No. ________

In the Supreme Court of the United States

MICHIGAN ATTORNEY GENERAL BILL SCHUETTE, ET AL., PETITIONERS,

V.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Power Act's requirements that interstate electric rates be "just and reasonable," and non-preferential, 16 U.S.C. § 824d(a)–(b), require that charges associated with regional power-grid upgrades be allocated to consumers on a basis proportional with the benefits those consumers will receive from the upgrades (as the D.C. Circuit has held) or instead allow charges to be socialized, such that consumers must pay an equal share for power-grid upgrades that overwhelmingly benefit others (as the Seventh Circuit held here).

2. Whether the Federal Energy Regulatory Commission must conduct an evidentiary hearing under 16 U.S.C. § 824d when utilities and state agencies come forward with admissible evidence creating material questions of fact regarding the cost-benefit analysis of new proposed charges associated with regional power-grid upgrades anticipated to cost billions of dollars.

PARTIES TO THE PROCEEDING

In addition to the Michigan Attorney General, the Petitioners (also known as the MISO Northeast Transmission Customers and collectively identified as "Michigan" by the Seventh Circuit) in this case are Association of Businesses Advocating Tariff Equity (ABATE), DTE Electric Company (formerly The Detroit Edison Company), Michigan Public Power Agency, Consumers Energy Company, and the Michigan Municipal Electric Association.

Other parties to the proceedings before the Seventh Circuit were the Federal Energy Regulatory Commission, the Midcontinent Independent System Operator, Inc. (formerly known as Midwest Transmission System Operator, Inc.) (MISO), the Midwest ISO Transmission Owners, the PJM Interconnection, L.L.C., the PPL Energy Plus, LLC, the Illinois Commerce Commission, the Hoosier Energy Rural Electric Cooperative, the Southern Illinois Power Cooperative, the First Energy Service Company, the Public Service Commission of Wisconsin, the American Municipal Power, Inc., the Coalition of Midwest Transmission Customers, the Electricity Consumers Resource Council, the American Forest and Paper Association, the Illinois Industrial Energy Consumers, the Minnesota Large Industrial Group, the Wisconsin Industrial Energy Group, the Exelon Corporation, and the Public Service Electric and Gas Company.

Several of the other parties in the consolidated Seventh Circuit cases, including the Hoosier Energy Rural Electric Cooperative, Inc., the Southern Illinois Power Cooperative, the First Energy Service Company, the Illinois Industrial Energy Consumers, the Minnesota Large Industrial Group, the Wisconsin Industrial Energy Group, and American Municipal Power, Inc. are concurrently filing a separate petition for a writ of certiorari.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 26, undersigned counsel state, on behalf of their respective clients, that (1) no publicly held company owns 10% or more of the stock in the Association of Businesses Advocating Tariff Equity, (2) CMS Energy, a publicly held company, owns 100% of the stock in Consumers Energy, (3) DTE Energy Company, a publicly held company, owns 100% of the stock in DTE Electric Company, (4) no publicly held company owns 10% or more of the stock in the Michigan Municipal Electric Association, and (5) no publicly held company owns 10% or more of the stock in the Michigan Public Power Agency.

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The June 7, 2013 opinion of the court of appeals is reported at 721 F.3d 764 and reprinted in the Appendix herein at App. 1a. The October 21, 2011 opinion of the Federal Regulatory Commission is reported at 137 FERC ¶ 61,074 and reprinted in the Appendix to the companion petition for certiorari filed by the Hoosier Energy Rural Electric Cooperative Inc., et al. at App. 26. The Federal Energy Regulatory Commission's December 16, 2010 opinion is reported at 133 FERC ¶ 61,221 and is likewise reprinted in the Appendix to the companion petition for certiorari filed by the Hoosier Energy Rural Electric Cooperative, Inc., et al. at App. 334.

JURISDICTION

This Court has jurisdiction under 16 U.S.C. § 825*l*(b) and 28 U.S.C. § 1254(1). The Seventh Circuit issued its opinion on June 7, 2013. On August 22, 2013, Justice Kagan granted Petitioners' application to extend the time for filing a petition of certiorari in this case to and including October 7, 2013.

STATUTORY PROVISIONS INVOLVED

Section 205 of the Federal Power Act, as amended, 16 U.S.C. § 824d, states in relevant part:

> (a) Just and reasonable rates. All 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 the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) Preference or advantage unlawful. No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
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> * * *
>
> (d) Notice required for rate changes. Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and

to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect.

* * *

(e) Suspension of new rates; hearings; five-month period. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon….

INTRODUCTION

This case affects the rates that electrical consumers in over a dozen states will pay for new power lines estimated to cost billions of dollars to transmit so-called "green energy" from upper Midwestern-state wind farms to areas in the rest of the region. But the jurisprudential and practical significance of the underlying legal issues is much larger.

The first issue presented concerns the standards courts must apply when determining whether costs for upgrading the nation's power grid have been allocated in a "just and reasonable" and non-preferential manner as 16 U.S.C. § 824d requires. Historically, under what is known as the "cost-causation principle," the D.C. Circuit and the Federal Energy Regulatory Commission have required proof that the costs assessed against utilities—and thus their consumers—in a particular region are proportional with the project benefits. In other words, the D. C. Circuit and FERC have applied a pay-for-your-own-benefits rationale.

But the Seventh Circuit abandoned that standard here in favor of a cost-socialization approach. The record establishes that less than 4% of Michigan's physical connections to the electrical grid are to the regional network involved in this case, and that the proposed upgrades will not change those network connections. So Michigan is likely to receive only minimal benefit from the regional investment. Yet the Seventh Circuit affirmed a cost structure that assesses Michigan consumers at the same rate as the consumers in other states that will derive the most direct benefit from the grid investment.

The Seventh Circuit's theory is that the transmission upgrades will improve overall grid reliability, and that Michigan residents will benefit environmentally and aesthetically from promoting wind power production in western parts of the region. But the Seventh Circuit failed to quantify these "benefits" and compare them to the benefits the upgrades will bestow on consumers in states where the upgrades have a more direct effect.

As a result, the Seventh Circuit's approach is the exact opposite of the prevailing methodology. It imposes an equal-contribution requirement on every consumer in the affected states, all for the purpose of subsidizing wind-energy transmission in areas where the local utilities and generators could not (or would not) pay the costs of grid upgrades necessary to transmit their product. Such a result punishes Michigan consumers and distorts the market by diverting funds that might otherwise be used to invest in Michigan's own wind-generating capabilities. More important, the Seventh Circuit's new approach to a project's cost-benefit analysis has no basis in § 824d and, as a result of the circuit split, creates non-uniformity in electric rate setting, contrary to the purpose underlying the Federal Power Act.

The second issue presented involves the fundamental question of when the Commission must conduct an evidentiary hearing in an interstate, electric rate-making proceeding. Both the D.C. Circuit and the First Circuit have held that the Commission should conduct such hearings when a genuine issue of material fact exists, unless the disputed issue may be adequately resolved on the written record.

The Seventh Circuit eviscerated that established legal principle by blindly accepting the Commission's unsupported conclusion that no issue of material fact was present that could not be resolved on the written record. In doing so, the Seventh Circuit ignored detailed affidavits submitted by Petitioners' experts that specifically disputed key factual bases for the claimed reasonableness of the rates at issue.

The Seventh Circuit's approach effectively insulates Commission proceedings from meaningful judicial review and virtually eliminates any requirement that the Commission ever conduct an evidentiary hearing. This result is particularly troubling given the magnitude of the interests at stake in the agency proceeding: unprecedented decisions by a *private* transmission organization determining the siting and development of wind-energy generation facilities within a large region with the authority to assess billions of dollars of transmission costs on electric consumers. Review is warranted.

STATEMENT OF THE CASE

A. The Federal Power Act

Congress enacted the Federal Power Act of 1935 in response to *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), which held that the dormant commerce clause prohibited states from regulating rates for interstate-electricity sales. Section 201 of the Act filled the void—known as the "*Attleboro* Gap"—by regulating the "[s]ale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824.

Section 205 of the Act, as amended, vests the Federal Energy Regulatory Commission with the duty to ensure that all rates and charges for interstate sales of electricity are "just and reasonable" and non-preferential. 16 U.S.C. § 824d(a)–(b). Under what is known as the "cost-causation principle," the D.C. Circuit has frequently interpreted "just and reasonable" to mean that "all approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them," *K N Energy*, *Inc*. v. *FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992), a pay-for-your-own benefits approach. This principle is evaluated by "comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party." *Midwest ISO Transmission Owners* v. *FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004).

B. The proposed transmission projects

MISO, the Midcontinent Independent System Operator, Inc.,[1] is one of seven regional transmission organizations. Each of these organizations is a company created by agreement among utilities that own electrical transmission facilities. Each regional transmission organization operates a portion of the electrical grid on behalf of member utilities and is responsible for directing expansions and upgrades of its transmission grid. App. 5a.

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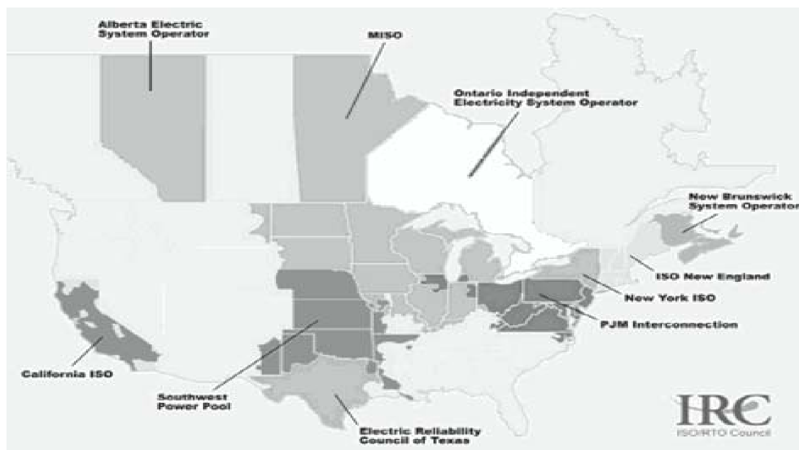
[1] MISO was formerly known as the Midwest Independent Transmission System Operator, Inc.

When a transmission-owning utility joins a regional transmission organization such as MISO, retail utilities and their customers who depend on service by that transmission owner also become and remain members of the regional organization—whether they like it or not. Each of these regional transmission operators is a public utility subject to the Commission's jurisdiction. 61 Fed. Reg. 21,540 (May 10, 1996). To finance its activities, a transmission organization adds a rate schedule—approved by the Commission under its Federal Power Act authority—to the tariff governing the price for transmitting wholesale electricity on the grid. Retail utilities, which in Michigan are not always the same as the transmission owning utility, pay this rate increase and necessarily pass the cost to their consumers: the individuals and commercial entities who pay the utility for electric service. The grid that MISO operates is located primarily in the Midwest, App. 3a–4a:



Historically, a power generator seeking new transmission facilities to interconnect the generator with the MISO grid would pay 90% of the cost under MISO's FERC-approved tariffs. For other grid improvements, the local planning zone bore the entire cost of low-voltage lines and 80% of high-voltage lines. In other words, there was a nearly one-to-one correlation between cost and benefit, even though lines connecting new generators or improving grid reliability indirectly benefit everyone connected to the grid.

Everything changed in 2010, when MISO sought the Commission's approval to impose a rate schedule that would fund new high-voltage power lines that MISO calls "multi-value projects," or MVPs, to transmit power from upper Midwestern-state wind farms (that do not yet exist but which the transmission upgrades are designed to promote) to the rest of the region and beyond. App. 5a.

The projected future wind farms are generally located in isolated areas, requiring new transmission facilities to move the wind-generated energy to market. Under the Commission's and MISO's historical practice, the generators and nearby utilities would have paid the costs of these new transmission facilities, because these entities were the ones most benefitted by the grid upgrade. But the wind farms and nearby utilities were often unwilling or unable to pay. So MISO's proposed tariff spread the cost equally among transmission customers in every state in MISO's geographic footprint. And because the charges were calculated only by electricity *withdrawals*, MISO insulated the actual wind-farm generators from any cost at all.

So MISO's proposal is a subsidy that promotes wind-energy projects in certain (primarily western) areas of the region. But the proposal is financed by *all* consumers in the MISO network, regardless of benefit. (Only one of the 16 projects is in Michigan. App. 100a. Michigan consumers should pay for that project, not the rest of the upgrade.)

Despite their moniker, the "value" of the new MVP transmission lines to a given state's utilities and consumers varies dramatically. Consider Michigan. The Lower Peninsula (which includes more than 96% of Michigan's total population), is referred to as the "MISO Northeast" area. App. 36a. A staggering 96.5% of the interconnected capability of the MISO Northeast transmission system is not with MISO but with a separate regional transmission organization known as PJM Interconnection, LLC and the Ontario Independent Electric Systems Operator. App. 37a, 81a–82a, 126a–128a. The current record shows that Michigan customers receive only nominal benefit from transmission upgrades constructed within MISO's service area. App. 81a–83a. As one expert explained, "This [lack of connection between Michigan and MISO] is a unique defining characteristic of MISO Northeast." App. 83a.

Disregarding Michigan's nominal benefit from the new transmission-line projects, MISO proposed a new rate schedule to its tariff that socialized project costs throughout the entire region and without any analysis of where the benefits of a given project will be realized. The schedule requires Michigan utilities and consumers to pay the same price—based on total electrical consumption—as utilities and customers located in every state located within MISO. App.84a.

C. Commission proceedings

On July 15, 2010, MISO filed an application with the Federal Energy Regulatory Commission containing a new rate schedule for its tariff for the wind-energy transmission projects. The application identified 16 initial projects expected to cost $4.6 billion and proposed to allocate those costs, and the cost of unspecified future "multi-value" projects, among utilities drawing power from the MISO grid not in proportion to each utility's expected *benefit*, but instead in proportion to each utility's *share* of the region's total electricity consumption. More than 100 parties intervened in the Commission proceeding. Hoosier Energy, et al. App. 334, 639–45. The Commission conducted no hearings, permitted no discovery, and allowed no cross-examination. With only a few exceptions not relevant to the petition, the Commission approved MISO's proposal in two orders dated December 16, 2010, and October 21, 2011.

Petitioners, identified as the MISO Northeast Transmission Customers, submitted a protest and request for an evidentiary hearing. Among other things, Petitioners asserted that the proposed rates: (a) are not "just and reasonable" and depart from the "cost-causation" principle established in numerous federal circuit precedents, (b) do not provide benefits to Michigan consumers proportional with the costs imposed, (c) are unlawfully discriminatory by allocating no portion of the costs to the generating facilities who directly benefit from the transmission projects, and (d) should be modified to designate the "MISO Northeast" as a separate area for transmission planning and cost allocation purposes. App. 36a–38a.

In support of their protest, Petitioners provided affidavits establishing that (1) no new interconnections are being added between the area currently serving the MISO's Northeast territory and the area in which most MVP facilities are being proposed, App. 126a, and (2) while only 3.5 % of MISO Northeast customers' grid interconnections are with the relevant interconnected transmission facilities, those customers will shoulder 18% of the new projects' costs, App. 84a. The affidavits also included evidence rebutting MISO's claim that the projects will provide values that are roughly equivalent to the charges MISO is assessing. App. 84a–91a, 97a–101a. Based on this evidence and the disputed facts regarding the cost-benefit analysis, Petitioners asked the Commission to conduct an evidentiary hearing. App. 76a–77a.

On December 16, 2010, the Commission issued an Order Conditionally Accepting Tariff Revision. Hoosier Energy, et al. App. 334. Among other things, that order noted, but denied without comment, the Petitioners' request for an evidentiary hearing. Hoosier Energy, et al. App. 338–39. The Commission acknowledged that it must ensure that costs allocated to beneficiaries are at least roughly proportional with benefits expected to accrue to them. Hoosier Energy, et al. App. 451–52. But, based on projected reductions in transmission losses, regional congestion costs, and the region's installed capacity requirements, the order deferred to MISO's claim that the projects will provide *regional* benefits. Hoosier Energy et al. App. 474–75.

The Commission also projected total benefits and total costs. The Commission concluded that, over time, the proposed projects will enhance *all* parts of the MISO transmission system, even though no single project can directly benefit all users. Hoosier Energy et al. App. 478.

Many parties, including Petitioners, filed rehearing requests under 16 U.S.C. § 825*l*. On October 29, 2011, the Commission issued its Order Denying in Part and Granting in Part Rehearing, Conditionally Accepting Compliance Filing, and Directing Further Compliance Filings. Hoosier Energy et al. App. 26. The partial rehearing grant did not relate to the issues raised here. Petitioners and many others appealed.

D. Seventh Circuit Decision

The Seventh Circuit largely affirmed. App. 1a. Extolling the virtues of green energy, the panel noted that the "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. 13a. Moreover, while "[n]o one can know how fast wind power will grow," 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." App. 14a (emphasis added). Thus, whatever the projects' direct benefit to Michigan utilities and customers, Michigan will be able to enjoy the *intangible* benefit of cleaner air and the reduction of emissions from fossil-fuel power plants in Michigan. App. 14a ("There is no reason to think these benefits will be denied to particular subregions of MISO.").

The Seventh Circuit also noted that more and better transmission lines ultimately improve the "reliability of the grid," App. 14a, though the opinion failed to juxtapose this observation with the undisputed fact that Michigan is largely unconnected to the grid being improved. And while the court acknowledged that the value of an improved grid "can't be calculated in advance, especially on a subregional basis" App. 14a, the court was seemingly comforted by its declaration that the value is "real and will benefit utilities and consumers in all of MISO's subregions." App. 14a.

Turning to Michigan's objection that its minimal connection to the rest of the MISO grid drastically limits its potential benefit from the projects outside Michigan, the Seventh Circuit disposed of the point in a single sentence without any record citation: "The . . . argument founders on the fact that the construction of high-voltage lines from Indiana to Michigan is one of the multi-value projects and will enable more electricity to be transmitted to Michigan at lower costs." App. 16a. Meanwhile, Figure 2 in the Court's opinion, identifying the location of the multi-value projects, shows that none are located near the Indiana-Michigan border. App. 7a. The court also affirmed the Commission's conclusory refusal to provide Michigan an evidentiary hearing on the important issue of cost-benefit analysis, App. 17a, saying that if Michigan didn't like the outcome, it could just withdraw from MISO, App. 18a. Yet, because it is the regional transmission utility owners—not the retail utilities and their customers—who decide whether to join or exit MISO, leaving MISO is not even an option for most, and perhaps any, of the Michigan Petitioners.

Such withdrawal would also expose Michigan to a substantial "departure fee," App. 18a, but not one that should "prevent a discontented MISO member from decamping to an adjacent RTO," said the Seventh Circuit App. 18a. The court did not acknowledge that the Federal Power Act's "just and reasonable" requirement and the Commission's regulatory oversight prevent regional transmission organizations like MISO from imposing disproportionate charges that benefit utilities and consumers in some states at the expense of utilities and consumers located in other states. The Seventh Circuit nevertheless affirmed Commission decisions that do exactly that.

On a related issue, the Petitioners objected that the Commission afforded the new wind power generators an undue preference prohibited by 16 U.S.C. § 824d(b) because they would not be required to pay any of the transmission upgrade costs which will be assessed solely to MISO customers, App. 72a–76a. The Seventh Circuit responded that all MISO utilities would "benefit from cheaper power generated by efficiently sited wind farms whose development the multi-value projects will stimulate." App. 21a. But the Court pointed to no evidence in the record demonstrating that the projected benefits would be proportional with the shifted costs.

In sum, the Seventh Circuit here departed from the evidence-specific, cost-benefit analysis that the D.C. Circuit (and until now, the Seventh Circuit) had long followed. Instead, the court perceived western-state green energy as a social good; thus, there was nothing inappropriate about forcing every electric consumer in the region to pay for that benefit, however vague.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition to resolve a circuit conflict regarding the "just and reasonable" and non-preferential rate standard under the Federal Power Act.

Neither the Federal Power Act nor federal-court decisions require the Commission to adopt a particular formula to determine whether rates are "just and reasonable." But until the Seventh Circuit's decision in this case, the analysis required a comparison of "the costs assessed against a party to the burdens imposed or benefits drawn by that party." *Midwest ISO Transmission Owners* v. *FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). In other words, properly 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 Electric Cooperative, Inc.* v. *FERC*, 684 F. 2d 20, 27 (D.C. Cir. 1982).

In two respects, the Seventh Circuit departed from and significantly diluted the established principle in a way that conflicts with previous decisions of the D.C. Circuit.

First, the Seventh Circuit upheld a Commission decision unsupported by substantial evidence quantifying the perceived "benefits" of the proposed upgrades, such as improved grid reliability, an increase in western-state wind energy, and a decrease in fossil-fuel-based energy, App. 14a, Michigan's predominant method of creating electricity. To the extent Michigan will lose economic activity (and taxes and jobs) as a result of power generation shifting away from

Michigan toward the subsidized western-state wind farms that are afforded a competitive advantage over Michigan's own renewable energy facilities, MISO's proposed projects are a net loss to Michigan utilities and residents, not a benefit. App. 144a, 123a–24a. And even the Seventh Circuit itself has previously rejected grid reliability as a benefit sufficient to socialize costs in an electric tariff without hard evidence to support the actual benefit. *Illinois Commerce Comm'n* v. *FERC*, 576 F.3d 470, 477 (7th Cir. 2009) ("No doubt there will be *some* benefit to the midwestern utilities just because the network *is* a network, and there have been outages in the Midwest. But enough of a benefit to justify the costs that FERC wants shifted to those utilities? Nothing in the Commission's opinions enables an answer to that question. . . . [FERC] cannot use the presumption [of benefit] to avoid the duty of 'comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party"). (citations omitted).

Second, the Seventh Circuit assumed, without record support, that "the construction of high-voltage lines from Indiana to Michigan . . . will enable more electricity to be transmitted to Michigan at lower cost." App. 16a. At a minimum, such a conclusion would require evidence demonstrating (1) Michigan's actual benefit from the new lines, (2) the costs actually caused by Michigan residents drawing power from the new lines, and (3) a comparison of those relative benefits and costs to determine if they are proportional with Michigan's share of total electricity sales in the region.

The Seventh Circuit did not analyze any of these factors. Worse yet, the court misread the record. The only evidence on this point is the unrebutted affidavit testimony that Michigan submitted, analyzing MISO's proposal and concluding that the project *includes no new power lines connecting Indiana and Michigan*:

> In reviewing the approved transmission projects in the Midwest ISO Transmission Expansion Plan ("MTEP"), I found no new interconnections being added between the area serving MISO Northeast Transmission Customers [i.e., Michigan] and adjacent areas. [App. 126a.]

Moreover, the Court simply assumed, without citing substantial evidence in the record, that the Commission's decision to allocate none of the transmission line costs at issue to the wind-farm operators who most directly benefit from them was nonetheless just and reasonable (and non-preferential) on the theory that the MISO customers would benefit from "cheaper power." App. 21a. Neither the magnitude of the assumed benefits of granting this substantial preference to the wind-power generators nor their relationships to shifted costs were analyzed by the Court.

The cost-causation principle requires "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. Yet avoiding that cost-benefit analysis is precisely what both the Commission and the Seventh Circuit engaged in here.

The Seventh Circuit's approach has important implications that go far beyond the parties to this case. To begin, the division between the Seventh and D.C. Circuits regarding the "just and reasonable" rate-making analysis means that utilities and consumers will be experiencing electric-rate burdens with disproportionate benefits based solely on the circuit in which their state happens to be located. In a federal scheme designed to ensure uniform policy and enforcement, that outcome is untenable.

In addition, the Seventh Circuit's approach adversely affects every single consumer of electricity in the State of Michigan and the other affected states. In essence, the Seventh Circuit has commanded Michigan residents to pay for new transmission lines that not only fail to benefit those very consumers, but in fact hurt Michigan residents by replacing Michigan jobs, profits, and taxes with more western-state energy and by diverting monies that could otherwise be used to improve Michigan's own wind-energy capacity. Whether such a job-shifting policy may ultimately be good for the environment and Americans generally is not a determination to be made by the Commission or the Seventh Circuit. And § 824d(a) and (b) hardly contemplate that Michigan residents should be forced to pay for that "privilege."

Moreover, the Seventh Circuit's analysis defeats the entire purpose of § 824d(a) and (b). By imposing a "just and reasonable" and non-preferential rate-setting standard on regional transmission organizations and the Commission, Congress sought to create a pay-your-own-share rationale when an organization seeks to build out infrastructure. In other words, Congress set

up a system in which energy surcharges would be assigned based on the benefit consumers actually receive, thus ensuring that some consumers are not forced to subsidize benefits provided primarily to others. Rightly or wrongly, that was a policy call that belonged to Congress alone, not the Seventh Circuit. But now, rather than require the proposed wind farms to pay their own share, the Seventh Circuit has allowed the generators to avoid paying any cost at all, even though these entities will undeniably be the largest beneficiaries of the upgrades. It is difficult to imagine a rate-setting scenario more at odds with the "just and reasonable" and non-preferential standards that Congress intended to be applied in circumstances like these.

Most concerning is the Seventh Circuit's blithe and factually incorrect suggestion that Michigan can just walk away from MISO and avoid the MVP-project charges altogether. App. 17a. Even if that suggestion were true, the "just and reasonable" and non-preferential standards established by Congress in the Federal Power Act are legal requirements, not mere suggestions. The Seventh Circuit's casual approach to enforcing federal law is as mystifying as it is erroneous.

And, as explained above, it is the *transmission grid owners*, not retail utilities and their end consumers, who decide whether to join or leave a regional transmission organization such as MISO. So the Michigan Petitioners stuck with the bill for MISO's wind-farm bonanza cannot, as the Seventh Circuit assumed, "vote with their feet."

II. The Court should grant the petition to resolve a circuit split regarding when the Commission should conduct an evidentiary hearing.

Section 205 of the Federal Power Act, 16 U.S.C. § 824d(d), authorizes the Commission to conduct evidentiary hearings, which are governed by 18 C.F.R. § 385.501 *et seq*. Generally, decisions by the Commission on whether to conduct such a hearing are reviewed for "abuse of discretion." *See Louisiana Pub. Serv. Comm'n* v. *FERC*, 184 F.3d 892, 895 (D.C. Cir. 1999). But such discretion is not unlimited.

The Commission must hold an evidentiary hearing "when a genuine issue of material fact exists" unless the disputed issues "may be adequately resolved on the written record." *Cajun Elec. Power Co-Op, Inc.* v. *FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994) (internal citations and quotations omitted). In *Cajun*, for example, the D.C. Circuit held that because the petitioners proffered several facts that raised serious doubts concerning a key issue related to a disputed tariff, the Commission erred in approving the tariff without an evidentiary hearing. *Id*.

Similarly, in *Central Maine Power Co.* v. *FERC*, 252 F.3d 34 (1st Cir. 2001), the First Circuit remanded to the Commission because the Commission had failed to adequately explain why it approved, without a full evidentiary hearing, a "capacity deficiency charge" paid by utilities in the face of extensive affidavits disputing the bases for the charge.

Here, the Petitioners protested the MVP tariff and requested an evidentiary hearing. App. 29a. The protest and hearing request were supported by two detailed affidavits and an incorporated report from experts that specifically disputed key factual aspects of the asserted reasonableness of the tariff. App. 79a–129a. The Petitioners' experts testified, among other things, that:

- Michigan's unique geographical position–only 3.5% of its physical interconnections with the electrical grid are with the remainder of MISO versus 96.5% with regional transmission organizations in Ohio and Ontario–means that the estimated benefits of the projects to be financed by the MISO proposal cannot be even roughly proportional with the approximately 18% share of costs allocated to Michigan. App. 81a–84a.

- The written direct testimony proffered by MISO projecting theoretical cost savings and benefits is not based on realistic assumptions and cannot come close to justifying MISO's projected $4.6 billion in costs for the initial starter projects, let alone additional MVP project costs on the order of $16 to $20 billion. The MVP project will allocate to Michigan consumers costs amounting to approximately *10 times* the maximum projected savings customers might see from improvements in line losses and congestion. App. 84a–91a, 120a–123a.

The Michigan Petitioners requested the Commission to set the matter for hearing, noting that Petitioners' "preliminary analysis, prepared without the benefit of discovery, has revealed numerous issues that require further investigation," and that "an evidentiary hearing is needed to provide a mechanism for developing the necessary facts to ensure that the MVP Proposal, should it be allowed to become effective, is just and reasonable." App. 77a. Under 18 C.F.R. § 385.504, discovery is available only where the Commission sets a matter for hearing. The Michigan Petitioners noted that there were genuine issues of material fact and that these disputed issues of fact could not be determined on the written record. App. 77a.

The Commission did not meaningfully address or explain its decision to deny the Michigan Petitioners' hearing and discovery request. The December 2010 order noted the request, Hoosier Energy et al., App. 625, but denied it without explanation, by conditionally approving the MVP Proposal, essentially in its entirety. Hoosier Energy at al. App. 638.

And on rehearing, when the Michigan Petitioners and other parties again submitted detailed explanations of the disputed issues of fact and the need for an evidentiary hearing and discovery, App. 79a–129a, the Commission simply offered the wholly conclusory "determination . . . that no issue of material fact was present that could not be resolved on the basis of the written record in this proceeding." Hoosier Energy et al., App. 304.

The Seventh Circuit decision to uphold the Commission's summary denial of Petitioners' hearing and discovery requests, App. 16a–18a, conflicts with the decision of the D.C. Circuit in *Cajun* recognizing a right to an evidentiary hearing where, as here, substantial factual issues are genuinely disputed. It also conflicts with the First Circuit's decision in *Central Maine Power Co*. requiring the Commission to meaningfully address key factual disputes raised by the parties.

Like the Commission, the Seventh Circuit mechanically recited the formula that a full evidentiary hearing need not be held if the Commission "can adequately resolve factual disputes on the basis of written submissions," App. 17a, citing a series of cases including *Blumenthal* v. *FERC*, 613 F.3d 1142, 1144–45 (D.C. Cir. 2010). But the present dispute is nothing like *Blumenthal*. There, the court found the petitioners offered only "bald assertion[s]" and "bare allegation[s]" of disputed facts, unsupported by an adequate proffer of evidence. *Id*. at 1145. And, the D.C. Circuit found, "nothing in the record suggests that FERC's decision to resolve the issue without a hearing was unreasonable." *Id*.

Here, Petitioners offered detailed affidavits specifically challenging the testimony and assumptions of MISO's witnesses on issues critical to determining just and reasonable rates. App. 79a–129a. Indeed, the record demonstrated, not merely suggested, that the Commission's decision to ignore those factual disputes and to resolve them without a hearing was unreasonable.

There are legal and factual flaws in the Seventh Circuit's stated reasons for affirming the Commission's arbitrary and unexplained failure to meaningfully address the disputed facts on the ground that such disputes could adequately be resolved in the written record before the Commission. First, neither the "highly technical" character of the data and analysis at issue nor the assumed expertise of the Commission and its staff, App 17a, obviate the need for discovery to ascertain, and for cross-examination to test, critical factual assumptions made in support of MISO's disputed estimate of costs and benefits. If due process was reserved solely for non-technical matters, the Commission likely would never conduct any hearings since it regularly deals with complex and technical issues.

Second, some delay in the Commission proceeding needed to accommodate that hearing process would hardly be "gratuitous," App 17a, under the circumstances presented here. The factual disputes pertain to a proceeding where the Commission allocated billions of dollars in costs for 16 starter projects, and those projects are "just the beginning," App 12a, of those that will be governed by the MVP proposal. The enormous magnitude of the interests at stake militates in favor of a thorough fact-finding process. Cf. *Lockyer* v. *FERC*, 329 F.3d 700, 709–11 (9th Cir. 2003) (applying *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976) (factors including the private interests that will be affected in determining whether the requirements of due process are satisfied)). There is nothing uncommon about review of a Commission hearing coming long after the disputed provision first became effective.

Third, the Seventh Circuit's suggestion that an evidentiary hearing and discovery were unnecessary because Petitioners and others members of MISO had full "access" to its studies, App. 15a, is not supported by the record nor is it factually accurate. Although various cost-allocation concepts had been discussed in the MISO "stakeholder process" preceding the Commission proceeding, MISO's actual cost allocation was not presented to its members until June 22, 2010, less than a month before its case filing, App. 110a, and the cost analysis by MISO's principal witness was not presented to the "stakeholders" before the case filing, App. 62a. Moreover, MISO was the regulated utility, not the disinterested regulator that the Commission is supposed to be. Due process is not served where utility customers are entitled only to the information that the regulated entity chooses to make available.

Fourth, the Seventh Circuit mistakenly stated that Michigan failed to indicate what evidence it might present in an evidentiary hearing that would contribute to the data and analysis already in the record. To the contrary, Petitioners identified specific factual disputes and the need to test critical assumptions underlying the MVP proposal. App. 84a–91a.

Finally, the Court once again made the extraordinary and illogical suggestion that the Michigan Petitioners could "vote with their feet" by leaving MISO, and that such relief somehow provides an "answer" to Petitioners' procedural concerns. App. 17a–18a. Even if it were feasible for the Michigan Petitioners to leave MISO (which it is not), such a hypothetical possibility is irrelevant to whether the Commission's procedure was legally adequate.

In sum, the Seventh Circuit's decision eviscerates the established standards for evidentiary hearings in Commission proceedings and conflicts with decisions of the D.C. and First Circuits. Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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