

ORAL ARGUMENT IS SCHEDULED FOR

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 06-1408, et al.

**PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

**CYNTHIA A. MARLETTE
GENERAL COUNSEL**

**ROBERT H. SOLOMON
SOLICITOR**

**JUDITH A. ALBERT
SENIOR ATTORNEY**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

**FEBRUARY 23, 2007
FINAL BRIEF: APRIL 21, 2008**

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties and amici are as stated in the brief of Albany Engineering Company.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Fourth Branch Associates (Mechanicville) v. Hudson River – Black River Regulating District*, “Order on Complaint,” 117 FERC ¶ 61,321 (December 22, 2006), and

2. *Fourth Branch Associates (Mechanicville) v. Hudson River – Black River Regulating District*, “Order on Rehearing,” 119 FERC ¶ 61,141 (May 17, 2007).

C. Related Cases:

Undersigned counsel is unaware of any related cases pending judicial review in the federal courts. Petitioner’s Circuit Rule 28(1) Certificate states that there is a case pending in New York State dealing with the assessments imposed on downstream projects by the Hudson River-Black River Regulating District. *Niagara Mohawk Power Corp. v. New York and Bd. Of Hudson River-Black River Regulating District*, No. 6314-06 (N.Y. Sup. Ct. Fulton County filed July 28, 2006).

Judith A. Albert
Senior Attorney

April 21, 2008

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GLOSSARY

American Transmission	American Transmission Company, LLC
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
ISO	Independent system operator
Midwest ISO	Midwest Independent System Operator, Inc.
R	Record item number
RTO	Regional transmission organization
Wisconsin Commission	Public Service Commission of Wisconsin

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**FEDERAL ENERGY REGULATORY COMMISSION,
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**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably approved a proposed Midwest Independent System Operator, Inc. (“Midwest ISO”) tariff, following extensive stakeholder consideration and compromise, that excluded from regional cost-sharing those transmission projects already planned.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Addendum to this brief.

COUNTERSTATEMENT OF JURISDICTION

The opening briefs of Petitioners Public Service Commission of Wisconsin (“Wisconsin Commission”) and American Transmission Company LLC (“American Transmission”) assert various arguments that they either failed to raise at all on rehearing before the Commission or failed to raise with specificity as required by the Federal Power Act (“FPA”), §§ 313(a) and (b), 16 U.S.C. § 8251(a) and (b). Consequently, these issues are jurisdictionally barred. *See, e.g., Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34-35 (D. C. Cir. 1992) (“Under the FPA’s judicial review provision, 16 U.S.C. § 8251(b), parties seeking review of FERC orders . . . must themselves raise in [the rehearing] petition all of the objections urged on appeal. Neither FERC nor this court has authority to waive these statutory requirements.”) (internal quotations and citations omitted). These arguments are:

- That the Commission incorrectly stated that cost responsibility had already been determined for excluded projects. Wisconsin Commission Br. at 28; *infra* at 28.
- That transmission construction in Wisconsin has kept pace with transmission construction elsewhere. Wisconsin Commission Br. at 39; *infra* at 28.
- That the Commission’s approval of the Excluded Projects List is an unexplained departure from previous Regional Transmission Organization orders. Wisconsin Commission Br. at 45; *infra* at 29.
- That the record does not define “advanced stages” of planning. American Transmission Br. at 16; *infra* at 32.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This is the fourth case to come before this Court addressing the rules under which the Midwest ISO (rather than the individual transmission-owning companies) will control the transmission of electricity over a grid spanning fifteen states. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2007); *East Kentucky Power Cooperative, Inc. v. FERC*, 489 F.3d 1299 (D.C. Cir. 2007); and *Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007); *see also infra* at 7. The orders challenged here approved tariff revisions proposed by the Midwest ISO to allocate and recover costs associated with new transmission projects and system upgrades within the Midwest ISO Transmission System. *Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,106 (February 3, 2006) (“Approval Order”) (R 45, JA 18); *order on rehearing*, 117 FERC ¶ 61,241 (November 29, 2006) (“Rehearing Order”) (R 88, JA 61).

Of the issues addressed in extensive stakeholder negotiations within the Midwest ISO and then litigated before the Commission, only one now remains: how to transition to a new cost allocation regime. For the purpose of regional cost sharing, the tariff revisions exclude projects that were already planned and would be moving forward regardless of whether the Midwest ISO instituted cost sharing for future projects. Petitioners Wisconsin Commission and American

Transmission prefer the line be drawn differently, so that more Wisconsin projects already underway would be paid for in part by ratepayers throughout the Midwest ISO.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

Section 201(b) of the Federal Power Act (“FPA”), 16 U.S.C. § 824(b), grants FERC exclusive jurisdiction over transmission and wholesale sales of electric energy in interstate commerce. Under FPA § 205(c), 16 U.S.C. § 824d(c), utilities must file tariff schedules with the Commission showing their rates and service terms, along with related contracts, for jurisdictional service. Upon receipt of such a filing, the Commission must assure that the rates and services are just and reasonable and not unduly discriminatory. *See* FPA § 205(a)-(b), 16 U.S.C. § 824d(a)-(b).

“In the bad old days, utilities were vertically integrated monopolies; electricity generation, transmission, and distribution for a particular geographic area were generally provided by and under the control of a single regulated utility.” *Wisconsin Public Power*, 493 F.3d at 246; *Midwest ISO Transmission Owners*, 373 F.3d at 1363. In recent years, the Commission, through a series of rulemakings and initiatives, has encouraged utilities to transfer operational control of their transmission facilities to an independent regional entity in order to foster non-

discriminatory, more efficient access to transmission, improve reliability, and encourage competition in the market for electric power. *Midwest ISO Transmission Owners*, 373 F.3d at 1363-65, *Wisconsin Public Power*, 493 F.3d at 247.

In brief, the Commission, in Order No. 888,¹ directed utilities to offer non-discriminatory, open access transmission service through the functional unbundling of wholesale generation and transmission services. *See New York v. FERC*, 535 U.S. 1, 11 (2002). Order No. 888 also encouraged, but did not direct, the formation of independent system operators (“ISOs”) to operate regional, multi-system transmission grids. Subsequently, in order (among other things) to foster better regional coordination in transmission planning and operation, the Commission, in Order No. 2000, directed all transmission owning utilities to make filings either to participate in a regional transmission organization (“RTO”) or to

¹ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1966) (“Order No. 888”), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles] ¶ 31,048 (“Order No. 888-A”), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

explain efforts to so participate.² In Order No. 2003, the Commission sought to encourage new generation by requiring utilities (including RTOs) to file standardized procedures (including the pricing for related network upgrades) for interconnecting large generators to their transmission grids.³

B. The Midwest ISO

The Midwest ISO is an independent, nonprofit regional transmission organization. *Wisconsin Public Power*, 493 F.3d at 245. It operates 93,600 miles of transmission in 15 states and one Canadian province over a 920,000 square mile area and has over 100 members representing various interests.⁴ The Midwest ISO “represents an experiment” in that it was created “in a region that did not have an existing tight power pool that [could] be used as a platform on which to build the new institution.” *Midwest Independent Transmission System Operator, Inc.*, 84

² *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *dismissed sub nom. Public Utility District No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

³ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh’g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh’g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *aff’d*, *National Ass’n. of Regulatory Commissioners v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

⁴ See “Midwest ISO Fact Sheet,” accessible at <http://www.midwestmarket.org/page/FAQs> and “Current Listing of Midwest ISO Members by Sector,” at <http://midwestmarket.org/page/Members>.

FERC ¶ 61,231 at 62,142 (1998). It “serves an extremely large footprint that [had not] had a history of regional transmission planning or cost allocation.” *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,209 at P 69 (2007).

As might be expected when a large number of public utilities in a broad area make such a fundamental change in the way they do business, disagreement over cost allocation (and other) issues have accompanied each step of the Midwest ISO’s development. *See Midwest ISO Transmission Owners*, 373 F.3d at 1372 (affirming allocation of certain administrative costs to bundled retail loads and loads moving under pre-existing contracts); *East Kentucky Power Cooperative*, 489 F.3d at 1301 (affirming FERC findings that transmission owners could pass these costs on to customers); *Wisconsin Public Power*, 493 F.3d at 245-46 (affirming FERC findings on, *inter alia*, cost allocation issues arising from establishment of day-ahead and real-time competitive wholesale power markets).

In 2004, the Midwest ISO made its large generator interconnection filing to comply with Order No. 2003. As with the cost allocations described above, not all stakeholders agreed with the ISO’s interim pricing proposals for the associated network upgrades. *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,027 at P 30 (2004) (“Generator Interconnection Order”), *order on reh’g*, 109 FERC ¶ 61,085 (2004). The Commission accepted the proposal, but

encouraged the ISO and its stakeholders (from all sections of the industry) to continue efforts to develop a permanent pricing policy based on the general principle of payment for network upgrades by those that cause and benefit from them. 108 FERC ¶ 61,027 at P 38. The tariff filing at issue here resulted from those efforts and provides both for generation interconnection upgrades and for other transmission expansions.

C. The Midwest ISO Transmission Expansion Cost Recovery Proposal

The Midwest ISO established the Regional Expansion Criteria and Benefits Task Force (“Task Force”) to “explore the criteria to be used to justify inclusion of expansion proposals in the [Midwest Transmission Expansion Planning protocols] and to recommend appropriate tariff structures to recover the costs of such expansions.” Midwest ISO October 7, 2005 filing at 2-3 (R 1, JA 236-37). The Task Force, a “stakeholder forum,” developed recommendations through a process lasting more than 18 months. Approval Order P 17, JA 25-26. The Midwest ISO Advisory Council, a stakeholder entity that provides advice to the Midwest ISO management and Board of Directors, endorsed most, but not all, of the Task Force recommendations. Ultimately, the Midwest ISO filed with the Commission the Task Force proposal, believing the Task Force “compromise” the “superior position.” October 7, 2005 filing at 14, JA 248.

Attachment FF of the proposal, the “Transmission Expansion Planning Protocol,” set forth the development process and cost allocations for Baseline Reliability Projects, New Transmission Access Projects (including Generator Interconnection Projects and Transmission Delivery Service Projects), and Regionally Beneficial Projects. Approval Order P 6, JA 21. While there was disagreement over cost allocations for all project types (*see id.* PP 46-90, JA 35-47), the issue here is primarily about whether certain projects will receive any Baseline Reliability cost sharing.

Baseline Reliability Projects are high-voltage projects (100 kV and above) needed to maintain transmission system reliability and accommodate the ongoing needs of existing customers. *Id.* P 26, JA 29. In order to receive regional cost sharing treatment, the ISO proposed that such a project must either have a project cost of \$5 million or the project costs must constitute five percent or more of the transmission owner’s net plant. *Id.* P 27, JA 29-30. For Baseline Reliability Projects with a voltage class of 345 kV and higher, the ISO proposed that 20 percent of project costs be allocated on a system-wide basis to all Transmission Customers throughout the Midwest ISO region and 80 percent be allocated sub-regionally to all Transmission Customers in the designated pricing zone(s) impacted by the project. *Id.* P 28, JA 30.

This cost-sharing proposal was controversial; some stakeholders supported these cost allocations, some opposed any system-wide cost sharing, some advocated system-wide sharing greater than 20 percent, and some objected to other aspects. *Id.* P 30-39, JA 30 -33. Ultimately, after a technical conference and the submission of supplemental evidence, FERC accepted the proposal as at least an acceptable first step toward regional cost sharing. Rehearing Order P 1, P 62-66, JA 61, 78-79. The issue now before the Court is the transition to this cost sharing regime.

D. The Excluded Projects List

The existing Midwest ISO transmission grid consists of facilities planned and paid for by individual transmission owners to provide service to their customers. In the future, projects will be subject to the Attachment FF planning protocols and may qualify for cost sharing under certain conditions. *See* Attachment FF, JA 271-75. A “threshold issue for many stakeholders,” however, was whether the Attachment FF cost sharing policies would apply “to all currently identified expansion projects in the latest Midwest ISO Transmission Expansion Plan (“2005 Expansion Plan”).” Midwest ISO October 7, 2005 filing at 12, JA 246. These are projects that had been identified by their sponsors as providing grid-wide benefits such as Baseline Reliability, but had been planned under the old cost and planning regime.

This issue was contentious. Approval Order P 92, JA 48; Midwest ISO October 7, 2005 filing at 12-13, JA 246-47. Stakeholders were concerned about “the wide variability in current investment projections,” and the possibility that some systems were in a “catch-up” mode relative to other systems. *Id.* at 12, JA 246. As one affidavit explained, the key was determining those “projects that already had an established justification and sufficient regulatory approval such that they were an essential part of the starting point for future planning, and were part of what most stakeholders viewed as a level playing field for starting a new cost allocation methodology.” Martin Blake affidavit at 12, attached to comments of Midwest ISO Transmission Owners (R 23, JA 395).

“Of paramount concern to many stakeholders was the prospect of cost sharing one particularly large-scale project planned for the Wisconsin system that [had] already received state regulatory approvals necessary to proceed with construction of the project.” Midwest ISO October 7, 2005 filing at 12-13, JA 246-47. This project was the Arrowhead-Weston project, a 220-mile 345 kV electric transmission line between Wausau, Wisconsin and Duluth, Minnesota, with an estimated \$420 million construction cost. Rehearing Order PP 97-98, JA 89; Midwest ISO October 7, 2005 filing at 12, JA 246. The project had been planned in the late 1990’s and authorized by the Wisconsin Commission in 2001.

See Final Decision of the Public Service Commission of Wisconsin, Docket 05-CE-113 at 5 (“Arrowhead Decision”), JA 98.⁵

The Task Force discussed various means of identifying whether this and other projects on the 2005 Expansion Plan “may represent long standing needs that might have been completed by now and therefore would not be subject to cost sharing.” Midwest ISO October 7, 2005 filing at 12, JA 246. Some stakeholders proposed using a project’s in-service date, others a project’s planning status, and still others suggested that cost sharing should apply to all planned or proposed projects immediately upon filing of the proposal with the Commission. Approval Order P 92, JA 48. “These stakeholder efforts did not yield a method that stakeholders could agree on or uniformly support.” Midwest ISO October 7, 2005 filing at 12, JA 246.

Ultimately, the Midwest ISO proposed Attachment FF-1, an “Excluded Projects List,” which identified projects which would not be eligible for cost sharing under Attachment FF. “The list was generated by examining the latest Midwest ISO Transmission Expansion Plan ([2005 Expansion Plan]) for projects that were either listed as ‘planned’ or were sufficiently advanced in the planning process that even if they were listed as ‘proposed’ they were viewed by the

⁵ Portions of the Final Order are set out in the Addendum to this brief. The entire Order may be found at http://psc.wi.gov/apps/erf_share/view/viewdoc.aspx?docid=3817.

Midwest ISO as being, for practical purposes, ‘planned.’ The Midwest ISO state[d] that these projects were excluded from cost sharing because they would be moving forward with development and construction regardless of whether the . . . Task Force was successful in developing a regional cost allocation policy.” Approval Order P 91, JA 47-48.

The Wisconsin Commission and American Transmission objected because the Excluded Projects List resulted in certain projects in Wisconsin being ineligible for cost sharing, including Arrowhead-Weston. *See id.* PP 95-101, JA 49-50. They contended that this exclusion would result in Wisconsin ratepayers subsidizing ratepayers in other states, and that only projects with an in-service date prior to October 7, 2005 should be excluded. *See id.* PP 95, 100, JA 49, 50.

The Commission accepted the proposal as a reasonable position from which the Midwest ISO could start to apply regional cost sharing for future transmission expansion projects, “leaving previously planned projects untouched.” *Id.* P 108-109, JA 52. The Commission found, *inter alia*, that the proposal was not unduly discriminatory as to American Transmission. Rehearing Order P 98, JA 89. Moreover, at the time of the 2005 Expansion Plan project designations, parties had no way of foreseeing how the Task Force would come out on cost allocation. Stakeholders could not manipulate the process by their project designations, and

parties moved forward with those projects with no assurance that the projects would receive cost sharing. *Id.* P 96, JA 88.

This consolidated appeal followed.

SUMMARY OF ARGUMENT

The Commission's approval of the Excluded Projects List was reasonable and should be sustained on appeal. The Midwest ISO proposal merely provides a method for regional cost sharing for future projects, leaving projects developed under earlier planning and cost allocation regimes to move forward as originally planned. That other cost sharing methods could have been developed, based on other eligibility criteria for including or excluding certain projects, does not establish, under applicable standards of review, that the Commission's approval of the Midwest ISO's proposal was unreasonable, uninformed, or otherwise undeserving of deference.

The Excluded Projects List does not unduly discriminate against American Transmission (or, by extension, Wisconsin ratepayers). Like American Transmission, other transmission companies have significant projects excluded by the List. Like other companies, American Transmission, which has over \$350 million worth of projects not on the excluded list, will benefit from cost sharing in the future. Moreover, some companies expect to receive no cost sharing at all, either now or in the foreseeable future.

The Excluded Projects List, moreover, is fair because all stakeholders were on equal footing in planning in that they were unaware of what, if any, future cost sharing might be available. The excluded projects were planned before the

Midwest ISO stakeholders agreed to cost sharing for new projects, the cost responsibility had already been determined under then-existing cost allocation regimes, and the excluded projects were moving forward based on that allocation.

Finally, while the Commission found the Excluded Projects List reasonable based on factors independent of the stakeholder process, the fact that the List was part of an overall stakeholder compromise on numerous expansion cost allocation issues also supports the Commission's approval of the List.

ARGUMENT

I. STANDARD OF REVIEW

The Commission's determination that the Midwest ISO's cost allocation proposal is reasonable is subject to the arbitrary and capricious standard of the Administrative Procedure Act. *Sithe Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under this standard, the court "will affirm the Commission's orders so long as FERC 'examined the relevant data and articulated a . . . rational connection between the facts found and the choice made.'" *Midwest ISO Transmission Owners*, 373 F.3d at 1368 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Moreover, deference to FERC's decisions regarding rate issues is particularly appropriate, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *N. States Power Co. (Minn.) v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) ("our review of whether a particular rate design is 'just and reasonable' is highly deferential").

II. THE COMMISSION'S APPROVAL OF THE EXCLUDED PROJECTS LIST WAS REASONABLE.

In this case, numerous stakeholders with varying interests, operating in an extremely large region with no previous history of unified transmission planning, agreed, after much negotiation, to cost sharing for transmission expansions. The narrow issue remaining is whether the Excluded Projects List represents a

reasonable point at which to initiate the new cost sharing. As the Supreme Court has found, "allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Colorado Interstate Co. v. FPC*, 324 U.S. 581, 589 (1945); *see also, e.g., Midwest ISO Transmission Owners*, 373 F.3d at 1368-69 (Court does not require particular allocation and has never required that costs be allocated with "exacting precision"). Here, the Commission exercised its judgment reasonably, and explained itself adequately, in approving exclusion of already planned projects from the new allocations.

The "Excluded Projects List has the advantages of: (1) using a starting point which was unknown to the parties and thus project sponsors were on an equal footing in designating their projects in the 2005 Expansion Plan; and (2) applying cost-sharing on a going forward basis." Approval Order P 111, JA 53. The excluded projects were planned before the Midwest ISO stakeholders agreed to cost sharing for new projects, the cost responsibility had already been determined under the then-existing cost allocation regimes, and the projects were moving forward based on that existing allocation. Rehearing Order P 97, JA 89.

The Arrowhead-Weston project, the excluded project for which cost sharing would most benefit Petitioners, is a good example. Because of reliability issues and the potential for capacity shortages in Wisconsin, the state's electric utilities

convened a task force in the 1990's to formulate recommendations. Arrowhead Decision at 5, JA 98. In 1997, the utilities recommended additional generation in eastern Wisconsin and additional transmission capacity between eastern Wisconsin and other regions. *Id.* Subsequently, the Wisconsin utilities, along with utilities in neighboring states, formed the Wisconsin Reliability Assessment Organization. On June 14, 1999, this organization filed a report with the Wisconsin Commission recommending construction of the Arrowhead-Weston transmission line. *Id.* at 5-6, JA 98-99.

On November 10, 1999, Wisconsin Public Service Corporation and Minnesota Power Company requested authority from the Wisconsin Commission to construct the project. *Id.* at 6, JA 98. American Transmission asked to become a co-sponsor on April 13, 2001. *Id.* at 7, JA 100. The Wisconsin Commission issued its Arrowhead Decision authorizing the project on October 30, 2001, finding, *inter alia*, that the facilities “will provide usage, service, or increased regional reliability benefits to wholesale and retail customers or members in this state, and the costs are reasonable in relation to the benefits of the project.” *Id.* at 10, JA 103. The Project was already under construction when the Midwest ISO submitted its proposal. Rehearing Order P 97, JA 89. Under these circumstances, it was “perfectly reasonable for the Midwest ISO to . . . exclude[] this project from cost sharing.” Rehearing Order P. 97. JA 89

The Excluded Projects List, moreover, did not place an undue disadvantage on any one party. Rehearing Order P 87, JA 86. “The Midwest ISO’s proposal merely advances a method for regional cost sharing for future projects leaving previously planned projects untouched by the proposed cost sharing.” Approval Order P 109, JA 52. As the starting date of any regional cost sharing that might be agreed upon was unknown to the parties, project sponsors were on an equal footing in planning their projects and in designating projects in the 2005 Expansion Plan. *Id.*; Rehearing Order P 96, JA 88. “Parties moved forward with those projects without any assurance that such projects would be candidates for regional cost sharing.” *Id.*

American Transmission, moreover, suffered no undue discrimination. It is not the only transmission owner with projects on the Excluded List. For example, “Ameren and Ameren IP projects amounting to \$141 million are excluded, and ITC projects amounting to \$102 million are also excluded.” *Id.* P 98, JA 89. American Transmission projects on the List (excluding the \$420 million Arrowhead-Weston project) total \$273 million. *Id.*

In addition, American Transmission (like other stakeholders) will benefit from cost sharing in the future. Four American Transmission projects, “amounting to over \$350 million, should qualify for regional and/or sub-regional cost sharing under the Midwest ISO cost allocation policy. However, unlike the Arrowhead-

Weston project, these projects are long-term proposed projects with expected in-service dates of 2010, 2011, and 2012.” Rehearing Order P 98, JA 89.

American Transmission itself stated that it “plans to spend an additional \$3.4 billion over the course of the next ten years to improve the reliability of the transmission system . . .” Midwest Coalition Rehearing Request at 14 (R 51, JA 538). Presumably (since the Excluded Projects List includes only \$693 million worth of American Transmission projects), either all or most of that investment will benefit from cost sharing. In comparison, American Transmission also cites “CapX 2020,” a four-state plan “exploring the possibility of erecting approximately 3,300 miles of additional transmission facilities with an estimated cost of \$2.7 billion, all of which would be eligible for cost-sharing consideration under the Midwest ISO’s proposal.” *Id.* at 21, JA 545. Other utilities, moreover, expect to make no transmission expansions (and receive no cost sharing), while their ratepayers will pay for cost sharing for expansions on other systems. Comments of Indianapolis Power & Light Company at 9-10 (JA 323-24). As these numbers demonstrate, the proposed starting point for the new cost sharing plan does not unduly discriminate against American Transmission. *See Electric Consumers Resource Council v. FERC*, 407 F.3d 1232, 1240 (D.C. Cir. 2005) (balancing short-term costs against long-term benefits within agency’s discretion).

Finally, while the Commission found the Excluded Projects List just and reasonable based on factors independent of the stakeholder process (Rehearing Order P 23, JA 68), FERC also observed with favor the fact that the “Midwest ISO’s [proposed Excluded Projects List] represents the culmination of significant stakeholder discussions regarding expansion of the transmission grid.” Approval Order P 108, JA 52. Cost sharing for transmission expansions in the Midwest ISO and other regional transmission organizations can provide the incentive to construct new transmission, but the resulting cost-shifting also has the potential to discourage RTO membership and the benefits that flow from a unified grid. *See, e.g.,* Order No. 2000 at 31,777. Here, the stakeholder process was extensive, open, and fair, *see* Rehearing Order PP 15-23, JA 65-68, and the fact that the List was part of an overall compromise on numerous expansion cost allocation issues provides additional support for FERC’s approval of it. *See NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1164-65 (D.C. Cir. 1998) (in the analogous settlement context, while not conclusive, FERC is “clearly entitled” to give weight to support of customers); *see also Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (D.C. Cir. 1993 (same)).

III. PETITIONERS' ARGUMENTS TO THE CONTRARY ARE UNPERSUASIVE.

A. The Commission Gave Appropriate Consideration To The Stakeholder Process Which It Reasonably Found To Have Been Fair And Open.

The Wisconsin Commission contends (Br. at 20-27) that the Commission erred “by giving weight to the non-consensus stakeholder process.” In fact, however, the Commission found the proposals just and reasonable independently of the stakeholder process:

We agree with the requests for rehearing that just because those contested provisions were a product of stakeholder process, that fact is not dispositive as to whether those provisions are unjust, unreasonable or unduly discriminatory. The [Approval Order], however, independently found that each of the contested elements of the proposed cost allocation policy was just and reasonable, as conditioned therein. While the Commission noted the stakeholder compromises with favor, the [Approval Order] did not exclusively “rely on” the compromises as justification for the justness and reasonableness of the various aspects of the Midwest ISO proposal.

Rehearing Order P 23, JA 68; *see also* discussion *supra* at 17-21.

The Wisconsin Commission essentially concedes (Br. at 21) that, as FERC found, the stakeholder process was open and allowed for extensive participation. It continues (Br. at 21), however, that the process allowed non-Wisconsin participants “to engage in an economic cram down of costs on Wisconsin, a small minority.” The majority, however, simply let Wisconsin continue to pay costs it

would reasonably have expected to pay for projects such as Arrowhead-Weston, the planning for which began in the 1990's. *See* Rehearing Order P 97, JA 89.

The Wisconsin Commission also objects (Br. at 22-24) to the Commission's use of the word "compromise" and argues that "openness" of the process doesn't mean the results are fair. These arguments miss the point, discussed above, that the Commission found the Excluded Projects List to be reasonable and not unduly discriminatory based primarily upon the merits, not on the process or whether it was a compromise. Rehearing Order P 95, JA 88; *see* discussion *supra* at 17-21.

In any case, stakeholders came to the Task Force discussions with varying positions on all aspects of cost sharing. With regard to cost sharing for Baseline Reliability Projects, for example, some stakeholders supported the 20 percent system-wide cost allocation (Approval Order P 30, JA 30), some supported system-wide sharing of 33-50 percent (*id.* P 33, JA 31), and some supported 100 percent system-wide sharing (*id.* PP 31, 34, JA 31-32). Still others opposed system-wide sharing (*id.* P 35, JA 32) or otherwise contended that the proposal unfairly discriminates against load serving entities in areas that do not require new facilities to meet reliability standards. These entities must pay the entire cost of existing facilities in their areas as well as costs for new facilities in other regions (*id.* P 36, JA 32). Such disparate positions required compromise for any cost sharing at all to be achieved. As the Commission found, the Excluded Projects

List is a reasonable part of that overall package. *See, e.g., Florida Municipal Power Agency v. FERC, 315 F.3d 362, 368 (D.C. Cir. 2003)* (under the substantial evidence standard, Commission’s choice between competing submissions is entitled to respect).

Finally, the Wisconsin Commission (Br. 24-26) cites numerous cases for the proposition that, regardless of stakeholder input, FERC has a duty to independently determine whether a proposal is just and reasonable. The Commission agrees with that proposition, and made that demonstration in the orders challenged here.

B. Cost Responsibility For Excluded Projects Had Already Been Determined.

The Commission found that for the excluded projects:

[A]ny need identified and listed as planned by the Transmission Owner is already accounted for under a previous cost recovery construct. For any projects not grandfathered, the proposed regional cost sharing plan does indeed consider the regional nature of a project.

Approval Order P 110, JA 53. On rehearing, the Wisconsin Commission accepted the finding that costing for these projects had already been established, arguing with respect to FERC’s finding quoted above that:

These observations beg the question. The “previous cost recovery construct” will dictate that Wisconsin ratepayers will pay for 100 percent of all of the projects on the Excluded Projects List without regard for the regional benefits of those projects. Applying “cost-sharing on a going forward basis” is simply arbitrary.

Wisconsin Commission Rehearing Request at 11 (R 47, JA 521). The Wisconsin Commission now contends (Br. at 28-35) that the Commission was incorrect in stating that cost responsibility had already been determined. As the Wisconsin Commission did not raise this issue on rehearing, Petitioner is barred from raising it now. FPA § 313(a) and (b); *see* discussion *supra* at 2 (Counterstatement of Jurisdiction).

In any case, Wisconsin Commission's arguments lack merit. It contends (Br. at 28) that cost responsibility could not already have been determined because parties "have long been aware" that cost responsibility would be determined in "this very proceeding." However, the proposition that projects such as Arrowhead-Weston Project (the application for which was filed in 1999 before the Midwest ISO was approved as a regional transmission organization) did not have a "previous cost recovery plan" is not credible. These projects had been planned and developed under the prior cost recovery regime and were moving forward under that regime. Rehearing Order P 97, JA 89. *See also* affidavit of Martin Blake at 12, JA 395 (Midwest ISO Transmission Owners witness, stating that the key in deciding the starting point for cost sharing was to determine the projects "that already had an established justification and sufficient regulatory approval such that they were an essential part of the starting point for future planning"). As FERC found, "parties moved forward with those projects without any assurance that such

projects would be candidates for regional cost sharing.” Rehearing Order P 96, JA 88.

C. The Excluded Projects List Merely Determines Where Regional Cost Sharing May Begin.

The Wisconsin Commission argues (Br. at 35-39) that FERC mischaracterized the excluded projects as “local.” The Wisconsin Commission’s point seems to be (Br. at 37) that the projects are not “local” if they enhance regional reliability. FERC addressed this issue in the Approval Order:

We find that [the Wisconsin Commission’s] concerns that the proposal does not consider regional benefits are misplaced. The Excluded Projects List merely determines where regional cost sharing may begin. The purpose of the Excluded Projects List was not to determine the regional nature of any planned or advanced-stage project, but rather the identified need by the Transmission Owner. As such, any need identified and listed as planned by the Transmission Owner is already accounted for under a previous cost recovery construct. For any projects not grandfathered, the proposed regional cost sharing plan does indeed consider the regional nature of a project.

Approval Order at P 110, JA 53.

The issue in this case is the point at which the new expansion protocols and cost sharing will take effect. There is no perfect answer to this question. Under the Midwest ISO proposal, existing facilities contribute to regional reliability (but do not benefit from the new cost-sharing procedures), future expansions planned pursuant to the Attachment FF expansion planning procedures will receive cost-sharing, and facilities that were in an advanced stage of planning under the old

regime will (like existing facilities) not benefit. Other dividing lines could be (and were) suggested, but given the size of the Midwest ISO and the differing interests of its many members, the one ultimately elected, as the challenged orders explain, was reasonable and not unduly discriminatory. *See Wisconsin Public Power*, 493 F.3d at 266 (the burden “is on the petitioners to show that the Commission’s choices are unreasonable and its chosen line of demarcation is not within a zone of reasonableness as distinct from the question of whether the line drawn by the Commission is precisely right”).

D. The Other Issues Raised By The Wisconsin Commission Lack Merit As Well.

The Wisconsin Commission asserts (Br. at 39-42) that Wisconsin “has kept pace” with transmission construction so that contentions from exclusion list supporters that Wisconsin projects are “catch-up” projects are incorrect. The Wisconsin Commission did not raise this argument on rehearing, however, so may not raise it now. FPA § 313(a) and (b); *see* discussion *supra* at 2. Moreover, as the Wisconsin Commission itself concedes (Br. at 41), FERC made no findings on this issue and did not base its approval of the cost-sharing proposal, and the projects excluded from the benefits of cost-sharing, on any analysis of it. In any case, the issue is subsumed in the broader issue of whether the Midwest ISO proposal unduly discriminates against Wisconsin ratepayers. As the Commission found, it does not. *See* discussion *supra* at 20-21; Rehearing Order P 98, JA 89.

Finally, the Rehearing Order observed that “the Commission has approved different approaches towards cost allocations for different regions.” Rehearing Order P 101, JA 90. The observation was directed at the unremarkable fact that there can be more than one just and reasonable way to allocate transmission costs, but nevertheless, if the one presented to the Commission is just and reasonable, the Commission must approve it. *Id.* P 62, JA 78 ; *see also Midwest ISO Transmission Owners*, 373 F.3d at 1368-69.

On appeal (Br. at 49), the Wisconsin Commission has bootstrapped this general observation into an argument that FERC’s approval of the Excluded Projects List is an “unexplained departure” from previous ISO/RTO orders. It is not surprising, however, that the Commission did not compare and contrast the proposals addressed in those orders with the proposal here, because the Wisconsin Commission did not argue on rehearing that the challenged orders were inconsistent with those orders.

In any case, as explained *supra* at 6, the Midwest ISO is unique in the large area that it covers and in the fact that it was created in a region that did not have an existing tight power pool with a history of regional transmission planning and cost allocation. Consequently, it is not surprising that it is developing differently than, for example, ISO New England, Inc., which grew out of a tight power pool formed in 1971 by New England transmission and generation owners, suppliers, publicly-

owned entities, and end-users. *See ISO New England, et al.*, “Order Granting RTO Status Subject to Fulfillment of Requirements and Establishing Hearing and Settlement Judge Procedures,” 106 FERC ¶ 61,280 at P 5 (March 24, 2004), *aff’d*, *Maine Public Utils. Comm’n. v. FERC*, 454 F.3d 278 (D.C. Cir. 2006).

Finally, the Wisconsin Commission preserved its argument (Br. at 47) that the challenged orders are not consistent with the Generator Interconnection Order premise that the Midwest ISO should file a cost allocation policy based on “payment for transmission upgrades by the parties that cause and benefit from them.” As FERC found, however, the Excluded Project List “merely determines where regional cost sharing may begin, not the regional nature of a particular project. Approval Order P 110, JA 53; *see* discussion *supra* at 27-28.

E. American Transmission Has Not Demonstrated That Including Planned And Proposed Projects On The Excluded Projects List Was Arbitrary.

American Transmission’s arguments are mostly variations on the theme that there is no rational basis for basing the Excluded Projects List on the listing of projects as “proposed” and “planned” in Midwest ISO’s 2005 Expansion Plan. However, as the Commission found, it was reasonable for the Midwest ISO to propose a method for regional cost sharing for future projects that leaves projects planned under the old cost allocation regime untouched. Approval Order P 109, JA 52. The 2005 Expansion Plan “proposed” and “planned” categories, which (as

American Transmission states, Br. at 5) have relatively near expected in-service dates compared to other categories, offer an appropriate basis for such a method.

American Transmission contends first (Br. at 14) that the 2005 Expansion Plan distinction between “proposed” and “planned” was arbitrary because the Midwest ISO never independently verified the transmission owners’ designations and because in-service dates of some planned and proposed projects were similar. However, the Excluded Projects List included all “planned” projects and those “proposed” projects that were in advanced stages of planning. Approval Order P 112, JA 53-54. Thus, the 2005 Expansion Plan distinctions were not controlling for purposes of the Excluded Projects List.

The Midwest ISO, moreover, has used the same designations for projects throughout the development of its 2003 and 2005 Expansion Plans. Approval Order P 112, JA 53-54; Midwest ISO October 7, 2005 filing at 13, JA 247. “The Midwest ISO also offered any Transmission Owner . . . the opportunity to argue that one or more of its projects that were represented as Planned Projects in the [2005 Expansion Plan] should be considered more tentative in nature and thus be re-categorized as Proposed projects (subject to cost sharing . . .).” Midwest ISO October 7, 2005 filing at 13, JA 247; Rehearing Order P 99, JA 90. Moreover, “the proposal’s reliance on Transmission Owners’ assessment passed several [Midwest ISO] procedural hurdles to end up before the Commission.” Rehearing

Order P 100, JA 90. Finally, the parties provided no evidence to the Commission “that a project should be removed from the Excluded Projects List because the project was not in advanced stages of planning.” Approval Order P 112, JA 54.

American Transmission nevertheless now contends (Br. at 14) that “the most compelling evidence of the arbitrary nature of the Planned and Proposed designations is the fact that the Midwest ISO included on the Excluded Projects List not just all of the Planned Projects in Appendix A, but 36 of the Proposed Projects.” However, American Transmission did not make this argument with regard to the “compelling evidence” in its rehearing request. In any case, inclusion of the proposed projects simply demonstrates that the Midwest ISO made every effort to include on the List projects at the same stage of development.

American Transmission’s complaint (Br. at 15) that the Midwest ISO represented at the outset that only planned projects were included is beside the point. The List itself designates the listed projects as planned or proposed (*see* JA 283), commenters indicated that the List included both (*see* Midwest Transmission Owners’ Comments at 10, JA 368), and the Commission required the Midwest ISO to correct the language in its proposed tariff (Approval Order at P 113, JA 54).

American Transmission also asserts (Br. at 16) that nothing in the record defines what it means for a project to be in the “advanced stages of planning.” American Transmission did not raise that specific issue in its rehearing request, nor

did it argue on rehearing either that its excluded projects were not in advanced stages of planning, or that particular projects of other owners should be (but were not) on the Excluded Projects List. Moreover, there can be no dispute that Arrowhead-Weston, the project for which cost-sharing would most benefit Petitioner, was at least at (if not beyond) the advanced stages of planning.

American Transmission (Br. at 22) also analogizes the opportunity to demonstrate that a project was planned or proposed to a Federal Communications Commission waiver procedure addressed by this Court in *ALLTEL Corp. v. FCC*, 838 F.2d 551 (D.C. 1988) (rejecting agency reliance on waiver to avoid application of irrational rule). American Transmission now contends that the fact that it could have challenged the categorization of its projects “does not remedy the fact” that the categories themselves were irrational, “especially in light of the fact that no one knew what level of planning would be sufficient” Br. at 22. American Transmission, however, prefers the line to be drawn based on in-service dates in part on the theory that the difference between “planned” and “proposed” is unclear. The submission of evidence (other than in-service date comparisons) would have illuminated that issue. In any case, that American Transmission prefers a different dividing line does not mean that the Commission’s approval of another dividing line based on different eligibility criteria was irrational. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000) (“It is not

enough for petitioners to convince us of the reasonableness of their views . . . [P]etitioners must demonstrate that FERC’s policy judgments are arbitrary or capricious, a heavy burden indeed.”).

Finally, American Transmission’s argument (Br. at 25) that the Excluded Projects List unreasonably penalizes transmission owners that engaged in “proactive planning” is also unpersuasive. In particular, the application for the Arrowhead-Weston Project was filed in 1999 and approved in 2001. American Transmission was formed in 2001 and began its transmission assessment then. Midwest Coalition Comments at 16, JA 342. Consequently, Arrowhead-Weston was not part of the American Transmission’s statutorily-required ten year process. Moreover, American Transmission may benefit to the extent that its “aggressive” planning has resulted in projects on the 2005 Expansion Plan that should get cost-sharing. *See* Rehearing Order P 98, JA 89. As the Commission found, “no party has been able to demonstrate that the Excluded Projects List should have been changed in regards to the status of [American Transmission’s] projects.” Approval Order P 109 fn. 56, JA 52.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Robert H. Solomon
Solicitor

Judith A. Albert
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6046
Fax: 202-273-0901
judith.albert@ferc.gov
February 1, 2008

Final Brief: April 21, 2008

Public Service Commission of Wisconsin v. FERC **Docket No. ER06-18**
D.C. Cir. Nos. 06-1408, et al.

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 7,357 words, not including the tables of contents and authorities, the certificate of counsel, this certificate and the addendum.

Judith A. Albert
Senior Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
TEL: (202) 502-6046
FAX: (202) 273-0901

April 21, 2008

