

No. 22-1347

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

National Wildlife Refuge Association, *et al.*,
Plaintiff-Appellees,

v.

American Transmission Company, LLC, *et al.*,
Intervenor Defendant-Appellants.

On Appeal from the United States District Court
for the Western District of Wisconsin,
Case Nos. 21-cv-0096 and 21-cv-0306
The Honorable William M. Conley, District Judge

**Brief of *Amicus Curiae* the Midcontinent Independent System Operator, Inc.
Supporting Intervenor Defendant-Appellants' Petition Seeking Reversal**

Jeffrey L. Small
MISO
720 City Center Drive
Carmel, Indiana 46032
jsmall@misoenergy.org
Phone: (317) 249-5400
Fax: (317) 249-2111

*Attorney for Amicus Midcontinent Independent System Operator, Inc.
Supporting Intervenor Defendant-Appellants*

F.R.A.P. and Circuit Rule 26.1 Disclosure Statement
(Docket No. 22-1347; *National Wildlife Refuge*
***Association v. American Transmission Company, LLC*)**

The Midcontinent Independent System Operator, Inc. (“MISO”) is a non-governmental, nonprofit organization founded in 1998. It is a membership organization whose members include the non-governmental bodies in the region comprised of all or portions of fifteen states and one Canadian province. MISO does not have a parent company, subsidiary, or affiliate. MISO’s counsel of record, Jeffrey Small, is a member of the bar of this court and is inside counsel.

- | | | |
|-----|---|------------|
| [1] | Full name of every party the attorneys represents in this case:
Midcontinent Independent System Operator, Inc. | |
| [2] | Law firms whose lawyers have/may appear for MISO: | N/A |
| [3] | MISO’s parent corporations, if any:
Publicly held company with 10% of MISO stock: | N/A
N/A |
| [4] | Information required by FRAP 26.1(b): | N/A |
| [5] | Debtor information required by FRAP 26.1 (c) 1 & 2: | N/A |
| [6] | Who will enter an appearance for MISO: | |

*/s/ Jeffrey L. Small**

Jeffrey L. Small, MISO Senior Corporate Counsel

*Mr. Small is Counsel of Record pursuant to Circuit Rule 3(d).
Address: MISO, 720 City Center Drive, Carmel, IN 46032
Phone: (317) 249-5400 Fax: (317) 249-2111
jsmall@misoenergy.org

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

GLOSSARY.....v

IDENTITY/INTEREST OF AMICUS/AUTHORITY 1

RULE 29(a)(4)(E) CERTIFICATION 6

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. The District Court Decided that the EIS Was Invalid Based on
Its Confusion Regarding the Facts..... 8

II. The District Court Misapplied the Legal Precedent Regarding
the Statement of Purpose in the EIS. 10

CONCLUSION..... 17

CERTIFICATE OF COMPLIANCE..... 19

CERTIFICATE OF SERVICE..... 20

Table of Authorities

Court Cases

Citation	Pages
<i>American Transmission Company LLC v. Midwest Independent Transmission System Operator</i> , 142 FERC ¶ 61,090 (2013).....	5
<i>Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.</i> , 462 U.S. 87, 103 S.Ct. 2249, 76 L.Ed.2d 437 (1983).....	12, 17
<i>Hoosier Environmental Council v. U.S. Army Corps of Engineers</i> , 722 F.3d 1053, 1061 (7 th Cir. 2013).....	12
<i>Illinois Commerce Commission v. Federal Energy Regulatory Commission</i> , 721 F.3d 764, 769 (7 th Cir. 2013).....	1, 2, 5
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976).....	11, 12
<i>Marsh v. Oregon Natural Resources Council</i> , 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989).....	12
<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 97 FERC ¶ 61,326 (2001).....	1
<i>National Wildlife Refuge Assoc. v. Rural Utilities Service</i> , No. 21-cv-00096-wmc, consolidated with 21-cv-00306-wmc, Final Judgment (W.D. Wis. March 1, 2022).....	6
<i>North Buckhead Civic Ass’n v. Skinner</i> , 903 F.2d 1533 (11 th Cir. 1990).....	11
<i>Preventing Undue Discrimination and Preference in Transmission Service</i> , Order No. 890, FERC Stats. & Regs. ¶ 31,241, <i>order on reh’g</i> , Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), <i>order on reh’g and clarification</i> , Order No. 890-B, 123 FERC ¶ 61,299 (2008), <i>order on reh’g</i> , Order No. 890-C,	

126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D,
 129 FERC ¶ 61,126 (2009) 3

Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835,
 104 L.Ed.2d 350 (1989).....10, 11

Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664 (7th Cir. 1997).....8, 9, 11

Stryker’s Bay Neighborhood Council, Inc. v. Karken, 444 U.S. 223,
 200 S.Ct. 497, 62 L.Ed.2d 433 (1980).....11

*Transmission Planning and Cost Allocation by Transmission Owning
 and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 66,051
 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132
 (2012), *order on reh’g and clarification*, Order No. 1000-B,
 141 FERC ¶ 61,044 (2012).....4

*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense
 Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).....11

Statutes/Rules

Citation	Pages
18 C.F.R. 35.34 Regional Transmission Organizations, Sections (j)(1), (k)(1), and (k)(7).....	1, 2
F.R.A.P. & Circuit Rule 26.1, 28 U.S.C.A.	i
F.R.A.P. Rule 29(a)(4)(E), 28 U.S.C.A.	6
Federal Power Act, 16 U.S.C. § 791a <i>et seq</i>	1
National Environmental Policy Act, 42 U.S.C.A. §§ 4321, <i>et seq</i>	7

Glossary

App'x – Appellants' Appendix

CHC Project – Cardinal Hickory Creek 345 kV transmission project

EIS – Environmental Impact Statement

FERC – Federal Energy Regulatory Commission

January Order – January 14, 2022, Opinion and Order of District Court

kV – Kilovolt

MISO – Midcontinent Independent System Operator, Inc.

MTEP – MISO Transmission Expansion Plan

MVP – Multi Value Project

NEPA – National Environmental Policy Act

ROD – Record of Decision

RTO – Regional Transmission Organization

RUS – Rural Utilities Service

Transmission Developers – Intervenor Defendant-Appellants (American Transmission Corporation, ITC Midwest, and Dairyland Power Cooperative)

Identity/Interest of Amicus/Authority

The Midcontinent Independent System Operator, Inc. (“MISO”) is a regional transmission organization (“RTO”) (App’x at 623), under the supervision of the Federal Energy Regulatory Commission (“FERC”)¹ and other federal authorities. FERC has the responsibility to regulate the transmission of electricity in interstate commerce. (Federal Power Act, 16 U.S.C. § 791a *et seq.*²) Among MISO’s responsibilities as a FERC-approved RTO is the vital task of ensuring that the regional transmission system is reliably planned to provide for existing and expected use of that system. (18 C.F.R. § 35.34(k)(7) (“responsible for planning, and for directing or arranging, necessary transmission expansion”).) MISO is a not-for-profit entity that provides reliability and market services over a region that stretches

¹ FERC is an independent agency within the U.S. Department of Energy that, for purposes of the arguments in this case, regulates the interstate transmission of electricity (generally, the high voltage portion of the electric system). (Federal Power Act, 16 U.S.C. § 791a *et seq.*) MISO was approved as the nation’s first RTO. *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001).

² *See Illinois Commerce Commission v. Federal Energy Regulatory Commission*, 721 F.3d 764, 770 (7th Cir. 2013) (“7th Circuit MVP Decision”).

from the Ohio-Indiana border to Eastern Montana and south to New Orleans.³ (App'x at 623-24.)

MISO does not own transmission assets serving its region, but supervises those facilities and maintains the tariff that governs the transmission service provided by those facilities that are owned by others. (18 C.F.R. § 35.34(k)(1) (“administer ... pricing system that will promote efficient use and expansion of transmission and generation facilities.”).) MISO approves transmission service, new generation interconnections,⁴ and new transmission interconnections within the MISO footprint, and is responsible for ensuring that the system is planned to reliably and efficiently provide for existing and forecasted usage of the transmission system. (App' at 625.) MISO performs planning functions collaboratively with stakeholder input and provides planning assessments that are independent from the transmission system owners regarding the needs of the transmission system. (18 C.F.R. § 35.34(j)(1) (“independent of any market participant”) and (k)(7) (“responsible for planning, and for directing or arranging, necessary transmission expansion”).)

³ In December 2013, MISO's South Region was added, extending the MISO footprint to New Orleans from that described by this Court in its June 2013 decision. *7th Circuit MVP Decision* at 769.

⁴ Generator interconnections are studied based upon existing and MISO-approved transmission projects. Failure to build a major, planned project would require restudy of many generator interconnections both west and east of the Mississippi River that were initially studied based on such a project.

MISO performs collaborative planning functions for the regional transmission system with its stakeholders while independently assessing regional transmission needs. (App'x at 625.) MISO's planning process adheres to the nine planning principles outlined in FERC Order 890. (*Preventing Undue Discrimination and Preference in Transmission Service*, FERC Order No. 890.⁵) MISO's planning process is open and transparent, welcoming participation by a wide range of stakeholders to arrive at outcomes that will provide net benefits under a range of future scenarios (App'x at 634) that are reported in the MISO Transmission Expansion Plan ("MTEP"). (App'x at 628.) The transmission projects in the annual MTEP are recommended by the MISO staff for approval by MISO's independent Board of Directors. (App'x at 636.) MISO's planning process also complies with FERC Order No. 1000, an order that included the requirement that MISO and other regional transmission operators plan for public policy (such as state requirements for

⁵ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009). 'The Transmission Provider's planning process shall satisfy the following nine principles, as defined in the Final Rule in Docket No. RM05-25-000: coordination, openness, transparency, information exchange, comparability, dispute resolution, regional participation, economic planning studies, and cost allocation for new projects.' Order 890-B, Attachment K.

renewables) and for coordinated inter-regional planning and cost allocation. (*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, FERC Order No. 1000.⁶)

MISO's collaborative planning functions resulted in the identification of the Cardinal-Hickory Creek 345 kV transmission project ("CHC Project") (App'x at 629) – ultimately the subject of this appeal – as an important link in the transmission system that is needed to ensure the continued existence of an economic and reliable transmission system in Wisconsin-Iowa area as well as the surrounding region. (App'x at 628-631.) The CHC Project is a vital part of MISO's MTEP, and the Intervenor Defendant-Appellants (the "Transmission Developers") are designated to implement that plan as approved by MISO's independent Board of Directors. (App'x at 639.)

This appeal addresses one of the ongoing challenges brought by Plaintiff-Appellees to invalidate, among other matters, the EIS on which the RUS led the analysis related to the CHC Project. The District Court's action in favor of Plaintiff-Appellees invalidates that EIS based upon the "purpose" stated for the CHC Project. That EIS is essential to the ability of one of the Transmission Developers – Dairyland

⁶ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 66,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

Power Cooperative – to borrow funds from federal sources to finance its share of the CHC Project. (January Order at 41, n. 6, App’x at 41.) MISO is the best source of information regarding the purpose served by the CHC Project, a development that was planned by MISO and that was approved by the MISO Board of Directors as a vital part of the MTEP plan for ensuring necessary transmission expansion.

MISO is immensely concerned about obstacles to the completion of its transmission plan, and especially in this case concerning the CHC Project that links the western and eastern sub-regions of the MISO footprint that are separated by the Mississippi River. The CHC Project links new sources of renewable and other generation west of the Mississippi River with centers of demand for electricity located to the east of the Mississippi River. (*See 7th Circuit MVP Decision* at 771-772.)

Due to the time required to plan and construct transmission projects, MISO’s regional planning process is necessarily cumulative,⁷ more recent improvements necessarily building upon portions previously planned. Since the CHC Project was approved by the MISO Board of Directors years ago, failure to complete the CHC Project and place it into service would cause serious disruption to MISO’s regional

⁷ *See, e.g. American Transmission Company LLC v. Midwest Independent Transmission System Operator*, 142 FERC ¶ 61,090 at P 55 (2013) (“In order to plan future projects, MISO’s planning cycles necessarily assume that previously-approved projects in its models will be in operation even if they have not yet been placed in service.”).

planning process in the Midwestern portion of MISO's footprint that depends upon the existence of the CHC Project. This Court's disposition of this appeal is likely to have an impact on regional transmission planning, and also national transmission planning as that process is supervised by FERC.

Intervenor Defendant-Appellants (the Transmission Developers) lodged this appeal. MISO files its brief supporting the Transmission Developers over the objection of Plaintiff-Appellees, with leave of the Court.

Rule 29(a)(4)(E) Certification

The undersigned counsel certifies that he authored this entire brief and that no person, party, or parties' counsel contributed money to support preparation or submission of the brief other than MISO.

Argument Summary

The brief filed by Intervenor Defendant-Appellants demonstrates the imbalance of the Opinion and Order on summary judgment of the United States District Court for the Western District of Wisconsin dated January 14, 2022 ("January Order") and the subsequently issued Final Judgment entered on March 1, 2022 that relies upon the determinations in the January Order.⁸ This MISO brief

⁸ *National Wildlife Refuge Assoc. v. Rural Utilities Service*, No. 21-cv-00096-wmc, consolidated with 21-cv-00306-wmc, Final Judgment (W.D. Wis. March 1, 2022). Appellants' Appendix ("App'x" filed on April 13, 2022, Dkt. 20) at 46-47. The January Order is located in App'x at 1-45.

addresses matters contained in the January Order relating to the Environmental Impact Study (“EIS”) prepared under the leadership of the U.S. Department of Agriculture Rural Utilities Service (“RUS,” *see introductory discussion in January Order at 3; RUS report at App’x 785 et seq.*) that was decided in favor of Plaintiff-Appellees. (January Order at 35-41, App’x at 35-41.) The EIS was prepared in response to requirements of the National Environmental Policy Act (“NEPA”), 42 U.S.C.A. §§ 4321, *et seq.* (App’x at 795), which is described in more detail by Intervenor Defendant-Appellants.

The District Court partly decided that the EIS was invalid based on a misstatement of facts. Its January Order states that the RUS violated its duty to prepare an EIS according to NEPA requirements when it based the purpose statement for the CHC Project on work performed by MISO as “one of the three utilities” in the case. (January Order at 40, App’x at 40.) This statement is false, and contradicted by the other contents of the January Order. The District Court used precedent that it found useful to invalidate the EIS under NEPA, and misunderstood facts in making its determination. The District Court’s decision should be reversed.

The District Court’s treatment of this case raises a serious issue regarding the relationship between the entity charged with responsibility for planning the transmission system – here, MISO – and a federal reviewing court. The role of the

courts under NEPA is to ensure that a federal agency takes its actions based upon an adequate consideration of environmental impacts. The approach taken by the District Court – which would divorce the “purpose” statement for NEPA purposes from that used in the RTO-supervised transmission planning process – threatens to supplant the regional transmission planning process approved by FERC. That approach should be rejected as reaching beyond the bounds of judicial review; the District Court should cease engaging in transmission planning. NEPA’s process-related provisions were met in this case, RUS’ action based on the EIS was neither arbitrary nor capricious, and the District Court’s Order and Final Judgment that invalidated the RUS EIS should be reversed.

Argument

I. The District Court Decided that the EIS Was Invalid Based on Its Confusion Regarding the Facts.

The District Court stated that it based the part of its Order regarding the EIS on facts that a reader can determine were misstated by the District Court, and which contradict facts stated correctly elsewhere in the Order. The Order states: “Perhaps unsurprisingly, the EIS actually adopts one of the three utilities’ (MISO’s) stated purpose for the CHC project almost verbatim (ROD031341.)” (January Order at 40, App’x at 40.) The Court applied its misunderstanding of facts to precedent in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), quoting it as stating that “agencies have ‘the duty under NEPA to exercise a degree of

skepticism in dealing with self-serving statements from a prime beneficiary of the project.” (January Order at 41, App’x at 41, *citing Simmons* at 669.) However, MISO is *not* “one of the three utilities” that were identified elsewhere in the order.⁹

Elsewhere, the January Order identifies the three utilities as the Transmission Developers. “The utility companies charged with building and operating the CHC [are] American Transmission Company, LLC (‘ATC’), Dairyland Power Cooperative (‘Dairyland’) and ITC Midwest LLC (‘ITC’) (the ‘Utilities’)” (January Order at 2, App’x at 2.) Further, according to the January Order itself: “Because Dairyland expressed an intent to request funding for its 9% stake in the CHC project from the U.S. Department of Agriculture Rural Utilities Service (‘RUS’), that government entity led the effort to prepare an Environmental Impact Statement (‘EIS’)” (January Order at 3, App’x at 3.) So, the “prime beneficiary” for purposes of *Simmons* would be Dairyland Power Cooperative, not MISO. The

⁹ Also, the purpose for the CHC Project stated in the EIS is *not* taken “almost verbatim” from the page in MISO’s report that the District Court cites as “ROD031341.” App’x at 795-96 from the EIS, *compare with* App’x at 138 from the 2012 MISO report. The referenced page is from MISO’s 2012 MVP report, “Multi Value Project Portfolio: Results and Analyses” that states the justification for the CHC Project (referred to as the Dubuque to Spring Green to Cardinal Project, 3127). It states, in part: “This expansion creates an additional wind outlet path across the state; bringing power from Iowa into southern Wisconsin, where it can then go east . . . [and contributes to] 1,100 MW of wind power transfer capability.” Electric system reliability is benefitted, but high voltage rebuilding of existing lines would not provide the benefits of a MVP project. App’x 138.

text located on pages 2-3 of the January Order (App'x at 2-3) cannot be reconciled with the accusation leveled against RUS (and seemingly MISO) where the District Court renders its decision. (January Order at 41, App'x at 41.)

The top of the January Order identifies MISO in contrasting terms: “Midcontinent Independent System Operator, Inc. (‘MISO’) [is] an independent not-for-profit group which manages the power grid in 15 states, [and] worked with various state regulators and utility industry stakeholders from 2008 to 2011 to identify projects that would increase energy transmission and usage of renewable energy.” (January Order at 3, App'x at 3.)

The determination by the District Court that the EIS is deficient based on it having been drawn from a MISO document as one of the three utilities most benefitting from the RUS' document is factually incorrect, and conflicts with the facts stated at the beginning of the January Order. The District Court's January Order regarding the insufficiency of the EIS should be reversed.

II. The District Court Misapplied the Legal Precedent Regarding the Statement of Purpose in the EIS.

The District Court's animus towards completion of the CHC Project was partly accomplished by inappropriately wielding NEPA as a sword against further development of the transmission system. However, “it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.” (*Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1846, 104

L.Ed.2d 350, 350 (1989), *citing Stryker’s Bay Neighborhood Council, Inc. v. Karken*, 444 U.S. 223, 227-228, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433 (1980) (*per curiam*); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1978).) From *Roberson* (at 1846):¹⁰

The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences, *Kleppe*, 427 U.S., at 410, n. 21, 96 S.Ct., at 2730, n. 21 (citation omitted) and that provide for broad dissemination of relevant environmental information.

NEPA “action forcing” in this case resulted in an EIS by the RUS that focused the requisite attention on environmental issues.

An agency such as RUS that formulates an EIS and lacks responsibility for planning infrastructure must obtain reliable information regarding the project.¹¹ Skepticism may be appropriate relating to positions taken from an applicant for a permit. (*Simmons* at 669.) However, the expertise of an entity should be deferred to

¹⁰ “*Kleppe*” refers to *Kleppe v. Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976).

¹¹ As a lending agency, RUS is not responsible for electric transmission planning resulting from NEPA provisions. *North Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1541-42 (11th Cir. 1990) (“NEPA does not confer the power or responsibility for long range local planning on federal or state agencies.”)

when “analysis of the relevant documents ‘requires a high level of technical expertise’”¹² (*Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377, 109 S.Ct. 1851, 1861, 104 L.Ed.2d 377 (1989), citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 96 S.Ct. 2718, 2731, 49 L.Ed.2d 576 (1976) and *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103, 103 S.Ct. 2249, 2255, 76 L.Ed.2d 437 (1983); see also *Hoosier Environmental Council v. U.S. Army Corps of Engineers*, 722 F.3d 1053, 1061 (7th Cir. 2013) (“independent responsibility . . . , [but] isn’t required to reinvent the wheel.”).) The District Court attributes the purpose statement – the aspect of the EIS rejected by the District Court – to RUS’ consideration of MISO’s planning process and stated results. (January Order at 40, App’x at 40.) The dependency of the EIS purpose statement on MISO planning is consistent with legal precedent.

The problem with the District Court inserting itself into transmission planning is illustrated in this case. The District Court stated that six sub-purposes located in the CHC EIS, taken together, were “incredibly specific, resulting in most reasonable alternatives being defined out of the EIS.” (January Order at 37, App’x at 37.) A

¹² The District Court pejoratively refers to “MISO’s convoluted purpose statement. . . .” (January Order at 41, App’x at 41.) To the extent that MISO’s Multi Value Project Portfolio: Results and Analyses (2012) report was reviewed by the District Court (as opposed to just the EIS), it was written for a technical, planning audience and not for a court.

misunderstanding of the facts behind the CHC Project results in the District Court's presumption of irregularity regarding development of the EIS. The January Order repeats the sub-purposes for the Project stated in the EIS, stating (January Order at 36, App'x at 36.; *quoting* EIS, App'x at 795-96.):

In the final EIS here, RUS defined six, sub-purposes of the CHC project, which taken together constitute its stated purpose:

- Address reliability issues on the regional bulk transmission system and ensure a stable and continuous supply of electricity is available to be delivered where it is needed;
- Alleviate congestion that occurs in certain parts of the transmission system and thereby remove constraints that limit the delivery of power from where it is generated to where it is needed to satisfy end-user demand;
- Expand the access of the transmission system to additional resources, including lower-cost generation from a larger and more competitive market that would reduce the overall cost of delivering electricity, and renewable energy generation needed to meet state renewable portfolio standards and support the nation's changing electricity mix;
- Increase the transfer capability of the electrical system between Iowa and Wisconsin;
- Reduce the losses in transferring power and increase the efficiency of the transmission system and thereby allow electricity to be moved across the grid and delivered to end-users more cost-effectively; and
- Respond to public policy objectives aimed at enhancing the nation's transmission system and to support the changing generation mix by gaining access to additional resources such as renewable energy or natural gas-fired generation facilities.

The January Order states that “the court is not convinced that increasing transfer capacity between Iowa and Wisconsin alone is impermissibly narrow. . . .” (January Order at 37, *referring to* sub-purpose 4; App’x at 37.) However, the shallow review undertaken by the District Court resulted in its determination that the remaining sub-purposes significantly narrow the opportunity for alternatives. The District Court failed to understand the sub-purposes, even though it accepted an overview that the CHC Project was one of a portfolio of projects “identif[ied by MISO] . . . that would increase energy transmission and usage of renewable energy.” (January Order at 3, App’x at 3.)

Upon closer examination, increasing transfer capability between Iowa and Wisconsin (sub-purpose four, *repeated in* January Order at 36; App’x at 36 *quoting* EIS, App’x at 795-96¹³) isn’t pursued in a vacuum, but to “ensure a stable and continuous supply of electricity to . . . where it is needed [towards the east]” (sub-purpose one¹⁴). The first sub-purpose also recognizes that build-out of the

¹³ See Multi Value Project Portfolio: Results and Analyses (MISO 2012), ROD031341 (“Iowa into southern Wisconsin” and “enables 1,100 MW of transfer capability”), App’x at 138; ROD031365 (“allows low cost energy in the western regions to reach a wider footprint”). To spare the Court the burden of an additional appendix, MISO refers to portions of the 2012 MVP report that are not contained in the appendix of Defendant-Appellants by only the ROD designation. MISO will provide these pages upon request of the Court.

¹⁴ See *id.*

transmission system “address[es local] reliability issues.”¹⁵ The CHC Project is a MISO “Multi Value Project” that maximizes benefits from an otherwise valuable transmission project by solving multiple problems, including local reliability problems to the extent that they can be simultaneously addressed. The CHC Project will “alleviate congestion that occurs in parts of the transmission system [*e.g.* Iowa-Wisconsin] that thereby remove constraints that limit the delivery of power from where it is generated [*i.e.* new locations to the west] to where it is needed [towards the east]” (sub-purpose two¹⁶). The location of new generation to the west of the Mississippi will provide the “additional resources, including lower-cost generation from a larger and more competitive market” (sub-purpose three¹⁷). The CHC Project will “reduce losses in transferring power . . . across the grid [from west to east] and [be] delivered to end-users more cost-effectively” (sub-purpose five¹⁸). Recognizing the new, less polluting generation locations in the west “support[s] the changing generation mix by gaining access to additional resources such as renewable energy or natural gas-fired generation facilities [that] support the changing generation mix

¹⁵ See *id.*, ROD031341 (“[f]rom a reliability perspective”), App’x at 138.

¹⁶ See *id.*, ROD031341 (“Iowa into Southern Wisconsin”), App’x at 138; ROD031317 (“reducing congestion costs”), ROD031317.

¹⁷ See *id.*, ROD031315 (“lowest delivered wholesale energy cost”); ROD031365 (“allows low cost energy in the western regions to reach a wider footprint”).

¹⁸ See *id.*, ROD031373 (“reduces overall system losses”).

by gaining access to additional resources such as renewable energy or natural gas-fired generation facilities [west of the Mississippi River]” (sub-purpose six¹⁹). These sub-purposes are repetitive and reinforcing, not cumulative and “incredibly specific.” (January Order at 37, App’x at 37.)

Key to the purpose of the CHC Project is connecting new, more western sources of generation to electric demand centers (generally to the east), and careful MISO planning took advantage of new, high voltage corridors to achieve local benefits. MISO, as the regional planner for the region, is the authority on this matter. In contrast, the District Court on its own expands the EIS purpose statement into a list of seventeen requirements without understanding the interrelationships involved in electrical systems and transmission planning. MTEP planning, for example, recognizes that the CHC Project and all other plans would fail to satisfy the District Court’s straw man suggestion that the EIS purpose statement includes “[e]nsur[ing] electricity can be delivered even if power lines or generation facilities are down.” (January Order at 39, characteristic three of the District Court’s expanded list of seventeen; App’x at 39.) The District Court should cease engaging in transmission planning.

¹⁹ See *id.*, ROD031382 (“[e]nhanced generation policy flexibility”).

Central to MISO's brief is the relationship between the entity charged with responsibility for planning the transmission system and a federal reviewing court. The role of the courts under NEPA's process-oriented approach "is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its action and that its decision is not arbitrary and capricious." (*Baltimore Gas & Elec.*, 462 U.S. 87, 97-98, 103 S.Ct. 2246, 2252.) NEPA's "action-forcing" objectives were met in this case; therefore, the District Court's Order and Final Judgment that invalidated the RUS EIS should be reversed.

Conclusion

The bases for the District Court's decision related to a deficient RUS EIS are deficient both factually and legally. The law supports reversal of the January Order and Final Judgment decisions relating to the EIS. This Court should grant the relief sought by Intervenor Defendant-Appellants by reversing the decision below.

Respectfully submitted,

/s/ Jeffrey L. Small

Jeffrey L. Small
MISO
720 City Center Drive
Carmel, Indiana 46032
(317) 249-5400 Phone
(317) 249-2111 Fax
jsmall@misoenergy.org

*Attorney for Amicus Midcontinent
Independent System Operator, Inc.
Supporting Intervenor Defendant-
Appellants*

April 20, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that this brief contains 4,012 words. In making this certification, counsel has relied on the word count function of Microsoft Word, the word processing system used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6); this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 pt. font Times New Roman type style.

/s/ Jeffrey L. Small

Jeffrey L. Small
MISO
720 City Center Drive
Carmel, Indiana 46032
(317) 249-5400 Phone
(317) 249-2111 Fax
jsmall@misoenergy.org

*Attorneys for Amicus Midcontinent
Independent System Operator, Inc.
Supporting Intervenor Defendant-
Appellants*

April 20, 2022

CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing Motion for Leave to file as *Amicus Curiae* and the accompanying *Amicus Curiae* Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit on this 20th day of April, 2022, through the CM/ECF electronic filing system, and thus also served on counsel of record.

/s/ Jeffrey L. Small

Jeffrey L. Small
MISO
720 City Center Drive
Carmel, Indiana 46032
(317) 249-5400 Phone
(317) 249-2111 Fax
jsmall@misoenergy.org

*Attorneys for Amicus Midcontinent
Independent System Operator, Inc.
Supporting Intervenor Defendant-
Appellants*

April 20, 2022