Nos. 13-443 and 13-445

In the Supreme Court of the United States

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

v.

FEDERAL ENERGY REGULATORY COMMISSION

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

v.

FEDERAL ENERGY REGULATORY COMMISSION

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

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

DAVID L. MORENOFF
Acting General Counsel
ROBERT H. SOLOMON
Solicitor
JENNIFER S. AMERKHAIL
HOLLY E. CAFER
Attorneys
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTIONS PRESENTED

1. Whether orders of the Federal Energy Regulatory Commission (FERC) approving changes to the tariff of a regional transmission organization satisfy the Federal Power Act's "just and reasonable" standard, 16 U.S.C. 824d(a).

2. Whether FERC permissibly considered publicly available studies cited by the regional transmission organization.

3. Whether FERC acted within its discretion in rendering a decision on the written record, without holding an oral evidentiary hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25)[1] is reported at 721 F.3d 764. The orders of the Federal Energy Regulatory Commission (Pet. App. 26-333, 334-647) are reported at 133 F.E.R.C. ¶ 61,221 (2010) and 137 F.E.R.C. ¶ 61,074 (2011).

[1] Unless otherwise specified, all references to "Pet. App." are to the appendix in No. 13-445.

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 the petitions for a writ of certiorari to and including October 7, 2013, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (FERC or Commission) exclusive jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. See 16 U.S.C. 824(a)-(b). Under the FPA, the Commission reviews all rates within its jurisdiction to assure that they are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a), (b) and (e). To enable such review, the FPA requires every public utility to file with the Commission "schedules showing all [jurisdictional] rates and charges * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. 824d(c).

b. Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among electric-power suppliers. In 1996, partially in response to those changes, FERC issued Order No. 888,[2] a watershed rulemaking designed to

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[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, 61 Fed. Reg. 21,540 (May 10, 1996) (Order No. 888), clarified, 76 F.E.R.C.

ensure that utilities that own both generation and interstate-transmission facilities could not leverage their ownership of the transmission facilities to unduly discriminate against other utilities that wished to use them. To that end, Order No. 888 requires such "vertically integrated" utilities to "unbundle" their generation and transmission services—*i.e.*, to make each service available to customers on an individual basis—and to file "open access" transmission tariffs enabling other entities to access their transmission facilities on standard terms. See *New York* v. *FERC*, 535 U.S. 1, 5, 11-13 (2002).

To promote competition and efficiency, the Commission has also encouraged the creation of "regional transmission organizations" (RTOs), which are entities that operate the electricity grid on behalf of transmission-owning member utilities within a particular region, but which have no ownership interest in the transmission facilities or in their utility members. See *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 536-537 (2008). RTOs provide access for all members "at rates established in a single, unbundled, grid-wide tariff" filed with FERC. *NRG Power Mktg., LLC* v. *Maine Pub. Utils. Comm'n*, 558 U.S. 165, 169 n.1 (2010) (citation omitted). To ensure that all generators have equal access to the transmission grid, FERC has created a stand-

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¶¶ 61,009 and 61,347 (1996), order on reh'g, 62 Fed. Reg. 12,274 (Mar. 14, 1997) (Order No. 888-A), order on reh'g, 62 Fed. Reg. 64,688 (Dec. 9, 1997) (Order No. 888-B), order on reh'g, 82 F.E.R.C. ¶ 61,046 (1998) (Order No. 888-C), aff'd in relevant part, *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd *sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

ardized "interconnection agreement" and a default system of allocating the costs of operating the grid among different utilities.[3] Under that default system, an electricity generator pays the costs of connecting its facility to the grid, while the utilities that own the transmission facilities pay for all other upgrades. See *National Ass'n of Regulatory Util. Comm'rs* v. *FERC*, 475 F.3d 1277, 1284 (D.C. Cir. 2007), cert. denied, 552 U.S. 1230 (2008).

2. a. This case concerns Midwest Independent Transmission System Operator, Inc. (MISO), an RTO established in 2002 that controls a grid that transmits electricity over a region spanning 15 States.[4] MISO has over 130 members representing transmission owners, municipalities, cooperatives, power marketers, and independent generators. Like other RTOs, it is responsible for planning expansions and improvements to its grid. See *Public Serv. Comm'n of Wis.* v. *FERC*, 545 F.3d 1058, 1059-1060 (D.C. Cir. 2008). It is required to file a tariff with FERC that governs how costs of new transmission facilities are allocated among its members.

MISO's approach to allocating costs of constructing new transmission facilities has evolved over time. At first, MISO adopted the Commission's default rule (discussed above), but proposed to reimburse the

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[3] *Standardization of Generator Interconnection Agreements and Procedures*, 104 F.E.R.C. ¶ 61,103 (2003) (Order No. 2003), order on reh'g, 106 F.E.R.C. ¶ 61,220, order on reh'g, 109 F.E.R.C. ¶ 61,287 (2004), order on reh'g, 111 F.E.R.C. ¶ 61,401 (2005), aff'd *sub nom. National Ass'n of Regulatory Util. Comm'rs* v. *FERC*, 475 F.3d 1277 (D.C. Cir. 2007), cert. denied, 552 U.S. 1230 (2008).

[4] Midwest ISO recently changed its name to Midcontinent Independent System Operator, Inc.

costs that generators paid for grid upgrades. See *Public Serv. Comm'n of Wis.*, 545 F.3d at 1060. Although FERC approved that initial plan, it encouraged MISO and its stakeholders to continue efforts to develop a permanent pricing policy based on the general "principle of payment for upgrades by those that cause and benefit from the upgrades." *Ibid.* (citation omitted). MISO accordingly created a stakeholder group to consider "cost allocation" issues.

In 2005, acting on recommendations from this stakeholder group, MISO adopted a regional cost-allocation plan for projects needed to preserve system reliability (*i.e.*, to ensure that the grid operates as intended and avoids interruptions such as blackouts). *Public Serv. Comm'n of Wis.*, 545 F.3d at 1060-1061. Under that plan, utility members throughout the MISO region pay 20% of the costs of high-voltage projects built to meet reliability needs or increase the economic efficiency of the system. See *ibid.* The remaining costs are assessed to utility members within a particular subregion of the MISO region in proportion to the benefits that the subregion is expected to realize from the projects. *Ibid.*; Pet. App. 343-346.

b. In recent years, a majority of States in the MISO region have adopted policies to encourage the use of renewable energy, such as wind power. As a result, by 2009, a large number of wind-energy generators were waiting to connect to MISO's grid. Pet. App. 147; see *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 F.E.R.C. ¶ 61,060, para. 11 (2009). Expecting to shoulder an overwhelming share of the costs of connecting new wind-power generators to the grid under MISO's existing cost-allocation plan, two utilities declared their intent to exit MISO. See *id.*

para. 7. Withdrawal of these entities (and others like them) threatened MISO's ability to provide regional benefits to all of its members. *Id.* para. 39. In response, FERC approved a temporary change to the allocation of costs of high-voltage network upgrades to accommodate new generators. Pet. App. 347-348. With that change, generators paid 90% of those costs and nearby member utilities were relieved of those costs. *Ibid.*

Over the next 19 months, MISO, stakeholders, and state commissions negotiated a package of reforms to replace this temporary solution. See Pet. App. 348-352. In July 2010, MISO and owners of the transmission facilities filed those proposed reforms, accompanied by extensive testimony and exhibits supporting the changes, with the Commission. See *id.* at 334-337, 352-364. The package generally retains the prior regional cost-allocation plan and generally makes permanent the 2009 modification requiring generators to bear 90% of the costs of interconnection projects.

As particularly relevant here, the package also allocates the costs for a new category of facilities, called Multi-Value Projects (MVPs), to all customers taking energy off the transmission grid. See Pet. App. 4. As their name suggests, MVPs are improvements to the MISO grid intended to confer multiple benefits on MISO members, with an emphasis on enabling the connection of renewable energy to the MISO grid. To qualify as an MVP, a project must be sufficiently large in terms of its cost (at least $20 million) and its voltage (at least 100kV). It must also satisfy at least one of three additional criteria designed to ensure that it will produce system-wide benefits in the form of reduced electricity costs, system reliability improvements, or

the advancement of state or federal public policies.[5] Projects are ineligible for regional cost-sharing under the MVP plan if they are driven solely by a generator's interconnection request. See *id.* at 491.

MISO conducted a series of studies of potential pilot MVPs. Those studies estimated that the projects' annual economic benefits, starting in 2015, would be between $582 million and $798 million, offsetting the pilot projects' estimated annual costs of $675 million. Pet. App. 359-361. The models demonstrated that the benefits would generally be evenly distributed among MISO's various subregions. *Id.* at 360; see also *id.* at 475. In particular, they showed that the largest category of savings, lower energy prices from lower production costs and the freer flow of energy across uncongested transmission lines, would accrue to each subregion under nearly all scenarios and would generally be "evenly divided through the regions." FERC C.A. Br. 43 (quoting MVP Proposal, Tab F, Test. of John Lawhorn).

3. FERC approved MISO's MVP plan after finding that it reflected rates that are "just and reasonable." The Commission concluded that the plan will provide incentives for needed expansion of the MISO grid, fairly assigns costs among MISO market participants,

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[5] Under Criterion 1, a project must: (1) be developed through MISO's transmission expansion plan to meet an energy policy mandate that favors a specific type of generation; and (2) enable the transmission grid to more reliably or economically deliver that type of generation. Criterion 2 requires that a project provide multiple types of economic value across multiple pricing zones and have a benefit-cost ratio of 1.0 or higher. A project qualifying under Criterion 3 must resolve a projected reliability violation, provide economic value in more than one pricing zone, and have costs less than its quantifiable benefits. See Pet. App. 35-36.

and generally has support among States and market participants. See, *e.g.*, Pet. App. 338, 365, 457. In particular, the Commission explained that the criteria for MVPs are designed to identify projects that will provide benefits throughout MISO's region, not only in particular subregions. See *id.* at 460-466. It accordingly 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." *Id.* at 455 (internal quotation marks omitted).

Multiple parties filed petitions for rehearing with FERC. As relevant here, some parties argued that the MVP program was invalid under the Seventh Circuit's decision in *Illinois Commerce Commission* v. *FERC*, 576 F.3d 470 (2009). See Pet. App. 51-65. In that decision, which reviewed a FERC order allocating the costs for expanded transmission facilities within another RTO, the Seventh Circuit held that the Commission had not presented sufficient evidence to satisfy the so-called "cost causation" principle—*i.e.*, that "[a]ll approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them." 576 F.3d at 476 (quoting *K N Energy, Inc.* v. *FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (second alteration in original)). The petitioners challenging FERC's approval of MISO's revised tariff argued that *Illinois Commerce Commission* stood for the proposition that FERC must ensure that the benefits of a grid upgrade outweigh the costs of the program for each affected utility. See Pet. App. 119-120.

FERC rejected that argument, explaining that neither *Illinois Commerce Commission* nor the D.C.

Circuit precedents on which it relied require a rigid utility-by-utility evaluation of costs and benefits before a new rate design can be approved. See Pet. App. 120-123 (citing *Midwest ISO Transmission Owners* v. *FERC*, 373 F.3d 1361 (D.C. Cir. 2004), and *Western Mass. Elec. Co.* v. *FERC*, 165 F.3d 922 (D.C. Cir. 1999)). In the Commission's view, given the integrated nature of an RTO, system upgrades will often benefit all members of an RTO over time through increased reliability and other enhancements, and it is impossible to allocate those benefits with any degree of precision among different members. See *id.* at 120-132. The Commission found the MVP program "just and reasonable" because it was expected to confer substantial benefits over time throughout the MISO region.

4. A number of entities filed petitions for review of FERC's orders in the United States Court of Appeals for the Seventh Circuit. See 16 U.S.C. 825*l*(b). The court largely affirmed FERC's conclusions, Pet. App. 1-25, although it remanded the case to the Commission for a more complete explanation of an issue not relevant here, *id.* at 25.

a. The court of appeals rejected the argument that the Commission had approved criteria for deeming a project to be an MVP that were "too loose" and so would force all MISO members "to contribute to the cost of projects that benefit only a few." Pet. App. 10. The court explained that the Commission had reasonably concluded that the MVP program would, among other things, "improve reliability" on the system, thus "benefit[ting] the entire regional grid by reducing the likelihood of brownouts or outages." *Id.* at 10-11. Although it was unlikely that "every utility in MISO's

vast region will benefit from every MVP project, let alone in exact proportion to its share of the MVP tariff," the court of appeals explained that the projects were expected to generate well over $100 million dollars in annual cost savings, and that it is "impossible to allocate these cost savings with any precision across MISO members." *Id.* at 10-12.

Given that the challengers had failed to "offer [any] estimates of costs and benefits either, whether for the MISO region as a whole or for particular subregions or particular utilities," they could not demonstrate that FERC's assessment of the costs and benefits was unreasonable. Pet. App. 11. It was "not enough," the court of appeals underscored, "for [the challengers] to point out that MISO's and FERC's attempt to match the costs and the benefits of the MVP program is crude; if crude is all that is possible, it will have to suffice." *Id.* at 13. For similar reasons, the court of appeals found unpersuasive the argument of certain Michigan entities that "unique features of the state's power system will cause Michigan utilities to pay a share of the MVP tariff greatly disproportionate to the benefits they will derive from the [MVPs]." *Id.* at 14.

b. The court of appeals also rejected the argument that FERC had erred in failing to order an evidentiary hearing, a precondition to discovery under the Commission's rules. See Pet. App. 13-14, 15. FERC had reasonably declined to hold such a hearing, the court held, "because it already had voluminous evidentiary materials, including MISO's elaborate quantifications of costs and benefits—and these were materials to which petitioners had access as well." *Id.* at 13. The court concluded that the petitioners had not

shown any need for discovery, and that "for us to order it without a compelling reason two and a half years after the Commission rendered its exhaustive decision * * * would create unconscionable regulatory delay." *Id.* at 14.

ARGUMENT

Petitioners principally argue (Hoosier Pet. 20-29; Mich. Pet. 16-20)[6] that the court of appeals erred in holding that FERC's orders approving MISO's tariff revisions were not arbitrary and capricious. They essentially recast the court of appeals' determination that the orders satisfy the "cost causation" principle as a repudiation of that principle. Their contentions lack merit. The court of appeals faithfully applied the cost-causation principle to the MVP proposal in light of the record evidence before the Commission. It concluded that, given the difficulty of assessing costs and benefits associated with MVPs and the impossibility of allocating benefits among individual utilities with any degree of precision, FERC had reasonably found that the cost-causation principle was satisfied here based on MISO's projections. That factbound holding does not conflict with any decision of this Court or another court of appeals; to the contrary, the D.C. Circuit has long presumed that grid upgrades benefit every member of an integrated system. See, *e.g.*, *Western Mass. Elec. Co.* v. *FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999). Particularly given FERC's ability, as recognized by the court of appeals, to reconsider in the future the cost-benefit conclusions set forth

[6] This brief refers to petitioners in No. 13-443 as "Michigan petitioners" and petitioners in No. 13-445 as "Hoosier petitioners."

in its orders, further review of this issue is not warranted.

Petitioners also challenge FERC's reliance on publicly available studies that estimated the costs and benefits of the MVP program (Hoosier Pet. 30-38) and its decision not to hold a trial-type evidentiary hearing as part of its decision-making process (Mich. Pet. 21-27). Neither of those procedural objections supplies a ground to set aside FERC's orders, and in any event they do not raise legal questions of general applicability warranting this Court's review.

1. a. The court of appeals correctly rejected petitioners' challenge to FERC's conclusion that the MVP program reasonably allocates costs among members of MISO.

i. Petitioners argue (Hoosier Pet. 20-24; Mich. Pet. 16-20) that FERC's approval of the MVP program violated 16 U.S.C. 824d, which provides that "[a]ll rates and charges made * * * by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission * * * shall be just and reasonable," and bars tariffs that "grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage." 16 U.S.C. 824d(a) and (b). A court reviewing a challenge to FERC's determination that particular rates or tariff terms meet those statutory standards "appl[ies] the familiar arbitrary and capricious standard," which is "highly deferential." *Black Oak Energy, LLC* v. *FERC*, 725 F.3d 230, 237 (D.C. Cir. 2013); see also *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be 'just and reasona-

ble' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions."). As the D.C. Circuit has explained, "[i]ssues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission." *Alcoa Inc.* v. *FERC*, 564 F.3d 1342, 1347 (2009) (alteration in original).

Petitioners contend that the MVP program, which allocates costs for large-scale grid-improvement projects to all entities that take power from MISO's system, violates the "cost causation" principle. That principle of electricity rate regulation provides that "all approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them." *Black Oak Energy*, 725 F.3d at 237. Petitioners believe that the MVP plan runs afoul of that principle both because it imposes costs on some entities that purportedly exceed the benefits those entities will receive from MVPs and because the plan does not call for generators that connect to the grid via MVPs to pay anything for the projects. See Hoosier Pet. 23.

Those objections do not demonstrate that FERC "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). They therefore provide no basis for upsetting FERC's orders. FERC has long applied the cost-causation principle as a central part of its evaluation of wholesale power rates, and nothing in its orders here purported to abandon it. FERC reasonably determined that because MVPs will provide system-wide benefits over the long run

that are impossible to quantify for any individual utility with any degree of precision—such as improvements in the system's reliability and thus fewer interruptions over time—it was reasonable to require all members of MISO that take power from the system to contribute to their costs. See Pet. App. 116-117 ("We continue to find, based on the record, that the MVP Proposal enjoys broad state authority and stakeholder support, presents significant incentives to construct new transmission, and fairly allocates the costs of new transmission * * * to the market participants that use the [MISO] transmission grid and who will benefit from its maintenance and further development.").

That represents a reasonable exercise of the Commission's discretion in an area of intense factual complexity and uncertainty. It also comports with the Commission's "consistent policy to assign the costs of system-wide benefits to all customers on an integrated transmission grid," which has been repeatedly affirmed on judicial review. *Western Mass. Elec. Co.*, 165 F.3d at 927; see also, *e.g.*, *National Ass'n of Regulatory Util. Comm'rs* v. *FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007) ("We have endorsed the approach of assign[ing] the costs of system-wide benefits to all customers on an integrated transmission grid.") (alteration in original; internal quotation marks omitted), cert. denied, 552 U.S. 1230 (2008).

The court of appeals' determination that FERC reached a reasonable conclusion does not, as petitioners contend (Hoosier Pet. 27), lack a limiting principle, much less sanction the "socializ[ation]" of electricity costs. Petitioners fail to acknowledge that the MVP program is only one part of a broader system that

MISO has adopted for allocating costs of upgrading the grid. That system is designed to distinguish between projects, such as MVPs, that FERC reasonably concluded could be expected to benefit the entire MISO region over time, and projects that have more limited impacts or that primarily meet local needs. Pet. App. 10-11. For the latter type of projects, the costs are borne by those entities that will demonstrably benefit from them. For example, although petitioners object that power generators do not have to share in the costs of MVPs, under the orders they will continue to pay the majority of the costs of interconnecting to MISO's grid, as they have in the past, even though in reality other users of the transmission grid generally receive some benefits from such new interconnections. See *id.* at 200-201.

But for MVPs, which are designed to provide region-wide benefits, FERC has reasonably concluded that it is appropriate to spread the costs among all who take power from the system.[7] That does not reflect "socialized ratemaking" (Hoosier Pet. 27), but rather a reasonable attempt to ensure, in circumstances where precision is impossible, that those who benefit from grid upgrades pay for them.

ii. Petitioners also appear to object to the court of appeals' factbound conclusion that the Commission reasonably determined that MVPs will confer benefits

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[7] Generators are excused from paying MVP costs, though not the costs of other network upgrades they require, because the MVPs will allow more efficient siting, reducing both overall transmission upgrade costs and allowing more access to less expensive wind power. See Pet. App. 18-19. For example, a generator must pay grid-upgrade costs that it causes if it does not locate near an MVP. *Id.* at 200-201, 480-481.

that outweigh costs and that are generally evenly distributed among all MISO members. The court of appeals, however, correctly held that FERC had reasonably determined, based on "voluminous evidentiary materials, including MISO's elaborate quantifications of costs and benefits," Pet. App. 13, that MVPs will bring inexpensive wind energy onto the system, lowering the cost of electricity, increasing the reliability of the electricity supply in the region (and thus reducing outages), *id.* at 6, and enhancing the efficiency with which electricity is distributed throughout the region, *id.* at 7. Petitioners do not directly attack any of those predictive judgments, and in any event such a disagreement with an agency's decisionmaking in its core area of expertise would not justify setting aside its orders.

The court of appeals also correctly concluded that FERC had reasonably found, based in part on a study showing region-wide usage of MVPs, that "[t]here is no reason to think these benefits will be denied to particular subregions of MISO." Pet. App. 11-12. Indeed, courts of appeals have regularly relied on the presumption that improvements in system-wide reliability on an integrated grid will benefit all who take power from that grid. See *id.* at 128-129; *Western Mass. Elec. Co.*, 165 F.3d at 927 ("When a system is integrated, any system enhancements are presumed to benefit the entire system."); *Entergy Servs., Inc.* v. *FERC*, 319 F.3d 536, 543 (D.C. Cir. 2003) ("[U]pgrades designed to preserve the grid's reliability constitute system enhancements [that] are presumed to benefit the entire system.") (internal quotation marks omitted; second alteration in original); see also *Midwest ISO Transmission Owners* v. *FERC*,

373 F.3d 1361, 1369 (D.C. Cir. 2004) (citing *Entergy* and *Western Massachusetts* for same presumption). The court of appeals thus committed no error in reaching that conclusion here, where FERC fortified that presumption with substantial factual material.

The court of appeals acknowledged that in all likelihood not every utility in the MISO region will benefit from every MVP or in exact proportion to its share of the MVP costs. Pet. App. 10. But it explained that the cost-causation principle does not require that level of precision—a level that would be impossible to meet in reviewing complex grid-improvement projects. See *id.* at 13; see also *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U.S. 581, 589 (1945) ("Allocation of costs * * * involves judgment on a myriad of facts [and] has no claim to an exact science."); see also *Midwest ISO Transmission Owners*, 373 F.3d at 1369 ("[W]e have never required a ratemaking agency to allocate costs with exacting precision."). As the court of appeals observed, petitioners themselves were unable to come forward with any evidence showing an "imbalance of costs and benefits" supporting their arguments. Pet. App. 13. Petitioners have provided no reason to believe that Congress would have intended the Commission to be powerless to approve grid upgrades unless it could develop a granular estimate of costs and benefits for each particular subregion or entity.

In any event, a case-specific claim that FERC erred either in weighing the costs and benefits of the MVP program, or in concluding that the benefits of the program are likely to be evenly distributed among its subregions, would not present a legal issue of general applicability warranting this Court's review.

Moreover, FERC's determination is not set in stone. As the court of appeals explained, "FERC has required MISO to provide annual updates on the status of [MVP] projects," and "[s]hould the reports show that the benefits anticipated by MISO and FERC are not being realized, the Commission can modify or rescind its approval of the MVP tariff." Pet. App. 11. All that the Commission determined here is that the criteria for selecting MVPs likely indicate that the projects selected will have widely distributed benefits that outweigh their costs. If that turns out not to be the case, petitioners can ask FERC to modify MISO's tariff accordingly.

iii. The Michigan petitioners argue (Mich. Pet. 17-18) that the court of appeals erred in finding reasonable the Commission's conclusion that Michigan utilities will benefit from MVPs, given their limited electrical connections with the rest of MISO. That fact-bound objection to conclusions within the Commission's expertise does not warrant further review. Both the Commission and the court of appeals acknowledged that Michigan utilities have only limited connections to MISO, Pet. App. 14; see also *id.* at 147-148, but the Commission reasonably found, based on the record evidence, that substantial benefits would flow to all utilities in MISO from the MVPs, *id.* at 11-12. And even apart from Michigan utilities' ability to realize the same region-wide benefits as other utilities in MISO's system, the Commission conducted an exhaustive analysis of benefits that would be realized by Michigan utilities specifically from the MVP program. See *id.* at 149-153 (analysis of impact on real-time, day-ahead, peak, and off-peak power prices and operating reserve prices, as well as a quantification of the

impact of a blackout on Michigan consumers). That analysis would satisfy even petitioners' unduly narrow understanding of the cost-causation principle.

iv. Finally, the court of appeals correctly rejected petitioners' contentions (Hoosier Pet. 27-29; Mich. Pet. 5, 19) that the construction and funding of MVPs would impermissibly intrude on state prerogatives. Pet. App. 8-9. In approving MISO's revisions to its tariff, the Commission acknowledged differences in state energy policies, with not every State imposing renewable-energy mandates on utilities. *Id.* at 4. But the MVP program does not, as petitioners claim, require customers in States without renewable-energy mandates to subsidize customers in States with such mandates. Rather, as the court of appeals explained, by lowering the total cost of connecting wind energy to markets, the MISO rate design is expected to reduce the price of power available to all MISO members and to improve the reliability of the system overall. See *id.* at 19. Although petitioners dispute that judgment, it "is the kind of reasonable agency prediction about the future impact of its own regulatory policies to which [courts] ordinarily defer." *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 370 (D.C. Cir. 1998).

b. The court of appeals' decision does not conflict with the decision of any other court of appeals. No other circuit has considered the MVP program, and the decision below does not set forth any general principles of administrative law or energy regulation that conflict with holdings of other circuits.

The Hoosier petitioners argue that the decision "conflicts with decades of D.C. Circuit authority" adopting the cost-causation principle. Hoosier Pet.

20-21 (citing *K N Energy, Inc.* v. *FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)). But the court of appeals expressly acknowledged that principle in reviewing FERC's orders, quoting the same D.C. Circuit authority as petitioners. See Pet. App. 4 (quoting *K N Energy*, 968 F.2d at 1300). Petitioners' real dispute is with the court of appeals' particular application of that principle to the MVP program at issue here. Although it is not entirely clear, they appear to believe that FERC must ensure that the cost of any improvement to a large electricity grid is borne by a utility in close proportion to the benefits it will receive from the improvement.

No court of appeals, however, requires such a showing. To the contrary, other circuits have approved broad RTO cost-allocation plans that are not confined to the rigid and infeasible approach that petitioners appear to envision. See, *e.g.*, *Midwest ISO Transmission Owners*, 373 F.3d at 1367 (affirming broad cost-sharing on the premise that all members draw benefits from being part of a regional transmission system and thus should share administrative and capital costs of operating and planning the system); *California Dep't of Water Res.* v. *FERC*, 489 F.3d 1029, 1041 (9th Cir. 2007) (affirming pro rata system-wide pricing "based on the rationale that transmission customers all benefit from the operation of the integrated grid"). Although both the D.C. Circuit and the Seventh Circuit have at times articulated the cost-causation principle as requiring FERC to "compar[e] 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 (empha-

ses added), their decisions have not actually required a utility-by-utility comparison of costs and benefits.

Far from requiring such an impracticable approach, both the Seventh Circuit and the D.C. Circuit have concluded that new transmission lines are presumed to benefit the entire network by increasing the reliability of an integrated grid. *Illinois Commerce Comm'n* v. *FERC*, 576 F.3d 470, 477 (7th Cir. 2009); *Western Mass. Elec. Co.*, 165 F.3d at 927. For example, in *Western Massachusetts Electric Co.*, the D.C. Circuit approved the Commission's system-wide allocation of the costs of a transmission line that was necessary only because a single generator sought to transmit its electricity across one utility's grid for sale to a neighboring utility in the power pool. *Id.* at 923-925. In so doing, the Commission did not undertake an individualized analysis of each customer's benefit from the new line; rather, it rested on the presumption that grid improvements benefit all entities that take power from the grid, as well as a study of power flows on the system showing that some "customers other than [the generator] will make use of and benefit from the grid upgrades," in those few times when the power flowing from the generator is "lower than expected." *Id.* at 927; see also *Western Mass. Elec. Co.*, 64 F.E.R.C. ¶¶ 63,028, 65,128 (1993) (stating that FERC trial staff "was unable to identify any specific added system benefits accruing to either [the transmitting utility] or to its transmission customers"). The D.C. Circuit upheld FERC's decision as reasonable, explaining that "[w]hen a system is integrated, any system enhancements are presumed to benefit the entire system," 165 F.3d at 927, and that the Commis-

sion had reasonably concluded that the presumption was not rebutted by evidence in the record.

The Hoosier petitioners cite (Hoosier Pet. 21-22) the D.C. Circuit's decision in *Sithe/Independence Power Partners, L.P.* v. *FERC*, 285 F.3d 1 (2002) (*Sithe*), which held that FERC had not adequately justified its method for allocating the costs of "transmission losses"—electricity lost when it flows across the grid. See *id.* at 2. The D.C. Circuit believed that the Commission had not sufficiently explained why the feasibility and efficiency goals that it claimed were served by the approach it had adopted could not be achieved through a different method "based more closely on cost-causation principles." *Id.* at 5. It therefore remanded for a better explanation. The court, however, did not suggest that the cost-allocation system would be invalid unless FERC could establish that each entity subject to a charge would experience quantifiable benefits or could otherwise demonstrate the sort of precise matching of costs and benefits that petitioners seek. And unacknowledged by petitioners, the D.C. Circuit later affirmed the same rate design at issue in *Sithe* after the Commission explained that it was impossible to attribute benefits to any particular customer. See *Sacramento Mun. Util. Dist.* v. *FERC*, 616 F.3d 520 (2010); see also *Black Oak Energy*, 725 F.3d at 237 ("In *Sithe*, we held that FERC had failed to justify the imposition of marginal loss pricing under [the cost-causation] principle, but we left the door open to clarification and explanation. That explanation was forthcoming in *Sacramento*.") (citation omitted). There is thus no merit to petitioners' claim that the decision below

conflicts with *Sithe* or any other decision of the D.C. Circuit.

c. The Hoosier petitioners also assert (Hoosier Pet. 24-29) that the court of appeals' decision will have "far-reaching consequences" warranting this Court's review. It is true that any FERC decision approving a cost-allocation plan for one of the Nation's RTOs will involve a significant amount of money over time. But that fact does not merit this Court's review absent a circuit conflict—indeed, in this case, absent even a square legal question. As the court of appeals noted, moreover, FERC has the ability to reconsider its cost-benefit conclusions as more evidence comes to light or as particular MVPs are planned. See Pet. App. 11. If petitioners are correct that after the court of appeals' decision, other RTOs will adopt similar plans (Hoosier Pet. 26), then other circuits will have the opportunity in the near future to address petitioners' arguments.

2. Petitioners also raise objections to the court of appeals' rejection of their contention that certain alleged procedural errors by the Commission required the court to set aside the Commission's orders. The court of appeals' decision was correct, and in any event petitioners' case-specific objections do not warrant further review.

a. The Hoosier petitioners contend (Hoosier Pet. 31-36) that the Commission unlawfully relied on "extra-record evidence" in approving the MVP plan. They principally claim that the Commission relied on certain studies that, while publicly available, were not submitted to the agency as part of MISO's filing. They also argue that they were unlawfully denied access to certain workpapers that MISO created in the course of developing the MVP plan.

i. The Hoosier petitioners' claim that FERC relied on "extra-record" material (Hoosier Pet. 31-33) lacks merit. Although they never identify precisely the material to which they object, they appear to contend that MISO should have physically filed hundreds of pages of publicly available studies on which it relied rather than simply citing them.[8] Petitioners, however, point to no authority that supports that proposition.

As the decisions that petitioners cite explain, evidence relied upon by the agency must be "made public in the proceeding and exposed to refutation." *Chamber of Commerce of U.S.* v. *SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006); see *James Madison Ltd.* v. *Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("The administrative record includes all materials 'compiled' by the agency * * * that were 'before the agency at the time the decision was made.'") (quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971), and *Environmental Def. Fund, Inc.* v. *Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981)), cert. denied, 519 U.S. 1077 (1997). Here, the studies at issue were publicly available and were expressly cited by MISO in its filings. See FERC C.A. Br. 46-47 (citing studies). The Commission then expressly referred to them in its orders—in some cases providing Internet links. See, *e.g.*, Pet. App. 146 n.314, 461 n.270. No

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[8] Petitioners identify (Hoosier Pet. 13, 32) three studies that were included in MISO's motion to supplement the appendix before the Seventh Circuit. Those were publicly available studies that MISO explicitly relied on in its rate filing and the Commission explicitly relied on in its orders. See Pet. App. 461 n.270 (citing and providing website link to publicly available study); *id.* at 146 n.314 (citing and providing website links to publicly available Transmission Expansion Plan and another report).

case cited by petitioners suggests that agencies may not rely on publicly available research or documents in this manner in rendering decisions. To the contrary, the D.C. Circuit has held that an agency may "cite relevant, publicly available studies, which need not have been introduced into the record." *Wisconsin Power & Light Co.* v. *FERC*, 363 F.3d 453, 463 (2004).

Nor would such a rule make sense in this case. Because the relevant studies were cited by MISO and the Commission and were publicly available, petitioners had a full and fair opportunity to respond to them and to rebut them if they believed that the studies were flawed. See 5 U.S.C. 556(d) and (e) (parties are entitled to review and rebut evidence in agency record). Indeed, the studies were addressed in detail by commenters. See Pet. App. 476 ("Some parties find fault with the studies performed by [MISO]."). Petitioners never explain why the fact that the studies were cited rather than reproduced in full made any difference in whether they could be rebutted. No principle of administrative decisionmaking requires a party to submit verbatim reproductions of publicly available scientific papers, economic studies, or other types of reports in order to urge an agency to examine and rely on them. Rather, "so long as [a study] is referenced, thereby enabling meaningful adversarial comment and judicial review[,] such material need not be directly introduced into the record." *Wisconsin Power & Light Co.*, 363 F.3d at 463 (internal quotation marks omitted).

ii. The Hoosier petitioners also object (Hoosier Pet. 33-36) that they were not permitted to view cer-

tain MISO workpapers.[9] But FERC reasonably concluded that the requested materials were merely "intermediate analyses" that were not necessary to assess the accuracy of MISO's conclusions and that would be unduly burdensome for MISO to produce. Pet. App. 128-130. That conclusion was reasonable, particularly in light of the wealth of information that MISO provided. MISO's filed testimony and exhibits equaled or surpassed what the Commission ordinarily requires in cost-allocation cases. See *id.* at 129-130. Stakeholders had the opportunity to (and, in extensive written pleadings before the agency, did in fact) evaluate and challenge the inputs, assumptions, and results of the studies upon which the Commission relied to find regional benefits. See *id.* at 476 ("The debate centers on the inputs and assumptions used in the various studies."); see also *id.* at 419 (parties "question load growth estimates and other [study] inputs"). Petitioners point to no precedent requiring MISO to share all of its "intermediate analyses" regardless of whether those analyses are necessary for a fair appraisal of its conclusions. To the extent petitioners argue that FERC unreasonably concluded that the workpapers were unnecessary to scrutinize MISO's

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[9] Certain parties sought an evidentiary hearing before FERC (including the Michigan petitioners), but aside from the repeated request for an individualized assessment of benefits by one of the Hoosier petitioners, none of the petitioners here mentioned workpapers in their requests for agency rehearing. See 15 U.S.C. 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.").

studies, that highly factbound claim does not present any question meriting this Court's review.[10]

b. The Michigan petitioners contend (Mich. Pet. 21-27) that FERC should have conducted a trial-type evidentiary hearing and that the court of appeals created a circuit conflict in declining to order one. That claim lacks merit. Petitioners correctly recognize (Mich. Pet. 21) that a court reviews FERC's decision not to hold an evidentiary hearing for an abuse of discretion, see *Louisiana Pub. Serv. Comm'n* v. *FERC*, 184 F.3d 892, 895 (D.C. Cir. 1999), and that the court of appeals properly articulated that governing legal standard. They acknowledge the well-accepted principle that an oral evidentiary hearing "need not be held if the Commission 'can adequately resolve factual disputes on the basis of written submissions.'" Mich. Pet. 24 (quoting court of appeals' opinion). But they believe that FERC abused its discretion in declining to hold such a hearing because petitioners had submitted two affidavits and a report disputing two of MISO's factual assertions. See Mich. Pet. 22.

Petitioners, however, do not claim that FERC failed to consider the written materials they submitted. The Commission specifically recognized Michigan's argument concerning allocation of costs to Michigan customers. See, *e.g.*, Pet. App. 147-153, 382-384, 477-478. But the Commission concluded that it could address and resolve those issues based upon the submissions before it. See, *e.g.*, *id.* at 147-153 (addressing Michigan-specific concerns), 476-479 (resolving issues

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[10] The Michigan petitioners state only that MISO's cost analysis "was not presented to the 'stakeholders' *before* the case filing," Mich. Pet. 26 (emphasis added), but raise no objection about the level of detail in the information filed with MISO's proposal.

concerning studies and evidence). Petitioners do not explain why that conclusion was an abuse of discretion. Nor do petitioners indicate what new facts would have been developed at an oral evidentiary hearing or explain what information they would have sought from discovery.[11]

Given that, FERC did not abuse its discretion in determining that it adequately could resolve factual issues on the basis of the written record, without a trial-type evidentiary hearing. As the court of appeals explained, in light of the highly technical nature of the issues, the expertise of FERC staff, the availability of the evidence to all parties, and petitioners' failure adequately to specify the additional evidence they would present at an evidentiary hearing, an evidentiary hearing was not warranted. Pet. App. 15-16. Petitioners' disagreement with that case-specific conclusion does not justify further review.

Petitioners claim that the court of appeals' conclusion that FERC did not abuse its discretion by declining to hold an evidentiary hearing in response to their factual assertions conflicts with decisions of the D.C. and First Circuits. But those decisions involved agencies that entirely "ignored [an] important question of fact," *Cajun Elec. Power Co-op., Inc.* v. *FERC*, 28 F.3d 173, 180 (D.C. Cir. 1994), or failed adequately to address particular issues raised by the parties, *Central Me. Power Co.* v. *FERC*, 252 F.3d 34, 47 (1st Cir. 2001); see also *id.* at 48 (leaving it to FERC's discre-

[11] The court of appeals held that the Michigan petitioners had forfeited the argument that they were unreasonably deprived of the opportunity to conduct discovery by failing to raise it until their reply brief. See Pet. App. 15. For that reason, that issue is not properly before this Court.

tion whether to hold oral hearing on remand). Like the Seventh Circuit, those circuits have explained that agencies are entitled to broad deference in their decisions whether to hold trial-type evidentiary hearings. See *Blumenthal* v. *FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) ("Even when there are disputed factual issues, FERC does not need to conduct an evidentiary hearing if it can adequately resolve the issues on a written record."); *Central Me. Power Co.*, 252 F.3d at 47 ("[A]n agency's decisions as to procedure are reviewed for abuse of discretion, and * * * the reasons for deference are especially strong where the decision is entangled with the agency's expert judgment."); see also Pet. App. 15 (citing *Blumenthal*). As the First Circuit observed in the case cited by petitioners, "where forward-looking industry-wide regulation is at issue, it is increasingly common for agencies to employ such hearings by affidavit and nothing more." *Id.* at 46.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DAVID L. MORENOFF
Acting General Counsel
ROBERT H. SOLOMON
Solicitor
JENNIFER S. AMERKHAIL
HOLLY E. CAFER
Attorneys
Federal Energy Regulatory Commission

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