No. 24-1074

IN THE

Supreme Court of the United States

ENTERGY ARKANSAS, LLC,

Petitioner,

v.

DOYLE WEBB, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE MISO TRANSMISSION OWNERS SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the MISO Transmission Owners are a group of investor-owned utilities, municipal utilities, and cooperatives, including both vertically integrated utilities and independent transmission companies, that own transmission facilities over which the Midcontinent Independent System Operator, Inc. ("MISO") provides transmission service in the central United States spanning fifteen states, including six of the seven states in the United States Court of Appeals for the Eighth Circuit.[2]

1. The MISO Transmission Owners provided timely notice of their intention to file this brief under this Court's Rule 37.2. No counsel for any party authored this brief, in whole or in part, and no person or entity, other than the MISO Transmission Owners, or counsel, made a monetary contribution to the preparation or submission of this brief.

2. The MISO Transmission Owners are the following entities: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; American Transmission Company LLC Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; Citizens Electric Corporation; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Cooperative Energy; Dairyland Power Cooperative; Duke Energy Business Services, LLC for Duke Energy Indiana, LLC; East Texas Electric Cooperative; Great River Energy; GridLiance Heartland LLC; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company d/b/a AES Indiana; International Transmission Company d/b/a ITC*Transmission*; ITC Midwest LLC; Lafayette Utilities System; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company LLC; Northern

In addition to owning interstate transmission facilities, many of the MISO Transmission Owners own electric generation assets and are load-serving entities with an obligation to serve. Working through MISO's regional transmission planning process that is filed with and approved by the Federal Energy Regulatory Commission ("FERC"), the MISO Transmission Owners make considerable investments in infrastructure to provide affordable and reliable transmission service and maintain the bulk electric system.

The decision below of the United States Court of Appeals for the Eighth Circuit that a FERC order does not have preemptive effect unless the order affirmatively states that it preempts state law is wrong as a matter of law and threatens to undermine the MISO Transmission Owners' recovery through state-jurisdictional retail rates of the substantial investments they are making in the bulk electric system. The Eighth Circuit decision would allow state commissions to bar recovery by the MISO Transmission Owners of their investment in transmission facilities from retail customers and thereby "trap" FERC-approved wholesale costs, leaving them for the utilities to absorb.

The MISO Transmission Owners do not submit this *amicus* brief to argue the Eighth Circuit's legal

States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power, Inc.; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a CenterPoint Energy Indiana South); Southern Minnesota Municipal Power Agency; and Wolverine Power Supply Cooperative, Inc.

error. Instead, the MISO Transmission Owners write to emphasize the magnitude of potential harm if the Eighth Circuit's erroneous decision stands. The MISO Transmission Owners are investing billions of dollars in transmission infrastructure to address the needs of the electric system in the central United States. If FERC orders lack preemptive force, which would allow states to block transmission owners from recovering FERC-jurisdictional transmission costs from retail customers, recovery of these investments is at risk and the MISO Transmission Owners will be directly affected.

SUMMARY OF ARGUMENT

The electric industry in the United States stands at an inflection point today. Changes in the fuel types of electric generation, from predominantly fossil fuel-fired generation to increasing amounts of intermittent, renewable generation resources over the last two decades, as well as explosive growth in the demand for electricity driven by electrification of housing and transportation and new data center demand, along with other factors such as technological changes and extreme weather, combine to create significant reliability challenges for the electric grid. As electricity underlies our entire society, the critical need to address these challenges to assure continuing reliable and cost-effective electric service cannot be overstated. New and upgraded electric transmission infrastructure offers a comprehensive solution for many of these challenges.

The MISO Transmission Owners have been investing in regional transmission facilities for the last twenty years and the pace of their planning and investment has been increasing. At present, the transmission owners in MISO are responsible for planned and approved investment in transmission facilities with an estimated cost of more than $97 billion.

The Eighth Circuit decision of which Entergy Arkansas seeks review, *Entergy Ark., LLC v. Webb*, 122 F.4th 705 (8th Cir. 2024), is wrong legally, for all the reasons Entergy Arkansas identifies in its petition. *See generally* Petition for a Writ of Certiorari, *Entergy Ark., LLC v. Webb*, No. 24-1074 (Apr. 10, 2025) ("Pet. for Cert."). In practical terms, though, the decision threatens to undercut the MISO Transmission Owners' recovery of the tremendous amount of investment they are making by allowing state regulatory commissions to prevent recovery of that investment from retail ratepayers. This "trapping" of FERC-approved wholesale-level costs for the utilities would severely affect the MISO Transmission Owners' ability to continue investing in much-needed transmission infrastructure.

The Eighth Circuit's mistaken view of the preemptive effect of FERC orders would fundamentally alter the interaction of FERC's jurisdiction over wholesale power rates and tariffs with state commissions' jurisdiction over retail rates unless this Court steps in to correct the Eighth Circuit's error and resolve the circuit split it has caused. This Court should grant Entergy Arkansas's petition and summarily vacate the judgment of the United States Court of Appeals for the Eighth Circuit, or alternatively set the case for plenary briefing and argument.

ARGUMENT

I. Transmission Investment Addresses Reliability Challenges

In the central United States, MISO is the FERC-regulated regional transmission organization that operates the electric grid to ensure that power flows reliably and affordably across fifteen states. MISO partners with the transmission owners and other stakeholders in MISO to plan the transmission system it operates, as well as to coordinate with neighboring systems to plan interregionally. Fifty-four transmission owners, including the MISO Transmission Owners, are members of MISO with nearly 77,000 miles of high-voltage transmission lines under MISO's functional control serving 45 million people. *MTEP24 Report*, Midcontinent Independent System Operator, Inc., 2-3, (Dec. 11, 2024), https://cdn.misoenergy.org/MTEP24%20Full%20Report658025.pdf ("MTEP24 Report").

Reliability challenges to the bulk electric system are steadily emerging within the MISO region and across the United States. *See* Pet. for Cert. at 2; *see, e.g.*, Revision to the Open Access Transmission, Energy and Operating Reserve Tariff Expedited Resource Addition Study Filing of Midcontinent Independent System Operator, Inc., FERC Docket No. ER25-1674-000, at 3 (Mar. 17, 2025) ("Expedited Resource Addition Study Filing"). The MISO grid is experiencing dramatic transformation driven by economic, technological, policy-related, and extreme weather factors. "Widespread retirements of dispatchable resources, lower reserve margins, more frequent and severe weather events and increased reliance on weather-dependent resources and emergency-only resources have altered the region's historic risk profile," changing the times at which reliability risks are most pronounced and demanding new and reinforced transmission facilities. *MTEP24 Executive Summary*, Midcontinent Independent System Operator, Inc., 3, (Dec. 10, 2024), https://cdn.misoenergy.org/MTEP24%20Executive%20Summary658126.pdf ("MTEP24 Executive Summary"). Capacity margins in MISO are tightening as existing fossil fuel resources retire at a rate that outpaces the addition of generating resources of an equivalent reliability rating, leading the North American Electric Reliability Corporation to designate MISO's footprint as "high risk" for falling below established resource adequacy criteria in the next five years. Expedited Resource Addition Study Filing at 3 (citing *2024 Long-Term Reliability Assessment*, North American Electric Reliability Corp., 6 (Dec. 2024), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_Long%20Term%20Reliability%20Assessment_2024.pdf). In addition, demand for electricity is increasing sharply as existing consumption, or "load," expands with electrification and new load spikes in the form of large, single-site load additions associated with resurgent manufacturing and high-demand data centers. MTEP24 Executive Summary at 4.

MISO's Reliability Imperative, the shared responsibility that MISO, its transmission owners, members, and states have to address the urgent and complex challenges to electric grid reliability in the central United States, seeks to address these issues. A key pillar of the Reliability Imperative is planning and building needed transmission to increase transfer capability and reduce barriers to interconnection of new generation resources. *See* Midcontinent Independent System Operator, Inc., *MISO's Response to the Reliability Imperative*, 18-20 (Feb. 2024), https://cdn.misoenergy.org/2024%20Reliability%20Imperative%20report%20Feb.%2021%20Final504018.pdf?v=20240221104216; MTEP24 Executive Summary at 3. Investing in new and reinforced transmission facilities is critical to addressing the challenges presented by the changing mix of generation fuel types, the major load growth and load additions, and the accelerating speed of change in the MISO region. As MISO notes, "[a] more interconnected system is stronger." MTEP24 Executive Summary at 19.

II. Transmission Investment in MISO

MISO and its transmission owners are meeting these challenges and responding to the Reliability Imperative with significant infrastructure investment. Each year, MISO and its members develop a transmission plan to meet the needs of the MISO region. The MISO Board of Directors approves the MISO Transmission Expansion Plan ("MTEP") and the transmission owners then have an obligation to construct the transmission approved in the MTEP. Since 2003, transmission owners in MISO have been assigned responsibility for more than $97 billion of infrastructure investment, of which approximately $39 billion was built and placed in service as of December 2024. MTEP24 Report at 14-15 ($67 billion of infrastructure investment approved 2003 through 2023 plus an additional estimated $30 billion approved in MTEP24).

Of the $97 billion total MISO Board-approved transmission investment, $32 billion has been approved since 2021 in two large portfolios of regional transmission projects (designated Tranche 1 and Tranche 2.1) specifically to help ensure a reliable and resilient future grid to address the Reliability Imperative in MISO. The Tranche 1 portfolio consists of eighteen projects totaling $10.3 billion, MTEP24 Report at 15, 23. The Tranche 2.1 portfolio consists of twenty-four projects totaling $21.8 billion, *id.* at 80, 161.

Once approved and implemented, the investment in transmission facilities by the MISO Transmission Owners flows through MISO's FERC-filed tariff and is charged to customers at the FERC-jurisdictional rates for transmission service.

III. The Decision Below Threatens Recovery of Much-Needed Transmission Investment

As Entergy Arkansas argues in its petition, the Eighth Circuit's decision conflicts with decisions of this Court and other circuits. Pet. for Cert. at 1. This Court has held that a wholesale rate or tariff filed with and accepted or approved by FERC that establishes allocation of a wholesale cost to a utility precludes a state commission from barring recovery of that wholesale cost allocation through a state-jurisdictional retail rate. *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 48 (2003); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 968 (1986). The Eighth Circuit's decision produces the opposite result, as it would allow a state commission to block recovery of wholesale-level costs from retail customers unless the FERC order establishing the wholesale rate or cost allocation explicitly states that it preempts any state commission attempt to alter that rate. As the former members of FERC explain in their *amici curiae* brief, FERC "very rarely asserts federal preemption in its Federal Power Act rate orders" because the filed rate doctrine was established by the courts and is for the courts to enforce. Brief Amici Curiae of Former Members of the Federal Energy Regulatory Commission, et al. at 4, *Entergy Ark., LLC v. Webb*, No. 24-1074 (Apr. 15, 2025). Given FERC's understanding when it issued orders prior to the Eighth Circuit's decision, its orders accepting FERC-filed tariffs/rates for recovery of transmission investment, and the tariffs/rates themselves, usually do not explicitly state that they have a preemptive effect.

Vertically integrated utilities with load serving obligations take transmission service under the MISO tariff to serve their retail (state-regulated) customers. If their state regulators do not honor the transmission service rates set by FERC when they are setting the state-regulated retail rates, the utilities' transmission investment can be "trapped" (i.e., paid at the wholesale level, but not allowed to be recovered at the retail level). This leaves the trapped transmission investment to be absorbed by the utility and its shareholders, in the case of investor-owned utilities.

Given the extraordinary investment in transmission facilities the MISO Transmission Owners have made and are planning to continue making, and the critical need for that investment as described in Part II, *supra*, the potential the Eighth Circuit decision presents for a substantial portion of their investment to be trapped and therefore unrecoverable cannot help but deter investment. If the Eighth Circuit's decision below, which defers entirely to FERC's silence on preemption and does not leave any role for the courts, is not reversed, the ability of the MISO Transmission Owners and other similarly situated transmission owners to invest substantial amounts in critically needed transmission infrastructure will be jeopardized. This Court should grant Entergy Arkansas's petition and summarily vacate the judgment of the United States Court of Appeals for the Eighth Circuit, or alternatively set the case for plenary briefing and argument.

CONCLUSION

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

Respectfully submitted,

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