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Seventh Circuit Upholds Method to Fund Transmission Expansions to Carry Renewable Energy

By Kathleen M. LaValle

A recent Seventh Circuit opinion, *Illinois Commerce Commission v. FERC*, represents a significant victory for the future of renewable energy. The decision, authored by Judge Richard Posner, upholds the method Midcontinent Independent System Operator (MISO) uses to fund the construction of transmission lines that bring electricity from remote wind farms to urban centers. FERC approved MISO's rate design which allocates the costs of certain projects (called multi-value projects) among utilities in proportion to each utility's share in the region's total wholesale consumption of electricity. FERC approved the MISO rate design, leading to challenges on a number of grounds, primarily focused on the proportionality of benefits to costs and on the departure from financing mechanisms that previously allocated expansion and upgrade costs to the utilities closest to a proposed transmission line.

Challenges to the method MISO uses to qualify a project as a multi-value project were rejected. To qualify, the project cost must be at least \$20 million and the high-voltage transmission lines must help MISO members meet state renewable energy requirements, fix reliability problems, or provide economic benefits in multiple pricing zones. A general complaint that the costs of multi-value projects exceed their benefits also failed, with the court citing estimates of significant cost savings expected to be spread "almost evenly across all [MISO] Planning Regions." The opinion also noted that it would be "impossible" to allocate certain other costs savings "with any precision across MISO members." In further answer to proportionality objections, the opinion noted that MISO members who believe they are disadvantaged by the tariff rate design are members of a voluntary association and "can vote with their feet."

Distinct arguments raised that Michigan should not be required to contribute to multi-value projects built outside Michigan likewise failed. In response to an argument that Michigan legislation forbids crediting out-of-state wind generation toward the state's required use of renewable energy, the court observed that the restriction "trips over an insurmountable constitutional objection." In an interesting twist, the court observed that the cited restriction discriminates against out-of-state renewable energy in violation of the commerce clause of the Article 1 of the Constitution. Although considered *dicta* because the pronouncement was not essential to the holding, the court's statement raises questions as to the validity of certain state renewable portfolio standards.

The court vacated the part of FERC's decision prohibiting MISO from charging for exports of energy to PJM that are enabled by the multi-value projects, while permitting charges for exports to all other Regional Transmission Organizations. The court also dismissed as premature a protest that MISO should not be able to recover from

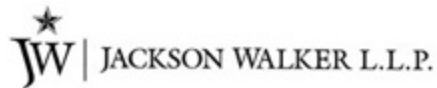
departing MISO members certain multi-value project costs incurred prior to the members' announced departures.

If you have any questions regarding Jackson Walker's energy regulatory and litigation practice, please contact **Kathleen M. LaValle** (214.953.6144 or klavalle@jw.com) or **Patrick Cowlshaw** (214.953.6049 or pcowlshaw@jw.com).

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