No. ______

In the

Supreme Court of the United States

HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC., ET AL.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

RANDOLPH LEE ELLIOTT
SEAN T. BEENY
BARRY COHEN
MILLER, BALIS & O'NEIL, P.C.
1015 Fifteenth St. NW, 12th Floor
Washington, DC 20005

Counsel for Petitioners Hoosier Energy Rural Electric Cooperative, Inc., and Southern Illinois Power Cooperative

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner FirstEnergy Service Company

(Additional Counsel Listed on Inside Cover)

October 7, 2013

LEILA L. VESPOLI
MORGAN E. PARKE
KAREN A. SEALY
FIRSTENERGY
SERVICE COMPANY
76 South Main St.
Akron, OH 44308

JOHN L. SHEPHERD, JR.
DAVID W. FOSTER
KARIS ANNE GONG
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005

Counsel for Petitioner FirstEnergy Service Company

ERIC ROBERTSON
LUEDERS, ROBERTSON
& KONZEN
1939 Delmar Ave.
Granite City, IL 62040

Counsel for Petitioner Illinois Industrial Energy Consumers

ANDREW P. MORATZKA
STOEL RIVES LLP
33 South Sixth St.
Suite 4200
Minneapolis, MN 55402

Counsel for Petitioners Minnesota Large Industrial Group and Wisconsin Industrial Energy Group

GARY J. NEWELL
JENNINGS, STROUSS
& SALMON, PLC
1350 I St. NW, Suite 810
Washington, DC 20005

JOHN W. BENTINE
LISA G. MCALISTER
AMERICAN MUNICIPAL
POWER, INC.
111 Schrock Rd., Suite100
Columbus, OH 43229

Counsel for Petitioner American Municipal Power, Inc.

QUESTIONS PRESENTED

The Federal Power Act requires that all rates approved by the Federal Energy Regulatory Commission be "just and reasonable." 16 U.S.C. § 824d(a). The D.C. Circuit and FERC have long interpreted that statutory mandate to include a "cost-causation" principle requiring that a rate reflect the actual cost caused or benefit received by each customer paying the rate. *See, e.g.*, *K N Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992). In approving rates, FERC is prohibited from relying on evidence outside the administrative record unless it provides the parties with notice and the opportunity to rebut the extra-record evidence. *See, e.g.*, 5 U.S.C. § 556(e); *Union Elec. Co. v. FERC*, 890 F.2d 1193 (D.C. Cir. 1989). In this case, however, in its apparent zeal to promote renewable energy, FERC approved a novel ratemaking scheme that imposes billions of dollars in transmission project costs on customers in over a dozen states without regard to the actual costs caused or benefits received by those customers. And it did so based on evidence outside the administrative record that petitioners were denied the opportunity to rebut before the agency. In conflict with D.C. Circuit precedents and longstanding administrative law principles, the Seventh Circuit affirmed these measures.

The questions presented are:

1. Whether the cost-causation principle underlying the "just and reasonable" standard of the Federal Power Act permits the socialization of costs across a regional transmission network without

regard to the actual costs caused or benefits received by customers required to pay those costs.

2. Whether an administrative agency may concededly rely upon extra-record evidence without providing the parties notice and an opportunity to rebut that evidence.

PARTIES TO THE PROCEEDING

Petitioners are Hoosier Energy Rural Electric Cooperative, Inc.; Southern Illinois Power Cooperative; FirstEnergy Service Co.; Illinois Industrial Energy Consumers; Minnesota Large Industrial Group; Wisconsin Industrial Energy Group; and American Municipal Power, Inc. Each of these petitioners was a petitioner before the court of appeals.

Respondent is the Federal Energy Regulatory Commission.

The following entities were also parties in the consolidated proceedings before the court of appeals:

Allete, Incorporated
Ameren Illinois Company, d/b/a Ameren Illinois
Ameren Transmission Company of Illinois
American Forest & Paper Association
American Wind Energy Association
Association of Businesses Advocating Tariff Equity
Bill Schuette, Michigan Attorney General
Coalition of Midwest Transmission Customers
Consumers Energy Company
Detroit Edison Company
Duke Energy Kentucky, Incorporated
Duke Energy Ohio, Incorporated
E.On Climate & Renewables North American LLC
Edison Mission Energy
Electricity Consumers Resource Council
Exelon Corporation
Great River Energy
Illinois Commerce Commission

International Transmission Company, d/b/a ITC Transmission, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC
Madison Gas and Electric Company
Michigan Electric Transmission Co., LLC
Michigan Municipal Electric Association
Michigan Public Power Agency
Michigan Public Service Commission
Midwest Independent Transmission System Operator, Incorporated
Midwest ISO Transmission Owners
Midwest Municipal Transmission Group
Missouri Joint Municipal Electric Utility Commission
Missouri River Energy Services
Montana Public Service Commission
Organization of MISO States, Incorporated
PJM Interconnection, L.L.C.
PPL Electric Utilities Corporation
PPL Energyplus, LLC
Public Service Commission of Wisconsin
Public Service Electric & Gas Company
Southern Indiana Gas & Electric Company, d/b/a Vectren Energy Delivery of Indiana, Inc.
Wind on the Wires
Wisconsin Electric Power Company
WPPI Energy

CORPORATE DISCLOSURE STATEMENT

Petitioners Hoosier Energy Rural Electric Cooperative, Inc.; Southern Illinois Power Cooperative; Illinois Industrial Energy Consumers; Minnesota Large Industrial Group; Wisconsin Industrial Energy Group; and American Municipal Power, Inc. have no parent corporations, and no publicly held corporation owns 10% or more of their stock. Petitioner FirstEnergy Service Co. is a wholly-owned subsidiary of FirstEnergy Corp. FirstEnergy Corp. has no parent corporations, and no publicly held corporation owns 10% more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Regulation, & Rule

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Since 1935, the Federal Power Act has required that all rates approved by the Federal Energy Regulatory Commission, which has jurisdiction over electric energy transmitted in interstate commerce, be "just and reasonable." And for decades, the United States Court of Appeals for the District of Columbia Circuit, which hears the vast majority of challenges to FERC decisions, has construed this statutory mandate to include what is known as the "cost-causation" principle—that costs assessed against a ratepayer must be commensurate with the burdens imposed or benefits drawn by that ratepayer. In short, the principle stands for the commonsense proposition that the rate a customer pays must reflect the costs actually caused by that customer.

In the decision below, the Seventh Circuit turned this requirement on its head. It affirmed FERC's approval of a novel ratemaking methodology—proposed by a regional transmission organization known as MISO—that socializes the costs of new electricity transmission projects to *every customer* on the transmission grid, regardless of each customer's proximity to, or use of, the projects, and charges *nothing* to generators who cause (and profit from) those projects. The Seventh Circuit conceded that FERC's attempt to match costs and benefits was "crude," but even that is too generous. By design, the novel ratemaking proposal achieved precisely the opposite of the cost-causation principle. It was purposely formulated to subsidize transmission for wind energy projects in areas where new generators and local utilities were unable or unwilling to pay their share of costs under the previous allocation regime. Whatever the policy merits of a scheme formulated to encourage development of renewable energy resources, all ratemaking must satisfy the cost-causation principle and, by extension, the FPA's "just and reasonable" standard. The methodology here does not.

The Seventh Circuit's contrary holding imposes billions of dollars in costs on parties in over a dozen states and tramples on federalism principles. The states within MISO have adopted a diverse array of renewable energy policies: Some have imposed mandatory quotas, others have enacted only aspirational goals, and one has no policy at all. This is precisely how federalism is meant to work. Yet the cost-spreading methodology at issue here ignores those fundamental differences and trades traditional cost-causation principles for the misguided assumption that renewable energy uniquely and uniformly benefits all MISO members in all MISO states. The members of the remarkable coalition of petitioners here—comprising municipal power distributors, cooperative suppliers, private transmission owners, and industrial energy users from numerous states—do not often find themselves aligned; nor do they lightly contest MISO or FERC action or seek Supreme Court review. Petitioners uniformly agree, however, that the decision below is a bridge too far. Because that erroneous decision opens a circuit split on an issue of exceeding importance, this Court should grant certiorari and reverse.

But there is more. In accepting the cost-socialization methodology, FERC relied on a series of MISO studies purporting to demonstrate compliance with the cost-causation principle. These critical studies, however, were never entered into the record, and petitioners were never afforded an opportunity to respond to them before the agency, despite so requesting. Petitioners were also denied the opportunity to review and rebut workpapers containing MISO's own cost-benefit analyses underlying those studies. Remarkably, FERC and the Seventh Circuit *acknowledged* these facts. Nevertheless, the Seventh Circuit brushed them aside because, in its view, petitioners had "access" to the withheld materials—a statement that is both factually wrong and legally irrelevant. These obvious violations of bedrock administrative law squarely conflict with decisions from the D.C. Circuit and other courts of appeals, and further demand this Court's review and reversal of the anomalous, erroneous, and far-reaching decision below.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-25) is reported at 721 F.3d 764. The initial FERC order (App. 334-647) is reported at 133 FERC ¶ 61,221 (2010). The FERC order on rehearing (App. 26-333) is reported at 137 FERC ¶ 61,074 (2011).

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2013. On August 19, 2013, Justice Kagan extended the time within which to file a petition for certiorari to and including October 7, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Power Act provides that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy" subject to FERC's jurisdiction must be "just and reasonable." 16 U.S.C. § 824d(a). It further provides that "[t]he finding of [FERC] as to the facts, if supported by substantial evidence, shall be conclusive." *Id.* § 825*l*(b).

The Administrative Procedure Act provides that "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). It further provides that "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision," and "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." *Id.* § 556(e).

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The provision of electricity involves three components: generation, transmission to utility customers over long distances along high-voltage lines, and distribution to consumers over local distances along low-voltage lines. For much of the nation's history, electric utilities were vertically integrated monopolies that owned and controlled all three components and served only limited geographic areas. *See New York v. FERC*, 535 U.S. 1, 5 (2002). In those "bad old days," consumers paid a single price for generation, transmission, and distribution. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (Roberts, J.). Competition among utilities was "not prevalent." *New York*, 535 U.S. at 5.

In 1935, Congress passed Part II of the Federal Power Act, which gave the Federal Power Commission—now FERC—exclusive authority to regulate "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). The FPA requires regulated utilities to file rate schedules, or "tariffs," with FERC. FERC, in turn, is obligated to ensure that "[a]ll rates and charges … for or in connection with the transmission or sale of electric energy" are "just and reasonable." 16 U.S.C. § 824d(a); *see Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 531 (2008). The states retain regulatory jurisdiction over local distribution facilities and the rates for retail sales of electricity (*i.e.*, local electricity distribution). *See Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824-25 (D.C. Cir. 2006).

Since the FPA's passage, the electricity industry "has undergone significant change, both economically and technologically." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000). Beginning in the 1970s, engineering innovations "lowered the cost of generating electricity and transmitting it over long distances." *Morgan Stanley*, 554 U.S. at 535-36. The number of parties engaging in competitive electricity generation increased dramatically, as new entrants were able to generate and sell electricity at lower prices than many utilities' existing generation facilities. *Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). But because utilities owned the transmission lines, they retained the ability to refuse to deliver competitor-generated power or to deliver it on less favorable terms than their own electricity. *See id.*; *New York*, 535 U.S. at 8.

Accordingly, FERC has taken steps to "promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power, while ensuring that the segment of the industry characterized by natural monopoly—namely, the transmission grid that conveys the generated electricity—cannot exert monopolistic influence over other areas." *Morgan Stanley*, 554 U.S. at 536. For instance, FERC has required integrated utilities to "unbundle" generation and transmission and charge separate rates for these services, and required transmission providers to "offer transmission service to all customers on an equal basis." *Id.* Additionally, FERC has encouraged transmission providers to establish "Regional Transmission Organizations," or RTOs, which are "entities to which transmission providers … transfer operational control [though not ownership] of their facilities for the purpose of efficient coordination." *Id.*; *see also Midwest ISO Transmission Owners*, 373 F.3d at 1364.

In 2002, FERC approved the creation of an RTO named Midwest Independent Transmission System Operator, Inc., or MISO. *Wis. Public Power, Inc. v. FERC*, 493 F.3d 239, 248-49 (D.C. Cir. 2007). Among other things, MISO monitors existing capacity on its grid to manage congestion, approves transmission requests, authorizes the interconnection of new generators to the grid, and "provide[s] various ancillary services to support the regional electricity market." *Id.* at 245; *see also Midwest ISO Transmission Owners*, 373 F.3d at 1365. MISO grew to have approximately 130 members in numerous states and one Canadian province. App. 4. Members include vertically integrated utilities as well as utilities providing only generation, transmission, or distribution services. App. 1-2.[1]

B. MISO's Proposed MVP Tariff

Like all RTOs, MISO is responsible for planning and approving expansions and upgrades of the transmission grid it operates and deciding how to allocate the costs of these new facilities among its members. App. 3. MISO's method for allocating costs of new transmission facilities is incorporated into its tariffs and is subject to FERC approval under the FPA's "just and reasonable" standard. Within the context of cost allocation, the "just and reasonable" standard requires adherence to what is known as the "cost-causation" principle. That principle requires that "'all approved rates reflect to

[1] MISO recently renamed itself the Midcontinent Independent System Operator, Inc. *See* https://www.misoenergy.org/AboutUs/MediaCenter/pages/MediaCenter.aspx.

some degree the costs actually caused by the customer who must pay them.'" *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 237 (D.C. Cir. 2013) (quoting *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1303 (D.C. Cir. 2007)). It "helps ensure that utilities 'produce revenues from each class of customers which match, as closely as practicable, the costs to serve each class of individual customer.'" *Id.* (quoting *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300-01 (D.C. Cir. 1992)). Compliance with the cost-causation principle—and, by extension, the "just and reasonable" statutory standard—is determined by "comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party." *Midwest ISO Transmission Owners*, 373 F.3d at 1368.

Before 2010, FERC-approved MISO tariffs required a generator to pay 90% of the costs of transmission facilities necessary to interconnect a new plant with the MISO grid. For other transmission projects, the costs of low-voltage lines (below 345 kV) were borne entirely by the local planning zone where the lines were built; the costs of high-voltage lines (345 kV and above) were split between the local planning zone (which covered 80% of the cost) and the system (which covered 20% of the cost). *See* App. 7, 9, 336 n.6, 343-44.[2] In each of these cases, the vast majority of costs for new transmission facilities were borne by the entities who derived obvious and cognizable benefits from them.

---

[2] MISO contains 24 local planning zones. App. 9.

In 2010, MISO sought FERC approval for a tariff imposing a new and unprecedented system-wide cost allocation methodology. The impetus for MISO's proposal was the decision of several states within MISO to establish quotas for the percentage of energy used in the state from renewable resources, such as wind power. In response, a number of generators proposed to build new wind-powered generation facilities. Such generation facilities are generally located in geographically isolated, lightly populated areas, so they needed substantial new transmission facilities to interconnect with MISO's grid and make their generation available to potential customers. App. 5-6. Consistent with the cost-causation principle, MISO's then-existing cost allocation methodology imposed most of the costs of these projects on the generator and energy users in the respective local planning zone. Wind-powered generators and nearby affected utilities, however, were frequently unable or unwilling to pay these costs. *See* App. 479-80.

MISO thus proposed to establish a new category of transmission facilities called "Multi-Value Projects," or MVPs. App. 334-36. The criteria for designating a transmission facility an MVP are strikingly broad. A project qualifies if it satisfies any one of three conditions: (1) it is developed "for the purpose of enabling [MISO] to reliably and economically deliver energy in support of documented energy policy mandates or laws … that directly or indirectly govern the minimum or maximum amount of energy that can be generated by specific types of generation"; (2) it provides "multiple types of economic value across multiple pricing zones"; or

(3) it "address[es] at least one Transmission Issue associated with a projected violation of" reliability standards "and at least one economic-based Transmission Issue that provides economic value across multiple pricing zones." App. 355-56.

To pay for MVPs, MISO abandoned its previous cost-allocation framework and proposed an entirely new methodology: The costs for building any MVP would be borne by *all* MISO customers through a new energy usage charge called the "MVP usage rate." The proposed charge applied to *all* withdrawals of electricity at *any* point on MISO's system—regardless of proximity to, or use of, an MVP. App. 7, 480-81, 556-59. Moreover, because 100% of the costs of MVPs would be borne by electricity withdrawals, generators who interconnected with MVPs—*i.e.*, geographically isolated wind-powered generators—would pay *nothing* for the MVPs.

Ostensibly to illustrate that this dramatic operational and methodological shift satisfied the "just and reasonable" statutory standard and cost-causation principle, MISO included with its proposal sixteen "potential starter projects" estimated to cost $4.6 billion. App. 358-59. MISO submitted to FERC written testimony purporting to summarize studies showing the starter projects' financial benefits. MISO claimed, for example, that the projects would generate between $297 million and $423 million in "production cost savings," between $68 million and $104 million in "system loss savings," and between $217 million and $271 million in reductions to MISO's "reserve margin." App. 359-60. MISO did not, however, submit the actual studies supporting these findings. Nor did it disclose workpapers containing MISO's underlying cost-benefit analyses for these studies or for local geographic areas. App. 13-14, 414-17.

C. The FERC Order

Dozens of parties, including petitioners, intervened to file comments or protests with FERC regarding MISO's proposed tariff. App. 364. Numerous parties, including petitioners, sought an evidentiary hearing in order to obtain discovery of the studies and workpapers upon which MISO relied but did not submit to FERC. *See* 18 C.F.R. § 385.504(b)(5) (establishing hearing as precondition to discovery). FERC denied those requests. App. 13.

In December 2010, FERC entered an order accepting MISO's tariff. App. 334-647. As relevant here, FERC found that MISO had demonstrated "that the MVP proposal is a framework that will result in the allocation of the costs of transmission projects on a basis that is roughly commensurate with the benefits of those projects and that the proposal is otherwise just and reasonable." App. 455 (quotation marks omitted). FERC conceded that "it can be difficult, and controversial, to identify which types of benefits are relevant for cost allocation purposes, which entities are receiving those benefits, and the relative benefits that accrue to various beneficiaries in an integrated transmission grid." App. 456. Nevertheless, FERC found that MISO had "submitted persuasive evidence that supports a broad approach to cost allocation for projects that qualify as MVPs," citing the purported cost savings MISO had identified in its testimony submitted to the agency. App. 474-75. FERC did not address the fact that the studies and workpapers supporting MISO's testimony and cost-causation analysis were never submitted to FERC and not disclosed to the parties for rebuttal before the agency.[3]

Numerous parties petitioned for rehearing, arguing, *inter alia*, that the FERC order failed to comply with the cost-causation principle and failed to acknowledge the absence of MISO's studies and workpapers in the record or the parties' inability to review and respond to them. *See, e.g.*, App. 51-65. As relevant here, FERC denied rehearing. App. 26-333. FERC reiterated that "the MVP Proposal is just and reasonable," and rejected arguments that "the MVP Proposal is inconsistent with cost causation principles." App. 48; *see also* App. 117-38.

As for the missing studies and workpapers, FERC did not deny that this information was never entered into the record (much less disclosed to petitioners) yet formed the basis of MISO's cost-causation argument that FERC accepted. But it brushed aside these deficiencies because, in its view, it would have been "unduly burdensome" for MISO to provide its cost-benefit calculations since they comprised "intermediate analyses" rather than "basic

[3] The FERC order "conditionally accept[ed]" the MISO tariff, requiring MISO to undertake certain commitments with which MISO subsequently complied. App. 338-39.

criteria, assumptions, and data" underlying MISO's system plans. App. 128-30.[4]

D. The Seventh Circuit's Decision

Numerous parties petitioned for review of the FERC order; some petitioned the D.C. Circuit, while others petitioned the Seventh Circuit. The Judicial Panel on Multidistrict Litigation randomly assigned the petitions to the Seventh Circuit.

During briefing, MISO sought leave to file a supplemental appendix so that the Seventh Circuit could "review information relied upon by [FERC] but that was not submitted to the Commission docket in this proceeding." Mot. for Leave to File Supp. Appendix 1, *Ill. Commerce Comm'n v. FERC*, No. 11-3421 (7th Cir. Jan. 10, 2013) (Dkt. 124). Specifically, MISO wished to include "three reports prepared by MISO that MISO claimed showed multi-region benefits." *Id.* MISO reiterated that these reports "were not submitted to the Commission" but were "relied upon" by FERC "in the orders on review." *Id.* FERC supported the motion. *Id.* The court denied the motion but permitted MISO to file a motion "to supplement the record on appeal with the reports." Order 2, *Ill. Commerce Comm'n* (7th Cir. Jan. 14, 2013) (Dkt. 127). MISO never did so.

As relevant here, the Seventh Circuit denied the petitions for review. App. 1-25. The court rejected petitioners' argument that MISO's new cost allocation methodology failed to satisfy the "just and

---

[4] FERC granted rehearing and clarification regarding certain ancillary issues not relevant here. *See* App. 28.

reasonable" statutory standard and cost-causation principle. In the court's view, "FERC's attempt to match the costs and the benefits of the MVP program is crude," but "if crude is all that is possible, it will have to suffice." App. 13. With little elaboration, the court explained that if FERC "cannot quantify the benefits to particular utilities or a particular utility," but it "has an articulable and plausible reason to believe that the benefits are at least roughly commensurate with those utilities' share of total electricity sales in the region, then fine." *Id.* (brackets omitted).

The court intimated (without actually stating) that FERC met these vague requirements by reiterating the purported systemwide savings that FERC had identified based on MISO's assertions. App. 11-12. The court then bolstered those estimates with its own non-record musings on the policy benefits of promoting wind power, observing, for example, that "[t]he use of wind power in lieu of power generated by burning fossil fuels reduces both the nation's dependence on foreign oil and emissions of carbon dioxide." App. 12. It concluded: "No one can know how fast wind power will grow. But the best guess is that it will grow fast and confer substantial benefits on the region served by MISO by replacing more expensive local wind power, and power plants that burn oil or coal, with western wind power." *Id.* In the court's view, "[t]here is no reason to think these benefits will be denied to particular subregions of MISO." *Id.*

The court also faulted petitioners' cost-causation argument because "[petitioners'] briefs offer no estimates of costs and benefits either." App. 11. The court would not permit petitioners to "counter FERC without presenting evidence of imbalance of costs and benefits." App. 13. At the same time, however, the court rejected petitioners' argument that they were unable to counter FERC's analysis because MISO had not entered its studies or workpapers into the record or even disclosed its underlying cost-benefit analysis to petitioners, and FERC had refused to grant discovery of those materials. *Id.* Like FERC, the court did not deny that these materials were absent from the record. (Nor could it, given MISO's concession in its motion.) Instead, it asserted that "MISO's elaborate quantifications of costs and benefits" were "materials to which the petitioners had access" as "members of MISO." *Id.* The court added that granting petitioners the opportunity to view and respond to the materials "would create unconscionable regulatory delay." App. 14; *see also* App. 16 (refusing to create "gratuitous delay" in light of "petitioners' access to MISO's studies").[5]

REASONS FOR GRANTING CERTIORARI

The Seventh Circuit's decision warrants the Court's review for two separate but equally compelling reasons. First, the unprecedented MVP

---

[5] The parties below, including many parties who are not petitioners here, sought review of several other aspects of MISO's tariff and the FERC orders. The Seventh Circuit rejected most of those challenges but granted review on one issue and remanded it to FERC. Those challenges and their disposition by the Seventh Circuit are not at issue here.

cost allocation methodology does not remotely satisfy the "just and reasonable" standard of the Federal Power Act or its animating cost-causation principle as the federal courts of appeals, particularly the D.C. Circuit, have long understood those requirements. The cost-causation principle mandates that parties responsible for costs must bear a commensurate burden of those costs; in short, those who receive the benefits of new projects must pay their fair share for those projects. In affirming FERC's approval of the MVP methodology, the Seventh Circuit's decision turns this commonsense requirement on its head and renders it a nullity. Transmission projects constructed specifically to connect renewable energy generators to MISO's grid are funded not by those generators or even the utilities using the generators' power. Instead, the costs are socialized to *every customer* who uses power from MISO's grid—regardless of whether those customers caused the costs or draw any benefit from the projects. By contrast, generators responsible for—and who profit from—the projects pay *nothing*, and utilities who reap disproportionately large benefits pay a miniscule fraction of the costs, at the same rate as all other customers.

The Seventh Circuit was forced to concede that any attempt to match costs and benefits here was "crude." But even that is a considerable understatement. The MVP proposal was consciously designed as a *departure* from cost-causation analysis, and was enacted precisely because renewable energy generators and utilities purchasing renewable energy were unable or unwilling to pay their share of costs under the previous allocation regime. Indeed, to bolster its cost-causation holding, the Seventh Circuit resorted to its own musings on the policy benefits of wind power. But whatever the merits of promoting renewable energy resources, any cost allocation scheme designed to that end must satisfy the cost-causation principle and the "just and reasonable" standard. If, as the Seventh Circuit concluded, the methodology here does so, then there is truly nothing left to those requirements, and no limitation on FERC's cost allocation authority.

The Court's intervention is especially necessary given the decision's far-reaching consequences. The novel ratemaking at issue here amounts to almost $5 billion in costs, and that is just for MISO's sixteen MVP "starter projects." Billions more in socialized costs are certain to come, particularly given the broad criteria for designating a transmission project an MVP. Moreover, the ratemaking directly affects customers in over a dozen states and tramples on core principles of federalism. The states in MISO, operating as laboratories of democracy, have adopted a variety of policies concerning renewable energy, ranging from strict mandates to aspirational goals to no policies at all. Yet the cost-spreading methodology approved below ignores those fundamental differences and trades traditional cost-causation principles for the misguided assumption that renewable energy uniquely and uniformly benefits all MISO members in all MISO states. The range of parties adversely affected is reflected by the variety of petitioners here, who do not lightly challenge MISO's or FERC's actions or seek this Court's review, but who uniformly agree that the decision below is both wrong and exceptionally pernicious.

The Seventh Circuit's decision establishes a dangerous precedent for future FERC ratemaking decisions concerning emerging energy technologies. The purpose of the shift to socialized rate-making here was to promote renewable energy when traditional cost-causation principles would render it infeasible. As states enact or increase renewable energy thresholds, RTOs and other similarly situated entities across the country will be tempted to force their members and ratepaying customers to subsidize the costs of bringing renewable energy sources onto their grids, much as MISO did here. That may or may not be good environmental policy, but if the "just and reasonable" statutory standard and the cost-causation principle are to mean anything, such efforts cannot stand as a matter of law. And if the FPA needs reworking to facilitate otherwise uneconomical renewable energy development, those changes are for Congress to make through legislation—not FERC and the federal courts through disregard of decades of precedent.

Second, the Court's review is merited because FERC and the Seventh Circuit contravened fundamental administrative law procedures. In accepting the novel methodology, FERC relied on a series of MISO studies purporting to demonstrate compliance with the cost-causation principle. These critical studies, however, were never entered into the record, and petitioners were never afforded an opportunity to respond to them. Petitioners were also denied the opportunity to view and rebut MISO's own workpapers containing its cost-benefit analyses underlying those studies. Remarkably, MISO, FERC, and the Seventh Circuit *acknowledged* these facts. FERC nevertheless brushed them aside by concluding that it would have been "overly burdensome" for MISO to provide its cost-benefit analyses to petitioners—an assertion that has no basis in administrative law and that MISO itself never made. And the Seventh Circuit dismissed petitioners' claims of procedural unfairness because they had "access" to the withheld information as "members of MISO." That statement is not only factually wrong but legally irrelevant, and like FERC's conclusion, it conflicts with well-established case law holding that an agency's determination cannot rely on extra-record evidence without providing affected parties with notice of that evidence and an opportunity to respond.

Adherence to proper administrative procedure is always significant, but it is especially compelling here, where the deleterious consequences of the Seventh Circuit's decision affirming the MVP methodology are so extensive. What is more, the particular nature of the substantive issue here demands even more rigorous compliance with procedural protections. If the cost-causation principle can in fact be employed to spread costs in the broad-based manner allowed below, then there is an even greater need to ensure that evidence demonstrating supposed costs and benefits has been thoroughly ventilated. That was assuredly not the case here. Particularly in the exceptionally important context of this case, these egregious procedural errors demand the Court's review and reversal.

I. The Seventh Circuit's Decision Eviscerates The Cost-Causation Principle Underlying The Federal Power Act's "Just And Reasonable" Standard, Warranting The Court's Review.

The MVP cost-allocation methodology is consciously designed to shift the cost of transmission projects *away* from parties that are causing and benefiting from projects and *onto* parties who do not cause them and derive only the most attenuated benefits from them. The Seventh Circuit's decision upholding that methodology conflicts with a wall of D.C. Circuit precedents interpreting and applying the cost-causation principle that do not countenance this purposeful cost socialization. Whatever the merits of encouraging the development of renewable energy, that policy goal cannot be achieved through blanket cost-spreading measures that violate the FPA. Because the Seventh Circuit's decision sanctions this mistaken and far-reaching result, this Court's review is warranted.

A. The Seventh Circuit's Decision Conflicts with D.C. Circuit Decisions Interpreting and Applying the Cost-Causation Principle.

The Seventh Circuit's decision fundamentally conflicts with decades of D.C. Circuit authority addressing the Federal Power Act. The FPA provides that FERC may only approve rates that are "just and reasonable." 16 U.S.C. § 824d(a). The D.C. Circuit has long "added flesh to these bare statutory bones" by requiring adherence to what has become known as the "cost-causation principle." *K N Energy*, 968 F.2d at 1300 (quotation marks omitted). This principle is the "touchstone in any legal analysis of FERC-approved rate schemes." *Id.* It requires that "all approved rates reflect to some degree the costs actually caused by the customer who must pay them." *Id.*; *see also Black Oak Energy*, 725 F.3d at 237. As this definition implies, it necessarily demands an individualized, rather than broad-based, inquiry. Compliance with the cost-causation principle is determined by "comparing the costs assessed against a party to the burdens imposed or benefits drawn by *that party*." *Midwest ISO Transmission Owners*, 373 F.3d at 1368 (emphasis added) (citing *K N Energy*, 968 F.2d at 1300-01 (citing *Alabama Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982))). As the D.C. Circuit has long held, "[p]roperly designed rates should produce revenues from each class of customers which match, as closely as practicable, the costs to serve each class or individual customer." *Alabama Elec. Coop.*, 684 F.2d at 27 (internal citations omitted).[6]

Consistent with this well-established authority, the D.C. Circuit has squarely prohibited rates that

[6] FERC, too, has long held "that rates must be cost supported." *Alabama Elec. Coop.*, 684 F.2d at 27 (quoting Docket No. ER76-495 at 2 (FERC 1979)) (quotation marks omitted); *see also Empire State Pipeline & Empire Pipeline, Inc.*, 116 FERC ¶ 61,074 at ¶ 61,115 (2006) (cost-causation requires that each "customer pay[s] for the service [it] receive[s] and do[es] not subsidize service rendered on behalf of others"); *System Energy Res., Inc.*, 41 FERC ¶ 61,238 at ¶ 61,616 (1987) (stating that "those who are responsible for the incurrence of costs" must "be the ones who bear those cost burdens").

socialize costs among parties who only marginally benefit from their imposition. In *Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1 (D.C. Cir. 2002), for example, the court rejected a FERC-approved tariff that would have overcharged transmission customers in order to cover transmission losses, *i.e.*, the amount of electricity lost when electricity flows across a transmission system. The methodology relied upon a "simplifying assumption" by which "[e]very MWH of energy injected into the system is treated as the 'last' MWH of energy on the system, [which] would lead to the systematic overcollection of the amount of revenue needed to offset the transmission system's actual losses." *Id.* at 3. The overcollected revenue would first be used to "offset" the system's administrative "Scheduling Charge," then refunded to the transmission customers. *Id.*

FERC claimed that the methodology would "produce[] 'efficient price signals'" and that other methods "would be 'infeasible.'" *Id.* at 5. Nevertheless, the D.C. Circuit vacated FERC's order because it "never established that each entity that would be overcharged … is subject to and would benefit from a reduced Scheduling Charge." *Id.* at 3; *see also Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991) (requiring FERC to "outline[] with reasonable particularity the system-wide benefits which each new facility produces" before upholding cost-allocation scheme); *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1516 (D.C. Cir. 1984) (rejecting rate as not "just and reasonable" given absence of "legally sufficient reason for charging high-load factor customers a rate that does not accurately reflect the cost of serving them").

The decision below dramatically diverges from the holding of *Sithe* and the broader principles that the D.C. Circuit has repeatedly endorsed in interpreting and applying the cost-causation principle. The MVP cost allocation methodology turns the cost-causation principle on its head twice over. First, instead of "reflect[ing] to some degree the costs actually caused by the customer who must pay them," *K N Energy*, 968 F.2d at 1300, it relieves the party in fact responsible for the costs of an MVP—*i.e.*, a renewable energy generator requiring connection to the grid—from paying *any* of the costs associated with that project. Second, the methodology then imposes those same costs on parties that *least* impose any burdens or draw any benefits from the new project—utility customers who may be situated thousands of miles away from the project and just happen to have drawn power from the MISO grid.

To be sure, the cost-causation principle does not require "exacting precision" of costs and benefits. *Midwest ISO Transmission Owners*, 373 F.3d at 1369. But the MVP methodology's new broad-based cost socialization is not just a "crude" attempt to match costs and benefits, as the Seventh Circuit believed. App. 13. Rather, it is a conscious *departure* from the cost-causation principle. MISO purposefully abandoned its prior rule that a new generator and nearby consumers shoulder the cost of a project, and adopted a new rule that *absolves* the generator of any burden and *spreads* the entire cost to all users across the network. This is not an incremental change whose costs and benefits cannot be measured with "exacting precision." It is a radical reconceptualization of cost-sharing that stretches the cost-causation principle and even the elastic notion of "just and reasonable" beyond the breaking point.

The MVP cost-allocation scheme was enacted precisely because certain utilities dependent on renewable energy were unable or unwilling to pay their fair share of costs. MISO's response to that perceived problem was to subsidize those utilities by taxing all consumers based on general power usage—including consumers who neither want nor need MVP projects, or may be harmed by their development. Whatever the policy merits of this approach, it cannot survive scrutiny under the cost-causation principle and the FPA. Had this case been decided in the D.C. Circuit, where the vast majority of FERC decisions are reviewed, *see* 16 U.S.C. § 825*l*(b), and where many of the petitions for review in this case were filed, the case would have come out the other way. This Court's intervention is necessary to restore the consistency to the FPA that existed prior to the outlier decision below.

B. The Seventh Circuit's Decision Has Far-Reaching Consequences.

This is no minor, isolated administrative decision. The financial impact of the Seventh Circuit's holding is staggering. FERC's ratemaking here amounts to nearly $5 billion, and that is only from MISO's sixteen initial "starter projects." Given the strikingly broad criteria for designating a transmission project an MVP, *see* pp. 9-10, *supra*, there will assuredly be billions more in costs to come. The decision below ensures that these massive costs—now and in the future—will be foisted upon parties who did not cause them, will not benefit from them (except in the most negligible, attenuated sense), and in many instances would prefer they were not spent at all. Meanwhile, the parties who *have* caused them and *will* benefit from them pay nothing (in the case of the generators) or a miniscule fraction of the costs (in the case of transmission customers who purchase renewable energy). This is precisely the inverse of the cost-causation principle and results in a manifestly unjust and unreasonable ratemaking regime.

The decision below has a far-reaching geographic impact as well. The Seventh Circuit's decision directly affects all ratepayers and end-use consumers in MISO, which covers over a dozen states.[7] Those parties will suffer significant economic harm, which necessarily will affect local economies in that broad region. Moreover, under another portion of the Seventh Circuit's decision, MISO may now export MVP charges to customers outside MISO who buy energy from the MISO system. *See* App. 19-24.[8] Thus, the financial and geographic reach of the

[7] FERC recently approved MISO's expansion into Arkansas, Louisiana, Mississippi, and East Texas. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,056, *reh'g denied*, 141 FERC ¶ 61,128 (2012).

[8] Several petitioners disagree with this portion of the Seventh Circuit's decision but do not challenge it here.

Seventh Circuit's cost-causation holding extends far beyond the already expansive MISO footprint.

The decision below also sets a troubling precedent for future ratemaking decisions concerning emerging energy technologies. The traditional model of vertically-integrated companies that generate power close to distribution networks has given way to wider transmission networks with many power generation methods and sources. Meanwhile, many states have adopted a variety of renewable energy policies, leading to a proliferation of renewable energy development. That development, however, frequently proves economically infeasible; indeed, that was the very reason for MISO's change to the MVP methodology.

FERC's response to these events has been to invert the cost-causation principle to foster the development of power from renewable sources by socializing the costs of transmission projects related to such development onto those who did not cause them. If this disregard for the cost-causation principle is left to stand, other RTOs will no doubt also seek to compel their members and ratepaying customers to subsidize the costs of bringing renewable energy onto their grids. The result will be no end to the socialization of costs for these emerging technologies, in further violation of the FPA's "just and reasonable" standard. If that standard must be altered to accommodate cost-allocation schemes intended to facilitate otherwise uneconomical renewable energy development, that decision should come from Congress—not from FERC and the lower courts violating decades of precedent and stretching the FPA beyond recognition.

Indeed, the Seventh Circuit's reasoning has no discernible limiting principle. Rather than attempting to match rates to costs caused or benefits received, the decision below rests on the generalized notion that transmission improvements increase the grid's reliability, thereby benefiting all participants. App. 10, 12-13. But this proves too much: If generalized grid reliability justifies socialized rate-making, the costs of *any* transmission project, at *any* location, can be spread to *every* consumer of the grid—no matter how far-flung or unaffected. The same is true for the amorphous benefits of renewable energy. If the cost-causation principle is satisfied by broad-based, inchoate notions like "[t]he promotion of wind power," as the Seventh Circuit believed, App. 12, then the Federal Power Act's "just and reasonable" requirement is an empty truism. And, of course, the Seventh Circuit's all-boats-rise-with-the-tide reasoning is the very antithesis of the cost-causation principle and underscores the divide that separates the decision below from well-established D.C. Circuit precedent.

The lower court's decision also intrudes on fundamental state prerogatives and undermines federalism principles. As the Seventh Circuit noted, "a primary goal of the MVPs is to increase the supply of wind-powered energy," so as to meet the demands resulting from a number of states' renewable energy requirements. App. 18. But the states within MISO have adopted widely differing approaches to renewable energy. *See* App. 4. Kentucky has no renewable energy mandate, while the mandates in Indiana, North Dakota, and South Dakota are only aspirational. Ind. Code 8-1-37-5; N.D. Cent. Code § 49-02-28; S.D. Codified Laws § 49-34A-101. Illinois imposes renewable energy mandates on investor-owner utilities but not cooperatives. 20 Ill. Comp. Stat. 3855/1-75. Michigan has a renewable energy quota, but energy produced out of state does not count toward it. Mich. Comp. Laws § 460.1029. Other states have adopted various renewable energy thresholds.

This variety, of course, is the point of federalism. It is "one of the happy incidents of the federal system" that the states may "serve as … laborator[ies]" for energy policies. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Federalism "allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, … and makes government more responsive by putting the States in competition for a mobile citizenry." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (internal quotation marks omitted). Precisely because of this variety, though, to the extent MVPs benefit certain MISO members, that benefit is not uniform across states. Depending on the location of a project, its benefit often will not reach a great number of MISO members. And other members in states without mandatory renewable energy quotas will reap no benefit at all from the MVPs' promotion of renewable energy.

Neither MISO, FERC, nor the Seventh Circuit accounted for these differences. Instead, they obliterated the obvious policy differences among states, acting as if all states within MISO had adopted similar renewable energy requirements and assuming that promoting wind energy would equally benefit all parties in all states. The effect is that consumers whose states have chosen not to impose renewable energy requirements are forced to subsidize the compliance costs of other consumers in other states with renewable energy mandates. But public utility regulation, which includes selecting desired types of generation resources, is a fundamental state police power. *See Ark. Elec. Co-op Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). And if the cost-causation principle is to mean anything, it must mean that FERC cannot assume generalized benefits where such benefits are foreclosed by the states' disparate policy choices.

The number and variety of petitioners—who comprise municipal power distributors, cooperative suppliers, private transmission owners, and industrial energy users—confirm the exceptional importance of this case. In many instances, petitioners are direct competitors; in others they simply disagree on the best outcome or policy. Here, however, they uniformly agree that MISO, FERC, and the Seventh Circuit have disregarded the critical cost-causation principle of federal energy law, and that the broad-scale cost socialization approved below is neither just nor reasonable. The significant consequences of the Seventh Circuit's divergence from established D.C. Circuit precedent and the FPA call out for this Court's prompt intervention.

II. The Seventh Circuit's Decision Endorses Agency Reliance On Extra-Record Evidence, Warranting The Court's Review.

The Seventh Circuit also committed clear legal error and opened another conflict with the D.C. Circuit when it affirmed FERC's reliance on evidence outside the administrative record in approving the novel MVP cost allocation methodology. Both the Administrative Procedure Act and Federal Power Act limit administrative decisionmaking and judicial review to the actual record before an agency. Here, however, FERC's order relied on critical MISO studies that were never made part of the administrative record and never put before the Seventh Circuit. Petitioners were also denied the opportunity to review and rebut workpapers containing MISO's own cost-benefit analyses underlying those studies. Remarkably, MISO, FERC, and the Seventh Circuit all *acknowledged* these facts. The court of appeals nevertheless brushed aside petitioners' concerns because petitioners supposedly had "access" to the critical information as MISO members. But that is not how administrative review works: It is not incumbent upon affected parties to search out materials upon which an agency ultimately relies, much less materials central to the agency's determination. This fundamental legal error also departs from the decisions of the courts of appeals and warrants this Court's review and reversal.

A. The Seventh Circuit's Endorsement of FERC's Reliance on Extra-Record Evidence Creates a Circuit Split and Conflicts with Bedrock Administrative Procedure.

1. The APA and FPA require that FERC's decisions be based on substantial evidence in the record. *See* 5 U.S.C. § 556(d); 5 U.S.C. § 706(2)(e); 16 U.S.C. § 825*l*(b). "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the *exclusive record* for decision." *Id.* § 556(e) (emphasis added). And before the agency can take notice of a fact outside that "exclusive record," it must provide the parties "an opportunity to show the contrary." *Id.*; *cf.* Fed. R. of Evid. 201(e).

In accordance with these requirements, the D.C. Circuit has long held that agency actions may not rely on evidence outside the administrative record without "disclosing it to the parties and affording them a suitable opportunity to contradict it or 'parry its effect.'" *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1202-03 (D.C. Cir. 1989) (quoting *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio,* 301 U.S. 292 (1937)). Indeed, the D.C. Circuit affirmed this very rule in a FERC case only a month before the Seventh Circuit's decision below. *See S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 187-88 (D.C. Cir. 2013); *see also Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 900 (D.C.

Cir. 2006) (stating that "at least the most critical factual material that is used to support the agency's position on review" must be "made public in the proceeding and exposed to refutation"); *cf. La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113-16 (D.C. Cir. 1992). Consistent with the APA, other circuits have adopted the same strict procedural requirements. *See, e.g.*, *Sykes v. Apfel*, 228 F.3d 259, 272-73 (3d Cir. 2000); *Air Prods. & Chems., Inc. v. FERC*, 650 F.2d 687, 697 (5th Cir. 1981).

FERC and the Seventh Circuit flatly contradicted these bedrock administrative principles. To satisfy the critical cost-causation principle, MISO submitted testimony purporting to summarize certain studies showing that the MVP starter projects would lead to quantifiable financial benefits. It is undisputed, however, that MISO did not submit into the record any of the actual studies supporting these findings, FERC refused to grant petitioners discovery to rebut the studies, and yet FERC ultimately relied on the studies in concluding that the MVP cost allocation methodology satisfies the cost-causation principle. Indeed, MISO, FERC, and the Seventh Circuit all recognized these facts. Before the Seventh Circuit, MISO (supported by FERC) moved to file a supplemental appendix encompassing the missing studies, so that the court could "review information relied upon by [FERC] but that was not submitted to the Commission docket in this proceeding." The Seventh Circuit denied the motion but allowed MISO to file a motion "to supplement the record on appeal" with the studies. MISO never did so. *See* p. 13, *supra*. The motion and order demonstrate that the studies were *not* part of the administrative record before FERC—otherwise, they would have automatically been part of the record on appeal. And because MISO never supplemented the record, the critical studies were never before the Seventh Circuit, either.

What is more, petitioners were never permitted to view or respond to MISO's workpapers containing its cost-benefit analyses underlying the critical studies (nor, like the studies, were those workpapers entered into the record). When petitioners claimed that the workpapers were neither part of the administrative record nor made available to any of the parties, FERC's only response was that it would be "unduly burdensome" for MISO to provide them since they constituted "intermediate analyses," not "basic criteria, assumptions, and data" underlying MISO's system plans. But MISO never made any such claim, and, more important, there is no "unduly burdensome" exception to the requirement that a party have an opportunity to review and rebut evidence critical to an agency's ultimate determination. And even if there were, the information petitioners sought could not more plainly comprise "basic criteria, assumptions, and data," given that the cost-benefit analyses were the centerpiece of MISO's cost-causation argument that FERC and the Seventh Circuit accepted.

The result is remarkable: In upholding an unprecedented, legally dubious ratemaking regime affecting hundreds of parties and involving billions of dollars, *both* an administrative agency *and* a court of appeals recognized that the agency relied on information that was critical to its determination and yet *not* part of the administrative record, leaving the affected parties no chance to review and rebut it before the agency or the court. The prejudice to petitioners is plain. For example, the only "evidence" FERC cited for its conclusion that all parties would share in the supposed benefits of MVPs—and thereby satisfy even FERC's novel cost-socialization conception of cost-causation—was the finding of one of MISO's studies that the purported $297 million to $423 million in production cost savings would be "spread almost evenly across all Midwest ISO Planning Regions." App. 359-60, 474-75. In concluding that the MVP methodology satisfied the cost-causation principle, the Seventh Circuit simply repeated this statement verbatim. App. 11. Thus the Seventh Circuit relied on FERC's repetition of MISO's own statement that its studies demonstrated an "almost even[]" distribution of alleged benefits from MVPs; yet the very studies and analyses purporting to demonstrate the point were not part of the record, and their methodologies and assumptions remain untested and indeed undisclosed. Such egregious procedural errors contravene the basic demands of the APA and FPA, and create an irreconcilable conflict with a long line of decisions from the D.C. Circuit and other courts of appeals that requires resolution by this Court.

2. The eye-popping procedural irregularities below are not saved by the Seventh Circuit's assertion that, as "members of MISO," petitioners purportedly had "access" to the critical MISO materials in question. App. 13.

To begin with, as a factual matter, petitioners did *not* have access to "MISO's elaborate quantification of costs and benefits," as the Seventh Circuit believed. It is undisputed that MISO never disclosed its workpapers containing its underlying cost-benefit analyses and never entered these materials into the record. Just because petitioners are members of MISO does not mean they have access to all of the records of MISO, an entirely separate and independent corporate entity. Indeed, the FERC rehearing order confirms this point. After numerous petitioners contended that MISO had failed to provide the workpapers, FERC concluded that petitioners were not entitled to them not because they could obtain them as MISO members—as one might expect were that the case—but because petitioners' request would be "unduly burdensome." Moreover, numerous petitioners sought (and were denied) discovery of the workpapers, which would hardly have been necessary had they had "access" to them all along. The Seventh Circuit's facile assumption otherwise was simply another unsupported, incorrect statement in a decision full of them.

In all events, as a matter of law, the Seventh Circuit's "access" theory is flatly inconsistent with the bedrock administrative law principles recounted above. It is not incumbent upon an affected party to discern and seek out evidence upon which an agency ultimately relies. The evidence must be in the record in the first place, to "afford interested persons meaningful notice and an opportunity for comment." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008); *see* 5 U.S.C. § 556(e). Though parties may seek discovery, the agency itself controls whether discovery is granted; that is why the law requires that all the evidence upon which the agency relies be in the record, and the parties must have an opportunity to view and rebut that evidence before the agency. *See* 5 U.S.C. § 556(d). Here, petitioners were neither properly informed of the content of the critical MISO materials withheld from the record, nor given any opportunity (despite their requests) to "parry [the materials'] effect" before the agency. *Union Elec.*, 890 F.2d at 1202-03. But that is what the APA and FPA, as well as the decisions of other courts of appeals, require.[9]

---

[9] In the Seventh Circuit's view, a "further answer to both the substantive and procedural questions" regarding cost-causation is that MISO members "can vote with their feet" by leaving the RTO. App. 16. But it is no "answer" to suggest that a party can simply avoid injury by refraining from conduct leading to that injury. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). Indeed, on numerous occasions, RTO members have successfully challenged RTO tariffs, without suggestion that they should simply leave the organization if unsatisfied. *See Black Oak Energy*, 725 F.3d at 232-33; *Sithe*, 285 F.3d at 1; *Cent. Maine Power Co. v. FERC*, 252 F.3d 34 (1st Cir. 2001). Nor is compliance with the law excused by the specter of "unconscionable regulatory delay." App. 14. An agency's legal obligations are not somehow lessened by the passage of time. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 561 (D.C. Cir. 2004) (invalidating, for third time in eight years, FCC order seeking to implement statutory requirement).

B. The Seventh Circuit's Departure From Bedrock Administrative Law Principles Is Especially Troubling Given the Far-Reaching Consequences of the Seventh Circuit's Decision.

Adherence to fundamental administrative law principles is always important, but it is even more critical here given the significant consequences of the Seventh Circuit's decision. The financial, geographic, and policy impact of this case cannot be overstated. The decision below imposes billions in unjustified costs for petitioners and other MISO members across the Midwest and beyond. And it will undoubtedly lead to more frequent and more aggressive cost-socialization efforts as renewable energy technology initiatives proliferate. It is imperative that a decision of such import rest on solid factual grounds, which in turn requires compliance with proper administrative procedures—not the egregious procedural errors that occurred here.

Moreover, the very nature of the substantive issue in this case heightens the need for adherence with procedural requirements. If, contrary to petitioners' contentions, the cost-causation principle can in fact be applied to spread costs in the broad-based and amorphous manner sought by MISO and approved by FERC and the Seventh Circuit, then there is an even greater need to ensure that costs and benefits have been thoroughly ventilated by the agency and the parties before it. In short, the broader the cost-benefit scope, the greater the need for compliance with sound procedural principles concerning record evidence of costs and benefits and parties' ability to rebut that evidence. Otherwise, enormous costs and generalized policy choices will be imposed on millions of people across the country without commensurate assurance of a firm basis for those burdens. That is the inherent wisdom of the requirement that an agency rely only on record materials that parties have the opportunity to rebut. Yet it is precisely what was missing from these proceedings.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

RANDOLPH LEE ELLIOTT
SEAN T. BEENY
BARRY COHEN
MILLER, BALIS & O'NEIL, P.C.
1015 Fifteenth St. NW, 12th Floor
Washington, DC 20005

Counsel for Petitioners Hoosier Energy Rural Electric Cooperative, Inc., and Southern Illinois Power Cooperative

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner FirstEnergy Service Company

LEILA L. VESPOLI
MORGAN E. PARKE
KAREN A. SEALY
FIRSTENERGY
SERVICE COMPANY
76 South Main St.
Akron, OH 44308

JOHN L. SHEPHERD, JR.
DAVID W. FOSTER
KARIS ANNE GONG
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005

Counsel for Petitioner FirstEnergy Service Company

ERIC ROBERTSON
LUEDERS, ROBERTSON
& KONZEN
1939 Delmar Ave.
Granite City, IL 62040

Counsel for Petitioner Illinois Industrial Energy Consumers

ANDREW P. MORATZKA
STOEL RIVES LLP
33 South Sixth St.
Suite 4200
Minneapolis, MN 55402

Counsel for Petitioners Minnesota Large Industrial Group and Wisconsin Industrial Energy Group

GARY J. NEWELL
JENNINGS, STROUSS
& SALMON, PLC
1350 I St. NW, Suite 810
Washington, DC 20005

JOHN W. BENTINE
LISA G. MCALISTER
AMERICAN MUNICIPAL
POWER, INC.
111 Schrock Rd., Suite100
Columbus, OH 43229

Counsel for Petitioner American Municipal Power, Inc.

October 7, 2013