dictionary of the American Language* 376 (1970) (defining "demonstrate" as "to show by reasoning; prove" and "to explain or make clear by using examples, experiments, etc."). "Adequate" means "sufficient for a specific requirement." *Webster's Seventh New Collegiate Dictionary* 11 (1970); see also *Webster's New World Dictionary of the American Language* 16 (1970) (defining "adequate" as "enough or good enough for what is required or needed; sufficient; suitable"). Accordingly, to "adequately demonstrate[]" an emission-

reduction technology, EPA must "show clearly," using "evidence" and "examples," that the technology is "sufficient for [the] specific [emission-reduction] requirement" that is being imposed. EPA therefore must provide concrete examples of its chosen BSER's achieving the standard of performance and "show clearly" that it can do so in all of the settings to which the regulation extends. See *Nat'l Lime Ass'n* v. *EPA*, 627 F.2d 416, 431 n.46 (D.C. Cir. 1980) ("[T]o be achievable, * * * a uniform standard must be capable of being met under [the] most adverse conditions which can reasonably be expected to recur * * * .").

The backwards-looking nature of "has been" confirms that this adequate demonstration must have already been made at the time of the rule's enactment. "Congress' use of a verb tense is significant in construing statutes." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992). That is why this Court "ha[s] frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr* v. *United States*, 560 U.S. 438, 448 (2010). As the present-perfect tense of "to be," "has been" denotes "an action as having been completed at some indefinite time in the past * * * [or] indicates that an action continues to the present." Garner, *Garner's Modern English Usage* 1080-1082 (2022). Applied here, both senses of that verb tense require that the BSER's adequate demonstration take place by the time of the rule's enactment. Either it was "completed at some indefinite time in the past"—*i.e.*, before the rule's enactment—or the state of adequate demonstration "continues to the present"—*i.e.*, the time of the rule's enactment.

In light of the statute's remarkably clear text, EPA cannot defend its interpretation as "the best reading of the statute." See *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2266 (2024).

2. EPA attempts to deny just how much its Final Rule depends on future projections concerning a technology system that has not been adequately demonstrated today. For example, while EPA doggedly defends its power to set a BSER based on such projections, it also insists that it need not use that power here because "CCS is already in existence." 89 Fed. Reg. at 39,830 n.202. To be sure, CCS does indeed exist. But there is a wide gulf between CCS with some unspecified level of capture operating in certain settings and adequate demonstration of CCS with a consistent 90%-capture capable of operating at every existing coal-fired power plant and new gas-fired power plant across the country, as the Final Rule requires. The Final Rule impermissibly tries to rely on "projection[s]," "prediction[s]," "extrapolation[s]," "anticipated improvements," and other "forward-looking" mechanisms to bridge that yawning gap. See, *e.g.*, *id.* at 39,801, 38,830 n.202, 39,831, 39,832, 39,878 n.610, 39,889, 39,926.[5]

Similarly, EPA elsewhere states that "although the EPA is not relying on this point for purposes of these rules, it should be noted that the EPA may determine a system of emission reduction to be adequately demonstrated based on some amount of projection, even if some aspects of the system are still in development." *Id.* at 39,832 n.223. Yet in the very next sentence, EPA explains that "the authorization for lead time [in the Final Rule] accommodates *the development of projected technology*." *Id.* (emphasis added). If EPA is

[5] In this same vein, EPA also repeatedly insists that a BSER "need not be in widespread use at the time EPA's rule is published." 89 Fed. Reg. at 39,830; see also *id.* at 39,831-39,832, 39,878. But that misses the point. Here, no plant anywhere has installed a CCS system and achieved the 90%-capture the Final Rule requires. BSER may not need to be in widespread use, but it must be in use and achieving the mandated standard of performance somewhere before it can be required everywhere.

not relying on projections of technological development, then why does it emphasize that it is allowing "lead time" for just such technology development? See *Ark. Dep't of Health & Hum. Servs.* v. *Ahlborn*, 547 U.S. 268, 292 (2006) (rejecting an agency's "reasoning [that] couple[d] internal inconsistency with a conscious disregard for the statutory text"). The reality is that EPA has no choice but to unlawfully rely on projections of future technological development to defend its BSER determination and standard of performance that not a single power plant anywhere has yet achieved.

* * *

EPA's embrace of 90%-CO_2-capture CCS as the BSER therefore rests on a fundamental overreach of statutory authority. EPA's misconception of its statutory powers caused it to ask the wrong question at the outset of its BSER analysis and thereby infected the entire exercise. This error alone warrants vacatur. See *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 325-326 (2014) (vacating in relevant part a regulation that "rewr[ote] unambiguous statutory terms" and therefore "went well beyond the bounds of [EPA's] statutory authority" (internal quotation marks omitted)).

B. EPA exceeded its statutory authority and acted arbitrarily and capriciously in determining that the Final Rule's 90%-capture CCS system "has been adequately demonstrated."

It is axiomatic that a technology has not "been adequately demonstrated" when *no one* has ever successfully employed it. Here, EPA cannot cite even a single example of a power-generating facility achieving the Final Rule's 90%-capture standard with a CCS system. That disqualifies 90%-capture CCS from being the BSER. Faced with comments detailing this fault during the rulemaking process, EPA failed entirely to "supply 'a

satisfactory explanation for its action'" and "instead ignored '[this] important aspect of the problem' before it." *Ohio*, 144 S. Ct. at 2054 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Armed with only a few scattered examples that indisputably fall short of the 90%-capture CCS required by the Final Rule, EPA forged ahead with its BSER conclusion. That action exceeds the clear bounds of its statutory authority and exemplifies arbitrary and capricious agency action. See *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) ("[A]gency action must not be 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" (quoting 5 U.S.C. § 706(2)(C)); *FCC* v. *Prometheus Radio Project*, 592 U.S. 414, 423 (2021) ("The APA's arbitrary-and-capricious standards requires that agency action be reasonable and reasonably explained").

1. EPA describes a few "industrial applications" of CCS to support its claim that "all components of CCS—CO_2 capture, CO_2 transport, and CO_2 sequestration—have been demonstrated concurrently, with each component operating simultaneously and in concert with the other components." 89 Fed. Reg. at 39,846. But none of those has achieved the 90%-capture the Final Rule requires, much less paired that with a system to transport and sequester the captured CO_2. Claiming that a BSER "has been adequately demonstrated" without identifying a single facility that has ever achieved it (or satisfactorily explaining why that does not matter) is definitionally arbitrary agency action.

EPA first points to the Searles Valley Minerals/Argus Cogeneration Plant that provides power to a soda ash plant and captures approximately 270,000 metric tons of CO_2 annually. *Id.* at 39,846-39,847. But critically, EPA does not explain whether this represents

capture of 90% of facility emissions—which is what the Final Rule requires. Moreover, EPA cannot claim that this facility transports or stores the captured CO_2—because it does not. App.310 (Technical Support Document). Accordingly, this example demonstrates only that some unspecified level of CO_2 capture—without the transport and storage of the captured CO_2 that the Final Rule requires—can be achieved in an industrial setting.

EPA also cites the Shute Creek Facility and the Great Plains Synfuels Plant, but once again it identifies only the total volume of CO_2 sequestered per year, ignoring whether that amount represents the required 90% capture. 89 Fed. Reg. at 39,847. Worse, at least for the Great Plains Synfuels Plant, the record demonstrates that it attained only "partial" (50%) CO_2 capture, without providing further details on the degree of efficiency achieved. App.311 (Technical Support Document). EPA's refusal to consider the actual capture percentage cannot be countenanced in light of the Final Rule's strict 90%-capture mandate.

Lastly, EPA relies on the Quest steam methane reformer facility in Alberta, which purportedly "capture[s] and sequester[s] approximately 80 percent of the CO_2 in the produced syngas." 89 Fed. Reg. at 39,847. That falls below EPA's 90%-capture requirement. And, as EPA acknowledges, the CO_2 capture methods employed there are "tailored to the flue gas conditions of a particular industry," rendering the efficiency metric reported for Quest less instructive for power plants. *Id.* at 39,847.

2. As for coal-fired power plants, EPA proffers one facility in Canada and two domestic examples of partial CCS implementation. But none of those even come close to achieving the 90% capture, transport, and storage that the Final Rule mandates—a deficiency that EPA wholly ignores.

EPA notes that Boundary Dam 3, located in Saskatchewan, has been shown "capable of achieving capture rates of 83 percent *when the capture plant is online*." *Id.* at 39,848 (emphasis added). But Boundary Dam does not regularly achieve even that carbon capture rate; indeed, its "CCS facility has only operated at full nameplate capacity for a few days shortly after it was commissioned," App.761 (SaskPower Comments), and has been continually "affected by technical issues," 89 Fed. Reg. at 39,848. For those reasons, Boundary Dam does not approach 90%-capture when judged on the Final Rule's continuous, facility-wide metric. App.543 (EEI Comments). EPA's only response consists of forward-looking optimism—claiming that those technical issues "will definitively not occur in a different type of * * * system" and that "[b]ased on the experiences of Boundary Dam Unit 3, key improvements can be implemented in future CCS deployments during initial design and construction." 89 Fed. Reg. at 39,849.

EPA next cites Plant Barry, a coal-fired power plant operated by EEI member Southern Company, as an example of a "fully integrated 25 MWe CCS project with a capture rate of 90 percent." *Id.* at 39,850. But that CCS project captures just a *fraction* of the CO_2 output of *one unit*, not the total CO_2 output of the entire plant that is required under the Final Rule. App.743 (Buckeye Institute Comments). Judged by the Final Rule's continuous, facility-wide standard, it achieved less than 5% capture. *Ibid.* As such, it cannot demonstrate the continuous, facility-wide 90% capture that the Final Rule mandates. EPA offers no response to this serious critique in its Final Rule.

EPA also points to the Petra Nova system, which "was designed to capture 90 percent of 37 percent of the flue gas produced by a single EGU that was part of the larger

facility." App.541 (EEI Comments); see 89 Fed. Reg. at 39,849-39,850. But it achieved that rate of capture only sporadically, with the result being that Petra Nova captured only 33% of the unit's (and less than 10% of the eight-unit facility's) CO_2 emissions when judged under the Final Rule's metric. App.541 (EEI Comments); App.747 (Buckeye Institute Comments). While EPA acknowledges that Petra Nova "experienced some technical challenges," it wholly ignores that Petra Nova's facility-wide capture rate is an order of magnitude below what the Final Rule requires. 89 Fed. Reg. at 39,849-39,850.

EPA's remaining examples fare worse. CCS demonstration projects at the Warrior Run power plant in Maryland and the Shady Point power plant in Oklahoma captured 10% and 5% of facility-wide CO_2 emissions, respectively. *Id.* at 39,849. Project Tundra in North Dakota and Project Diamond Vault in Louisiana are still in development—not yet built, let alone operational—and thus provide no support for EPA's position that CCS at 90% efficiency has been adequately demonstrated today. *Id.* at 39,850-39,851.

3. EPA's BSER determination for new and modified gas-fired units has even less real-world support. EPA's main example of CCS at a gas-fired unit is the Bellingham, Massachusetts facility. *Id.* at 39,926. EPA asserts the facility achieved 85-95% CO_2 capture, *ibid.*, but that number represents only the capture rate from a small subset of the facility's total CO_2 emission sources. App.549-550 (EEI Comments). Judged under the Final Rule's facility-wide metric, Bellingham's CCS captured less than 10% of the facility's emissions—an important marker that EPA ignores. *Ibid.* Moreover, the facility neither transported nor stored captured CO_2, as required by the Final Rule. App.550 (EEI Comments). And it closed in 2005. *Ibid.*

EPA also cites the Mongstad technology demonstration center that is testing carbon capture on a small subset of a facility's emissions. 89 Fed. Reg. at 39,852, 39,927 & n.768. However, EPA declined to provide the CO_2 capture rate of that test project when measured on the continuous, facility-wide basis that the Final Rule requires, thereby rendering it unable to support the Final Rule's 90%-capture requirement.

In an effort to shore up this grossly deficient record for *gas*-fired units, EPA invokes uses of CCS on *coal*-fired units. *Id.* at 39,924. But EPA does not explain how those examples support establishing CCS as the BSER for an entirely different type of generation (turbines instead of boilers) that uses a different fuel (natural gas instead of coal). See App.551 (EEI Comments) ("EPA * * * examines some demonstrations at coal-based steam generating units and other industrial processes, but that * * * experience is not comparable or applicable to natural gas-based units given the different engineering between coal powered steam turbines and natural gas combined cycle units."). In any event, EPA's coal examples have fatal problems of their own, as detailed above, and thus could not save EPA's baseless BSER determination for new and modified gas-fired units even if they were applicable.

* * *

This is not a close call. No power generation facility has deployed a 90%-capture CCS system required by the Final Rule. By definition, that means the Final Rule's selected BSER has not "been adequately demonstrated." Given that dispositive fact, EPA is unable to "supply 'a satisfactory explanation for its action.'" *Ohio*, 144 S. Ct. at 2054 (quoting *State Farm*, 463 U.S. at 43). And its attempt to rely upon far inferior CCS outcomes only confirms

the emerging, still-developing nature of CCS technology. EEI's members are committed to CCS and hope that it has a bright future, but much work remains to be done before it can be "adequately demonstrated" and mandated for deployment nationwide.

C. EPA exceeded its statutory authority and acted arbitrarily and capriciously in determining that the Final Rule's 90%-capture CCS system "has been adequately demonstrated" to be deployable by the Final Rule's January 1, 2032 deadline.

Even if—contrary to the statute—EPA could show adequate demonstration by using a crystal ball, CCS with 90%-capture still would not be adequately demonstrated to be deployable in the seven-and-a-half-year timeframe the Final Rule mandates.

As support for its timeline, EPA relies on a report illustrating a "baseline project schedule for the CO_2 capture plant"—*i.e.*, the schedule for installing and deploying carbon capture at a single plant. 89 Fed. Reg. at 39,874 (citing App.328 (Sargent & Lundy Report)). EPA cannot reasonably extrapolate from a single hypothetical plant's construction timeline to conclude that every unit subject to the 2032 CCS mandate could do so in the same timeframe, given the resulting demand for equipment and labor and strain on permitting resources, among other issues. See App.699 (EEI Supplemental Comments) (explaining how heightened demand and supply chain challenges have extended timeframes to obtain certain components); App. 714 (EEI Supplemental Comments) ("[D]evelopers of [CO_2 pipelines] have cited permitting challenges as the rationale for their decisions to delay, withdraw, or cancel.").

Importantly, the report EPA relies on admits that it "does not consider the timeline or requirements associated with transporting and sequestering the CO_2 that is ultimately captured" and yet emphasizes that "these other infrastructure aspects of the CCS value

chain are critical to the feasibility and timeline of implementing a CCS project." App.332 (Sargent & Lundy Report); see also *id.* at App.342. In other words, even the single-plant timeline only evaluates the lead time for *one part* of the CCS system—the capture of carbon. And the unconsidered transport and storage aspects of CCS present heightened timing challenges. Recent experience demonstrates the difficulty of constructing transport pipelines, as three projects to build 3,650 miles of new pipeline—which EPA trumpeted in the proposal—have since been either postponed or cancelled. App.714 (EEI Supplemental Comments). EPA asserts that *most* units have nearby access to geologic storage for carbon, rendering extended pipeline networks unnecessary. 89 Fed. Reg. at 39,856, 39,861-39,862. But it ignores the many units that it concedes lack such access. That is impermissible, because "[t]o be achievable, * * * a uniform standard must be capable of being met under [the] *most adverse* conditions which can reasonably be expected to recur." *Nat'l Lime Ass'n*, 627 F.2d at 431 n.46 (emphasis added). EPA cannot look only to the *most favorable* conditions instead.

In any event, pipelines of any distance must be permitted by relevant authorities, and EPA's unsupported claim that shorter pipelines "would not likely be as challenging to permit and build," 89 Fed. Reg. at 39,861, ignores the reality of constructing modern pipeline infrastructure. See *PennEast Pipeline Co.* v. *New Jersey*, 594 U.S. 482, 490-492 (2021) (describing six-plus years of regulatory proceedings and litigation to secure right to condemn land needed for a relatively short (116-mile) natural gas pipeline). EPA has little more than blind faith that the vast CO_2 pipeline network necessary for CCS will spring into existence before 2032. See 89 Fed. Reg. at 39,855 ("The EPA *anticipates* that in the coming

years, a large-scale interstate pipeline network *may* develop to transport CO_2.") (emphases added).

Similar hurdles plague storage facilities. EPA's discussion of permitting timelines for sequestration sites is long on optimism and short on record support. EPA notes that from 2021 to 2023 the number of permit applications for CO_2 injection wells for long-term storage increased tenfold. *Id.* at 39,870. Unfortunately, EPA's permitting resources have not increased correspondingly; EPA has 130 applications under review but has issued only *eight permits*. *Ibid.* EPA claims it "is devoting increased resources to the Class VI program" and "expect[s] that the additional resources * * * will lead to increased efficiencies." *Ibid.* These "expectations" are indistinguishable from the "speculation or surmise" that renders agency action arbitrary and capricious. *Bennett* v. *Spear*, 520 U.S. 154, 176 (1997).

And that assumes that appropriate storage sites can be located in the first place. EPA claims that "*[m]ost* coal-fired steam EGUs * * * are located in relatively close proximity to deep saline formations that have the *potential* to be used as long-term CO_2 storage sites." 89 Fed. Reg. at 39,855 (emphases added). But that, once again, improperly focuses on the Final Rule's application in the most favorable rather than the "most adverse" operating conditions. *Nat'l Lime Ass'n*, 627 F.2d at 431 n.46. And even then, there is no guarantee that these "potential" storage sites will prove to be suitable for long-term CO_2 storage in practice.

In sum, EPA's seven-and-a-half-year timeline is built on best-case scenarios and speculation. EPA may have demonstrated that if everything goes perfectly, some units

somewhere may be able to meet that timeline. But it plainly has not "been adequately demonstrated" that most—much less all—of the power-generating units subject to the Final Rule can do so. Instead, EPA impermissibly "ignore[d] * * * 'important aspect[s] of the problem.'" *Ohio*, 144 S. Ct. at 2053 (quoting *State Farm*, 463 U.S. at 43). Therefore, EPA's seven-and-a-half-year timeframe exceeds its statutory authority and is arbitrary and capricious even if its other BSER determinations could somehow survive review.

II. Applicants Face Imminent And Irreparable Injury.

Absent a stay, EEI's members face imminent irreparable harm. The D.C. Circuit shrugged off Applicants' serious harms by remarking that the "actual compliance deadlines do not commence until 2030 or 2032—years after this case will be resolved." App.269. But it ignored the demonstrated fact that the Final Rule's 2032 CCS deadline forces electric companies to make costly and effectively irreversible decisions *now*. During the pendency of this challenge, companies must decide whether to attempt the seemingly impossible task of timely installing CCS on existing coal and new gas generation or instead seek to avoid the CCS requirement at great cost. Either option inflicts substantial irreparable harm.

There simply is not sufficient time to install CCS on existing coal and new gas generation. The U.S. Department of Energy estimates that doing so will take between 8 and 14.5 years—which is longer than the less-than-eight-years the Final Rule provides. App.356 (Dep't of Energy Funding Opportunity Announcement). EPA attempted to downplay its sister agency's analysis by claiming that it was focused on more experimental, advanced CCS technologies rather than existing ones. But DOE's analysis explicitly addressed the precise kind of CCS technologies that the Final Rule requires—those that can "capture, transport (if required), and store CO_2 from new or existing [coal or gas units]

and * * * achieve the [minimum] *unit-wide* 90% CO_2 capture efficiency (or greater) once stable operations are achieved." App.352-353 (emphasis original). Further confirming DOE's timeline, the declarants' intensive, technical assessments conclude that it will take more than a decade for their companies to install CCS, with many unknowns that could add months or years. App.772-774 (Adelman Decl. ¶¶ 30-37); App.785 (Bakken Decl. ¶¶ 25-36); App.802-806 (Bulpitt Decl. ¶¶ 21-29); App.814-823, 830-831 (Burch Decl. ¶¶ 23-46, 76).

Due to these long lead times, any company opting to pursuing CCS installation must start *immediately* (and even then surpass the most optimistic of both DOE's and the declarants' time estimates) to have 90%-capable CCS functioning by the Final Rule's 2032 deadline. Indeed, the Final Rule itself "assumes" that companies will have to begin "work" on their compliance efforts by "June 2024." 89 Fed. Reg. at 39,874, 39,893. That would require the expenditure of many millions of dollars during the pendency of this challenge. App. 775 (Adelman Decl. ¶ 44); App.801, 806-807 (Bulpitt Decl. ¶¶ 19, 30); App.823-826 (Burch Decl. ¶¶ 47-59). Those substantial sums of money cannot be recovered by Applicants or their customers if they ultimately prevail in their challenge to the Final Rule. App. 775-776 (Adelman Decl. ¶¶ 43-45); App.784-785, 789 (Bakken Decl. ¶¶ 23-24, 36); App.806-807 (Bulpitt Decl. ¶ 30); App.812-813 (Burch Decl. ¶ 19).

Such expenditures are classic irreparable harm, as this Court confirmed in staying an EPA rule last Term. See *Ohio*, 144 S. Ct. at 2053 (holding that incurring significant "nonrecoverable" compliance costs "during the pendency of th[e] litigation" constitutes a "strong argument[]" on "[irreparable] harm[]"); see also *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 220-221 (1994) (Scalia, J., concurring) ("[C]omplying with a regulation later

held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.") (emphasis original); *Ala. Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021) (recognizing a "risk of irreparable harm by depriving [landlords] of rent payments with no guarantee of eventual recovery"); *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304 (2010) (economic losses may be considered irreparable "[i]f expenditures cannot be recouped").

The alternative compliance options also inflict irreparable harm. A company may avoid the CCS requirement by operating new gas units at less than 40% capacity. Consequently, one option is to build more units that are designed for base-load operation and then operate them less efficiently to remain below the 40% threshold. App.768-769, 774 (Adelman Decl. ¶¶ 23, 38-39); App.782-783, 789-790, 792 (Bakken Decl. ¶¶ 20, 38, 40, 48); App.830-831 (Burch Decl. ¶ 76). Another is to build different kinds of units that are designed to operate at lower capacity, but those types of units produce power less efficiently. App.769, 774 (Adelman Decl. ¶¶ 24, 39); App.783, 789, 790, 792 (Bakken Decl. ¶¶ 21, 38, 40, 48); App.831 (Burch Decl. ¶ 77). Both paths lead to a less efficient and more costly generation fleet.

Companies must decide among those generation options now and spend many millions of dollars building that new generation *during the pendency of this challenge*, if they are to navigate the long timelines required for building new generation and meet growing demand for electricity. App.764, 767-771, 775-776 (Adelman Decl. ¶¶ 7, 18-19, 22-23, 26, 28-29, 40-45); App.780-782 (Bakken Decl. ¶¶ 15-18, 41-48); App. 798-799 (Bulpitt Decl. ¶¶ 10-11); App.831-832 (Burch Decl. ¶¶ 80-81). Beyond those immediate costs, companies

risk being effectively locked-in to building less efficient and more costly generation sources that would inflict harm on themselves and their customers for decades, even if this challenge were successful. App. 775-776 (Adelman Decl. ¶ 45); App.833 (Burch Decl. ¶ 84).

The non-CCS options for existing coal units also inflict irreparable harm. Each route to avoiding CCS—accelerated retirement or conversion to gas—requires that millions of dollars be spent imminently. App.812-814, 826-832 (Burch Decl. ¶¶ 18, 21-22, 60-82).

The D.C. Circuit wrote off this substantial showing of irreparable harm by concluding that "a stay will not help because the risk remains that the distant deadlines in EPA's rule will come back into force at the end of the case." App.269. But that is not how the irreparable-harm test for stays works. If it were, then this Court's recent stay in *Ohio* would have been improper because the significant "nonrecoverable" compliance costs that would have been incurred "during the pendency of th[e] litigation" would have had to be expended anyway since the same compliance deadlines would spring back into force if EPA prevailed. 144 S. Ct. at 2053. Yet this Court held that those compliance costs constitute a "strong argument[]" on "[irreparable] harm[]." *Ibid.* That makes sense because a stay of a rule necessarily tolls the rule's compliance deadlines, as that is the only way to truly preserve the status quo.[6] Otherwise, a stay would be utterly useless, and there would be no

[6] EPA's consistent practice reflects this reality. See 88 Fed. Reg. 67,102, 67,103-67,104 (Sept. 29, 2023) ("EPA generally anticipates that any future action bringing the Good Neighbor Plan's requirements into effect after a stay would phase in the requirements so as to provide lead times to implement the Good Neighbor Plan's identified emissions control strategies comparable to the lead times that the Good Neighbor Plan would have provided in the absence of the stay, thereby giving parties sufficient time to prepare for implementation."); 79 Fed. Reg. 71,663, 71,665 (Dec. 3, 2014) ("[T]his action tolls by three calendar years dates and years in the regulatory text as previously amended that had not passed as of December 30, 2011, the date of the stay order.").

way to obtain much-needed interim relief from regulations that impose serious harm before judicial review can be completed.

In sum, all roads lead to substantial irreparable harm if a stay is not granted. Applicants do not have the luxury of waiting to see how this litigation turns out before acting. They must spend many millions of dollars and make effectively irreversible decisions *now*. As a result, an eventual victory in their challenge to the Final Rule will be hollow, for much of the damage will already have been done. Only a stay can prevent that injustice.

III. The Balance Of Harms And The Public Interest Favor A Stay.

Whereas EEI's member companies face imminent irreparable harm should the CCS-based standards and guidelines remain in effect, there is no possibility of substantial and imminent harm to non-Applicants if a stay is granted. EPA admits that utilities have already achieved unprecedented emission reductions. 89 Fed. Reg. at 39,813; see also *West Virginia*, 597 U.S. at 755 (Kagan, J., dissenting) ("Market forces alone caused the power industry to meet the [Clean Power] Plan's nationwide emissions target."). Moreover, most EEI members that own generation have made voluntary commitments to reduce their CO_2 emissions to net-zero and are actively working to accomplish those goals. App.499 (EEI Comments). A stay would not affect these extant and ongoing emission reductions.

Equally importantly, there is no public interest in requiring compliance with an unlawful rule. *Ala. Ass'n of Realtors*, 594 U.S. at 766 ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends."). Rather, the public has a strong interest in regulatory stability. See *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015) (staying EPA water rule to "temporarily silence[] the whirlwind of confusion that springs

from uncertainty about the requirements of the new Rule and whether they will survive legal testing"). A stay directly serves that interest here.

Furthermore, the public possesses an intense interest in ensuring that the ongoing clean energy transition is affordable and reliable. EPA should allow sufficient time for major technological shifts so that electric companies and their customers are not required to fund and deploy emerging, not-yet-demonstrated technologies. That is especially true here, where it is doubtful at best that power companies could fully deploy CCS to achieve 90% CO_2 capture by 2032. Once 90%-capture CCS is in fact adequately demonstrated, EPA can commence a new Section 111 rulemaking establishing it as the BSER. But that is decidedly *not* the case today based on EPA's own record.

CONCLUSION

This Court should stay the Final Rule pending resolution of the merits below, any petition for writ of certiorari, and merits review (if any) in this Court.

Dated: July 29, 2024

Respectfully submitted,

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No. 24A116	
Title:	**Edison Electric Institute, et al., Applicants** **v.** **Environmental Protection Agency, et al.**
Docketed:	July 31, 2024
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Numbers:	(24-1152 24-1126 24-1155)

DATE	PROCEEDINGS AND ORDERS
Jul 29 2024	Application (24A116) for a stay, submitted to The Chief Justice. Main Document Other Proof of Service
Jul 31 2024	Response to application (24A116) requested by The Chief Justice, due by 4 p.m. (EDT), on August 19, 2024.
Aug 05 2024	Brief amicus curiae of Chamber of Commerce of the United States of America filed. Main Document Certificate of Word Count Proof of Service
Aug 19 2024	Response to application from Public Service Commission filed. Main Document Proof of Service
Aug 19 2024	Response to application from American Lung Association, et al. filed. Main Document Proof of Service
Aug 19 2024	Response to application from Environmental Protection Agency, et al. filed. Main Document Proof of Service
Aug 19 2024	Response to application from Power Company Respondents filed. Main Document Proof of Service
Aug 19 2024	Response to application from State and Municipal Governments New York et al. filed. Main Document Proof of Service

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177 FERC ¶ 61,180
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. RM22-5-000]

Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses

(Issued December 16, 2021)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of inquiry.

SUMMARY: In this Notice of Inquiry, the Federal Energy Regulatory Commission (Commission) seeks comments on the rate recovery, reporting, and accounting treatment of industry association dues and certain civic, political, and related expenses. In addition, the Commission seeks comments on the ratemaking implications of potential accounting and reporting changes. The Commission also seeks comments on whether additional transparency or guidance is needed with respect to defining donations for charitable, social, or community welfare purposes.

DATES: Initial Comments are due **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and Reply Comments are due **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through http://www.ferc.gov, is preferred.

- Electronic Filing: Documents must be filed in acceptable native applications and

print-to-PDF, but not in scanned or picture format.

- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.
    - Mail via U.S. Postal Service Only: Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.
    - Hand (including courier) delivery: Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

The Comment Procedures Section of this document contains more detailed filing procedures.

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SUPPLEMENTARY INFORMATION:

177 FERC ¶ 61,180
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses — Docket No. RM22-5-000

NOTICE OF INQUIRY

(Issued December 16, 2021)

1. In this Notice of Inquiry (NOI), the Federal Energy Regulatory Commission (Commission) seeks comments on the rate recovery, reporting, and accounting treatment of industry association dues and certain civic, political, and related expenses. In addition, the Commission seeks comment on the ratemaking implications of potential accounting and reporting changes. The Commission also seeks comments on whether additional transparency or guidance is needed with respect to defining donations for charitable, social, or community welfare purposes.

2. First, we seek comments on the delineation of recoverable and nonrecoverable industry association dues for rate purposes. Second, we seek comments on increased transparency in industry association expenses and segments of industry association dues charged to utilities, in addition to comments on utilities' and industry associations' expenses from civic, political, and related activities. Finally, we seek comments on a framework for guidance should the Commission determine action is necessary to further define the recoverability of industry association dues charged to utilities and/or utilities' expenses from civic, political, and related activities.

I. Background

3. The Commission has authority pursuant to the Federal Power Act (FPA) and the Natural Gas Act (NGA) to determine whether a rate is unjust, unreasonable, unduly discriminatory or preferential, and if the Commission determines that the rate is unlawful, to establish a just and reasonable replacement rate.[1] The Commission also has the authority to prescribe and maintain systems of accounts entitled "Uniform System of Accounts" for public utilities and licensees subject to the provisions of the FPA, and natural gas companies under the NGA,[2] and the rules and regulations contained therein.[3]

4. The regulatory authority to modify rates, terms, and conditions rests with the Commission where any rate, charge, or classification, collected by any utility for any transmission, transportation, or sale subject to the Commission's jurisdiction is unjust, unreasonable, unduly discriminatory or preferential.[4] The USofA contains accounts to record the portions of industry association dues paid by utilities as either operating or

[1] 16 U.S.C. § 824e(a); 15 U.S.C. § 717d(a).

[2] 16 U.S.C. § 825; 15 U.S.C. § 717g; 18 CFR pts. 101, 201 (2021).

[3] "Utilities" is used hereinafter to refer to both public utilities as defined by FPA section 201(e) and natural gas companies as defined by NGA section 2(6). This NOI does not contemplate any changes to oil pipeline regulation under the Uniform System of Accounts (USofA), because the instructions for oil pipelines differ from those for utilities. The Uniform Systems of Accounts Prescribed for Oil Pipeline Companies Subject to the Provisions of the Interstate Commerce Act, 18 CFR pt. 352 (2021), does not address industry association dues or civic and political expenses.

[4] 16 U.S.C. § 824e(a); 15 U.S.C. § 717d(a).

nonoperating in nature.[5] The USofA gives instructions on the separation of the expenses paid by utilities that industry associations incur and bill to utilities into the appropriate above the line (operating) and below the line (nonoperating) accounts.[6] For example, Account 930.2 (Miscellaneous and general expenses), which includes the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere in the USofA, is considered above the line (i.e., generally included in rate recovery) and covers industry association dues for company memberships.[7] Account 426.4 (Expenditures for certain civic, political and related activities), which is used for costs for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or

[5] 18 CFR pts. 101, 201. Hereinafter, citations are made only to part 101 of the Commission's regulations because they reflect the same provisions as part 201 for the accounts discussed herein. References to the USofA are to both part 101 and part 201 of the Commission's regulations.

[6] *See Delmarva Power & Light Co.*, 58 FERC ¶ 61,169, at 61,509 (1992) (The Commission "has allowed utilities to allocate [Edison Electric Institute (EEI)] contributions to wholesale customers only to the extent the contributions are for *research and development* programs to which wholesale customers themselves could not contribute. However, that portion of EEI contributions used for lobbying activities *may not, under any circumstances*, be included in the utility's cost-of-service.") (emphasis added). Typically, the "line" refers to the break between operating and nonoperating income and expenses on the Statements of Income for the year. For ratemaking purposes, the Commission has found that expenses above the line are usually chargeable to the ratepayer because they pertain solely to supplying a regulated utility service and are used in determining rates. Expenses usually chargeable to the utility, rather than ratepayers, appear below the line.

[7] 18 CFR pt. 101, Account 930.2.

ordinances or for the purpose of influencing the decisions of public officials, is considered below the line (i.e., generally excluded from rate recovery).[8]

5. The Commission has not previously adopted a bright line rule or specific guidelines that delineate between above the line and below the line expenses for informing and influencing the public, including industry association dues for such activities, instead allowing utilities to determine the portion of their industry association dues to include in above the line and below the line accounts, respectively, based on information provided by the industry associations about their activities and associated costs. The Commission relies on the principle that the "intended use and the reason behind the payment[]" to inform and influence the public dictates its accounting assignment.[9] Although the Commission applies this principle to the accounting treatment of utility expenditures, "where the line between public outreach and educational expenses and lobbying expenses is drawn has not been clearly delineated."[10] The Commission generally considers the appropriate delineation between above the line and below the line

[8] 18 CFR pt. 101, Account 426.4.

[9] *Alaskan Nw. Nat. Gas Transp. Co.*, 19 FERC ¶ 61,218, at 61,429 (1982).

[10] *Potomac-Appalachian Transmission Highline, LLC*, Opinion No. 554, 158 FERC ¶ 61,050 (2017), *order on compliance*, 166 FERC ¶ 61,035 (2019), *order on reh'g*, Opinion 554-A, 170 FERC ¶ 61,050, at P 79 (2020) (*PATH*) (citing *ISO New England Inc.*, 117 FERC ¶ 61,070, at P 40 (2006) (*ISO New England*), *order on reh'g*, 118 FERC ¶ 61,105 (2007) (*ISO New England Rehearing*), *aff'd sub nom. Braintree Elec. Light Dep't v. FERC*, 550 F.3d 6 (D.C. Cir. 2008)).

expenditures on a case-by-case basis given the facts presented.[11] The Commission's case-by-case application of the "intended use" and "reason behind" tests on expenditures incurred by industry associations and borne by their utility members may have led to stakeholder confusion as to what expenses are properly recoverable in rates.[12]

6. The Commission presumes that expenses recorded in above the line, operating accounts may be recovered through rates, unless a showing is made that the expense is nonoperating in nature and the utility fails to rebut this showing. The Commission presumes that expenses recorded in below the line, nonoperating accounts may not be recovered in rates, without a further showing justifying such recovery for ratemaking purposes. Thus, if a utility records amounts in Account 930.2, those expenses are presumptively recoverable, while costs recorded in Account 426.4 are presumptively nonrecoverable.

7. The Commission, as a part of its Office of Enforcement audit program, and if within the scope of an audit, evaluates whether a utility's classification of expenses

[11] *See, e.g.*, *ISO New England*, 117 FERC ¶ 61,070 at P 47 ("On a number of occasions the Commission has found 'lobbying' expenses of any type to be non-recoverable, while on other occasions the Commission has determined that even if the costs are related to lobbying and should be recorded in Account 426.4, they are appropriately recoverable from ratepayers, upon sufficient showing that they were undertaken for the benefit of ratepayers.").

[12] *See N. Border Pipeline Co.*, 23 FERC ¶ 61,213, at 61,439 (1983) ("the distinction between influencing public opinion and public relations activities lies in the intended use and reason behind these payments"); *see also PATH*, 170 FERC ¶ 61,050 at P 79 (citing *Potomac-Appalachian Transmission Highline, LLC*, 152 FERC ¶ 63,025, at PP 30, 40 (2015)).

between Accounts 930.2 and 426.4 complies with the USofA. Such audits of the classification of industry association costs between above the line and below the line accounts are limited to examination by the Commission of the recordkeeping and accounting of industry association dues by member utilities.[13] Typically, the information available to audit staff lacks detailed descriptions of the industry association's activities for which members are charged. Also, a party to a utility's FPA section 205 rate case or NGA section 4 rate case may challenge the utility's accounting classification and/or recovery of expenses by protesting the utility's proposed rates. In addition, a complainant may file an FPA section 206 complaint or an NGA section 5 complaint alleging that the current rate treatment is unjust and unreasonable. For transmission formula rates and certain other formula rates, stakeholders also have the ability to file formal challenges before the Commission concerning utilities' implementation of their formula rates following review of annual updates.[14]

8. In a typical rate proceeding, opposing parties bear the burden of raising an initial challenge of whether the company properly designated expenses between above the line and below the line accounts, or whether recovery of expenses appropriately booked to

[13] Unlike utilities, industry associations are not jurisdictional entities and thus are not subject to the Commission's accounting, record keeping, or reporting requirements. Moreover, industry associations are not subject to the Commission audits program.

[14] *See, e.g.*, *Pacific Gas & Elec. Co.*, 176 FERC ¶ 61,196, at P 15 (2021) (recognizing protest of the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California). Utilities with formula rates are required to demonstrate that amounts are appropriately recorded through discovery (as part of an annual update information sharing process) and upon request.

above the line accounts is reasonable.[15] A challenge with reviewing the accounting of industry association dues—whether through the Commission's Office of Enforcement audit program, or pursuant to a utility's rate case, complaint proceedings, or formula rate challenges—is that utilities typically have not required their industry association to provide more than simple invoices and thus lack detailed information on the nature of the association's activities for purposes of determining the appropriate classification of costs into above the line and below the line accounts.

9. On March 17, 2021, the Center for Biological Diversity filed a petition for rulemaking, requesting that the Commission amend USofA requirements relating to utility payments to industry associations engaged in lobbying or other influence-related expenses.[16] The CBD Petition requested that the Commission amend the USofA to allocate all industry association dues paid by utilities to Account 426.4 which would highlight them for scrutiny, where "the utility, not the consumer, must bear the burden of proof to demonstrate an entitlement to recover expenses from ratepayers."[17] In response

[15] *See, e.g.*, *PATH*, 170 FERC ¶ 61,050 at PP 25–26 (noting that PATH, in an FPA section 205 filing, booked certain costs to an above the line account, but that certain participants subsequently argued that the costs should instead be booked to Account 426.4).

[16] Center for Biological Diversity, Petition for Rulemaking to Amend the Uniform System of Accounts' Treatment of Industry Association Dues, Docket No. RM21-15-000, at 1 (filed Mar. 17, 2021) (CBD Petition). The CBD Petition requested changes to the USofA for both public utilities and natural gas companies. *See id.* at 4 n.9.

[17] *Id.* at 8 (quoting *Potomac-Appalachian Transmission Highline LLC*, 152 FERC ¶ 63,025 at P 29); *id.* at 16 (citing 16 U.S.C. § 824d(e)).

to the CBD Petition, some commenters recommended that the Commission remove all industry association dues from rates, whereas others suggested that such a move was unnecessary because industry association dues were properly allocated between recoverable and non-recoverable accounts and contrary to the fundamental principles of accounting.

II. Discussion

10. We find it appropriate to initiate this NOI to: (i) examine the Commission's current policies and regulations governing the rate recovery, reporting, and accounting treatment of industry association dues and certain civic, political, and related expenses; and (ii) identify potential changes that may be necessary to ensure that such expenditures are appropriately accounted for under the USofA and that recovery of these expenditures through Commission jurisdictional rates is just and reasonable. First, the NOI outlines the accounts utilities use to recover industry association dues. Second, we seek comments on the delineation of recoverable and nonrecoverable industry association dues for rate purposes. Third, we seek comments on increased transparency on industry association activities and expenses; comments on utilities' and industry associations' expenses from civic, political, and related activities; and what, if any, steps to increase transparency would assist the Commission in determining whether recovery of industry association dues in rates is just and reasonable.[18] Finally, we seek comments on a

[18] Although the Commission has well-established precedent disallowing the cost recovery of donations for charitable, social, or community welfare purposes included in Account 426.1, we also seek comment on whether additional transparency or guidance is

framework for guidance should we determine action is necessary to further define the recoverability of industry association dues charged to utilities and/or utilities' expenses from civic, political, and related activities.

A. Cost Recovery and Current Accounting

11. As discussed above, utilities record industry association dues in two distinct accounts—Account 930.2 (Miscellaneous and general expenses) for above the line expenses and Account 426.4 (Expenditures for certain civic, political and related activities) for below the line expenses.[19] Account 930.2 captures industry association dues that are operating in nature and therefore presumptively recoverable by utilities. The account states that "this account shall include the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere."[20] The illustrative list of expenses included in Account 930.2 includes "industry association dues for company memberships."[21]

necessary to ensure such costs are appropriately treated for accounting and rate recovery purposes. *See, e.g.*, *Ameren Ill. Co.*, 169 FERC ¶ 61,147, at P 81 (2019).

[19] *See supra* notes 5, 7–8 and accompanying text.

[20] 18 CFR pt. 101, Account 930.2.

[21] *Id.*, Item 2.

12. Utilities may include certain portions of industry association dues in Account 426.4, even though the definition of Account 426.4 does not specifically reference industry association dues.[22] This is because Account 426.4 is defined to include "miscellaneous expense items which are *nonoperating* in nature but which are properly deductible before determining total income before interest charges."[23] Whereas a certain proportion of industry association dues may fall under the operating cost category for miscellaneous general expenses, the proportion of an industry association's costs for nonoperating expenses is properly allocated to accounts in the Account 426 series. Namely, Account 426.4 includes:

> expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.[24]

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[22] *See Expenditures for Political Purposes — Amendment of Account 426*, *Other Income Deductions*, *Unif. Sys. of Accounts, and Report Forms Prescribed for Elec. Utils. and Licensees and Nat. Gas Cos. — FPC Forms Nos. 1 and 2*, Order No. 276, 30 FPC 1539 (1963).

[23] 18 CFR pt. 101, Special Instructions – Accounts 426.1, 426.2, 426.3, 426.4, and 426.5.

[24] 18 CFR pt. 101, Account 426.4.

As described above, while recording costs in certain accounts provides useful information to regulators, it is not necessarily dispositive regarding recoverability.[25] The Commission employs the "intended use" and "reason behind" the payment standard to delineate costs incurred to inform or influence public opinion as either operating or nonoperating.[26] With regard to rate recovery, the Commission has required utilities to record costs for lobbying, civic engagement, public information campaigns, and the like to Account 426.4, except those costs that the utility demonstrates provide a benefit to ratepayers, thus determining whether the costs are recoverable or nonrecoverable.[27]

13. Questions 1 through 5 seek information regarding how industry associations and their member utilities currently classify, record, and recover industry association costs, the nature of costs incurred, and dues assigned by industry associations. In particular, these questions seek to clarify which industry association costs member utilities currently

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[25] *See supra* P 6.

[26] The Commission has found that

> *The distinction lies in the intended use and reason behind the payments*. Expenditures incurred to influence the opinion of the public during the selection process have little or no *benefit to the ratepayers*, and therefore must be borne by stockholders. Just and reasonable expenditures incurred to keep the general public informed on the progress of the project and other public relations activities are proper expenses to be borne by ratepayers after operations commence.

Alaskan Nw. Nat. Gas Transp. Co., 19 FERC at 61,429 (emphasis added).

[27] *See* Order No. 276, 30 FPC at 1540; *Alaskan Nw. Nat. Gas Transp. Co.*, 19 FERC at 61,428.

book to Account 426.4 and which costs they book to Account 930.2. The responses to these questions may highlight cost categories that utilities include in rate recovery, which may, in turn, require further instruction from the Commission to ensure the proper rate treatment.

14. Questions 6 through 14 explore how much transparency for such costs exists and potential ways to improve this transparency. Due to the lack of transparency of industry association costs and the wide variety of activities and their specific contexts, the "intended use" and "reason behind" standard is difficult to apply to industry association dues and often requires case-by-case consideration.

15. Questions 15 to 20 below are intended to inform whether modifications to Commission regulations or additional guidance are needed to ensure the proper classification of utility and industry association costs between Accounts 426.4 and 930.2. The Commission has noted that recording expenses in Account 426.4 "simply means that those costs are not presumed to be recoverable, shifting the burden on the filing entity to demonstrate why such costs should be recoverable."[28] Further Commission instruction may reduce the frequency of rate proceedings that review industry association dues and help ensure that industry association dues are appropriately categorized for recovery purposes.

[28] *ISO New England Rehearing*, 118 FERC ¶ 61,105 at P 46.

B. Industry Association Dues

16. We are considering whether to clarify the delineation of recoverable and nonrecoverable industry association dues for rate purposes.

Q1) The CBD Petition, in an example it argues is emblematic of practices among other industry associations, asserts that during the period when the EEI budget was subject to audits by the National Association of Regulatory Utility Commissioners (NARUC), "EEI was spending up to 50% of its income on advocacy and lobbying efforts."[29] The Solar Energy Industries Association contends that in at least one instance, an investor owned utility's EEI invoice noted only 7% of its membership dues related to influencing legislation. The investor-owned utility therefore recorded 93% of its EEI dues to Account 930.2.[30]

[29] CBD Petition at 11 (citing Ex. A, David Anderson et al., *Paying for Utility Politics: How Utility Ratepayers are Forced to Fund the Edison Electric Institute and Other Political Organizations*, Energy and Policy Institute, at 6 (2017) ("One of the final audits from NARUC revealed that 50% of EEI's expenditures went to the following categories: legislative advocacy; regulatory advocacy; advertising; marketing; public relations; legislative policy research; regulatory policy research.")). NARUC ended its EEI budget audits over 10 years ago. *See id.*

[30] Solar Energy Industries Association, Comments in Support of Petition, Docket No. RM21-15-000, at 4–5 (filed Apr. 26, 2021). A copy of the 2006 invoice was attached to a pleading in Docket No. ER18-1122-001. Ameren Services Company, Motion for Leave to Answer and Answer, Docket No. ER18-1122-001, attach. EEI Invoice (filed Feb. 11, 2020).

(a) For the three most recent fiscal years, what are the annual dues charged to individual utilities for their membership in each industry association for which utilities seek recovery in rates?

(b) What percentage of industry association dues did industry association utility members classify and book as operating and nonoperating for the three most recent fiscal years?

(c) What percentage of EEI dues did members classify as operating and nonoperating in the last three years subject to a NARUC audit? What are the reasons for any difference between these amounts and the percentages in question 1?

Q2) What methodologies do industry associations use to apportion industry association operating budgets into dues among member companies? To what extent are industry association expenses assigned and apportioned based on member classes or sectors and/or directly assigned to specific members, and if so, what are the bases for such assignment/apportionment and/or direct assignment?

Q3) What internal controls and accounting methodologies are used by industry associations to track their costs generally and specifically to determine how costs are billed to members? In addition:

(a) What cost categories are used in budgetary and accounting processes internal to industry associations to account for industry

association dues? What were the budgets by cost category for the three most recent fiscal years?

(b) What processes do industry associations use to derive and inform utilities of their categorization of programs to allow the utilities to apportion their dues among various accounting classifications?

(c) How do industry associations derive and inform all jurisdictional companies of the portion of the total invoice payments associated with lobbying, public outreach on legislative and regulatory issues, and other categories of costs not recovered through rates?

(d) To what extent is information of any such methodologies or the underlying budgetary information shared with industry association members?

Q4) To what extent do industry associations provide utilities with estimated itemized expenses in dues invoices? To what extent do the associations conduct reviews or other activities to determine and evaluate the actual level of cost incurred related to influencing legislation and lobbying expenses, and compare such actual levels to the estimated percentages of such activities provided to jurisdictional companies? What is the frequency and scope of such reviews or activities and how were the results used? Please identify and explain any substantial impediments to, or industry association concerns with, providing utilities detailed information on the percentage of the association's charges attributable

to civic, political, public outreach on legislative and regulatory issues, and similar activities.

Q5) For industry associations, what is the nature of the activities and associated costs that fall into the following categories, and for each item, what percentage of the associated costs is classified as operating expense by the utility members:

(a) Engineering or reliability standards development;

(b) Legislative affairs including: (i) political contributions; (ii) following legislative events and informing members; (iii) preparation and research in connection with correspondence with legislators, their staff, or legislative committees; and (iv) correspondence with legislators, their staff, or legislative committees;

(c) Financial support of other organizations (list organizations with corresponding contributions);

(d) Public information or outreach related to: (i) safety; (ii) promotion of utilities; (iii) existing or potential state or federal environmental regulations and/or laws; (iv) proceedings at FERC or before other administrative agencies; or (iv) other subjects (describe each element with corresponding expenditures);

(e) Training for: (i) employee safety; (ii) accounting; (iv) planning; (v); reliability/resilience; (vi) market participation; and (vii) other (describe each element with corresponding expenditure);

(f) Regulatory affairs including: (i) participation in regulatory proceedings including listing each proceeding and its primary issue(s); (ii) research conducted for regulatory proceedings; (iii) following regulatory proceedings; (iv) informing members of regulatory proceedings;

(g) Meetings/conferences (to the extent not covered in the other categories listed here);

(h) Administrative costs including rents and other overhead; and

(i) Other (describe each element with corresponding expenditure).

C. Increased Transparency

17. We are considering whether increased transparency into industry association costs may improve public knowledge into industry association dues and therefore ensure the just and reasonable recovery of industry association dues.

Q6) What mechanisms currently exist for stakeholders to examine the costs and activities of industry associations?

Q7) Do industry associations disclose the nature of their costs and activities in any state regulatory proceedings? If yes, please provide citations.

Q8) Have any industry associations been the subject of audits by any regulatory bodies? If yes, please provide a summary of the purpose and findings of the audit(s).

Q9) What, if any, additional transparency is needed for stakeholders to evaluate the reasonableness of industry association costs that are recovered through rates?

Q10) If additional transparency is needed for stakeholders, should any transparency requirements for industry association costs be limited to certain rates, such as electric transmission and natural gas transportation rates, in light of the potentially larger costs involved, or should they apply to all types of rates (e.g., power sales agreements, reactive power, and sale of electricity)?

Q11) Specific to the electric industry, should any transparency requirements for industry association costs be limited to investor-owned utilities or should they also apply to municipal utilities and rural electric cooperatives who recover costs for Commission-jurisdictional service?

Q12) Industry associations rely on certain cost categories to enable utilities to determine what portion of their industry association dues are properly recovered from ratepayers and what costs are borne by shareholders. Please describe any additional or alternative cost categories to those in Question 5, above, that industry associations or their members should disclose to provide sufficient transparency.

Q13) What specific methods to enhance transparency of industry association costs should the Commission consider? For each of the following methods to enhance transparency, as well as others you may identify, please explain whether and how much would they (a) improve transparency; (b) impose burdens on industry associations and/or their members; (c) help ensure that utility rates are just and reasonable:

(a) utilities that seek to recover dues must possess detailed data that sufficiently explains such costs within their books and records, and such amounts must be subject to Commission audits, similar to that requested in Question 5, above;

(b) limit a utility's ability to seek and obtain recovery of industry association dues to industry associations that publicly disclose detailed cost data, similar to that requested in Question 5, above; and/or

(c) utilities must include in their FPA section 205 stated rate filings and their supporting workpapers to their formula rate annual updates, information similar to that requested in Question 5, above?

Q14) If the Commission imposed a requirement, such as one of those discussed in Question 13, above, should that requirement be limited to associations whose dues per utility exceed a certain minimum monetary threshold and, if so, what threshold?

18. We also seek comments on whether increased transparency into donations for charitable, social, or community welfare purposes is needed to improve public knowledge of such costs and therefore ensure just and reasonable treatment of donations or other charitable contributions.

Q15) What, if any, additional transparency is needed for stakeholders to evaluate whether donations for charitable, social, or community welfare purposes are treated appropriately for ratemaking purposes?

D. Guidance

19. We are considering whether the Commission should provide further guidance related to: (i) defining recoverable/nonrecoverable industry association costs for rate purposes; (ii) clarifying how certain "grey area" costs should be booked to accounts and treated in rates; and/or (iii) modifying Commission policies and instituting potential regulations with respect to costs that may currently be recoverable, but that the Commission may find should no longer be recovered.

Q16) Do utilities currently base the amount of their costs recoverable through rates on (i) the USofA, specifically the definitions in Accounts 930.2 and 426.4, (ii) the Internal Revenue Service (IRS) definition of lobbying, (iii) some other basis, or (iv) some combination thereof? What percentage of dues would be considered recoverable for each the four options for the most recent fiscal year?

Q17) What material differences, if any, are there between industry association costs considered nonoperating per the definition of Account 426.4 and

industry association costs that may be deducted for tax purposes based on the Internal Revenue Code or IRS regulations? What are examples of such activities and expenditures?

Q18) For what, if any, industry association costs is the classification as operating or nonoperating through utility rates unclear and ambiguous? Please describe any such "gray areas."

Q19) The Commission currently allows all costs related to regulatory interventions and litigation by both utilities and industry associations to be recorded to above the line accounts. Further, Account 426.4 provides as an exception to the political advocacy activities utilities are required to report in that below the line account, namely, "expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations."[31] What is the appropriate scope of this exemption for utilities and, by extension, their industry associations? Are there types of appearances before regulatory or governmental bodies for which the related expenditures should be excluded from rates, and if so, on what basis?

[31] 18 CFR pt. 101, Account 426.4 (stating that this subaccount "shall not include . . . expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.").

Q20) Please provide examples as to what, if any, costs for

(a) information campaigns carried out by industry associations are currently recoverable in utility member rates;

(b) information campaigns carried out by industry associations are currently recoverable in rates that the Commission should exclude from recovery in rates either by clarifying or revising its existing regulations;

(c) gifts, grants, donations, payments, dues, or contributions to other organizations by either utilities or industry associations are currently recoverable and should not be recoverable in utility member rates; and

(d) conferences or trainings are carried out by industry associations for which the Commission should prohibit from recovery in rates, and on what basis.

Q21) Please describe any other guidance that the Commission should provide with respect to the rate recovery of industry association dues or utilities' civic, political, and related expenses.

Q22) Please indicate whether there are any above the line, operating accounts other than Account 930.2 in which expenses related to civic, political, public outreach, and similar activities may be recorded (e.g., accounts pertaining to advertising costs) and, if so, what issues the Commission should consider with respect to those accounts.

III. Comment Procedures

20. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and Reply Comments are due **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments must refer to Docket No. RM22-5-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

21. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at http://www.ferc.gov. The Commission accepts most standard word processing formats. Documents created electronically using word processing software must be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

22. Commenters that are not able to file comments electronically may file an original of their comment by USPS mail or by courier-or other delivery services. For submission sent via USPS only, filings should be mailed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE, Washington, DC 20426. Submission of filings other than by USPS should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

IV. Document Availability

23. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

24. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

25. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202-502-6652 (toll free

at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

By direction of the Commission. Commissioner Danly is dissenting with a separate statement to be issued at a later date.
Commissioner Christie is concurring with a separate statement attached.
Commissioner Phillips is not participating.

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses — Docket No. RM22-5-000

(Issued December 16, 2021)

CHRISTIE, Commissioner, *concurring*:

1. I concur with today's order instituting a Notice of Inquiry (NOI) related to the treatment of industry association dues and certain civic, political, and related expenses. The NOI asks a number of important questions regarding transparency and current accounting practices that will assist this Commission in ensuring that rates paid by consumers are just and reasonable. I write separately because I respectfully disagree with any suggestion that First Amendment rights are implicated, much less threatened, by this inquiry.

2. The Supreme Court of the United States has ruled that commercial speech by corporations and other business entities is protected by the First Amendment,[1] and that political speech by such entities is likewise protected.[2] It is also true that spending on protected speech is inextricably part of such speech and is thus protected as well.[3]

3. That said, the questions raised in this NOI are not related to whether a corporation or other business entity is allowed to spend money in the exercise of its First Amendment right to free speech or "to petition the government for a redress of grievances"[4] (a/k/a "lobbying"). They can. Neither is it aimed at suppressing or burdening the protected speech of some limited subset of trade associations. Rather, the central question here is the same one present in so many of the cases before an economic regulator such as FERC, and that is the less headline-grabbing, albeit critically important, question: *Who pays?*

[1] *See 44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

[2] *See Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[3] *Id.*; *see also Buckley v. Valeo*, 424 U.S. 1 (1976).

[4] U.S. Const. Adt. 1.

4. Relevant to the "who pays?" question is the type of business. A business in a competitive market has a First Amendment right to spend its own money on speech, including lobbying the legislators who pass laws that affect it. These activities may be aimed at rent-seeking through regulation or subsidies (or seeking protection from other special interests' rent-seeking). James Madison made it clear in *The Federalist No. 10* that special interests ("factions") would always seek to gain advantage at the expense of others through the political process; but it was also Madison who authored the First Amendment that protected the freedom of all to pursue their interests in the public arena, and left it up to (hopefully) *public*-spirited legislators —elected by the *public*—to protect the *public* interest from the special interests (including those claiming to represent the public interest) and their rent-seeking behavior.

5. Privately-owned businesses get funds from two primary sources: (i) investors who put up capital; and (ii) customers who purchase its goods and/or services. A company that holds a state-granted and state-protected monopoly franchise is fundamentally different, however, from a business in a competitive market, not in its First Amendment rights, but in how it can pay for certain activities. Unlike the business in a competitive market whose customers *voluntarily* choose to purchase its products over the products of its competitors, the state-protected monopoly gets its money from captive customers who have *no choice* but to purchase, for example, electrical power, a vital necessity of modern life, from the monopoly. The state-protected monopoly is also guaranteed recovery of its prudent costs incurred to serve the public (hence the term "public service company," or "public service corporation," defined terms typically applicable to public utilities under many state laws[5]). The question asked herein, therefore, is which of its costs should be charged to investors, who have voluntarily invested in the company, and which to captive customers, who have no choice but to purchase an essential product such as electricity from it.[6]

6. Nothing keeps the monopoly from spending money on First Amendment protected speech, including lobbying legislators and related public-relations activities, but its investors should pay those costs, *not* captive customers.[7] That is the issue implicated by this NOI, which seeks to better understand whether costs permitted to be "above the line" (chargeable to customers) and those required to be "below the line" (chargeable to investors) for privately-owned companies are being treated as such on a transparent and consistent basis.

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[5] *See, e.g.*, Va. Code § 56-1 *et seq*.

[6] This analysis applies to privately-owned companies, not publicly-owned or government-owned providers or co-operatives.

[7] Legal fees are a more complicated matter.

7. While in a typical rate proceeding, the opposing parties bear the initial burden of challenging the accounting or rate treatment of "above the line" or "below the line" expenses, under section 205 of the Federal Power Act, the ultimate burden has always been on the regulated public utility to demonstrate the justness and reasonableness of its proposed rate. Based on the record before us, and the Commission audit staff's own experience, it may be that the Commission, customers, and other interested parties are not able to access the information necessary to determine whether the costs included in a jurisdictional utility's rates are appropriately classified. The questions raised in the NOI relate to issues squarely within, and essential to, the Commission's jurisdictional responsibilities to ensure just and reasonable rates.

8. Let me also emphasize: It may well be that the Commission's existing rules, regulations and precedent are sufficient to ensure the just and reasonable allocation of such costs, but it is worth reviewing. As always with energy regulation, the devil is in the details.

9. On a more specific topic, I also support asking whether it is time to clarify our regulations or further codify what is now established primarily through Commission precedent, *i.e.,* not allowing a monopoly to recover from customers the costs of its contributions and grants to charitable and civic organizations. Giving away other people's money is not altruism.

For these reasons, I respectfully concur.

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Mark C. Christie
Commissioner

Document Content(s)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses	)))	Docket No. RM22-5-000

REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE

I. INTRODUCTION

Pursuant to the Notice of Inquiry ("NOI") issued by the Federal Energy Regulatory Commission's ("FERC" or "Commission") on December 16, 2021,[1] the Edison Electric Institute ("EEI") respectfully submits these reply comments. EEI filed initial comments in this proceeding on February 22, 2022, which included as Appendix A EEI's 2022 Lobbying, Advocacy, and Other Expenditures Report.[2] This report provides information about EEI's dues, our budget, and our expenditures, as approved by EEI's Board of Directors. To help provide regulators and others with easier access to related materials, the report also includes a compilation of publicly available information, including annual filings with the Internal Revenue Service ("IRS") that are related to EEI's lobbying activities.

As discussed herein, electric utilities are regulated at the state and federal levels and therefore must be able to participate in a range of proceedings. At members' direction, EEI seeks to engage constructively in these proceedings, providing our expertise and collective

[1] *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, Notice of Inquiry, 177 FERC ¶ 61,180 (Dec. 16, 2021) ("NOI").

[2] *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses,* Initial Comments of the Edison Electric Institute, Docket No. RM22-5-000 (Feb. 22, 2022) ("EEI Initial Comments"). The Lobbying, Advocacy, and Other Expenditures Report will be updated annually and is available on EEI's website at https://www.eei.org/about/Pages/about.aspx.

industry knowledge and perspectives on how proposals may affect the provision of services to customers and impact electric utilities' ability to provide safe, reliable energy to customers at just and reasonable rates. State and federal policy makers and regulators require a complete record and the opportunity to consider a range of viewpoints to support reasoned decision making and help ensure that their decisions are in the best interest of customers while maintaining the resilience and reliability of the energy grid.

Moreover, electric utilities already are required to demonstrate that their rates are just and reasonable and already have the burden of proof when seeking to include any expense in rates. States are capable of making their own determinations about the recovery of association dues, and the Commission should not attempt to dictate state approaches. Commenters advocate for the Commission to adopt a one-sided approach to defining lobbying. However, as set forth in greater detail below, the Commission should reject commenters' arguments as commenters have not provided support for their position, the definition they propose is inconsistent with existing federal law, and changes to the Uniform System of Accounts ("USofA") are not needed.

II. COMMENTS

Outside of dicta and unsubstantiated allegations, commenters advocating for Commission action offer the same request contained in the original Petition,[3] which is that the federal definition of lobbying is too narrow and, as a result, the Commission should make substantial changes to its USofA. However, commenters have shown no reason for the Commission to adopt such an approach to defining lobbying, which is one-sided and inconsistent with existing federal law.

[3] *Petition For Rulemaking to Amend the Uniform System of Accounts' Treatment of Industry Association Dues*, Docket No. RM21-15-000 (Mar. 17, 2021) ("Petition").

As an initial matter, while commenters may wish to deem all trade association activities as lobbying by redefining the definition of "lobbying" for USofA purposes, the Commission cannot unilaterally change the definition that has been legislated by Congress. This definition forms the basis of all political activity reporting, not just activity undertaken by energy companies. This advocacy/lobbying portion of EEI's dues, which is legally not recoverable, is calculated using the Internal Revenue Code ("IRC") definition of "lobbying and political activities" under section 162(e), in addition to the definitions in the Lobbying Disclosure Act, as amended ("LDA"), and as permitted by the LDA. The IRC definition broadly captures not only federal lobbying, but also state and grassroots lobbying and political activity. EEI uses the IRC definition because it is broad, capturing both federal and state-level activities, which is important to members whose retail electricity rates are approved by state public utility commissions.[4] As discussed in EEI's Initial Comments, EEI elects to use the broad IRC definition for its mandatory LDA reports,[5] which are filed quarterly with the Secretary of the Senate and the Clerk of the House of Representatives and are publicly available.[6] Notably, it is a federal crime to provide any false statements or concealments in these reports.[7] In addition, the Government

[4] EEI also opts to use the IRC definition because such amounts are not tax deductible. *See* IRC §§ 162(e); *see also* 26 C.F.R. § 1.162-29. Using the same definition for IRS reporting and for other mandatory lobbying disclosures is reasonable from an accounting and membership perspective and legally permissible. *See* 2 U.S.C. § 1610.

[5] *See* 2 U.S.C. § 1601 *et seq*. The LDA definition of lobbying would require EEI to report contacts with the Commission but would exclude any state-level lobbying.

[6] Registrations and reports are available online at the U.S. House of Representatives website, http://lobbyingdisclosure.house.gov, as well as the U.S. Senate website, http://www.senate.gov/lobby. Links to EEI's quarterly reports for 2021 can be found in the 2022 Lobbying, Advocacy, and Other Expenditures Report.

[7] *See* the False Statements Accountability Act of 1996, amending 18 U.S.C. § 1001. In addition, whoever knowingly fails: 1) to correct a defective filing within 60 days after notice of any such defect by the Secretary of the Senate or the Clerk of the House; or 2) to comply with any other provision of this Act may be subject to a civil fine of not more than $200,000, and whoever knowingly and corruptly fails to comply with any provision of this Act may be imprisoned for not more than five years or fined under Title 18 of the U.S.C. or both. *See* LDA § 1606.

Accountability Office is required by law to audit these reports annually.[8] The U.S. Attorney's Office for the District of Columbia is charged with enforcing the requirements of the LDA and investigates all referrals for non-compliance made by the Secretary of the Senate or the Clerk of the House of Representatives.

While commenters concede that utilities do not seek cost recovery of their trade associations' "lobbying" expenses as defined by the federal tax code and do not provide any instances of trade associations mis-allocating funds, they nevertheless assert that substantial changes to the USofA are needed based on allegations of lack of transparency and clarity. The primary changes that commenters seek to make to the USofA are: (1) removing the language in Account 426.4 that states, "such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations" shall not be included in Account 426.4;[9] and (2) requiring utilities to record dues paid to industry associations in Account 426.4 rather than in Account 930.2. However, as set forth below, such changes are not needed because the USofA, in conjunction with regulatory and judicial clarification, provides guidance on what should be included in the accounts.

First, while expenses listed in Accounts 930.1[10] and 930.2[11] are presumptively recoverable, there is relevant guidance in the USofA notes. For example, Note B to Account 930.1 states that expenditures for Certain Civic, Political and Related Activities expenses for

[8] The Honest Leadership and Open Government Act of 2007 ("HLOGA") amended the LDA. Among these changes, HLGOA included a provision for GAO to annually audit the extent of lobbyists' compliance with LDA. *See* Pub. L. No. 110-81, 121 Stat. 735 (Sept. 14, 2007), codified at 2 U.S.C. §1614. 22 U.S.C. GAO's most recent report was published in April 2021, https://www.gao.gov/assets/gao-21-375.pdf.

[9] 18 C.F.R. pt. 101, Account 426.4.

[10] 18 C.F.R. pt. 101, Account 930.1.

[11] 18 C.F.R. pt. 101, Account 930.2.

advertising activities, which are designed to solicit public support or the support of public officials in matters of a political nature, should be included in Account 426.4.[12]

In addition, Commission precedent indicates that "the 'intended use' and 'reason behind' the expenditure[s]" dictates their appropriate account.[13] In *Delmarva,* the Commission stated,

> The Commission has allowed utilities to allocate EEI contributions to wholesale customers only to the extent the contributions are for research and development programs to which wholesale customers themselves could not contribute. However, that portion of EEI contributions used for lobbying activities may not, under any circumstances, be included in the utility's cost of service. Thus, the portion of EEI expenditures that a utility may include, if any, in its cost of service depends on the purpose for which the contributions were made. The burden of breaking down EEI expenditures falls upon the utility seeking to include such contributions in its cost of service.[14]

Furthermore, recently, in *Newman,* the U.S. Court of Appeals for the District of Columbia Circuit affirmed that the purpose of the activity should be considered, and that direct and indirect activity related to influencing decisions associated with certification of a transmission facility should be placed in Account 426.4.[15] There is no indication that the focus of this provision is on expenditures made to engage in regulatory proceedings, an activity that is essential to utilities' ability to function as some of the most heavily regulated businesses in the country, or on other activities that are not federally defined as lobbying. This direction is clear and additional changes to the USofA, as suggested by commenters, are therefore not needed. Federal regulations, court precedent, and the USofA are clear that expenses for the purposes of political lobbying should be included in Account 426.4.

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[12] 18 C.F.R. pt. 101, Special Instructions – Accounts 426.1, 426.2, 426.3, 426.4, and 426.5.

[13] *ISO New England Inc.*, 117 FERC ¶ 61,070, at P 42 (2006).

[14] *Delmarva*, 58 FERC ¶ 61,169 at 61,509 (1992).

[15] *Keryn Newman and Alison Haverty v. FERC*, 22 F.4th 189 (D.C. Cir. 2021) ("*Newman*").

Moreover, the Federal Power Act ("FPA") provides that "[t]he business of transmitting and selling electric energy for ultimate distribution to the public is affected with the public interest."[16] In furtherance of the public interest and consistent with the FPA, EEI's member companies are among the most regulated companies in the country and are responsible for providing safe, reliable, affordable and increasingly clean energy to their customers. How electric utilities serve the public—and their business models—is a function of their responsibilities as determined by law and applicable federal and state regulation. Accordingly, legislative and regulatory proceedings on energy issues directly relate to a "utility's existing or proposed operation"[17] and participation in the development of new legislation and regulations and in regulatory proceedings is both appropriate and necessary.

Commenters' proposed changes "conflate[] any sort of advocacy, for any purpose, in any forum, with the narrow category of presumptively non-recoverable 'lobbying' and 'political' activities. This petition comes across as no more than an attempt to invoke the Commission's jurisdiction to silence political opponents."[18] Commenters only support this point when they cite EEI's and other trade organizations' positions, primarily at the state level, with which they do not agree and therefore assert, without proof, that those positions are not in the best interest of customers.[19] To help members achieve their clean energy goals, fulfill their regulatory

[16] Federal Power Act section 201(a), 16 U.S.C. §824(a).

[17] 18 C.F.R. pt. 101, Account 426.4 (stating that "such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations" shall not be included in Account 426.4).

[18] *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, Dissent of Commissioner Danly, Docket No. RM22-5-000 at P 6 (Feb. 1, 2022).

[19] And, as EEI has repeatedly demonstrated through comments in response to the Petition and the NOI, commenters mischaracterize EEI's positions on a range of issues, particularly with respect to climate change and the clean energy transition. Fifty EEI members have made voluntary, forward commitments to reduce their emissions, with two-thirds having committed to reducing emissions to zero or net-zero before or by 2050. To date, EEI member companies have reduced their greenhouse gas emissions more than 40 percent below 2005 levels, more than any

obligations, and serve the public interest, EEI convenes members to assess the direction that legislators and regulators provide and participates in a range of dockets and proceedings open to all stakeholders at the state and federal levels. At members' direction, EEI seeks to engage constructively, providing our expertise and collective industry thinking on how proposals may affect the provision of services to customers and impact the ability of utilities to provide safe, reliable energy to customers at just and reasonable rates. In addition, EEI provides technical and operational assistance to members, including facilitating the industry's unique mutual assistance efforts to restore power after events likes storms, hurricanes, and wildfires. Thus, despite some commenters' assertions to the contrary, not all of EEI's goals are political.

It is also important to note that a very small portion of EEI dues is recovered via FERC-jurisdictional rates. Instead, where permitted, a more significant portion of EEI's dues is recovered via retail rates approved by state commissions. Commenters have urged the Commission to make changes to the USofA to assist state regulators. State regulators have demonstrated that they are capable of making their own required assessments about the recoverability of trade association dues and have not indicated that such changes are necessary to assist them in evaluating requests for recovery of trade association dues, as evidenced by the broad spectrum of approaches they have taken to address this issue. The Commission should avoid taking any action that attempts to dictate to state regulators how to approach this issue. Presumptive recoverability is not automatic, and states can and do seek additional justification for recovery of trade association dues when they feel necessary. Commenters' examples of states that have sought additional information about EEI dues only underscore that the existing

other sector of the U.S. economy and more than any country in the world. It is important to note that the greenhouse gas reductions in the U.S. have been driven by the power sector.

structure is sufficient to allow state regulators to make their own informed decisions. And, as noted, a new report is now publicly available to provide state regulators with more details about EEI expenditures. EEI made this report available to ensure that state regulators can readily access this information.

Thus, EEI urges the Commission not to expand the definition of lobbying to include education, advocacy, and other communication with state and federal regulatory and legislative bodies as proposed by commenters. The ability to educate and inform decision makers about the electric system and the impact that proposed regulatory changes could have on utility operations and the energy system is vital to ensuring that policies that are implemented support the clean energy transition while maintaining reliability and resilience, and providing a range of other benefits to customers. Utilities have the burden of showing that their rates are just and reasonable and prudently incurred, and as seen by the number of documents filed in this proceeding, information on EEI's activity and federal filings are readily available. Accordingly, no changes are needed to the USofA as suggested by commenters.

III. CONCLUSION

Commenters have shown no reason for the Commission to adopt an approach to defining lobbying that is one-sided and inconsistent with existing federal law. Federal regulations, court precedent and the USofA are clear that expenses for the purposes of political lobbying should be included in Account 426.4. Accordingly, changes are not needed to the USofA.

Respectfully Submitted,

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March 23, 2022

Document Content(s)

3 23 2022 EEI reply comments RM22 5.pdf.....1

United States Senate
WASHINGTON, DC 20510

February 25, 2022

Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426
Docket No.RM22-5-000

Dear Chairman Glick:

We are encouraged by the recent Federal Energy Regulatory Commission (FERC) Notice of Inquiry (NOI) on how utilities account for industry trade association dues, as well as civic and political activities. For too long, utilities have financed the political activities of trade associations using funds from captive ratepayers. These trade associations then lobby for policies that frequently run counter to ratepayers' interests. FERC should develop bright line for how utilities classify operating and non-operating expenses so that it is clear what can and cannot be recovered from ratepayers. Given the increasingly political nature of utility trade associations, we also urge FERC to treat trade association dues as non-operating expenses and therefore presumptively not recoverable from ratepayers.

The Supreme Court has called into question whether organizations can require unwilling participants to contribute funds that it uses for political activities. In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court decided that public sector employees cannot be required to pay any portion of union dues because the unions could be engaged in political activities they may not support. While we disagree with the Court's decision, it reasons that utility ratepayers, who may not support the political activities of their utility's trade associations, should not be required to pay any portion of the trade association's dues.

Yet current law allows utilities to do just that. FERC's Uniform System of Accounts (USofA) states that "operating expenses," including "membership fees and dues in trade, technical, and professional associations paid by a utility for employees," may be recovered through rates charged to customers.[1] Non-operating expenses are not recoverable. These include "expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances… or for the purpose of influencing the decisions of public officials…."[2] Trade associations, so-called social welfare organizations, and some nonprofit groups are increasingly political, and many of their activities can be viewed as seeking to influence public opinion or decisions of public officials. Such organizations, however, view their activities not through the lens of the USofA, but rather the IRS definition of lobbying. This gap allows trade associations to characterize their activities in a

[1] 18 C.F.R. pt. 101, Account 930.2
[2] 18 C.F.R. pt. 101, Account 426.4

manner that, under the current system, permits utilities to pass along much of their association dues to their ratepayers – even for political activities with which they disagree.

There are numerous examples of organizations to which utilities commonly pay dues or make donations that have engaged in political activity that is against the interest of ratepayers.

- The Edison Electric Institute (EEI) is a trade association that represents electric investor-owned utilities. It "provides public policy leadership, strategic business intelligence, and essential conferences and forums." The NOI notes a National Association of Regulatory Utility Commissioners audit that regulators relied on to find EEI spent up to 50 percent of its income on advocacy and lobbying; however, in an invoice to one of its investor-owned utilities, it attributed only 7 percent of dues to lobbying. The other 93 percent of its dues counted as an operating expense.[3] EEI also helped to finance the now defunct Utility Air Regulatory Group, which opposed over 200 clean air and public health matters.

- The U.S. Chamber of Commerce is by far the largest lobbying organization in the country.[4] It also engages in electioneering, litigation, and general influencing activities. It has been at the forefront of efforts to kill climate action, from organizing the effort to block the Obama administration's greenhouse gas regulations[5] to leading the charge against the Build Back Better Act,[6] which if passed would devote $550 billion to fighting climate change. According to a disclosure by Sempra Energy, only 20 percent of the $1.02 million it paid in dues to the Chamber in 2020 was non-tax deductible.[7] While that 20 percent may reflect the IRS definition of lobbying and electioneering, 100 percent of dues paid to the Chamber go towards influencing activities. The Chamber exists to influence – that is its very purpose.

- Among its activities, the American Gas Association (AGA) advocates against updates to building codes that would result in more efficient or all-electric energy codes. Updated codes save consumers money, improve public health, and reduce greenhouse gas emissions. Yet AGA's Codes and Standards team, a team outside of its Governmental Affairs and Public Policy division, has a "primary goal … to retain the option of placing a natural gas appliance in homes and businesses." It also coordinates with anti-

[3] Federal Energy Regulatory Commission Docket No. RM22-5-000, Notice of Inquiry, page 13
[4] Open Secrets, https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=a
[5] "Move to Fight Obama's Climate Plan Started Early," New York Times, August 3, 2015, https://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html
[6] "U.S. Chamber Vows to Defeat Reconciliation, Hails Voting Deadline for Bipartisan Infrastructure Deal," U.S. Chamber of Commerce, August 24, 2021, https://www.uschamber.com/infrastructure/us-chamber-vows-defeat-reconciliation-hails-voting-deadline-bipartisan-infrastructure
[7] https://www.sempra.com/sites/default/files/content/files/node-media-document/2021/2020%20Sempra%20Energy%20Political%20-%20combined.pdf

electrification front groups like Partners for Energy Progress.[8] It is unclear whether AGA identifies its advocacy as lobbying or how it classifies the work of its Codes and Standards team. No independent audit has been performed.[9]

- Two PJM member utilities formed the Potomac-Appalachian Transmission Highline (PATH), LLC to build a multi-state transmission line. From 2009 to 2011, PATH spent more than $6 million on public relations contractors to pressure state officials to provide the necessary certificates for the project. The contractors produced promotional materials, ran public opinion polls, enlisted individuals to join supportive "reliable power coalitions", and hired lobbyists. The utilities booked these costs as recoverable. Most recently, FERC issued orders agreeing with the utilities' approach. In December 2021, the D.C. Circuit vacated and remanded FERC's orders and required the utilities to reimburse their customers for these charges because they were used for political activities.[10]

Updating the USofA to fully encompass all influencing activities will provide FERC with the requisite information to ensure utility rates are just and reasonable. It can also aid state commissions in their oversight of non-FERC jurisdictional utilities.

FERC must also deem industry association dues as presumptively non-recoverable. Without this change, it will remain incumbent on ratepayers and their advocates to call attention to accounting violations. FERC is standing up its Office of Public Participation to engage members of the public in its proceedings, and we commend it for appointing a director and deputy director. Even with the Office of Public Participation, however, most ratepayers will still not have the time or means to intervene in utility rate cases. The only way to provide the transparency needed to ensure just and reasonable rates is to deem association dues as presumptively non-recoverable.

Characterizing industry association dues as presumptively non-recoverable does not mean that utilities cannot recover these expenses. It only means that they must justify dues as truly operational and not political in nature. If utilities choose to engage in industry associations, then it should be incumbent on utilities to disclose and justify what they want to charge to customers.

We look forward to your next steps.

[8] Federal Energy Regulatory Commission Docket No. RM21-15-000, Comments of Public Interest Organizations, April 27, 2021 page 14
[9] Federal Energy Regulatory Commission Docket No. RM21-15-000, Comments of Public Interest Organizations, April 27, 2021 page 14
[10] Newman v. FERC. United States Court of Appeals, No. 20-1324 (2021). https://www.cadc.uscourts.gov/internet/opinions.nsf/CEEC71D3AAB2CAE9852587B900589358/$file/20-1324-1928335.pdf

United States Senate
WASHINGTON, DC 20510

Sincerely,

Sheldon Whitehouse
U.S. Senator

Jeff Merkley
U.S. Senator

Edward J. Markey
U.S. Senator

Dianne Feinstein
U.S. Senator

Elizabeth Warren
U.S. Senator

Bernard Sanders
U.S. Senator

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