No. 22-1347

IN THE 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 & 21-cv-0306)
The Honorable William M. Conley

BRIEF OF EDISON ELECTRIC INSTITUTE AND ENERGY AND WILDLIFE ACTION COALITION AS *AMICI CURIAE* IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLANTS AND REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1347

Short Caption: National Wildlife Refuge Association, et al. v. American Transmission Company LLC, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Edison Electric Institute

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

EEI is a non-profit corporation with no parent corporations

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ David Y. Chung Date: April 20, 2022

Attorney's Printed Name: David Y. Chung

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Robert M. Adler Date: April 20, 2022

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N/A

Attorney's Signature: /s/ Emily S. Fisher Date: April 20, 2022

Attorney's Printed Name: Emily S. Fisher

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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CORPORATE DISCLOSURE STATEMENT

Edison Electric Institute ("EEI") is a non-profit corporation organized under the laws of the District of Columbia. EEI has no parent corporation, and no publicly held company has 10% or greater ownership in EEI.

Energy and Wildlife Action Coalition ("EWAC") is an unincorporated association whose members include publicly held corporations. EWAC has no parent corporation and no publicly held corporation owns 10% or more of EWAC.

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INTEREST OF *AMICI CURIAE*[1]

The Edison Electric Institute ("EEI") is the national association of all investor-owned electric companies. EEI members develop, own, operate, and maintain infrastructure, including the transmission facilities that are the backbone of the nation's energy grid, which provides essential power to the public, including reliable electricity for consumption in homes, businesses, courthouses, churches, schools, and every other venue that uses electricity. Collectively, EEI members provide electricity and related services to more than 220 million Americans and operate in all 50 states and the District of Columbia.

The Energy and Wildlife Action Coalition ("EWAC") is an unincorporated association headquartered in Washington, D.C., comprised of electric utilities, electric transmission and distribution providers, renewable energy companies, and related trade associations. EWAC members operate throughout the United States. EWAC's

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Proposed *Amici Curiae* submit this brief together with a motion for leave to participate as *amici curiae* in the instant case.

fundamental goal is to evaluate, develop, and promote reasonable environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

EEI's and EWAC's (together, "*Amici*") members are leading the clean energy transformation and are united in their commitment to provide reliable and affordable low- and zero-emission energy expeditiously. Their members have undertaken a wide range of initiatives to reduce the industry's carbon dioxide ("CO_2") emissions. Fifty EEI members, many of whom are also members of EWAC, have announced carbon reduction goals, and over two-thirds of these members intend to achieve net-zero CO_2 emissions or equivalent by 2050 or sooner, consistent with the national goal to achieve a net-zero emissions economy by 2050. *See* White House, *President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs*

and Securing U.S. Leadership on Clean Energy Technologies, Fact Sheet (Apr. 22, 2021).[2]

Achieving these clean energy and clean economy goals requires the deployment of new renewable electricity generating resources, such as wind and solar. In order to interconnect these resources to the energy grid and to meet the growing demand for clean electricity, experts estimate that the nation will need to expand the existing transmission system by 60 percent by 2030 and may need to triple the size of the system by 2050. *See, e.g.*, Eric Larsen et al., *Net-Zero America: Potential Pathways, Infrastructure, and Impacts*, Final Report, at 108, Princeton Univ. (Oct. 29, 2021), https://netzeroamerica.princeton.edu/the-report. Given that it can take as many as seven to ten years to plan, site, permit, and build new transmission lines, the challenge this presents is significant.

One of the transmission investments being made to support the clean energy transition is the Cardinal-Hickory Creek ("CHC") Project at

[2] The Fact Sheet is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/.

the center of this appeal. The project is the result of a multi-year-long planning and review process undertaken by a regional transmission organization, several Midwestern governors and state agencies, transmission operators, and other stakeholders. Upon completion, the project will be part of a regional package of new transmission investments that will (i) help facilitate the clean energy transition through the delivery of electricity generated from wind and other renewable energy sources; (ii) improve electric system reliability; and (iii) provide lower-cost electricity for communities and consumers in the region. Despite these benefits and the collaborative process used, the project now hangs in the balance because of the district court's ruling. More generally, the district court's order could have significant, negative consequences for regional transmission planning processes that are the exclusive province of the Federal Energy Regulatory Commission ("Commission") or its delegates under the Federal Power Act—and will make it even more difficult and time-consuming to construct critical new transmission infrastructure.

The ability of *Amici's* members to implement clean energy projects successfully depends on being able to build the new transmission

infrastructure that regional planning processes determine are necessary after balancing a range of technical, economic, and policy issues. Indeed, this is a real concern now. According to the U.S. Department of Energy, more than 930 gigawatts (GW) of solar, wind, hydropower, geothermal, and nuclear capacity are currently sitting in interconnection queues seeking transmission access, along with over 420 GW of energy storage. This is roughly the same amount of clean capacity needed to hit an 80 percent clean electricity share in 2030. *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*, at 1 (Apr. 2022) (internal citations omitted), https://www.energy.gov/policy/queued-need-transmission.

Allowing Plaintiff-Appellees to use the National Environmental Policy Act ("NEPA") to effectively reopen, and potentially upend, the transmission planning processes without the necessary expertise or statutory grant of authority delays and may jeopardize *Amici's* members' ability to lead the clean energy transition. Similarly, the inability to route new and upgraded transmission lines on lands within the National Wildlife Refuge System under an unduly restrictive interpretation of the

National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1253 ("Refuge Act"), would hamper the expansion of critical transmission infrastructure that is a necessary step in the clean energy transition. This Court should reverse the decision below to avoid that outcome.

For these reasons, *Amici* have a substantial interest in this case. *Amici* believe that their members' experience participating in and operating in reliance on regional transmission planning processes, as well as with routing transmission lines across National Wildlife Refuge System lands, can assist this Court in resolving the merits of this case, should this Court reach them. This Court's resolution of the merits could have profound implications for *Amici's* member companies' ongoing efforts to get the energy they provide as clean as they can as fast as they can, without compromising the reliability and affordability that are essential to the customers and communities they serve.

SUMMARY OF ARGUMENT

I. NEPA is a purely procedural statute that does not impose substantive obligations on federal agencies, but "merely prohibits uninformed—rather than unwise—agency action." *Robertson v. Methow*

Valley Citizens Council, 490 U.S. 332, 351 (1989). NEPA does not supplant decision-making processes conducted under other federal statutes. Thus, when federal agencies are charged with complying with NEPA's procedural mandates with respect to certain aspects of a multi-faceted project, it is appropriate for them to rely on and incorporate such prior planning decisions and objectives into environmental impact statements. That is precisely what happened here. The Rural Utilities Service reasonably relied on the years-long planning process for the Cardinal-Hickory Creek Project in analyzing the potential impacts of the project in the challenged environmental impact statement.

The district court, however, erred in holding that the Rural Utilities Service must reopen, and potentially disregard altogether, the Commission-authorized regional transmission planning process despite lacking either relevant expertise or any statutory grant of authority to engage in transmission planning. NEPA cannot be used this way to collaterally attack the planning processes for the CHC Project. Furthermore, courts in several circuits have agreed that NEPA does not prescribe any minimum number of alternatives to be considered in an environmental impact statement and that consideration of merely the

preferred alternative and the "no action" alternative can satisfy NEPA's procedural mandates. The challenged environmental impact statement, which analyzed numerous alternatives in addition to the preferred alternative and the "no action" alternative, fully complies with NEPA.

II. If the district court's erroneous ruling is allowed to stand, the consequences for transmission planning and the clean energy transition will be far reaching. In furtherance of its duty under the Federal Power Act to ensure that transmission rates are just and reasonable, and not unduly discriminatory or preferential, the Commission has ordered that transmission planning, which is essential to ensuring the reliability and affordability of electricity, must occur at the local and regional levels; involve participation by each transmission provider; and produce a regional transmission plan. And because the electricity sector continues to transform in terms of the mix of energy resources and the new demands that different resources place on the transmission grid, careful planning at the regional level is more important now than ever.

The CHC Project at issue in this case is the product of many years of regional planning and rigorous analyses conducted in accordance with the Commission's orders. Ultimately, the planning process resulted in a

finding that the project (along with several others) met Commission-approved criteria governing transmission expansions and are necessary to serve a range of economic, reliability, and state public policy goals. Requiring the Rural Utilities Service to effectively disregard this planning process—by redefining the purpose and need for the project to evaluate alternatives that were not approved through the regional planning process—would have the significant negative consequences of undermining the expectations of stakeholders involved in the planning process and frustrating ongoing efforts to make the electricity grid cleaner, smarter, and more affordable for customers.

III. Congress expressly authorized the routing of electricity transmission lines across lands within the National Wildlife Refuge System in the Refuge Act. Specifically, that statute authorizes the grants of rights-of-way and easements for "powerlines" and other linear infrastructure, so long as such infrastructure is "compatible with the purposes" for which a Refuge was established. 16 U.S.C. §668dd(d)(1)(B). Whether a use is compatible turns on whether the proposed infrastructure would "materially interfere" with Refuge purposes, and courts should defer to the sound professional judgment of the U.S. Fish

& Wildlife Service ("USFWS") on questions of material interference. *See id.* §668ee(1). The district court, however, disregarded these statutory provisions and improperly substituted its judgment for that of the USFWS when it held that the CHC Project cannot be deemed compatible with the Upper Mississippi River National Wildlife and Fish Refuge. That erroneous reading of the Refuge Act could have far-reaching consequences for future transmission line projects and the buildout of critical infrastructure given the prevalence and configuration of National Wildlife Refuge System lands across the country.

If this Court reaches the merits in this appeal, it should reverse the district court's judgment.

ARGUMENT

I. NEPA's Procedural Requirements Do Not Empower Agencies Or Reviewing Courts To Unravel Years-Long Planning Processes Conducted Pursuant To Other Statutory Schemes.

As explained in the Co-owners' opening brief (at 45-62), the district court erred by finding that the Rural Utilities Service violated NEPA. The district court effectively treated NEPA's purely procedural mandates as conferring substantive authority upon the Rural Utilities Service to second-guess, or undo altogether, regional transmission planning and

siting decisions made by the appropriate entities in accordance with the Commission's orders issued consistent with its Federal Power Act authority. Rather than repeat the Co-owners' arguments here, we emphasize two additional points: *First*, courts have recognized that NEPA cannot be used to reopen or collaterally attack planning decisions made by other entities acting pursuant to other statutory schemes. *Second*, neither NEPA nor its implementing regulations imposes any minimum number of alternatives that an agency must be considered and thus, courts have upheld environmental impact statements analyzing as few as two alternatives, *i.e.*, the proposed alternative and the "no action" alternative.

1. As in this case, it is often true that federal agencies do not start from scratch when formulating purpose and need statements in environmental impact statements. Accordingly, this Court has recognized that it is appropriate for agencies in those instances to account for prior planning and siting decisions when preparing purpose and need statements and, by extension, determining the alternatives they will analyze in detail. *See* Co-owners' Opening Br. 51-53 (collecting cases). In addition to those cases, courts in other cases have agreed that

NEPA cannot be used to collaterally attack planning and siting processes conducted pursuant to other laws, when those processes are used to inform the purpose and need statement in a subsequent, related federal action. For example, in *HonoluluTraffic.com v. Federal Transit Administration*, the court upheld the agency's adoption of a nine-point purpose and need statement that incorporated objectives from a Regional Transportation Plan prepared by a federally authorized entity pursuant to several federal statutes.[3] *See* 742 F.3d 1222, 1230-31 (9th Cir. 2014). In rejecting the plaintiffs' challenge that the agency's environmental impact statement unreasonably restricted the project's purpose and need, the court emphasized that the objectives in the underlying Regional Transportation Plan "comply with the intent of the relevant federal statutes" governing federally-funded transportation plans. *See id.*

Similarly, in *North Buckhead Civic Association v. Skinner*, the court found that a purpose and need statement complied with NEPA where it was based on transportation planning processes conducted by

[3] The plan in that case was developed by the Oahu Metropolitan Planning Organization, one of many metropolitan planning boards, whose creation Congress mandated in the Urban Mass Transportation Act of 1964. *See id.* at 1225.

state and local authorities. *See* 903 F.2d 1533, 1536, 1541-42 (11th Cir. 1990). The project at issue in that case was a combined highway and heavy rail mass transit project that required federal funding. The court rejected the plaintiffs' claim that the "agencies defined the 'Need and Purpose' of the project in such a way that the highway was conclusively presumed to be required" and that a "no build/heavy rail alternative was then perfunctorily dismissed for its failure to fully satisfy the project objective." *Id.* at 1541-42. In so holding, the court explained that the plaintiffs' claim "reflects a fundamental misapprehension of the role of federal and state agencies in the community planning process established by the Federal-Aid Highway Act" and that federal and local authorities play "specific role[s] in the development and execution of a local transportation project" pursuant to that statute. *Id.* at 1541. The Court then emphasized that "NEPA does not confer the power or responsibility for long range local planning on federal and state agencies." *Id.* at 1541-42.

These cases underscore that, when a proposed project is the result of a federally authorized planning process, the purpose and need statement in any subsequent environmental impact statement for an

aspect of the project cannot be divorced from the underlying planning process. Yet that is essentially what the district court's ruling would require the Rural Utilities Service to do—namely, reopen transmission planning decisions that Congress reserved for other entities under the Federal Power Act and engage in *ultra vires* planning and siting decisions under the guise of complying with NEPA's purely procedural requirements.

2. Other circuits have agreed that "there is no minimum number of alternatives that must be discussed" in an environmental impact statement. *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994); *accord Citizens for Smart Growth v. Sec'y of Dep't of Transp.*, 669 F.3d 1203, 1212 (11th Cir. 2012) ("NEPA does not impose any minimum number of alternatives that must be evaluated."). NEPA and its implementing regulations require only that an agency consider "appropriate" and "reasonable" alternatives. *See* 42 U.S.C. §4332(2)(E); 40 C.F.R. §1502.14(a).

It is therefore unsurprising that courts have found environmental impact statements to comply with NEPA in cases where agencies evaluated far fewer alternatives in detail than the Rural Utilities Service

considered in this case. For instance, in *California ex rel. Imperial County Air Pollution Control District v. U.S. Department of the Interior*, the Ninth Circuit held that an environmental impact statement that only compared the preferred alternative (a water delivery agreement negotiated among several irrigation and water districts[4]) to the no action alternative complied with NEPA because "[d]iscussing a hypothetical alternative that no one had agreed to (or would likely agree to) would have been unhelpful." 767 F.3d 781, 797-98 (9th Cir. 2014). About a decade earlier, in *Laguna Greenbelt*, that Circuit upheld an environmental impact statement where the agency discussed the no action alternative, the proposed toll road corridor, and a similar corridor "following the same alignment and having the same general land configuration, but differing somewhat in its operation and method of connecting Interstate 5." 42 F.3d at 523-24.

Elsewhere, in *Tongass Conservation Society v. Cheney*, the D.C. Circuit upheld an environmental impact statement where the agency

[4] In that case, because the Secretary of the Interior controls the delivery of Colorado River water, the Department of the Interior was responsible for preparing an environmental impact statement analyzing the impacts of the agreement. *See* 767 F.3d at 787.

analyzed only the proposed acoustic testing site and the no action alternative after determining that thirteen other preliminarily-identified sites were not reasonable alternatives. *See* 924 F.2d 1137, 1140-42 (D.C. Cir. 1991). Finally, in *North Buckhead Civic Association*, the Eleventh Circuit upheld an environmental impact statement that examined only the preferred alternative (a six-lane tollway) and the no build alternative in detail. *See* 903 F.2d at 1541-43.

These cases further illustrate that the Rural Utilities Service's detailed evaluation of six action alternatives and the "no action" alternative—in addition to its consideration of a host of other alternative routes and non-transmission alternatives before eliminating them from further evaluation, *see* App'x 0799-0804—more than satisfied NEPA's requirement to consider "appropriate" and "reasonable" alternatives.

II. This Court Should Reverse The Decision Below Because It Has Significant Adverse Consequences For Transmission Planning And The Clean Energy Transition.

As explained above, the district court erred by effectively transforming NEPA's procedural requirement to evaluate and disclose the environmental impacts of appropriate and reasonable alternatives into a substantive grant of authority that would allow Plaintiff-Appellees

to force inexpert agencies, like the Rural Utilities Service, to topple a multi-year planning and siting process conducted by a federally authorized regional transmission organization, state governments, and other stakeholders in accordance with the Federal Power Act. As a practical matter, this will thwart, or at a minimum significantly delay, the clean energy transition.

The district court's decision ignores—and indeed, would allow Plaintiff-Appellees and other similarly situated local groups to supplant—the federally-mandated regional transmission planning process the gave rise to the CHC Project. This is wholly inconsistent with the existing legal framework governing transmission planning and would undermine a regime designed to balance multiple competing objectives to produce a transmission system that is affordable, reliable, and increasingly clean.

A. The District Court's Decision Ignores The Federal Energy Regulatory Commission's Requirement That Transmission Planning Be Done On A Regional Basis.

The district court faults the Rural Utilities Service's environmental impact statement for failing to consider sufficient alternatives, including those that would not require the building of the CHC Project at all, which

are favored by Plaintiff-Appellees. NEPA does not bestow the Rural Utilities Service with authority to engage in its own transmission planning to satisfy its obligation to consider appropriate alternatives. Nor can Plaintiff-Appellees use the NEPA process to override the outcomes of a rigorous planning process because they prefer that no transmission be built.

Unless this Court reverses the decision below, the district court's approach to NEPA compliance in cases where a transmission line is involved would allow any lead agency to effectively end-run the regional approach to transmission planning mandated by the Commission, the expert agency charged by Congress with regulating interstate transmission. It is the Commission's process that must be used to determine the purposes of and need for any proposed line. (And, as discussed in more detail below, transmission system needs are determined first, with specific potential transmission lines assessed only afterwards.) Following the district court's approach, however, would upend the Commission's scheme for ensuring the development of a reliable transmission system to the detriment of the customers who rely

on the transmission system for the provision of affordable, reliable, and clean electricity.

Transmission planning is necessarily complicated and is essential to ensuring the reliability and affordability of electricity. The U.S. electric grid is the largest, most complex machine in the world, *see* Phillip, F. Schewe, *The Grid: A Journey Through the Heart of Our Electrified World* (Joseph Henry Press 2006), and interstate transmission infrastructure like the CHC Project forms its backbone, connecting the generators that create electricity with the customers who consume it. The interconnected nature of the electric grid is its greatest strength, bolstering reliability and lowering overall costs for customers by allowing the sharing of power across broader geographies. *See* Federal Energy Regulatory Commission, *Energy Primer: A Handbook for Energy Market Basics* at 36-37 (June 2020), https://www.ferc.gov/media/2020-energy-primer-handbook-energy-market-basics.

In the Federal Power Act, Congress charged the Commission with ensuring that transmission rates are just and reasonable, and not unduly discriminatory or preferential. *See* 16 U.S.C §824e. The Commission has long deemed transmission planning to be an essential component of just

and reasonable rates, and the availability of sufficient transmission capacity is necessary to ensure that generators, who often compete to provide electricity to customers, can interconnect to the larger grid.

To that end, in 1996, the Commission issued Order No. 888, which, among other things, set forth certain minimum requirements for transmission planning and required that transmission owners provide non-discriminatory access to all generators. *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Cost by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., ¶ 31,048 (cross-referenced at 75 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. Federal Energy Reg. Comm'n*. 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. Federal Energy Reg. Comm'n*, 535 U.S. 1 (2002). About a decade later, the Commission issued Order No. 890, which required coordinated, open, and transparent transmission planning on both a local *and a regional*

level. *See* Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, 118 FERC ¶ 61,119 (2007) (reh'g orders omitted).

In 2011, the Commission issued Order No. 1000, which built on the transmission planning requirements of Order No. 890. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011). Order No. 1000 included a package of reforms to ensure that transmission planning and cost allocation mechanisms were adequate to support the development of more efficient or cost-effective transmission. Among other things, those reforms addressed regional transmission planning and transmission needs driven by state public policy requirements, including state clean energy goals. In particular, Order No. 1000 requires that each transmission provider participate in a regional transmission planning process that produces a regional transmission plan. *See* Order No. 1000, 136 FERC ¶ 61,051 at PP 146, 148.

And just last year, the Commission issued an advanced notice of proposed rulemaking to continue its efforts at improving regional transmission planning, specifically noting that:

> [t]he electricity sector is transforming as the generation fleet shifts from resources located close to population centers toward resources, including renewables, that may often be located far from load centers. The growth of new resources seeking to interconnect to the transmission system and the differing characteristics of those resources are creating new demands on the transmission system. *Ensuring just and reasonable rates as the resource mix changes, while maintaining grid reliability, remains the priority in the regional transmission planning [ ] process.*

Building for the Future Through Electric Regulation Transmission Planning and Cost Allocation and Generator Interconnection, Docket No. RM21-17-000, 176 FERC ¶ 61,024 at P 3 (July 15, 2021) (emphasis added). Through these orders, the Commission has developed, and continues to refine, a transmission planning process that builds on the principles established in Order Nos. 888 and 890 and that recognizes the complex and interconnected nature of the electricity grid. The Commission requires both a local and a regional approach to ensuring that the interconnected transmission system meets the needs of customers, generators, and states.

Despite the Commission's carefully designed framework, the district court would mandate that a non-expert agency assess the potential environmental impacts of the CHC Project (or any other future transmission project that might have some federal nexus) *without*

reference to the reliability and public policy purposes that the Commission has determined must be served through the regional transmission planning process. That would be bad enough. But shockingly, the court further contends that NEPA would require the Rural Utilities Service to conduct *its own* transmission planning to assess the value of the CHC Project to the electric grid, dismissing the work of the regional planning entity that proposed the CHC Project in the first place as merely "hav[ing] its own reasons" for the Project without any reference to the complex planning framework that was used as required by the Commission. *See* App'x 0041. Again, NEPA cannot and should not be a vehicle to second guess the planning decisions made by expert agencies.

B. The CHC Project Is The Result Of An Extensive, Collaborative Regional Transmission Planning Process That Should Not And Cannot Be Cast Aside.

The district court's elevation of the Rural Utilities Service to the status of grid planner is particularly problematic when considered in the context of the rigorous, multi-year regional transmission planning process that gave rise to the CHC Project. This effort, as discussed below, and the related technical, economic, and reliability analyses illuminates

the complexity of the regional transmission planning process and the absurdity of charging non-expert agencies with making their own determinations as to the value of a proposed transmission line. It also underscores the perverse consequence of allowing Plaintiff-Appellees or the Rural Utilities Service to use NEPA to second guess the outcomes of regional transmission planning processes: delaying critical transmission expansion.

Starting around 2003, interconnection requests from the developers of new wind energy projects in the Midwest started to increase and quickly became backlogged as a result of a lack of transmission capacity. These projects sought interconnection with the regional transmission system overseen by the Midwest Independent System Operator ("MISO"), a regional transmission organization. Over the course of the next few years, many states in the region (including Wisconsin) began to adopt renewable portfolio standards, which mandated that a certain percentage of the electricity that serves customers in those states come from renewable energy sources like wind. In 2008, MISO, with the assistance of state economic regulators, the Midwest Governors Association, the Upper Midwest Transmission Development Initiative,

and the Organization of MISO States, began a Regional Generation Outlet Study to identify a set of transmission projects that would provide multiple benefits to regional transmission system and help states meet their renewable energy goals. *See generally*, David Boyd & Edward Garvey, AESL Consulting, *A Transmission Success Story: The MISO MVP Transmission Portfolio* (Nov. 8, 2021), https://www.aeslconsulting.com/wp-content/uploads/2021/11/MISO-MVP-History.pdf.

While it began as an effort to address wind energy interconnection and state public policy goals, the Regional Generation Outlet Study produced a recommended portfolio of seventeen transmission projects that would provide a range of benefits regardless of the future energy mix, such as reducing the wholesale cost of delivering electricity to customers by enabling the delivery of low-cost generation to customers; reducing transmission system congestion; and increasing system reliability. *See* MISO, *Multi-Value Project Portfolio, Results and Analyses*, Executive Summary at 5 (Jan. 10, 2012), https://cdn.misoenergy.org/2011%20MVP%20Portfolio%20Analysis%20Full%20Report117059.pdf.

The resulting seventeen Multi-Value Projects or "MVP" Projects were chosen from a range of options that were evaluated against Commission-approved criteria and included in the relevant portion of the MISO tariff, which governs the transmission expansion planning process. In summary, there were three main critical criteria:

- MVP Criterion 1: A candidate MVP Project had to enable the transmission system to deliver electricity reliably and economically in support of documented energy policy mandates or laws enacted or adopted through state or federal legislation or regulatory requirement. The candidate project must be shown to enable the transmission system to delivery electricity in a manner that is more reliable and/or more economic than without the project.

- MVP Criterion 2: A candidate MVP Project must provide multiple types of economic benefits to multiple MISO pricing zones and have a benefit-to-cost ration of at least 1.0, using an analysis that was included in MISO's Commission-approved tariff.

- MVP Criterion 3: A candidate MVP must address at least one transmission issue associated with a projected violation of a Commission-approved or regional reliability standards and at least one economic based transmission issue that provides economic value across multiple pricing zones. The project must generate total financially quantifiable benefits, including quantifiable reliability benefits, in excess of the total project costs based on the definition of financial benefits and Project Costs provided in the tariff.

Importantly, the current version of the MISO Tariff still includes these criteria. *See* MISO, FERC Electric Tariff, Attachment FF, Transmission

Expansion Planning Protocol effective Sept. 6, 2021), *Midcontinent Independent System Operator, Inc.*, Docket No. ER21-2365-000 (Sept. 3, 2015) (delegated letter order).

The seventeen MVP Projects, of which the CHC Project is one (and the only one that remains unbuilt), were intensively evaluated to ensure that each project, and the portfolio of Projects as a whole, was justified under the MVP cost allocation criterion. This evaluation included an analysis of each individual project's justification against MVP criterion 1. It also included an analysis of the full portfolio, both on a reliability and economic basis. *See* MISO, *Multi-Value Project Portfolio, Results and Analyses*, supra, at section 4, MVP Portfolio Development and Scope. These analyses were rigorous and analytic, involved a range of stakeholders, and are documented via extensive reports. See MISO, Multi-Value Projects, https://www.misoenergy.org/planning/planning/multi-value-projects-mvps/#t=10&p=0&s=&sd=.

The MVP Portfolio was proposed and formally approved by the MISO Board in 2011. *See* MISO's Compliance Filing Reporting on Multi-Value Project Process Under the Open Access Transmission, Energy and Operating Reserve Markets Tariff, Docket No. ER10-1791-000, 2 (Mar.

27, 2012). The MISO Tariff requires annual and tri-annual reviews of the MVP Portfolio and its economic, public policy, and qualitative benefits. *See* MISO, FERC Electric Tariff, Attachment FF, Transmission Expansion Planning Protocol, Sec. VII, Multi-Value Project Costs and Benefits Review and Reporting (effective Sept. 6, 2021).

As noted, the seventeen transmission expansion projects that comprise the MVP Portfolio were assessed both individually and collectively to determine whether they met the relevant criteria. In the context of this rigorous regional analysis, it is clear that MISO had more than a few of "its own reasons" for approving the MVP Projects, including the CHC Project. Accordingly, the district court's ruling that the Rural Utilities Service should—or even could have—independently assessed the value of the CHC Project without reference to the regional transmission criteria is nonsensical. Not only does the Rural Utilities Service lack the expertise and resources to conduct such rigorous analyses, even attempting to do so would undercut the robust process already undertaken by MISO, consistent with its Commission-approved tariff, to determine which new transmission lines are necessary to serve a range of economic, reliability, and state clean energy goals.

Allowing the district court's conclusions about the role of NEPA analyses in the context of transmission expansion would undermine efforts to ensure the delivery of affordable, reliable, and clean electricity to customers in the Midwest. That would be devastating for MISO, which is relying on the benefits that the CHC Project has been determined to provide. It would also cripple the development of transmission infrastructure across the country and, by extension, the clean energy transition, if Plaintiff-Appellees and others could second guess the regional transmission planning process using NEPA.

III. The District Court's Erroneous Reading Of The Refuge Act All But Nullifies Congress's Express Authorization To Route Transmission Lines Across National Wildlife Refuges And Thus, Threatens To Obstruct Future Infrastructure Expansions.

In addition to the NEPA errors discussed above, routing transmission lines across lands of the National Wildlife Refuge System would be made nearly impossible by the district court's misreading of the Refuge Act. The Refuge Act expressly authorizes rights-of-way ("ROW") and easements across National Wildlife Refuges for "powerlines" and other linear infrastructure. 16 U.S.C. §668dd(d)(1)(B). Despite this, the district court—taking guidance from a journal article, rather than the

plain language of the statute—concluded that the "singular purpose" of the Refuge Act was to prioritize wildlife conservation over all other uses, and thereby "curb" other uses. *See* App'x 0027-30, 0033.

Contrary to the district court's narrow reading of the Refuge Act, the statute requires only that a transmission line ROW or other use be "compatible with the purposes" for which a Refuge was established. 16 U.S.C. §668dd(d)(1)(B). Congress defined "compatible use" as one that "in the sound professional judgment of [USFWS], will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." 16 U.S.C. §668ee(1).

Accordingly, the district court's review should have focused on whether the proposed transmission line ROW would materially interfere with Refuge purposes. Instead, the district court wrongly looked to whether the Project would be "consistent with" Refuge management goals. *See* App'x 0029-31. The district court also improperly substituted its own assessment of the potential impacts of the Project on the Refuge, dismissing the sound professional judgment of USFWS. *Id.*; *see Sierra Club v. Marita*, 46 F3d 606, 619 (7th Cir. 1995) (when conducting review under the APA "[t]he court is not empowered to substitute its judgment

for that of the agency."). The transmission line route will actually reduce environmental impacts within the Refuge by removing and relocating an existing 161-kV line that currently crosses the Refuge and co-locating it with the new 345-kV Cardinal-Hickory Creek line along an existing road and farm field and by retiring and removing an existing 69-kV line that also currently crosses the Refuge. The net impact will be to reduce the electric transmission line footprint within the Refuge and replace existing structures with much shorter structures using an avian-friendly design. It is, therefore, unsurprising that USFWS found that the route of the new transmission line and relocation and removal of existing transmission lines across the Refuge, not only would be compatible with Refuge purposes, but also would result in a net benefit to the wildlife that use the Refuge. *See* Co-owners' Opening Br. 14-20.

The district court's interpretation of the Refuge Act's compatibility requirement was not only erroneous; it also was unnecessary. Well before the district court issued its decision, the ROW permit had been withdrawn and replaced by a land exchange. The district court incorrectly assumed, without analysis, that a land exchange would be subject to a compatibility determination, just like a ROW permit. *See*

App'x 0032-33. That was incorrect. Compatibility determinations are required for third-party uses of lands that are within the Refuge system. 16 U.S.C. §668dd(d)(1). A land exchange is not a "use" of Refuge lands and does not require a compatibility determination. *See* 16 U.S.C. §668dd(b)(3); *Town of Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1117 (D. Colo. 2012), *aff'd on other grounds*, 784 F.3d 677 (10th Cir. 2015).[5] Accordingly, the Refuge Act's compatibility requirement was not relevant to the land exchange.

The district court's faulty interpretations of the Refuge Act have broad implications for future transmission line projects. In particular, the court's stringent approach to compatibility determinations is not what the Congress intended when it authorized ROWs across Refuge lands. Instead, Congress expressly authorizes USFWS to grant ROWs, so long as they do not materially interfere with Refuge purposes. *See* 16

[5] Land exchanges have been an uncommon mechanism for gaining access across National Wildlife Refuges, or have rarely been contested. *Town of Superior* is the only reported case interpreting the requirements for a land exchange under 16 U.S.C. 668dd(b)(3). The Co-owners' Opening Brief discusses *Friends of Alaska National Wildlife Refuges v. Haaland*, 29 F.4th 432 (9th Cir. 2022), which overturned a land exchange case relied upon by the district court that was decided under another statute, the Alaska National Interest Lands Conservation Act. *See* Co-owners' Opening Br. at 34-36.

U.S.C. §668d(d)(1)(B). The potential barrier this creates to new and upgraded transmission lines is readily apparent here: the Upper Mississippi National Wildlife Refuge is narrow, but some 261 miles long. There are also many other places in the country where the inability to cross a Refuge could impede the necessary buildout of our nation's critical transmission infrastructure. The placement of such barriers could not come at a worse time given the need to expand the existing transmission system by 60 percent (by 2030) or as much as threefold (by 2050) to meet the growing demand for clean electricity. *See* Eric Larsen et al., *Net-Zero America: Potential Pathways, Infrastructure, and Impacts*, Final Report, at 108, Princeton Univ. (Oct. 29, 2021), https://netzeroamerica.princeton.edu/the-report.

CONCLUSION

For the foregoing reasons, if this Court reaches the merits in this appeal, it should reverse the district court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Circuit Rule 29 because it contains 6,141 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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) because the brief has been prepared in Century Schoolbook 14-point font using Microsoft Word 2019.

April 20, 2022

/s/ David Y. Chung
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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2022, the foregoing was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the Court's CM/ECF system, which sends a notice of filing to all registered CM/ECF users.

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