No.

In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL.,
Petitioners,
v.
THE FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission ("FERC") has statutory authority to regulate transmission providers' use of State-granted eminent domain power, and if so, whether the provisions of FERC *Order No. 2003* that effectively commandeer this core State function are barred by the Tenth Amendment of the United States Constitution?

2. Whether the FERC's extension of its statutory authority over *transmission facilities* and wholesale sales of electric power to regulate *physical* interconnections between *generation and local distribution facilities* is barred by Federal Power Act Section 201(b)(1), which specifies the FERC shall not have jurisdiction "...over facilities used for the generation of electric energy or over facilities used in local distribution?"

3. Whether the FERC's acceptance of a facially inadequate method for identifying when State-jurisdictional distribution facilities are "subject to an Open Access Transmission Tariff" results in arbitrary and capricious action?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to *Supreme Court Rule 29.6*, Petitioners state:

The National Association of Regulatory Utility Commissioners ("NARUC") was founded in 1889. Congress and the courts have consistently recognized NARUC as a proper entity to represent the generic interests of the State utility commissions[1] in the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands that oversee the activities of telecommunications, energy, and water utilities. NARUC's members have State law obligations to ensure that energy utility services required by the public convenience and necessity are established, maintained, and provided at rates and conditions that are just, reasonable and nondiscriminatory. NARUC is a non-profit corporation with no parent companies, subsidiaries or affiliates that have issued securities to the public. No publicly traded company owns any equity interest in NARUC.

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[1] Congress, at 47 U.S.C. §410(c) (1971), calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of carriers and utilities. Under § 410(c), NARUC nominates members to Federal-State Boards which provide recommendations a federal agency must act upon. Cf. 47 U.S.C. § 254 (1996) (describing functions of the Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "Carriers, to get the cards, applied to (NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued . . .") (emphasis added).

Co-Petitioners the Alabama Public Service Commission; the Public Utilities Commission of the State of California; the Public Service Commission of the Commonwealth of Kentucky; the North Carolina Utilities Commission; and the South Carolina Office of Regulatory Staff[2] are State governmental entities and are not required to file a Rule 29.6 statement.

Although the Washington Utilities and Transportation Commission; Consolidated Edison Company of New York, Inc.; Southern Company Services, Inc.; Orange & Rockland Utilities, Inc.; and Arizona Public Service Company were Co-Petitioners below, they have decided not to join this Petition.

Along with Petitioners, the following were also parties to the District of Columbia Circuit proceedings below: Alliant Energy Corporate Services, Inc.; Ameren Services Company; American

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[2] The South Carolina Office of Regulatory Staff ("ORS") was created by an Act of the South Carolina General Assembly, 2004 Act No. 175, signed into law on February 18, 2004. Under Act 175, the ORS is a party of record in all filings, applications and proceedings before the South Carolina Public Service Commission and is charged with balancing the concerns of the using and consuming public with the preservation of the financial integrity of the State's public utilities and economic development and job retention in the State of South Carolina. S.C. Code Ann. Section 58-4-10 (Supp. 2004). The ORS has additionally been charged under S.C. Code Ann. Section 58-4-50(A)(8) (Supp. 2004) to "provide legal representation of the public interest before State courts, federal regulatory agencies, and federal courts in proceedings that could affect the rates or service of any public utility."

Forest and Paper Association Inc.; Arizona Public Service Co.; California Electricity Oversight Board; Calpine Corp.; Central Illinois Light Co.; Central Illinois Public Service Co.; Central Maine Power Co.; Cincinnati Gas & Electric Co.; Cinergy Services, Inc.; City Of Los Angeles Department Of Water and Power; City Water, Light & Power, Springfield, Il; Consolidated Edison Co. of New York, Inc.; Duke Energy Corp.; Electric Power Supply Association; Florida Public Service Commission; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Co.; Intergen Services, Inc.; Interstate Power and Light Co.; Kentucky Utilities Co.; Large Public Power Council; LG&E Energy Corp.; Lincoln Electric System; Louisiana Public Service Commission; Louisville Gas and Electric Co.; Midwest Independent Transmission System Operator, Inc.; Midwest ISO Transmission; Midwest ISO Transmission Owners; Montana-Dakota Utilities Co.; New York State Electric & Gas Corp.; Northern States Power Co.; Northern States Power Co. (Wisconsin); Northwest Wisconsin Electric Co.; Oklahoma Gas and Electric Co.; Orange and Rockland Utilities Inc.; Otter Tail Corp.; Pacificorp; PSI Energy, Inc.; Rochester Gas and Electric Corp.; Sacramento Municipal Utility District; Southern California Edison Co.; Southern Company Services, Inc.; Southern Illinois Power Cooperative, Inc.; Southern Indiana Gas & Electric Co.; Southwestern Public Service Co.; Superior Water Light & Power; Tenaska, Inc.; Tucson Electric Power Co.; Union Electric Co.; Union Light, Heat and Power Co.; Wabash Valley Power Association, Inc.; Washington Utilities and Transportation Commission; and Xcel.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED iv

LIST OF PARTIES AND RULE 29.6 STATEMENT v

TABLE OF CONTENTS viii

APPENDICES xi

TABLE OF AUTHORITIES xii

BASIS FOR JURISDICTION IN THIS COURT 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

CONCISE STATEMENT OF THE CASE 1

I. STATE REGULATION OF ELECTRIC UTILITIES AND DELEGATION OF EMINENT DOMAIN AUTHORITY 1

II. FEDERAL REGULATION OF ELECTRIC UTILITIES. ... 3

A. Federal Water Power Act (1920). *3*

B. Federal Power Act (1935) *4*

III. CONGRESS LIMITS THE FERC'S AUTHORITY. 4

A. Congress Specifies no FERC Jurisdiction over Distribution or Generation Facilities. 4

B. Congress limits FERC Eminent Domain Authority and Provides no Statutory authority to condition State Eminent Domain Power. *7*

IV. *ORDER NO. 2003* - FERC IGNORES CLEAR CONGRESSIONAL AND CONSTITUTIONAL CONSTRAINTS ON ITS AUTHORITY. 9

V. THE D.C. CIRCUIT'S REVIEW. 13

REASONS FOR GRANTING THE WRIT 15

I. THE D.C. CIRCUIT'S CONFIRMATION OF FERC AUTHORITY TO INTERFERE WITH STATE-GRANTED EMINENT DOMAIN POWER ADDRESSES *DE NOVO* A SIGNIFICANT CONSTITUTIONAL /FEDERALISM ISSUE AND CONFLICTS WITH SUPREME COURT, FEDERAL CIRCUIT COURT OF APPEALS AND STATE COURT PRECEDENT. 18

A. The D.C. Circuit's Analysis Conflicts with Decisions of Other Courts by Treating the FERC Interference with State's Sovereign Power of Eminent Domain as mere regulation of an Electric Utility company. 18

B. The D.C. Circuit Decision is inconsistent with Supreme Court precedent requiring an unmistakably clear grant of authority before FERC can Dictate the Manner State Sovereign Powers are Exercised. 21

C. The D.C. Circuit Decision is Inconsistent with this Court's Decisions prohibiting The Federal Government from Commandeering State Eminent Domain Authority to enforce a Federal program. 23

II. THE D.C. CIRCUIT'S DETERMINATION THAT FERC HAS AUTHORITY TO REGULATE THE PHYSICAL

INTERCONNECTION BETWEEN STATE JURISDICTIONAL LOCAL DISTRIBUTION FACILITIES AND GENERATION FACILITIES RAISES IMPORTANT FEDERALISM ISSUES AND CONFLICTS WITH SUPREME COURT, AS WELL AS OTHER FEDERAL AND STATE COURT PRECEDENT..... 26

A. The D.C. Circuit Decision Conflicts With This Court's Precedent Regarding Jurisdiction Over Local Distribution Facilities..... 26

B. The D.C. Circuit's Decision Below Is In Direct Conflict With a Leading Decision of the Eleventh Circuit on the Same Issue. 28

C. The D.C. Circuit's Decision Below Is In Direct Conflict With Its Own Precedent in Detroit Edison Co. v FERC..... 30

III..... THE D.C. CIRCUIT'S DECISION UPHOLDING THE FERC ORDER'S EXTENSION OF FEDERAL JURISDICTION OVER CERTAIN FACILITIES "SUBJECT TO AN OPEN ACCESS TRANSMISSION TARIFF (OATT)" RESULTS IN ARBITRARY AND CAPRICIOUS ACTION. .. 36

CONCLUSION 39

APPENDICES CONTENTS..... A-I

APPENDICES

APPENDIX A A1
United States Court of Appeals for the District of Columbia Circuit Decision: *National Association of Regulatory Utility Commissioners, et al., v. Federal Energy Regulatory Commission*, 475 F.3d 1277 (D.C. Cir. January 12, 2007) ("*NARUC v. FERC*"). A copy of the United States Court of Appeals' decision is appended as APPENDIX A.

APPENDIX B A32
Relevant Excerpts from the FERC's *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 F.E.R.C. ¶61,103 (2003); Order No. 2003-A, 106 F.E.R.C. ¶61,220 (2004); and Order No. 2003-C, 111 F.E.R.C. ¶61,401 (2005).[3]

APPENDIX C A37
The United States Court of Appeals for the District of Columbia Circuit denied the Petitioners' Petition for Rehearing En Banc and entered judgment on June 20, 2007. A copy of Order is appended as APPENDIX C.

APPENDIX D A39
This case involves Sections 814, 824, 824a-4, 824p, 831c of the Federal Power Act, 16 U.S.C. §§ 791-839. APPENDIX D contains the text of these Sections.

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[3] Order No. 2003-B, 109 F.E.R.C. ¶61,287 (2004) is not included in **APPENDIX D.**

TABLE OF AUTHORITIES

CASES

Baldwin v. Appalachian Power Co., 556 F.2d 241 (4th Cir. 1977) ---------- 19
Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395 (D.C. Cir. 2004) ---------- 22
California Independent System Operator Corporation v. Federal Energy Regulatory Commission, 372 F.3d 395 (D.C. Cir. 2004) ("CAISO") ---------- 27
Chugach Elec. Ass 'n, Inc. v. Regulatory Comm'n of Alaska, 49 P.3d 246 (Alaska 2002) ---------- 20
Connecticut Light & Power Company v. Federal Power Commission, 324 U.S. 515, 525-530 (1945) ---------- iii, 4, 28
Detroit Edison Co. v. FERC, 334 F.3d 48 (D.C. Cir. 2003) ---------- 32
Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453 (1972) ---------- 27
Georgia v. City of Chattanooga, 264 U.S. 472 (1924) ---------- 20
Gregory v. Ashcroft, 501 U.S. 452 (1991) ----------5, 22
Handley v. Cook, 252 S.E.2d 147(W. Va. 1979) -------2
Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) -2, 20
Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) ---------- 22, 27
Louisiana v. Chambers Inv. Co., 595 So.2d 598 (La. 1992) ---------- 19, 21
Louisville & N.R. Co. v. W. Union Tel. Co., 268 F. 4 (6th Cir. 1920) ---------- 19
NARUC, et al. v. ICC, 41 F.3d 721 (D.C. Cir 1994) --v

National Association of Regulatory Utility Commissioners, et al., v. Federal Energy Regulatory Commission, 475 F.3d 1277 (D.C. Cir. January 12, 2007) ("*NARUC v. FERC*") x, 3, 12, 14, 23, 37
New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) ---------25
New York v. FERC, 535 U.S. 1 (2002) ("*New York*")7, 27, 32
New York v. United States, 505 U.S. 144 (1992) -- 24, 26
Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983) ---------- 1, 2
Printz v. United States, 521 U.S. 898 (1997)---------26
Southern California Edison Co., et al. v. FERC, D.C. Cir. Nos. 06-1031 et al.(consolidated) ----------9
Southern Co. v FCC, 293 F.3d 1338 (11th Cir. 2002) ---------- 29, 30
The Mounting States Telephone and Telegraph Co. v. The Public Utilities Commission of the State of Colorado, 576 P.2d 544 (Co. 1978)---------- 25
Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C.Cir.2000) ("*TAPSG*") ----------7

STATUTES

16 U.S.C. § 791a(2006)----------4
16 U.S.C. § 814----------8, 23
16 U.S.C. § 824(b)(1)(2006) ----4, 5, 6, 9, 27, 28, 29, 36
16 U.S.C. § 824a-4(a)----------8, 23
16 U.S.C. § 824o(a)(3) ---------- 17
16 U.S.C. § 824p(e)----------8, 23
16 U.S.C. § 825(l)(b) ---------- 13
16 U.S.C. § 831c(h)-(i)----------8, 23
16 U.S.C. §824o(b)(1) ---------- 16

28 U.S.C. § 1254(1)(2006) ---------- 1
47 U.S.C. § 224 ---------- 29
47 U.S.C. § 254(1996) ---------- v
47 U.S.C. §410(c) (1971) ---------- v
S.C. Code Ann. Section 58-4-10 (Supp. 2004) ---------- vi
S.C. Code Ann. Section 58-4-50(A)(8)(Supp. 2004) -- vi
The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) ---------- 16

RULES

Sup. Ct. R. 10 (a), (c) ---------- 15
Sup. Ct. R. 29.6 ---------- v, vi

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. X. ---------- 16, 24, 26

ADMINISTRATIVE DECISION

Order No. 672, 114 FERC ¶ 61,104 (2006) ---------- 17
Promoting Wholesale Competition through Open Access Non-discriminatory Transmission Services by Public Utilities and Transmitting Utilities, Order No. 888, F.E.R.C. Stats. & Regs. ¶31,036 (1996), clarified, 76 F.E.R.C. ¶61,009, 1996 WL 363765 and 76 FERC ¶61,347, 1996 WL 799257 (1996), on reh'g, Order No. 888-A, F.E.R.C. Stats. & Regs. ¶31,048, 62 Fed. Reg. 12,274, clarified, 79 FERC ¶61,182, 1997 WL 257595 (1997), on reh'g, *Order No. 888-B*, 81 FERC ¶61,248 (1997) WL 833250 (1997), *on reh'g,* Order No. 888-C, 82 F.E.R.C. ¶61,046, 1998 WL 18148 (1998) -------- 6, 7
Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 104 F.E.R.C. ¶61,103 (2003) ix, 9, 10, 11, 12, 13, 16, 18, 19, 21, 30, 31, 33, 35, 38, A-i, A-8, A-32, A-33

Order No. 2003-A, 106 F.E.R.C. ¶61,220 (2004)ix, 12, 19, 38
Order No. 2003-B, 109 F.E.R.C. ¶61,287 (2004) ix, 12
Order No. 2003-C, 111 F.E.R.C. ¶61,401 (2005) ix, 31
Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006, 111 FERC ¶61,220 (2005) ----------9

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals entered judgment on January 12, 2007. The Court of Appeals denied the Petitioners' Petition for Rehearing En Banc and entered judgment on June 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Sections 814, 824, 824a-4, 824p, 831c of the Federal Power Act, 16 U.S.C. §§ 791-839. APPENDIX D (Pet. App. A-39 *et seq.)* contains the text of these Sections.

CONCISE STATEMENT OF THE CASE

I. STATE REGULATION OF ELECTRIC UTILITIES AND DELEGATION OF EMINENT DOMAIN AUTHORITY.

Since 1920, States have exercised their inherent authority to pervasively regulate electric utilities providing retail service. Every State has a commission to assure adequate electric service at reasonable rates. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 n. 17 (1983). These commissions continue to exercise broad authority over electric utilities, granting and conditioning requests for certificates of public convenience and necessity. For example, as this Court has acknowledged:

> [S]tates . . . retain authority over *the*

> *need for electrical generating facilities easily sufficient to permit a State so inclined to halt the construction* of new nuclear plants by refusing on economic grounds to issue certificates of public convenience." Id., at 216. (emphasis added).

In conjunction with issuing certificates of public convenience and necessity, States often delegate their sovereign power of eminent domain to utilities, *but only to facilitate the specified utility's compliance with State-deliniated public service obligations.* See, e.g., *Handley v. Cook*, 252 S.E.2d 147, 149 (W. Va. 1979) ("The Legislature . . . to make power available has conferred upon electric power companies the right of eminent domain, and has thereby necessarily imposed upon them, as public service corporations, the right and duty of performing a public service."); see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 368 n.1 (1974) (Marshall, J., dissenting) (Under Pennsylvania statute, the certificate of public convenience confers certain eminent domain rights upon the company, whose rates, facilities and services are subject to *continuous State supervision.*)

As Judge Sentelle points out in his dissent below:

> Courts have also emphasized that even if eminent domain authority has been delegated to a public utility or a privately-owned corporation, it is still the State that is acting whenever the eminent domain power is used: . . . The

> right of eminent domain is an attribute of sovereignty. It is none the less a public right, because the State sometimes consents that it may be exercised by a quasi public corporation like a common carrier. Such license or permission is granted because its exertion in that form is thought to be for the public interest.... It permits them to proceed in their own names, but really on behalf of the State...(emphasis added and in the original.) *National Association of Regulatory Utility Commissioners v. FERC,* 475 F.3d 1277, 1287-88 (D.C. Cir. 2007) (Pet. App. A-27.)

II. FEDERAL REGULATION OF ELECTRIC UTILITIES.

A. FEDERAL WATER POWER ACT (1920).

In 1920, Congress passed the Federal Water Power Act, 16 U.S.C. §§ 791 – 823. This legislation created the Federal Power Commission ("FPC"), the FERC's predecessor agency,[4] and gave the new agency jurisdiction to license hydroelectric generation facilities located along "the navigable waters of the United States." From 1920 until 1935, the agency's authority over electric utilities remained limited to such hydroelectric facilities.

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[4] Hereinafter, all references to the "FERC" will encompass both the FPC and the FERC.

B. FEDERAL POWER ACT (1935) [5]

When Congress enacted the Federal Power Act ("FPA") in 1935, 16 U.S.C. §§ 791-839, it expanded the Federal government's oversight of electric utilities to include the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce.

III. CONGRESS LIMITS THE FERC'S AUTHORITY.

A. CONGRESS SPECIFIES NO FERC JURISDICTION OVER DISTRIBUTION OR GENERATION FACILITIES.

Congress could have treated generation, transmission, distribution and consumption of electric energy as if they were all transmission-related and subject to FERC jurisdiction. Instead, Congress chose to *expressly preserve*, in FPA Section 201(b)(1), 16 U.S.C. § 824(b)(1), *States' existing jurisdiction* over retail electric service and local distribution and generation facilities, while providing the FERC with jurisdiction over wholesale electric sales and transmission service.[6]

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[5] In 1935, the provisions of the Federal Water Power Act became subchapter I of the "Federal Power Act." See 16 U.S.C. § 791a.

[6] See generally, *Connecticut Light & Power Company v. Federal Power Commission,* 324 U.S. 515, 525-530 (1945) (explaining at 530 that "Congress is acutely aware of the ...vitality of these [S]tate governments. It sometimes is moved to respect [S]tate rights . . . even when some degree of efficiency of a Federal plan is thereby sacrificed . . . It may, too, think it

FPA Section 201(b)(1), in unmistakably "clear and unambiguous text," ***flatly prohibits*** federal regulation of *generation facilities and local distribution facilities*, stating, in pertinent part:

> (1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . . [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy, but ***shall not*** have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution . . .

16 U.S.C. § 824(b)(1) (emphasis added).[7] (Pet. App. A-41)

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wise to keep the hand of [S]tate regulatory bodies in this business, for . . . [S]tates' are still laboratories where many lessons in regulation may be learned . . . without involving a whole national industry." By preserving the sovereign status of the States, the FPA, in many ways, reflects the federal system established by the U.S. Constitution, which relies upon a healthy balance of power between the States and Federal Government. See *Gregory v. Ashcroft,* 501 U.S. 452, 457-458 (1991). The "federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society [and] it allows for more innovation and experimentation in government." Id. *at 458.*

[7] The single exception, as noted supra, remains hydroelectric *generation facilities* over which the FERC retained jurisdiction in the previous subchapter (i.e., subchapter I) of the FPA, 16 U.S.C. §§ 791 -823b.

For over seventy years, Courts have consistently reaffirmed these jurisdictional limits on FERC's authority. *Transmission Access Policy Study Group v. FERC,* 225 F.3d 667, 690-91, 695-96 (D.C.Cir.2000) ("*TAPSG*"), aff'd sub nom. *New York v. FERC,* 535 U.S. 1, 21-23 (2002) ("*New York*"). Indeed, even the FERC, in its landmark *Order No. 888*,[8] specifically acknowledges the Section 201(b)(1) constraints on its jurisdiction[9] by developing a

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[8] *Promoting Wholesale Competition through Open Access Non-discriminatory Transmission Services by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. ¶31,036, 61 Fed. Reg. 21,540 (1996), clarified, 76 FERC ¶61,009, 1996 WL 363765 and 76 FERC ¶61,347, 1996 WL 799257 (1996), on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶31,048, 62 Fed. Reg. 12,274, clarified, 79 FERC ¶61,182, 1997 WL 257595 (1997), on reh'g, *Order No. 888-B*, 81 FERC ¶61,248, 62 Fed. Reg. 64,688, 1997 WL 833250 (1997), *on reh'g,* Order No. 888-C, 82 FERC ¶61,046, 1998 WL 18148 (1998), aff'd in part and remanded in part sub nom. *TAPSG,* 225 F.3d 667, aff'd sub nom. *New York,* 535 U.S. 1, 122 S.Ct. 1012, 152 L.Ed.2d 47.

[9] The FERC found utilities were unlawfully using their monopoly control over interstate transmission to undercut wholesale energy sales by potential competitors. See generally *TAPSG,* 225 F.3d at 681-83. To correct this problem, the FERC required wholesale transmission of electric energy to be unbundled from power sales. *Order No. 888* at 31,635-36. The FERC required utilities to file "open access" tariffs containing prescribed minimum terms and conditions. Id. *Order No. 888* also specified that if a State agency ordered "unbundling" of retail transmission, open access requirements applied to unbundled retail transmission service as well. Id. The FERC concluded that, pursuant to FPA §201(b)(1), it had jurisdiction over the interstate transmission of electric energy to any wholesale or unbundled retail customer. *Order No. 888* at 31,980; *New York,* 535 U.S. at 11. The FERC realized that

"seven-factor test"[10] to determine *when* specified plant (involved in unbundled retail "wheeling")[11] is a *local distribution facility* over which FERC has no jurisdiction - or a *transmission facility* over which FERC does have jurisdiction. *Order 888* at 31,770-71,31,981; *New York,* 535 U.S. at 23; *TAPSG,* 225 F. 3d at 695.

B. CONGRESS LIMITS FERC EMINENT DOMAIN AUTHORITY AND PROVIDES NO STATUTORY AUTHORITY TO CONDITION STATE EMINENT DOMAIN POWER.

In the FPA, 16 U.S.C. §§ 791- 839, Congress provided eminent domain authority to the electric

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unbundled retail "wheeling" (the collective process of transmission and distribution) could involve service over transmission facilities, as well as service over local distribution facilities. *Order No. 888* at 31,980.

[10] The seven-factor test considers the following: (1) local distribution facilities are normally in close proximity to retail customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems, it rarely if ever, flows out; (4) when power enters a local distribution system it is not reconsigned or transported on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted geographic area; (6) meters are based at the transmission-local distribution interface to measure flows into the local distribution system; and (7) local distribution systems operate at reduced voltage. *Order No. 888* at 31,981.

[11] Retail wheeling is the movement of electricity, owned by a power supplier and sold to a retail consumer, over transmission and distribution lines owned by neither. A fee is charged by the owners of the lines for letting others use them. A "wheeling charge" is levied for both transmission and distribution line "rental."

utilities regulated by the FERC only in limited circumstances. The only provisions in the FPA granting eminent domain authority for generation facilities apply to *hydroelectric* generation facilities.[12]

Even in the area of transmission facilities, the FERC's authority to certify facilities or grant eminent domain authority is *limited and strictly circumscribed.* See FPA, 16 U.S.C. § 824a-4(a) (granting the Department of Energy ("DOE"), in tandem with FERC, limited authority to use eminent domain to acquire rights-of-way "through North Dakota, South Dakota, and Nebraska for transmission facilities for the seasonal diversity exchange of electric power to and from Canada") (Pet. App. A-44, A-45) and 16 U.S.C. § 824p(e) (granting federal eminent domain authority to certain licensees to build transmission facilities in "national interest electric transmission corridor[s] designated by the DOE"). (Pet. App. A-52)

The FERC's lack of eminent domain authority for non-hydroelectric generation facilities is not surprising. It would not be logical for Congress to expressly prohibit the exercise of FERC jurisdiction

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[12] *See* 16 U.S.C. § 814, granting eminent domain authority to certain licensees to acquire land "necessary to the construction, maintenance, or operation of any dam, reservoir, (Pet. App. A-39) diversion structure, or the works appurtenant thereto," and 16 U.S.C. § 831c(h)-(i), authorizing the TVA to use eminent domain to "acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River". (Pet. App. A-61)

over local distribution and generation facilities in FPA Section 201(b)(1) and then turn around and provide eminent domain authority to site such facilities.

IV. *ORDER NO. 2003* - FERC IGNORES CLEAR CONGRESSIONAL AND CONSTITUTIONAL CONSTRAINTS ON ITS AUTHORITY.

Order No. 2003 requires public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to file revised open access transmission tariffs containing standard *generator* interconnection procedures and a standard interconnection agreement specified by FERC and to provide interconnection service to devices used for the production of electricity having a capacity of more than 20 megawatts under them.[13]

Prior to *Order No. 2003*, the Commission had addressed interconnection issues on a case-by-case basis. This approach ensured that non-jurisdictional *generation* and *local distribution facilities* were not unlawfully subjected to FERC jurisdiction.

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[13] In a separate rulemaking, the FERC established procedures and an interconnection agreement applicable to Small Generators (any energy resource having a capacity of no more than 20 megawatts, or the owner of such a resource) that seek to interconnect to jurisdictional Transmission Providers. *See Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006*, 111 FERC ¶61,220 (2005). That rulemaking is currently under review before the United States Court of Appeals for the D.C. Circuit in the case captioned *Southern California Edison Co., et al. v. FERC*, D.C. Cir. Nos. 06-1031 et al.(consolidated).

In *Order No. 2003*, the FERC correctly and directly concedes it "may not regulate the *'local distribution facility' itself,* which remains State jurisdictional . . ." because that would violate the FPA. It contends it is only regulating a "wholesale transaction."[14]

However, the order then paradoxically *specifically extends* federal jurisdiction to the siting, construction, equipment, engineering, and procurement of the physical interconnection between *generating facilities* and *local distribution facilities*. A physical interconnection to a distribution line is *not* the sale of energy at wholesale.

The impact of the FERC's decision on the physical plant associated with generator facilities is clear. Article One of the Large Generation

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[14] See *Order No. 2003-C* at ¶53:

> "Because the Commission's authority to regulate in this circumstance is limited to the wholesale transaction, **we conclude that *we do not have the authority to directly regulate the facility that is used to transmit the energy being sold at wholesale.*** In other words, while the Commission may regulate the entire transmission component . . . of the wholesale transaction – whether the facilities used to transmit are labeled "transmission" or "local distribution"– ***it may not regulate the local distribution facility itself, which remains State jurisdictional.*** We believe this properly respects the boundaries drawn in the FPA." (emphasis added). (Pet. App. A-35, A-36)

Interconnection Agreement ("LGIA"), adopted in *Order No. 2003,*[15] states:

> Interconnection Facilities include all *facilities and equipment* between the Generating Facility and the Point of Interconnection, *including any modifications, additions, or upgrades that are necessary to physically and electrically interconnect the Generating facility* . . . (emphasis added).

Similarly, Section 8.2 of the Large Generation Interconnection Procedures ("LGIP") adopted in the same order states:

> The Interconnection Facilities Study shall specify and estimate the cost of the equipment, engineering, procurement and construction work needed to... *physically and electrically connect the Interconnection [distribution] Facility...* (emphasis added).

The FERC's proffered justification for this jurisdictional grab - a "transactional dual use" of the facilities – was rejected by a prior panel of the D.C. Circuit in a related case. As the D.C. Circuit explains:

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15 The FERC requires this LGIA to be (i) appended to every jurisdictional transmission providers Open Access Transmission Tariff and (ii) executed on an individual basis to memorialize the terms and conditions of interconnection for a new generator (or modification of an existing generator) with generating capability of greater than 20 MW.

> *Order No. 2003* asserts jurisdiction over the terms of interconnection between generators and transmission providers, even where the transmission facility also engages in local distribution, but only insofar as the interconnections are "for the purpose of making sales of electric energy for resale in interstate commerce." *NARUC v. FERC,* 475 F. 3d 1279-80. (Pet. App. A-9.)

Order No. 2003 also ignores the fact that Congress has not authorized the FERC to interfere with the use of State-granted eminent domain power. According to *Order No. 2003-A*, 69 Fed. Reg. 15,932, 15,953-54, 16,033 (2004), transmission providers must – acting as an agent of the State – use their imminent domain authority to help non-utility generators obtain necessary land for interconnection facilities. Specifically, transmission providers:

> shall at Interconnection Customer's expense use efforts, similar in nature and extent to those that it typically undertakes on its own behalf or on behalf of its affiliates, including use of its [State granted] eminent domain authority." Id. (emphasis added).

Following the submission of successive rehearing requests, FERC issued *Orders Nos. 2003-A* (March 5, 2004), *2003-B* (December 20, 2004), and *2003-C* (June 16, 2005), which primarily affirmed,

with some exceptions, *Order No. 2003's* LGIP and LGIA.

V. THE D.C. CIRCUIT'S REVIEW.

Petitioners filed timely requests for rehearing of FERC's July 24, 2003 *Order No. 2003,* and subsequently sought review of the order before the United States Court of Appeal for the District of Columbia Circuit. The jurisdiction of that Court arose under 16 U.S.C. § 825(l)(b). Ultimately, two D.C. Circuit Judges voted to uphold *Order No. 2003's* commandeering of State-granted eminent domain requirements over the vigorous dissent of Judge Sentelle.

Ignoring voluminous case law defining the character of this most coercive State authority, the purpose private entities are delegated this power, and the special status of any entity exercising it - the majority analyzed the issue *de novo* and found FERC's authority to cure undue discrimination sufficient *because there was no significant infringement on State's exercise of eminent domain authority*. According to the majority, FERC was purportedly merely regulating the utilities' actions – giving no real consideration to the fact that these utilities stand in the shoes of the State wielding a State power constrained by State conditions and oversight.

Unable to find specific statutory authorization to condition the exercise of a State agent wielding State eminent domain authority, the majority below contends the FERC order merely:

> conditionally, *compel[s] th*e utility either *to broaden its use of the State-provided authority for the benefit of independents,* or to drop the use for its own and its affiliates' power. But the modifier *conditionally* is critical. Nothing in the federal rule compels either continued State retention of the license, or public utilities' continued employment of eminent domain. The intrusion on state power is surely no greater than (many would say dramatically less than) that of a federal command that, if a state hires employees for the performance of traditional governmental functions, it must pay them no less than a federally determined wage...*the orders here leave State law completely undisturbed and bind only utilities-not State officials.* (emphasis added). (*NARUC v. FERC,* 475 F. 3d at 1283)(Pet. App. A-18)

Whatever this Court concludes about the majority's analysis, two things are clear: The FERC's rules do in fact bind authorized agents of the State; and, telling an agent of a State government how and when one of the most coercive of States' sovereign powers is to be exercised - that of condemning property for public use - is "surely" a dramatically greater intrusion on State sovereign authority than an agency complying with a federal minimum wage law.

As noted, supra, the entire panel adopted FERC's flawed rationale on the remaining jurisdictional issues. *See* Pet. App. A-9, A-16. In June, the D.C. Circuit denied Petitioners' Petition for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

The significant statutory and constitutional issues concerning the interaction between federal and State authorities, as well as the practical policy implications and potential impact on safety and reliability of electric service, raised by the decision below present a compelling case for granting certiorari. The D.C. Circuit's affirmation of the FERC's flawed decision falls within the contours of the general guidelines justifying review outlined in Supreme Court Rule 10 (a) and (c).

Specifically, the decision of the D.C. Circuit raises fundamental constitutional issues about a federal agency's ability to direct the use of State's eminent domain authority.

The decision also raises important issues concerning a federal agency's ability to ignore clear Congressional proscriptions, as well as the clear import of decisions of this Court, to significantly expand its jurisdiction.

For the first time in the 87 years of federal regulation of the electric power industry, the FERC, without additional statutory authorization, has divested the States of control over generation and

distribution facilities in contravention of the unambiguous dictates of the Federal Power Act.

Assuming arguendo there is no Tenth Amendment bar, the decision also permits FERC to condition State eminent domain authority with no express statutory authorization.

Moreover, the D.C. Circuit, in justifying these significant expansions of the FERC's authority, has rendered a decision, which conflicts with numerous precedents of not only this Court, but those of other Circuits and State Supreme Courts.

These are not just academic questions. Aside from the weighty federalism and separation-of-powers issues raised by FERC's usurpation of State and Congressional authority, there are also practical impacts flowing from the D.C. Circuit's decision as well.

The Court's endorsement of this flawed FERC decision will have an undeniable and critical impact nationally on State efforts to facilitate connection of alternative generation to local distribution plant and to otherwise regulate State-jurisdictional utilities in a manner consistent with State law.

A number of safety, reliability, and resource adequacy considerations are also impacted by the D.C. Circuit's decision to confirm *Order No. 2003.*[16]

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[16] The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), added Section 215(i)(2), 16 U.S.C. §824o(b)(1), to the FPA. That section gives the FERC authority to set

States retain the responsibility for ensuring the safe, reliable, and adequate delivery of electricity service to retail customers. Electric service is delivered through distribution facilities directly and physically connected to customers' homes and businesses. The physical interconnection of a generator to distribution facilities necessarily impacts the operation of these facilities and, thus, the safety, reliability, and adequacy of electric service to retail customers.

Finally, even the majority recognized the potential for uncertainty prompted by the difficulty of determining which distribution facilities are covered by the FERC's Open Access Transmission

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reliability standards for the bulk-power system. However, Congress denied FERC any authority to order the construction of additional generation or other facilities In implementing FPA Section 215, the FERC conceded the clear Congressional intent to limit the FERC's new jurisdiction over reliability. For example, in defining the term "reliability standard" as used in FPA Section 215(a)(3), 16 U.S.C. § 824o(a)(3) the FERC said that this term does not include any requirement to enlarge or construct new generation capacity. In *Order No. 672*, which adopted the Final Reliability Rule, FERC recognized the important role that States play in regulating many aspects of electric reliability, such as ensuring that State franchised utilities meet their obligation to construct enough capacity to ensure that they remain able to provide the public with reliable electric service. *Order No. 672*, 114 FERC ¶ 61,104 (2006) at 813. The reliability responsibilities left to the States generally include requiring franchise utilities to make adequate investment in new generation, distribution, and transmission infrastructure, and, to develop adequate demand response as needed to help keep generation and load in balance. Id. Obviously, assuring generation resource adequacy to retail customers is a fundamental aspect of reliable service.

Tariffs ("OATT") and which are not. The Court below dismisses the problem by merely stating that it sees no grounds for upsetting the FERC's judgment, even though FERC concedes that there is no simple method of deciding what facilities are subject to an OATT. The difficulty of enforcement in some instances and the probability of forum shopping in others are just two more reasons why the Supreme Court should take this case up for review.

I. THE D.C. CIRCUIT'S CONFIRMATION OF FERC AUTHORITY TO INTERFERE WITH STATE-GRANTED EMINENT DOMAIN POWER ADDRESSES *DE NOVO* A SIGNIFICANT CONSTITUTIONAL /FEDERALISM ISSUE AND CONFLICTS WITH SUPREME COURT, FEDERAL CIRCUIT COURT OF APPEALS AND STATE COURT PRECEDENT.

A. THE D.C. CIRCUIT'S ANALYSIS CONFLICTS WITH DECISIONS OF OTHER COURTS BY TREATING THE FERC INTERFERENCE WITH STATE'S SOVEREIGN POWER OF EMINENT DOMAIN AS MERE REGULATION OF AN ELECTRIC UTILITY COMPANY.

The D.C Circuit, by a 2-1 vote erroneously determined that *Order No. 2003's* requirements conditioning how utilities must exercise their State-regulated eminent domain powers – *is not regulation of the State's authority*, but only binds utilities. See *Pet. App. A -17, A-18.* [17]

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[17] *Order No. 2003* requires that transmission providers "shall at Interconnection Customer's expense use efforts,

This sophistry cannot disguise the fact that utilities exercising eminent domain authority, *are acting as agents of the State* - under a carefully conditioned certificate subject to State supervision and oversight. "[B]y exercising the delegated power of eminent domain, *a public service corporation acts as an agent of the State . . .*" *Baldwin v. Appalachian Power Co.,* 556 F.2d 241, 242 (4th Cir. 1977). (emphasis added).[18]

Not only was there a split among the members of the D.C. Circuit panel responsible for deciding this issue, with Judge Sentelle writing a vigorous dissent (Pet. App. A-24-31), but the majority's decision below conflicts with decisions of this Court, the Fourth Circuit (supra), and State Supreme Courts.

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similar in nature and extent to those that it typically undertakes on its own behalf or on behalf of its Affiliates, including use of its eminent domain authority." *Order No. 2003-A*, 69 Fed. Reg. 15,932, 15,953-54, 16,033 (2004). To the extent providers use eminent domain to interconnect with their own generation facilities, they must now also use that authority on behalf of unaffiliated generators.

[18] *Louisville & N.R. Co. v. W. Union Tel. Co.*, 268 F. 4, 8 (6th Cir. 1920) ("It is none the less a public right, because the State sometimes consents that it may be exercised by a quasi public corporation, like a common carrier. Such license or permission is granted because its exertion in that form is thought to be for the public interest. . . . It permits them to proceed in their own names, but really on behalf of the State."). *Louisiana v. Chambers Inv. Co.,* 595 So.2d 598, 601 (La. 1992) ("[Eminent domain] always involves the taking or damaging of property interests by the state or some alter ego of the state, such as a public utility, that has been delegated the power to condemn.").

The Majority's reasoning is premised on the notion that an electric utility can use its delegated eminent domain authority for other entities or for matters different than the service upon which the certificate was based.

It cannot. See, e.g., *Chugach Elec. Ass 'n, Inc. v. Regulatory Comm'n of Alaska,* 49 P.3d 246, 253 (Alaska 2002) (Utility requires an additional certificate prior to providing an additional type of service.)

No private company has a right to eminent domain authority. Those granted the responsibility, find the grant comes with clear conditions and oversight. The majority's claim that FERC's rules "*...bind only utilities- not State officials*" ignores the fact that the exercise of eminent domain authority by *any entity*, is the essence of States' sovereignty. As this Court declared in *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924): "The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. . . . [T]he power is deemed to be essential to the life of the State. *It cannot be surrendered*, and if attempted to be contracted away, it may be resumed at will." (emphasis added).[19]

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[19] Indeed, the archetype for when a utility's actions are considered the actions of the State is when the utility exercises the State's sovereign power of eminent domain. See e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345 at 353 (1974) (declining to find that an electric utility's termination of a customer's power is a State action while noting: "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated

The majority's analysis, by essentially ignoring the fact that the *utility is the State* when it exercises eminent domain authority, is in direct conflict with these decisions.

B. THE D.C. CIRCUIT DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT REQUIRING AN UNMISTAKABLY CLEAR GRANT OF AUTHORITY BEFORE FERC CAN DICTATE THE MANNER STATE SOVEREIGN POWERS ARE EXERCISED.

There is no specific statutory authority that permits *Order No. 2003's* restrictions on transmission providers' use of State-granted eminent domain power. By upholding these requirements, the decision conflicts with long-established Supreme Court precedent.

As Judge Sentelle emphasized in his dissent from the majority, FERC is a "creature of statute;" the agency has "*only* those authorities conferred upon it by Congress."[20] In 2004, this Court reached

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with sovereignty, such as eminent domain, our case would be quite a different one."); see also *Louisiana v. Chambers Inv. Co.,* 595 So.2d 598, 601 (La. 1992). ("Eminent domain...always involves the taking or damaging of property interest by the state, or some alter ego of the state, such as a public utility, that has been delegated the power to condemn.")

[20] See *NARUC v. FERC,* 475 F. 3d at 1286, Pet. App. A-24, citing *Cal. Indep. Sys. Operator Corp. v. FERC,* 372 F.3d 395, 398 (D.C. Cir. 2004) (Internal quotation marks omitted.) ("As a federal agency, FERC is a 'creature of statute,' having

the same conclusion by stating that, "if there is no statute conferring authority, FERC has none."[21]

Moreover, this Court has specified that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute."[22] Courts may not presume that Congress has intended to regulate the "substantial sovereign powers" of States unless the federal statute in question is unmistakably clear.

There is no question that States' eminent domain authority and the delegation of this authority to utilities involve State sovereign powers.

It is also true, as Judge Sentelle observes in his dissent, nowhere does FERC refer to any statutory provision whereby Congress has addressed the States' exercise of its sovereign power of eminent domain, much less an "unmistakably clear' one authorizing FERC to regulate or preempt States' use of it. *NARUC v. FERC,* 475 F. 3d at 1288. (Pet. App.

'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'")

[21] Id. This case follows a clear line of precedent consistently finding that a federal "... agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986).

[22] *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (Internal quotation marks omitted.) (emphasis added).

A-28)

The majority decision below carries the same frailty. It also fails to locate or refer to any statutory provision authorizing FERC to interfere with the exercise of States' sovereign power of eminent domain. Nor does it meaningfully address any of the cases cited by Judge Sentelle. Instead of attempting to identify any such clear statement in the relevant statutes, the majority decision follows FERC lead. FERC points to its statutory authority to remedy undue discrimination as the basis for ordering use of State condemnation authority.

However, the FERC's general authority to redress undue discrimination in no way supports the expansion of FERC's authority to reach State eminent domain power.

Congressional treatment of eminent domain in other provisions of the FPA confirms *when Congress addresses issues involving eminent domain; it tends to do so in a clear, detailed, and specific manner.* See FPA 16 U.S.C. §§ 814, 824a-4(a), 824p(e) and 831c(h)-(i). (Pet. App. A-39 et seq.)

If Congress wanted to grant FERC or independent generators eminent domain authority, Congress was capable of doing so. The fact is - Congress did not choose to grant FERC such independent authority, let alone authorize FERC to regulate the States' eminent domain authority.

C. THE D.C. CIRCUIT DECISION IS INCONSISTENT WITH THIS COURT'S DECISIONS

PROHIBITING THE FEDERAL GOVERNMENT FROM COMMANDEERING STATE EMINENT DOMAIN AUTHORITY TO ENFORCE A FEDERAL PROGRAM.

Even if Congress had chosen to pass a law allowing FERC to harness the State's eminent domain power, such a law would have been an unconstitutional infringement on core State functions. The Tenth Amendment of the United States Constitution bars the federal government from compelling the States to enact and enforce federal regulatory programs.[23] *See New York v. United States*, 505 U.S. 144, 161(1992).

That is precisely what FERC is attempting to do here.

The FERC and majority's reliance on generic FPA provisions that prohibit utilities from engaging in undue discrimination carries the same constitutional frailty.

Under the D.C. Circuit's decision, a utility can no longer seek or exercise eminent domain authority unless it also seeks, obtains and exercises eminent domain authority for independent generators.

In addition to potentially interfering with the utility's public service obligation, this decision significantly undermines the States' authority and

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[23] The Tenth Amendment states that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

interferes with its legislative processes. The decision will also impose significant burdens on State resources.

The majority states that the FERC's orders "conditionally, compel the utility to broaden its use of the State-provided authority for the benefit of independents, or to drop the use for its own and its affiliates' power." See Pet. App. A-18. But as noted, supra, a utility does not have the authority to broaden its use of the States' eminent domain powers. Rather, many will have to apply for additional certificate authority from the State to assist an independent generator condemn land. This compels the use of extensive State resources to conduct proceedings on applications for new certificates of public convenience and to complete the related necessary environmental reviews. These requirements on the utilities' future use of the States' eminent domain authority will also raise a range of issues that State commissions will be forced to address in the certificate proceedings.

State commissions perform a legislative function when they conduct certificate proceedings, because, like ratemaking proceedings, the certificate proceedings are determining what is in the public interest in the future. *See New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 370-71 (1989); *see also The Mounting States Telephone and Telegraph Co. v. The Public Utilities Commission of the State of Colorado,* 576 P.2d 544, 547 (Co. 1978).

The Court's decision below runs afoul of the

Tenth Amendment by allowing federal requirements to be imposed upon the States' legislative process. The States cannot be compelled to follow federal requirements under these circumstances, nor can they be required to "enact or administer a federal regulatory program."[24] See generally *Printz v. United States*, 521 U.S. 898, 926-29 (1997).

II. THE D.C. CIRCUIT'S DETERMINATION THAT FERC HAS AUTHORITY TO REGULATE THE PHYSICAL INTERCONNECTION BETWEEN STATE JURISDICTIONAL LOCAL DISTRIBUTION FACILITIES AND GENERATION FACILITIES RAISES IMPORTANT FEDERALISM ISSUES AND CONFLICTS WITH SUPREME COURT, AS WELL AS OTHER FEDERAL AND STATE COURT PRECEDENT.

A. THE D.C. CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING JURISDICTION OVER LOCAL DISTRIBUTION FACILITIES.

The D.C. Circuit's unprecedented decision to uphold FERC's attempt to regulate generator interconnections with local distribution facilities is fundamentally inconsistent with the dual Federal-State regulatory regime embodied in the FPA.

As pointed out at length, supra at pages 21-23, this Court has consistently ruled that a Federal agency's jurisdiction is limited to that authorized by

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24 *New York,* 505 U.S. 144, 188.

statute. *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 374 (1986). The FERC, "[a]s a federal agency ... is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'" *California Independent System Operator Corporation v. Federal Energy Regulatory Commission,* 372 F.3d 395, 398 (D.C. Cir. 2004) ("CAISO") (citations omitted).[25]

This Court has also explicitly recognized that the FERC's jurisdiction does not include local distribution facilities. The relevant statutory text is clear and unambiguous. FPA Section 201(b)(1) expressly *precludes* FERC from exercising jurisdiction over local distribution facilities and generation facilities. As this Court explained in *Federal Power Commission v. Florida Power & Light Co.,* 404 U.S. 453, 468 (1972), the FPA's recognition of exclusive State jurisdiction over local distribution facilities amounts to a legal standard that the agency [the FERC] must recognize and the courts must enforce. *Florida Power & Light,* 404 U.S. 453, 467.

Moreover, this Court has already rejected precisely the sort of unlawful assertion of FERC

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[25] In *CAISO,* the D.C. Circuit concluded "if there is no statute conferring authority, FERC has none." Id., *see also New York v. FERC,* 535 U.S. 1, 18 (2002) (stating that " the best way to answer such a question - *i.e.,* whether federal power may be exercised in an area of pre-existing [S]tate regulation - 'is to examine the nature and scope of the authority granted by Congress to the agency' ").

jurisdiction that the States have challenged in this case. Referencing the plain text of FPA Section 201(b)(1), the Supreme Court stated:

> [I]t is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.'" *Conn. Light & Power Co*, 324 U.S. 515, 528-29.[26]

The D.C. Circuits decision lacks this Court's skepticism. It simply ignores the same express statutory prohibition to uphold a FERC Order that unlawfully extends federal jurisdiction to cover physical interconnections between State-jurisdictional generation facilities and local distribution facilities.

B. THE D.C. CIRCUIT'S DECISION BELOW IS IN DIRECT CONFLICT WITH A LEADING DECISION OF THE ELEVENTH CIRCUIT ON THE SAME ISSUE.

The D.C. Circuit's decision below conflicts with a key decision of the Eleventh Circuit on the issue of whether the FPA authorizes FERC to regulate State-jurisdictional facilities used for the generation of electricity or over facilities used in local distribution.

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[26] Id. at 531, where this Court further stated that "The expression 'facilities used in local distribution' is...a limitation on jurisdiction and a legal standard that must be given effect...in addition to the technological transmission test." *Conn. Light & Power Co.*, 324 U.S. 515, 531. (emphasis added).

In *Southern Co. v FCC*, 293 F.3d 1338 (11th Cir. 2002), a group of electric utility companies challenged guidelines of the Federal Communications Commission ("FCC") implementing amendments to the Pole Attachments Act ("PAA"), 47 U.S.C. § 224. A critical element of the Eleventh Circuit's decision was whether the FCC exceeded its jurisdiction by asserting that the PAA applied not only to electric utilities' FERC-jurisdictional transmission systems, *but also to State-jurisdictional distribution systems.*

Citing FPA Section 201(b)(1), the Eleventh Circuit concluded that "the Federal Power Act explicitly divests the FERC of regulatory jurisdiction 'over facilities used for the generation of electric energy or over facilities used in local distribution.'" *Southern Co. v FCC*, 293 F.3d 1338, 1344. The Eleventh Circuit went on to observe:

> This provision recognizes the essentially local character of distribution facilities and systems, as opposed to the primarily interstate character of electric transmission facilities. Regulation of the latter was to be implemented by the FERC, while regulation of the former was to be left primarily in the hands of [S]tate and local authorities. *This bifurcated regulatory structure is indicative of the accepted and fundamental distinction between a utility's transmission plant and its distribution plant.* Id. (emphasis added).

The Eleventh Circuit correctly states the key distinction between the respective roles of the FERC and the States in the regulation of the nation's electric system. The D.C. Circuit decision, if allowed to stand, undermines this key legal distinction by allowing the FERC to assert federal regulatory authority over what has been the exclusive regulatory preserve of the States - the physical interconnection of generators to State-jurisdictional distribution facilities.

C. THE D.C. CIRCUIT'S DECISION BELOW IS IN DIRECT CONFLICT WITH ITS OWN PRECEDENT IN *DETROIT EDISON CO. V FERC.*

The FERC attempts to justify its jurisdictional overreach in *Order No. 2003* on the grounds that it is only asserting jurisdiction over so-called "dual use" facilities, *i.e.*, facilities that provided both retail and wholesale distribution services and, then, *only to the extent that there were FERC-jurisdictional transactions* over those facilities.

The FERC's rationale illuminates several flaws in the D.C. Circuit's decision. First, as outlined in more detail supra at pages 10-12 and 31-36, the express terms of FERC's order goes beyond sales transactions and actually requires the physical interconnection of generation and local distribution facilities in specific ways.

The statute does not permit this result.

Indeed, the FERC has already conceded that the physical local distribution facilities remain State-jurisdictional and beyond its reach. See *Order No. 2003-C* at ¶ 53, where the FERC concludes "while the Commission may regulate the entire transmission component (rates, terms and conditions) of the wholesale transaction – whether the facilities are used to transmit are labeled "transmission" or "local distribution"- *it may not regulate the "local distribution" facility itself, which remains State jurisdiction.*" (emphasis added). FERC may have jurisdiction over certain financial transactions that take place over otherwise State-jurisdictional distribution lines, but the law is clear that the FERC does not have jurisdiction over those facilities in any other respect.

This problem of actual impact on State-jurisdictional facilities caused an earlier panel of the D.C. Circuit to, in 2003, specifically find that the adoption of this "dual use" rationale was inconsistent with the statutory text. The panel below has thus produced an opinion that directly conflicts with recent precedent from the same Circuit. See, Detroit *Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003))[27].

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[27] Id. The Court reasoned that the FERC's effort to rewrite the statute to exclude only "facilities used exclusively in local distribution" effectively eviscerates State jurisdiction over numerous local facilities, in direct contravention of Congressional intent. Id., (*citing New York,* 535 U.S. 1, 22 (recognizing "Congress' intent to preserve State jurisdiction over local facilities").

The D.C. Circuit attempts to distinguish *Detroit Edison,* by first asserting that "Order No. 2003 applied to jurisdictional transactions only." (Pet. App. A-10) This assertion assumes away the key predicate in question: whether the facility in question is in fact a State-jurisdictional distribution facility over which the FERC simply lacks jurisdiction, or a FERC-jurisdictional transmission facility. FERC may have jurisdiction over certain financial transactions that take place over otherwise State-jurisdictional distribution lines, but the law is clear that the FERC does not have jurisdiction over those facilities in any other respect. Put another way, while FERC may have transaction-specific authority over certain State-jurisdictional facilities in limited instances, it does not have jurisdiction over the physical facilities themselves. The FERC's decision, affirmed by the Court below, moves beyond the assertion of federal jurisdiction over isolated financial transactions to the underlying physical facilities themselves.

This distinction between "physical" facilities and "transactions" (*i.e.*, sales or similar financial arrangements) taking place using those same facilities is a critical one. *Order No. 2003* contains detailed construction, equipment, engineering and procurement requirements regarding local distribution facilities[28]. None of these specifications

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[28] LGIA, Article 1 under *Order No. 2003,* states: "Interconnection Facilities include *all facilities and equipment* between the Generating Facility and the Point of Interconnection, including any *modification, additions or upgrades that are necessary to physically and electrically interconnect* the Generating Facility..."; LGIP, Section 8.2

have anything to do with financial transactions. However, by adopting these detailed interconnection requirements, the FERC is unquestionably attempting to assert jurisdiction over the *actual* facility, not simply over a wholesale transaction or sale that may be taking place over the facility.

A sale of energy is simply *not* a construction project. Similarly, the physical siting of a generator and related facilities is not a sale. However, both FERC's *Order No. 2003*, and the decision below upholding it, fail to recognize the fundamental distinction between these financial transactions and a physical interconnection.

The D.C. Circuit attempts a further justification by parsing the words "interconnection" and "facilities" and stating that "interconnections . . . clearly are not "facilities, as that would make the term, 'Interconnection Facilities', as used in the standardized agreements a redundancy." Id. (Pet. App. A-10) The Court's logic jumps from the limited observation that the two words appear to have different meanings in the verbiage in which a FERC decision is couched to the flawed conclusion that "interconnections appear to be relationships between parties with respect to electricity flowing over facilities." Id. The logic chain between the initial statements and the Court's conclusions are difficult

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under *Order No. 2003* says: "The Interconnection Facilities Study shall specify and estimate the cost of the *equipment, engineering, procurement and construction work needed to*...physically and electrically connect the Interconnection Facility [distribution facility]...". (emphasis added).

to discern. The D.C. Circuit's rationale reflects a fundamental misunderstanding of the nature of interconnections. An interconnection is not a "relationship" between the owner of a generating facility and the owner of the distribution system. An interconnection *necessarily* involves a *physical* connection that permits electricity to be delivered from a generating facility to the distribution wires that ultimately deliver electricity to end-use customers. An "Interconnection Agreement" defines the relationship under which *"interconnection facilities" are constructed* and the "interconnection" is accomplished. Id. (Pet. App. A-10) The term "Interconnection Facilities" refers to the *facilities necessary to accomplish the physical connection* between the generator and the distribution system.[29] Id. There is no hint of a "sale" or any other sort of financial arrangement when generation and distribution facilities are "interconnected." Rather, there is the pouring of concrete, the erection of structures, the installation of equipment and the stringing of wires. None of these activities has the remotest relationship to the FERC's limited jurisdiction over "wholesale sales" accomplished using such facilities. In any event, an interconnection certainly does *not* guarantee that any FERC-jurisdictional sale will ever take place after the interconnection is built.[30] It is an

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[29] The "Interconnection Facilities" at issue are the distribution and generation facilities that Congress has mandated be *excluded* from federal jurisdiction.

[30] The FERC Order does not require a contract for the sale of the generating facility's output at the time of interconnection.

impermissible distortion of unambiguous statutory text to read the FERC's limited federal authority over non-physical "services" and "transactions" to allow federal regulation of physical interconnections.

While the lower court concedes that the FERC Order *does* regulate facets of the engineering and construction of distribution facilities, it claims that these provisions are tethered to the Commission's authority over interstate transmissions and wholesale sales: "[I]t is hard to see how the Federal Power Act could leave FERC weaponless against conduct that might encourage the running up of unreasonable costs." *NARUC v. FERC*, 425 F. 3rd 1280 (Pet. App. A-11) From this, the Court concludes the Commission's "authority to disallow recovery of costs imprudently incurred by jurisdictional firms may . . . impinge as a practical matter on the behavior of non-jurisdictional ones," and finds this impingement does not exceed permissible limits. Id.

This aspect of the opinion below goes off on a tangent focusing on the FERC's authority to disallow unreasonably incurred costs. This observation is simply irrelevant (and unfounded). There is no factual basis for the lower court's expression of concern over unreasonable costs associated with State-jurisdictional facilities. The States are every bit as concerned about, and attentive to, unreasonably or imprudently incurred costs as is the FERC. Moreover, the States are in as strong a position to disallow recovery of such costs as the FERC.

The intention to sell power at wholesale some time in the future does not provide the FERC with jurisdiction over the physical interconnection to the facility itself. Only after interconnection facilities are constructed can there be a sale of electricity that invokes the FERC's wholesale sales jurisdiction. If the D.C. Circuit decision stands, the FERC will effectively have been allowed to expand its jurisdiction over "wholesale sales" transactions to include requests for, and the construction of, local distribution facilities.

From any perspective, the D.C. Circuit's conclusion, which lies at the heart of its rationale for upholding the FERC's jurisdictional overreach, is hopelessly flawed. It is clear from any reasonable examination of what the FERC has required that State-jurisdictional facilities will be physically impacted and altered as a result.

III. THE D.C. CIRCUIT'S DECISION UPHOLDING THE FERC ORDER'S EXTENSION OF FEDERAL JURISDICTION OVER CERTAIN FACILITIES "SUBJECT TO AN OPEN ACCESS TRANSMISSION TARIFF (OATT)" RESULTS IN ARBITRARY AND CAPRICIOUS ACTION.

While the D.C. Circuit recognized the potential for uncertainty prompted by the difficulty of determining which distribution facilities are covered by an Open Access Transmission Tariff

("OATT") and which are not,[31] it dismisses the problem by merely stating that it sees no grounds for upsetting the FERC's judgment on this issue. *NARUC v. FERC,* 475 F. 3d at 1282. (Pet. App. A-15) The FERC's failure to address and to solve this problem is the essence of arbitrary and capricious agency action.

The FERC concedes that *there is no simple method of deciding what facilities are subject to an OATT.*

The FERC acknowledges that a transmission owner's rate filings may not allow an interconnection customer to determine whether a line it seeks to connect to is "subject to an OATT".[32]

Unfortunately, the FERC proposed a solution

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[31] Even though it may not be possible to identify whether or not a particular facility is actually subject to an OATT, the FERC Order applies to certain State-jurisdictional local distribution facilities.

[32] To determine if a given distribution line is covered by an OATT, the logical path is to examine the transmission owner's uniform system of accounts. However, this approach is unlikely to work in the majority of circumstances because these accounts may not clearly indicate whether a given distribution line is covered by that OATT. Typically, OATTs that include distribution facilities do not specifically identify which facilities and which points of interconnection are covered by the OATT. Even in cases where distribution facilities are known to be included in an OATT, it is difficult or impossible to identify whether specific distribution lines are covered by an OATT. Thus, there is no readily discernable way for all parties to clearly determine when a specific distribution line is covered by an OATT.

that is neither feasible, practical nor certain.[33] The FERC's acceptance of a facially inadequate *solution* to a key problem in the context of a real-world application constitutes the *essence* of arbitrary and capricious agency action. This fundamental flaw completely undermines the stated rationale for the FERC Order.[34] The D.C. Circuit's decision sets a highly undesirable judicial precedent in allowing such arbitrary and capricious agency action to stand.

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[33] The Commission is in no better position than the parties to a particular interconnection to make this determination. Indeed, FERC admits there will be cases that will produce controversy about whether a facility is under an OATT. *Order No. 2003-A* at 712. The Commission concludes that the *only reasonable method* for identifying which facilities are subject to a Transmission Provider's OATT is to rely on the Transmission Provider to make this information available to the Interconnection Customer during the Scoping Meeting or earlier. *Id.* If the Interconnection Customer disagrees with the Transmission Provider's conclusion that the facility in question is or is not subject to the Transmission Provider's OATT, the Customer must bring the issue to the attention of the Commission to obtain a definitive ruling.

[34] Far from streamlining access to new generation providers, The FERC Order creates new roadblocks to the very goal it seeks to accomplish - facilitation of interconnections by virtue of its failure to address issues like this one.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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