

No. 22-1347

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

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NATIONAL WILDLIFE REFUGE ASSOCIATION, et al.,  
*Plaintiff-Appellees,*

v.

AMERICAN TRANSMISSION COMPANY LLC, et al.,  
*Intervenor-Defendant-Appellants*

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**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, Judge**

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**BRIEF OF THE AMERICAN CLEAN POWER ASSOCIATION AND  
THE CLEAN GRID ALLIANCE  
AS *AMICI CURIAE* IN SUPPORT OF  
INTERVENOR-DEFENDANT-APPELLANTS**

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Dated: April 20, 2022

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## CORPORATE DISCLOSURE STATEMENT

The American Clean Power Association (“ACP”) is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

None of the parties’ counsel authored this brief in whole or in part. None of the parties or their counsel contributed money that was intended to fund preparing or submitting the brief. No person other than ACP contributed money that was intended to fund preparing or submitting the brief.

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## CORPORATE DISCLOSURE STATEMENT

Clean Grid Alliance (“CGA”) is a nonprofit corporation organized under the laws of the state of Minnesota. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

None of the parties’ counsel authored this brief in whole or in part. None of the parties or their counsel contributed money that was intended to fund preparing or submitting the brief. No person other than CGA contributed money that was intended to fund preparing or submitting the brief.

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**GLOSSARY**

<b>Acronym</b>	<b>Definition</b>
App'x	Appellants' Appendix
ATC	American Transmission Company LLC and ATC Management Inc.
CHC Project	Cardinal-Hickory Creek 345-kV Transmission Line Project
Co-Owners	Collectively, Appellants American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative
District Court	U.S. District Court for the Western District of Wisconsin
FERC	Federal Energy Regulatory Commission
FWS	U.S. Fish and Wildlife Service
ITC	ITC Midwest LLC
MISO	Midcontinent Independent System Operator, Inc.
NEPA	National Environmental Policy Act
Order	January 14, 2022, Opinion and Order of the District Court, No. cv-21-0096
RTO	Regional Transmission Organization
RUS	Rural Utilities Service
Corps	U.S. Army Corp of Engineers

## INTEREST OF AMICUS CURIAE

The American Clean Power Association (“ACP”), is a non-profit national trade association representing a broad range of entities with the common purpose of encouraging the expansion and facilitation of clean energy resources in the United States, particularly with respect to the wind, solar, energy storage, and transmission industries. ACP represents the interests of clean energy manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers, customers, and their advocates. Through actions such as participation as *amicus curiae* in state and federal courts, ACP seeks to promote clean energy and transmission to provide affordable, reliable, and non-polluting electricity for consumers.

ACP member companies are actively pursuing clean energy and transmission projects benefiting from direct loans and loan guarantees, such as those provided by the U.S. Department of Agriculture’s Rural Utilities Service (“RUS”), to maintain, expand, upgrade and modernize America’s rural electric infrastructure. Plaintiffs in the original civil action requested and obtained declaratory and injunctive relief under the

judicial review provisions of the Administrative Procedure Act to prevent the Cardinal-Hickory Creek transmission line (“CHC Project”) from moving forward based upon alleged violations of the National Environmental Policy Act (“NEPA”) and the National Wildlife Refuge System Improvement Act of 1997. The CHC Project will be constructed, co-owned and operated by American Transmission Company LLC (“ATC”), ITC Midwest LLC (“ITC”), and Dairyland Power Cooperative (collectively, “the Co-Owners”). In light of the potential implications of the issues presented in this case for clean energy and transmission development more broadly, ACP respectfully submits this brief to provide the Court with the clean energy industry’s unique perspective and broader interest in ensuring the completion of the CHC Project.

Clean Grid Alliance (“CGA”) is a non-profit 501(c)(3) organization that works to overcome the barriers to bringing renewable energy to market in the Midwest. CGA achieves its mission through technical transmission work, active participation in state and federal regulatory cases, policy advocacy, and education and outreach efforts. CGA is actively engaged in renewable energy and transmission issues across the Midcontinent Independent System Operator (“MISO”) footprint and has participated in

multiple transmission line cases in Minnesota, Wisconsin, Iowa, Missouri, and Illinois.

Founded in 2001, CGA is a collaboration of renewable energy advocacy organizations, renewable energy owners and operators, and manufacturers of equipment and parts for renewable resources. The CGA footprint covers nine (9) states in the Midwest, including Minnesota, Wisconsin, and Iowa. CGA's more than forty (40) members include wind, solar, and energy storage developers and manufacturers; nonprofit environmental, public interest, and clean energy advocacy organizations; farmer organizations; and other businesses that support renewable energy. CGA respectfully joins in this brief to provide this Court the perspective of the wind, solar, and energy storage companies that have projects that are literally dependent upon the outcome of the CHC Project.

## SUMMARY OF ARGUMENT

The U.S. District Court for the Western District of Wisconsin found that RUS violated NEPA by adopting a purpose and need statement based on the regional transmission organization's ("RTO") conclusions regarding planning of its transmission system. The Federal Power Act, and the Federal Regulatory Commission's orders thereon, provide a cooperative federalism approach to regional transmission planning under which RTOs have significant control over the process of planning of lines to meet identified state energy needs. By concluding that NEPA should supplant this transmission decision-making process, the district court's erroneous ruling, if allowed to stand, would have far-reaching adverse consequences for considering and realizing state energy goals, such as the provision of affordable, reliable, and clean electricity.

The CHC Project is urgently needed to help advance state energy policy goals in the Midwest. The regional transmission planning entity, MISO, approved the CHC Project in 2011. In the decade since, the CHC Project has been studied and vetted by multiple bodies at the state and federal levels. The CHC Project will generate significant benefits for the upper Midwest in meeting state energy policy goals. The CHC Project,

long planned by the entity charged under federal law with responsibility for the regional transmission grid, should not be delayed any further.

The conclusion by the district court that NEPA requires RUS to conduct its own analysis regarding transmission planning for the CHC Project threatens to overturn the existing regional transmission planning process that has served to ensure that state energy goals and objectives are properly taken into account. Under this process, RTOs are required to plan necessary transmission expansions, additions, and upgrades that meet state public policy requirements, including state clean energy goals.

The failure to afford the correct deference to RUS's decision to adopt the judgment of an RTO to consider and balance transmission needs does not merely jeopardize the roughly 7.5 gigawatts of clean energy in the Midwest that are dependent on the CHC Project. If the expertise of the appropriate planning authority can be second-guessed, and potentially disregarded by an agency—such as RUS—with no expertise in transmission planning, the certainty provided by the regional transmission planning process for assessment of grid needs to meet state clean energy policy goals will be cast in doubt. This uncertainty will also have a chilling effect on the private investment that is needed to support

deploying the clean energy infrastructure needed to achieve valid state goals.

If this Court reaches the merits in this appeal, it should reverse the district court's Order and final judgment and allow this important transmission line to unlock thousands of megawatts of clean energy, fulfill state energy policy goals, and serve millions of electricity customers in the upper Midwest.

## ARGUMENT

In addition to the arguments asserted by Intervenor-Appellants, which *Amicus Curiae* join, ACP and CGA encourage this Court to reverse the district court's Order on the following grounds.

**I. This Court Should Reverse the Decision Below Because It Upends the Existing Cooperative Federalism Approach for Planning Transmission and Would Impede Valid State Energy Policy Goals.**

The district court overstated NEPA's procedural obligations as providing RUS the authority to replace its judgment for the transmission planning decisions of the grid operator (MISO) and states in the Midwest, which have the clear authority under the Federal Power Act to make those choices.

RUS's statutory mandate under NEPA to evaluate and disclose environmental impacts of the CHC Project simply cannot be used to vacate the planning decisions of the body charged by federal law to make them—in this case, MISO. This would undermine the ability of the regional transmission planning process to appropriately account for state clean energy goals and jeopardize the transmission investment that makes attainment of those goals possible.

Agencies conducting environmental reviews may rely upon the analysis of responsible authorities, such as transmission planning done by an RTO—that much is clear. *Protect Our Communities Found. v. U.S. Dep't of Agric.*, 845 F. Supp. 2d 1102, 1117 (S.D. Cal.), *aff'd*, 473 F. App'x 790 (9th Cir. 2012)) (finding that the regional transmission organization reasonably relied on the California Energy Commission's load-growth forecasts in approving a project, “cognizant that such forecasts may vary from time to time”). RUS's decision to depend on and integrate MISO's prior planning decisions and objectives into the environmental impact statement for the CHC Project was entirely reasonable and consistent with NEPA. *See, e.g., Protect Our Communities* at 1110; *Env't L. & Pol'y Ctr. v. U.S. Nuclear Regul. Comm'n*, 470 F.3d 676, 683 (7th Cir. 2006)

(finding a reviewing agency can take an applicant's goals for a project into account).

Requiring agencies without the statutory authority or expertise to conduct detailed transmission planning on their own, such as RUS, the U.S. Fish and Wildlife Service ("FWS"), and the U.S. Army Corps of Engineers ("Corps"),<sup>1</sup> would be inconsistent with congressional intent and established case law. Over the past quarter-century, FERC has assigned specific transmission planning responsibilities to regulated entities called RTOs, such as MISO, which are independently-run operators of the electric transmission system in much of the United States. *See Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285, 1999 WL 33505505 at \*298 (1999) ("The [RTO] must be responsible for planning . . . transmission expansions, additions, and upgrades . . . and coordinate such efforts with the appropriate state authorities."). In 2011, the Commission issued Order No. 1000, requiring that regional transmission planning consider transmission needs driven by state public policy requirements, such as clean energy goals.

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<sup>1</sup> RUS was the sole lead agency in developing the environmental impact statement for the CHC Project, which was adopted by FWS and the Corps in a joint Record of Decision. *See Record of Decision*, App'x 1171-228.

*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 at PP 212-19 (2011).

Federal courts have affirmed FERC's authority to assign transmission planning responsibility to RTOs, and to require the RTOs to consider state public policy goals. *See, e.g., S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 41, 63-64 (D.C. Cir. 2014) (holding that FERC had authority under the Federal Power Act to mandate transmission providers participate in regional planning processes). Over the years, RTOs, such as MISO, have developed considerable expertise at ensuring that transmission planning accounts for meeting the policy goals of the states in their footprint. Such an example is the rigorous MISO transmission study upon which RUS relied in developing its purpose and need statement for the CHC Project. *See* MISO Multi-Value Project Analysis Report, App'x at 95-150.

When a proposed transmission project is the result of a federally authorized planning process, the purpose and need statement in any subsequent environmental impact statement for the project *cannot* be separated from the underlying regional transmission planning process.

Nevertheless, that is the logic of the district court’s ruling: RUS, FWS, and the Corps can ignore the transmission planning responsibilities appropriately reserved for MISO. NEPA does not give RUS, FWS, or the Corps authority to overrule the MISO planning process and decide, as the Plaintiff-Appellees would have it, decide that no transmission should be built. Such a result would allow federal agencies conducting NEPA to ignore the decisions made by an RTO, sowing uncertainty in the role of the FPA-driven transmission planning process to meet state clean energy public policy needs. Further, in justifying its erroneous conclusion that RUS had the authority to supplant MISO’s planning decision, the district court mischaracterized MISO’s role as a “self-serving . . . beneficiary” of the CHC Project and a “utility.” Order at 40–41 (quoting *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997) (“[A]gencies have ‘the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.’”). In fact, MISO is an independent, non-profit transmission operator and is neither a beneficiary of the CHC Project nor a utility.<sup>2</sup>

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<sup>2</sup> RTOs, such as MISO, do not own any of the transmission or generation assets they manage.

Midwest states have adopted energy policies necessitating more transmission, including the Multi-Value Project Portfolio and the CHC Project. Multiple Midwest states, including Wisconsin, have adopted policies requiring an increasing proportion of energy to be derived from renewable resources. For example, in Wisconsin, Governor Tony Evers issued a 2019 Executive Order which committed the state to ensure that all electricity consumed within its borders is carbon-free by 2050. *See* Wisconsin Executive Order No. 38 (Aug. 16, 2019), <https://docs.legis.wisconsin.gov/document/executiveorders/2019/38.pdf>.

In response to these state policies, the Midwest is experiencing an accelerating transition in the power sector, which further necessitates transmission development. Across the region, utilities are retiring fossil fuel generators and turning to lower-emitting generation. Northeast Iowa and Southwest Wisconsin, in particular, have seen a dramatic shift in generation sources. In the past several years, utilities have closed four coal generating plants in Dubuque, Clinton, Iowa, and Cassville, Wisconsin. Other coal plant retirements are planned in the next few years, including Alliant Energy's 1,100-megawatt facility in Columbia County—its last remaining coal plant in Wisconsin. Danielle Kaeding, *Alliant Energy Will*

*Shut Down Its Last Coal Plant In Wisconsin*, Wisconsin Public Radio (Feb. 2, 2021), <https://www.wpr.org/alliant-energy-will-shut-down-its-last-coal-plant-wisconsin>.

State policies are shaping the mix of resources slated to replace these retiring generators—and most of the new generation will be non-fossil. As a result, requests to interconnect wind, solar, and storage into the transmission system are at an all-time high, while new projects are backlogged in many regions—including the Midwest—due to a lack of transmission capacity. MISO currently reports 910 projects representing 143.1 gigawatts seeking interconnection to the grid, over 90 percent of which is wind, solar and battery storage resources within its region. MISO, *Generator Interconnection: Overview*, (Nov. 4, 2021) <https://cdn.misoenergy.org/GIQ%20Web%20Overview272899.pdf>.<sup>3</sup>

### **A. The Multi-Value Projects and Cardinal-Hickory Creek Respond to these valid state policies.**

Attaining the clean energy goals of Midwestern states will require significant additions to the transmission grid to ensure that clean energy can be delivered to customers where and when it is needed. The CHC

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<sup>3</sup> Nationally, more than 930 gigawatts of solar, wind, hydropower, geothermal, and nuclear capacity, along with 420 gigawatts of energy storage, are in queues awaiting transmission access. See U.S. Dep't of Energy, *Queued Up... But in Need of Transmission* at 1 (2022).

Project was approved by MISO in 2011, as one of the 17 projects in the high voltage Multi-Value Project portfolio. *See* Multi-Value Projects, <https://www.misoenergy.org/planning/planning/multi-value-projects-mvps/#t=10&p=0&s=&sd=> (last viewed April 13, 2022); MISO Transmission Expansion Plan 2011 (“MTEP 2011”), § 4 – Regional Energy Policy Studies, App’x 96-129. At the time that MISO approved the Multi-Value Projects, twelve of the thirteen states in MISO’s footprint had statutory or regulatory renewable energy policies – and attaining these policy goals was an express factor in the selection of the Multi-Value Projects. *See* MTEP 2011, App’x at 104.

The Multi-Value Projects support these needs and were designed to deliver renewable energy to customers in the Midwest - enabling attainment of state energy policies and enhancing grid reliability. Prime wind locations in MISO are primarily located west of the Mississippi River, so Multi-Value Projects are needed to move this power across the Mississippi to the upper Midwest. *See Decl. of Neil Shah* at ¶ 11, ECF No. 128 in 3:21-cv-00096-wmc (10/19/2021).

The Multi-Value Projects, including the CHC Project, are also designed to be robust enough to be able to withstand transmission

disturbances, such as the those that took place in mid-February 2021 when the central United States experienced extremely cold weather. Regions with more interconnected transmission systems withstood the stress far better than those that did not, like Texas. *See, e.g.,* Michael Goggin, *Transmission Makes the Power System Resilient to Extreme Weather* (July 2021) at 8 (“While [Southwest Power Pool] and MISO also experienced extreme cold, they were able to avoid major power shortfalls by importing electricity from regions experiencing milder temperatures...”)  
[https://acore.org/wp-content/uploads/2021/07/GS\\_Resilient-Transmission\\_proof.pdf](https://acore.org/wp-content/uploads/2021/07/GS_Resilient-Transmission_proof.pdf). CHC, along with the other Multi-Value Projects, contribute to the resilience of the regional transmission system. *See Decl. of Neil Shah* at 23. *See also* MTEP 2011, App’x at 125-26 (describing increased system robustness and improved transfer capability from the Multi-Value Projects).

MISO affirmed the savings benefits from the Multi-Value Projects in its most recent Triennial Review, issued in 2017. That review indicated that the Multi-Value Project portfolio will generate benefits to customers in the range of \$2.20 to \$3.40 for each dollar spent (a benefit-to-cost ratio of 2.2 to 3.4). *See* MISO, *MTEP17 MVP Triennial Review* at 4 (2017)

<https://cdn.misoenergy.org/MTEP17%20MVP%20Triennial%20Review%20Report117065.pdf>.

The CHC Project is the only Multi-Value Project that has not yet been constructed, even though it has received regulatory approval from the Public Service Commission of Wisconsin and the Iowa Utilities Board, as well as authorizations from the RUS, FWS, and Corps.

The Cardinal-Hickory Creek Project will provide extensive benefits to local customers. If built, the new transmission line will lead to lower interstate energy costs by reducing congestion on the system, enhancing system reliability, and improving access to low-cost wind and solar generation under development in Wisconsin, Iowa, Missouri, North Dakota, South Dakota, and Minnesota.

Many renewable resources that would support Wisconsin's clean energy goals depend on the development of the Cardinal-Hickory Creek 345 kilovolt transmission line to interconnect to the grid. The CHC Project is scheduled to be energized by the end of 2023, and when energized, will enable 42 generators in the upper Midwest to deliver 7,566 megawatts of low-cost reliable wind and solar power in the region. *See Powering Up Clean Energy: Investments to Modernize and Expand the Electric Grid, H. Select*

*Comm. On the Climate Crisis*, 117<sup>th</sup> Cong. at 4 (May 20, 2021) (testimony of Linda Apsey, President and CEO of ITC Holdings Corp.), <https://docs.house.gov/meetings/CN/CN00/20210520/112657/HHRG-117-CN00-Wstate-ApseyL-20210520.pdf>.

**B. The District Court Decision Chills Private Capital Needed to Develop Clean Energy Infrastructure Needed to Meet State Energy Goals.**

The CHC Project is a \$492 million project, in which the Co-Owners have already invested \$159 million (as of August 2021). *See Justus Decl.* ¶ 13, ECF No. 103 in 3:21-cv-00096-wmc (10/19/2021); *Mathis Dec.* ¶ 8, ECF No. 132 in 3:21-cv-00096-wmc (10/19/2021). If the Order stands, the Co-Owners would be unable to complete their respective portions of the CHC Project, despite having already made this significant investment—thereby stranding the capital they have already invested. This would serve as a cautionary tale for capital providers, unsettling investment in clean energy infrastructure in the MISO region and beyond that is needed to meet state clean energy goals.

The electric utility industry faces unprecedented transmission capital investment demands in the upper Midwest, and elsewhere, to build out the additional transmission capacity to meet state clean energy

goals. However, the district court's Order would discourage other utilities and transmission developers from making the initial investments needed to get new transmission projects off the ground that will support the achievement of these state goals.

As this case makes clear, while building and investing in transmission development is needed, it is a complicated, costly, and risky undertaking. Transmission buildout requires large initial capital investments (and any subsequent investments) and a fair return, as well as recovery of operating, maintenance, and administrative costs associated with operating the assets that are dependent on technical, geographical, and regulatory factors that can cause uncertainty. Because transmission infrastructure is a long-term commitment, investors require adequate and stable returns over the life of these assets but need certainty upfront if they are willing to undertake such a substantial and long-term responsibility.

The Co-Owners' capital investment in the CHC Project is even more significant when put in context of the shortage of transmission development currently in the Midwest. Transmission buildout has simply not kept up with the pace of generation buildout. *See* U.S. Dep't. of

Energy Office of Policy, *Queued Up... But in Need of Transmission Unleashing the Benefits of Clean Power with Grid Infrastructure*, Fig. 2. (April 2022). Several new renewable generation projects are now backlogged due to a lack of transmission capacity in the Midwest. See ScottMadden, *Transmission in the United States: What Makes Developing Electric Transmission So Hard?*, at 21 (July 2021) available at [https://www.fortnightly.com/sites/default/files/whitepapers/ScottMadden\\_Transmission-in-the-US\\_72621.pdf](https://www.fortnightly.com/sites/default/files/whitepapers/ScottMadden_Transmission-in-the-US_72621.pdf). From 2016 through October 2020, developers withdrew from the queue, due largely to a lack of transmission, 278 wind, solar, and battery storage/hybrid solar-storage projects, which represent nearly 35 GW of capacity. *Id.* As the district court's ruling would raise uncertainty surrounding transmission development and, in turn, result in less improvements to the grid, the trend of abandoning renewable generation projects due a lack of available transmission capacity is likely to increase if the ruling is not reversed.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling that RUS failed to comply with NEPA.

Respectfully submitted this April 20, 2022.

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Dated April 20, 2022

**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Appellate Procedure 25(d) and 7th Circuit Rule 25(a), I hereby certify that on this 20 day of April, 2022, I have served the foregoing document upon all counsel registered to receive service through the Court's CM/ECF system via electronic filing.

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