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No. 02-299

In the Supreme Court of the United States

ENTERGY LOUISIANA, INC., PETITIONER

v.

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The question stated in the petition for a writ of certiorari is: "Whether *Mississippi Power & Light* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), require a state public utility commission to allow an electric utility member of a multi-state power system to recover, in retail rates, the costs allocated to it by a rate schedule of the Federal Energy Regulatory Commission ('FERC'), or whether the state commission has jurisdiction to decide that it was 'imprudent' for such a utility to incur the costs allocated to it under a FERC rate schedule, thereby 'trapping' such wholesale costs?"

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ENTERGY LOUISIANA, INC., PETITIONER

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LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner is an electric utility that operates in the State of Louisiana as part of an integrated multi-State system. A tariff filed with the Federal Energy Regulatory Commission (FERC) governs wholesale transactions among utilities in the multi-State system, including the deficiency payments that individual utilities must make when they do not meet specified targets for contributing electric power to the system. The question in this case is whether a state regulatory commission may determine that deficiency payments petitioner made pursuant to the federal tariff were

imprudent and may not be recovered through petitioner's retail rates, despite an earlier finding by FERC that the tariff terms governing the payments are just and reasonable, and despite the absence of a determination by FERC that petitioner violated the terms of the tariff. Because the Louisiana Supreme Court answered that question incorrectly and in conflict with decisions of this Court, and because the issue has considerable importance for federal regulation of multi-State entities in the electric industry, the petition should be granted.

1. Improved transmission technologies have made it possible to transmit electric power at high voltages over long distances, thereby enabling electric utilities to dispatch power economically from diverse generation sources across broad, interconnected transmission networks. Those technological advances have allowed increased integration of electricity markets in the United States. See *New York* v. *FERC*, 122 S. Ct. 1012, 1017-1018 (2002).

Multi-State utility systems have played an important role in that integration. Historically, many of the multi-State systems have been owned by holding companies that control the operation of both electric-generation and electric-transmission facilities on an interstate basis. In this case, petitioner Entergy Louisiana, Inc., is one of the operating companies of Entergy Corporation (Entergy), which is a holding company. See Pet. 3-4; *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 357 (1988). The member operating companies of the Entergy system "plan, construct, and operate their collective electric generating and transmission facilities as a single, integrated system serving parts of Louisiana, Arkansas, Mississippi, and Texas." Pet. App. 3a.

Recently, however, FERC has encouraged nondiscriminatory operation of electric transmission facilities by independent transmission system operators (ISOs) and regional transmission organizations (RTOs) that do not own electric-generation facilities and do not have any commercial interest in the generation business.[1] FERC's current RTO policy is intended to promote the realization of efficiencies from regional planning, construction, and operation of transmission facilities, while also removing barriers to a competitive wholesale energy market. See 18 C.F.R. 35.34 (RTO rules); *Public Utils. Dist. No. 1* v. *FERC*, 272 F.3d 607, 610-611 (D.C. Cir. 2001). FERC's rules contemplate that RTOs will integrate existing transmission facilities spanning several States and operate them as a single independent, open-access transmission system, subject to FERC regulation. See 18 C.F.R. 35.34(j) and (k).

2. a. The five Entergy operating companies contractually harmonize their different facilities and power requirements through a System Agreement. The System Agreement "provide[s] the contractual basis for the continued planning, construction, and operation of

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[1] See *Regional Transmission Orgs.*, Order No. 2000, 65 Fed. Reg. 810, on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (2000), petitions for review dismissed *sub nom. Public Util. Dist. No. 1* v. *FERC*, 272 F.3d 607 (D.C. Cir. 2001); see also *Promoting Wholesale Competition Through Open-Access Non-discriminatory Transmission Services by Pub. Utils.*, Order No. 888, 61 Fed. Reg. 21,540 (requiring utilities subject to FERC jurisdiction to provide nondiscriminatory transmission), clarified, 76 F.E.R.C. ¶ 61,009 and 76 F.E.R.C. ¶ 61,347 (1996), on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274, clarified, 79 F.E.R.C. ¶ 61,182, on reh'g, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), on reh'g, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), aff'd *sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd, *New York* v. *FERC*, *supra*.

the electric generation, transmission and other facilities of the [Entergy Operating] Companies," and "for equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies." Pet. App. 88a (quoting System Agreement); see *Mississippi Power & Light*, 487 U.S. at 360 (System Agreement "designed to ensure that each company contribute[s] proportionately to the total costs of generating power on the system."). The System Agreement is a federal tariff approved by FERC. Pet. App. 4a; see Pet. 4.

Service Schedule MSS-1 of the System Agreement makes each Entergy operating company responsible for providing a portion of the system's overall power-supply capability. Pet. App. 88a. Schedule MSS-1 requires that when a company's contributed share of total system capability falls below its share of total system demand, the company must make deficiency payments to those system members that cure the shortfall. See *id.* at 4a-5a, 88a-89a. For purposes of those calculations, each company's contributed capability "shall be the sum of *available owned or leased generating units*, purchases and seasonal or other energy exchange from demonstrated reliable sources." *Id.* at 89a (emphasis added). The jurisdictional issue in this case arises from a dispute about whether certain of petitioner's generating facilities were "available" as that term is defined in the System Agreement and used in Schedule MSS-1 to allocate the costs of system power-production.

b. In the mid-1980s, the Entergy system as a whole had excess electric-generation capacity. Rather than keeping excess generation facilities on-line, the operating companies placed them in an extended reserve shutdown (ERS) program. "The ERS program allowed

the Operating Companies to save money by * * * reducing operating staff [and] maintenance costs, and deferring the costs of repairing [excess generation] units." Pet. App. 90a; see *id.* at 163a n.8 (noting ERS program's benefits to retail customers).

A FERC proceeding during the mid-1990s addressed the question whether power-generation facilities in the ERS program could be deemed "available" for purposes of Schedule MSS-1, so that their capability would be considered when calculating an operating company's liability for deficiency payments, or eligibility to receive those payments. See Pet. App. 90a. Entergy's policy was to include ERS generation units as "available * * * units" when making capability calculations. That policy allegedly increased petitioner's deficiency-payment obligations. *Id.* at 91a; see *id.* at 85a n.1.

On August 5, 1997, FERC issued Order No. 415 to resolve the ERS dispute. Pet. App. 85a-106a. Interpreting the System Agreement, which had been filed as a federal tariff, FERC determined that generation units idled as part of the ERS program could not be considered "available" under the language of the System Agreement, and thus their capacity should not have been reflected in capability calculations under Schedule MSS-1. *Id.* at 85a-86a, 100a. FERC, however, exercised its discretion not to order refunds to the operating companies that were adversely affected by that tariff violation. FERC determined that Entergy received no net gain from its inclusion of ERS generation units in Schedule MSS-1 calculations and that inclusion of the generation units benefitted ratepayers by removing a disincentive to participation in the ERS program. FERC further determined that the ERS units at issue were planned and built to serve all the operating companies collectively, and that parties who

objected to the inclusion of ERS units in Schedule MSS-1 calculations had not objected to that treatment before FERC commenced its proceeding. *Id.* at 101a-103a. FERC concluded that "although Entergy acted in a manner inconsistent with Schedule MSS-1, the end result was just, reasonable, and not unduly discriminatory." *Id.* at 103a.

"[T]o prevent future disputes," FERC approved a negotiated amendment to the System Agreement that "expressly encompass[es] the ERS program" and "allow[s] ERS units [to be considered] in Schedule MSS-1 calculations pursuant to specific factors." Pet. App. 103a-104a. The amendment approved in Order No. 415 allows the inclusion of an ERS generation unit in capability calculations under Schedule MSS-1 if the unit is shut down "with the intent of returning the unit to service at a future date in order to meet Entergy System requirements," and if the unit's status is evidenced in Entergy corporate minutes and based on a consideration of criteria specified in the amended System Agreement. *Id.* at 104a (emphasis omitted).

3. In May 1997, shortly before FERC issued Order No. 415, petitioner filed with respondent Louisiana Public Service Commission (LPSC) financial data that the LPSC would use to set petitioner's retail rates for 1997. Pet. 9; Pet. App. 25a. In the ensuing rate proceeding, a dispute arose over whether petitioner should be allowed to include in its recoverable costs those deficiency payments that were made because generation units in the ERS program were deemed to be "available." Pet. App. 27a. The LPSC described the issue as "whether these ERS units are 'available' as defined in * * * the Entergy System Agreement." *Ibid.*

In a decision issued in November 1998, the LPSC determined that "[t]here exists no FERC Order or

other federal regulation that makes it mandatory for [petitioner] to treat ERS units as available after August 5, 1997" (*i.e.*, the date of FERC Order No. 415). Pet. App. 52a. The LPSC further determined that Entergy had not satisfied the requirements for treating units as "available" under the System Agreement as amended by Order No. 415. *Id.* at 52a-54a. And the LPSC concluded that petitioner's deficiency payments under Schedule MSS-1 "were imprudently incurred" (and thus not recoverable through petitioner's rates) to the extent that they reflected consideration of ERS generation units. *Id.* at 55a.

The LPSC recognized that its disallowance of petitioner's Schedule MSS-1 payments raised jurisdictional concerns (see Pet. App. 55a-56a), but deemed it critical that "there currently exists no FERC order that has found that the [treatment of ERS units as 'available'] is in compliance with the System Agreement." *Id.* at 65a. "In the absence of such FERC determination," the LPSC continued, "this Commission can scrutinize the prudence of [Entergy's] decision without violating the supremacy clause insofar as that decision affects retail rates." *Ibid.* The LPSC further determined that it could "take judicial notice of the FERC-set standard for treating ERS units as available" (*i.e.*, the 1997 amendment to the Service Agreement) and use it "as an additional test for reasonableness and prudence in [its] review of [petitioner's] MSS-1 expenses." *Id.* at 65a-66a.

The LPSC additionally determined that removing Schedule MSS-1 payments from petitioner's recoverable costs did not conflict with FERC's decision in Order No. 415 not to award refunds. The LPSC again noted that FERC "*did not order, prospectively*, that [petitioner] and the other sister companies must continue to include ERS units in MSS-1 calculations, or

that payments resulting from such continued inclusion are just and reasonable." Pet. App. 67a; see *id.* at 71a ("[P]etitioner's obligations to make FERC-approved overpayments ceased on August 5, 1997."). The LPSC therefore concluded that requiring petitioner to exclude the disputed Schedule MSS-1 payments from its recoverable expenses in determining retail rates is permissible because the exclusion "does not make dual compliance impossible" and "would not violate the filed rate doctrine or the supremacy clause." *Id.* at 69a; see *id.* at 72a ("[T]h[e] question of whether the continued inclusion of ERS units in MSS-1 calculations complies with the amended [System Agreement] has never been addressed or decided by the FERC, and therefore no FERC order exists, with which this Commission's finding of imprudence could conflict.").

When finding that the inclusion of ERS units in petitioner's Schedule MSS-1 calculations was imprudent, the LPSC acknowledged FERC's determination (Pet. App. 101a-103a) that there are system-wide benefits from that inclusion. See *id.* at 73a. But the LPSC stated that FERC's findings "apply *at the level of the parent company*, whereas this Commission is concerned solely with [petitioner] in this proceeding." *Ibid.* The LPSC also concluded (*id.* at 74a, 77a) that Entergy failed to make "a well-considered decision" to treat ERS generation units as "available" under the criteria specified in the amended System Agreement. Thus, the LPSC determined that petitioner "acted imprudently in not minimizing its MSS-1 payments after August 5, 1997 when its FERC-set obligations to make those payments ceased" (*id.* at 75a) and, further, that the LPSC could require petitioner to exclude payments made after August 5, 1997, "without interfering with" Order No. 415. *Id.* at 76a.

4. The Supreme Court of Louisiana affirmed the LPSC's decision. Pet. App. 1a-21a. The court stated that the LPSC "[wa]s not attempting to regulate interstate wholesale rates," and not challenging either "the validity of the FERC's declination to order refunds of amounts paid in violation of the System Agreement prior to the [1997] amendment," or petitioner's "decision to participate in the Agreement." *Id.* at 19a. Consistent with the LPSC's view, moreover, the Louisiana Supreme Court reasoned that "nothing in the federal statutes or case law * * * prohibits the LPSC from assessing the prudence of [petitioner's] actions," and that Order No. 415 did not require petitioner to continue to make payments under Schedule MSS-1 or to include ERS generation units when calculating its payments. *Ibid.*

Three Justices dissented. Justice Kimball wrote a dissenting opinion, in which she stated that the "LPSC is simply trying to do indirectly what it may not do directly, namely, determine that ELI violated a FERC tariff." Pet. App. 21a (Kimball, J., dissenting).

DISCUSSION

This case presents a fundamental jurisdictional question that implicates the Federal Energy Regulatory Commission's regulation of multi-State electric systems and its program for promoting competition in the electric power industry. The Louisiana Supreme Court has decided that question incorrectly, in violation of the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, and the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.* Review by this Court is warranted.

I. THE LOUISIANA SUPREME COURT'S HOLDING VIOLATES THE FPA AND THE SUPREMACY CLAUSE

Section 201(b)(1) of the FPA, 16 U.S.C. 824(b)(1), provides in pertinent part that federal regulatory jurisdiction extends "to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." Both wholesale power sales and electric transmission within a multi-State system occur in interstate commerce and thus are subject to FERC's jurisdiction. The rates and conditions of service for such wholesale sales and transmission must be set forth in a federal tariff, subject to review by FERC under Sections 205 and 206 of the FPA, 16 U.S.C. 824d, 824e.

In holding that the Louisiana Public Service Commission did not intrude on FERC's FPA jurisdiction, the Louisiana Supreme Court reasoned primarily that FERC has never specifically addressed whether petitioner's treatment of ERS generation units under Schedule MSS-1 is prudent or complies with the amended System Agreement. See Pet. App. 19a. The state court's reasoning was incorrect in two respects. First, FERC's exclusive jurisdiction over the interstate transactions in this case does not depend on a specific exercise of that jurisdiction. Second, there *has* been an exercise of federal jurisdiction over the inclusion of ERS generation facilities for purposes of calculating payments under Schedule MSS-1. FERC has concluded that the Entergy operating companies' inclusion of ERS generation facilities when calculating Schedule MSS-1 deficiency payments, under the terms of the amended System Agreement, is just and reasonable.

FERC, moreover, is exclusively empowered to sanction violations of the System Agreement's provisions.

A. The Louisiana Supreme Court's Reliance On The Absence Of A FERC Order Specifically Addressing Petitioner's Deficiency Payments Under The Amended System Agreement Conflicts With This Court's Decisions In Mississippi Power & Light and Nantahala Power & Light

Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), involved a state "prudence" review of the operations of the same multi-State utility system at issue here. See *id.* at 366-368. In *Mississippi Power & Light*, as in this case, a state court concluded that FERC's jurisdiction is limited to "matters *actually determined*" by FERC, and that a State may make determinations about the prudence of multi-State system operations if "*the issue was not presented*" in a FERC proceeding. *Id.* at 368. This Court, however, determined that the state court "erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." *Id.* at 374. The Court noted that the question of prudence in multi-State system operations is within "the scope of FERC's jurisdiction" even if no party has yet raised that issue in a FERC proceeding. *Id.* at 375. It explained that "[t]here can be no divided authority over interstate commerce" and, "[c]onsequently, a state agency's efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." *Id.* at 377 (citations and internal quotation marks omitted).

Mississippi Power & Light reinforces the settled rule that the FPA "draw[s] a bright line easily ascertained, between state and federal jurisdiction." *Federal Power*

Comm'n v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964). It would defeat that settled rule—and violate the Supremacy Clause—to have the locus of jurisdiction depend on a "case-by-case" analysis (*id.* at 216) of which regulator was first to address a matter.

The point is highlighted in this case by the LPSC's assessment that Entergy failed to abide by the requirements of the System Agreement, as amended by Order No. 415. See Pet. App. 52a-54a, 64a-66a, 74a, 77a. Determining compliance with FERC tariffs (such as the System Agreement) falls exclusively within FERC's jurisdiction, whether or not FERC actually has made such a determination. If a State (or another party) seeks a determination of compliance with a federal tariff, its recourse is to file a complaint with FERC under Section 206 of the FPA, 16 U.S.C. 824e. The absence of a federal ruling does not give a State jurisdiction to decide an issue that could be presented to FERC. See *Mississippi Power & Light*, 487 U.S. at 379 (Scalia, J., concurring in the judgment) (failure to seek FERC ruling "does not take the issue out of FERC's jurisdiction and recommit it to the States."). In short, the States must "give effect to Congress' desire to give FERC plenary authority" over wholesale sales and transmissions in interstate commerce, and may "not interfere with this authority." *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986).

B. The LPSC's Order Conflicts With FERC Order No. 415

Schedule MSS-1 is part of a federal tariff under which the costs of integrated interstate facilities are allocated among Entergy's operating companies. To carry out its statutory duty of ensuring just and reasonable rates and charges within its jurisdiction, see 16 U.S.C. 824d,

FERC analyzes such tariffs from a system-wide perspective, rather than "in light of local conditions alone." *Mississippi Power & Light*, 487 U.S. at 376 (discussing and enforcing FERC's system-wide approach) (internal quotation marks omitted). However, as FERC has explained in the context of an operating company's entry into an intra-system transaction, FERC's examination of system-wide costs and benefits necessarily includes some consideration of the individual operating companies' prudence:

> [W]here, as here, the transaction involves affiliated, jurisdictional utilities, which are members of an integrated, interstate holding company arrangement, performing diverse functions on a coordinated basis, and particularly where differing interpretations are advocated concerning the parties' rights and obligations under the basic system agreement, * * * more complex, interrelated questions arise and, *whether one characterizes the questions as related to prudence, interpretation, or cost allocation*, they are clearly matters most appropriately resolved by this Commission as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules.

AEP Generating Co., 36 F.E.R.C. ¶ 61,226, at 61,550 (1986) (emphasis added) (discussed in *Mississippi Power & Light*, 487 U.S. at 378-379 (Scalia, J., concurring in the judgment)).

FERC conducted that type of system-wide analysis —necessarily incorporating consideration of the individual operating companies—in Order No. 415. FERC determined that including ERS facilities in Schedule MSS-1 calculations provides "considerable system-wide benefits, in the form of enhanced system efficiencies

and cost reductions, that ultimately benefit[] ratepayers." Pet. App. 102a (footnote omitted). The LPSC, affirmed by the Supreme Court of Louisiana, revisited the issue of ratepayer benefits and reached an inconsistent conclusion based on State-specific considerations. As the LPSC made clear, its primary interest was in minimizing Entergy's rates in the State of Louisiana, even if that meant higher rates in other States. See *id.* at 51a ("FERC's conclusions were based on system-wide concerns and not on the effect of the violation on any individual operating company's retail rates."); *id.* at 51a-52a ("[O]ther sister companies are benefitting from the MSS-1 treatment of ERS units at [petitioner's] expense."). The LPSC's order in this case therefore conflicts directly with FERC's regulatory policy with respect to the individual Entergy operating companies, as well as the Entergy system as a whole.

It does not matter that, as the Louisiana Supreme Court emphasized (Pet. App. 19a), the LPSC disallowed only deficiency payments made after the issuance of Order No. 415. When FERC determined that ERS facilities could be included in Schedule MSS-1 calculations after August 5, 1997, under the amended System Agreement (see *id.* at 103a-105a), it necessarily determined that such inclusion was prospectively just and reasonable. See 16 U.S.C. 824d(a) (any rate that is unjust or unreasonable is unlawful).

C. The LPSC's Order Violates The Filed Rate Doctrine And Unlawfully "Traps" Costs Incurred Under A Federal Tariff

The LPSC's determination that petitioner did not comply with the amended System Agreement (see Pet. App. 74a, 77a) likewise does not support its assertion of jurisdiction over petitioner's Schedule MSS-1 pay-

ments. The filed rate doctrine enforces the Supremacy Clause and "holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Nantahala Power & Light*, 476 U.S. at 962; see *id.* at 963. The doctrine "is not limited to 'rates' *per se*," but extends to (among other things) FERC tariff filings or orders that "directly affect[] * * * wholesale rates." *Id.* at 966-967. In this case, the filed rate doctrine establishes that the payment regime required by the System Agreement, being the equivalent of a wholesale rate structure, is reasonable as a matter of law unless FERC determines otherwise. See *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 581-582 (1981). Moreover, as the Louisiana Supreme Court and LPSC acknowledged (see Pet. App. 14a), only FERC may determine in the first instance whether Entergy or its operating companies have violated the System Agreement. It follows that the LPSC may not find petitioner's payments under Schedule MSS-1 unreasonable without a predicate FERC determination.[2]

The LPSC's decision also unlawfully "traps" petitioner's costs by preventing petitioner from passing-through to its retail customers the payments it makes to purchase FERC-regulated wholesale services under

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[2] Respondents assert (Br. in Opp. 19) that petitioner's position in this case "would require state officials to accept an illegal charge" until it is disallowed by FERC. That is exactly what the filed rate doctrine provides in this context. As petitioner explains, moreover, the filed rate doctrine must be applied in this case with specific reference to the FPA's "bright line easily ascertained, between state and federal jurisdiction." *Southern Cal. Edison Co.*, 376 U.S. at 215. The decisions under other statutory schemes on which respondents rely therefore are distinguishable. See Pet. Reply Br. 6-7.

the System Agreement, even if there is no FERC finding of a violation of the Agreement. See *Nantahala Power & Light*, 476 U.S. at 970-972. Under the LPSC's decision, petitioner may sell Entergy system power to retail customers only at a price that does not reflect the full amount of petitioner's federally tariffed Schedule MSS-1 payments. See Pet. App. 77a-78a. Therefore, petitioner "cannot fully recover its costs of purchasing at the FERC-approved rate if [the LPSC's] order is allowed to stand." 476 U.S. at 970. "Such a 'trapping' of costs is prohibited" by the Supremacy Clause and this Court's cases. *Ibid.* The prohibition is no less clear if (as respondents assert, see Br. in Opp. 21) the magnitude of the trapping is relatively small.

The LPSC's order finds no support in "the principle" (Br. in Opp. 19) of cases like *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Commission*, 465 A.2d 735 (Pa. 1983). The principle for which those cases stand is that when FERC has approved a seller's wholesale rate for power, state regulators generally retain authority to determine whether buyers of the power acted prudently when purchasing the power at the federal rate, instead of seeking to buy less expensive power elsewhere. See *Nantahala Power & Light*, 476 U.S. at 972 (discussing *Pike County*). Here, by contrast, the LPSC has faulted petitioner's entry into and compliance with federal tariff terms that govern deficiency payments between the Entergy operating companies. *Pike County* has no application here because petitioner's compliance with the requirements of a federal tariff is at issue. Cf. 476 U.S. at 972-973 (rejecting state court's reliance on *Pike County* and finding conflict between state determination that utility's higher-cost power purchases were unreasonable,

and FERC determination limiting utility's access to lower-cost power).

II. THE LOUISIANA SUPREME COURT'S DECISION WARRANTS REVIEW BY THIS COURT

The Louisiana Supreme Court's decision permits a State to override a FERC order approving multi-State operations of an electric utility system, based on that State's assessment of local concerns. The decision therefore endangers FERC's ability to perform its assigned responsibility for assuring that federally regulated rates and services are just, reasonable, and not unduly discriminatory. In particular, FERC's ability to regulate traditional multi-State systems such as the Entergy system, and to promote independent open-access transmission on a regional basis, could be impaired if the Louisiana Supreme Court's decision is allowed to stand.

The jurisdictional ruling of the Louisiana Supreme Court implicates much more than petitioner's ability to recover specific costs in a single year. Holding companies own multi-State systems throughout the country. Moreover, multi-State independent transmission entities currently operate under FERC rules in all areas of the country except the South and the West, and plans for such entities are being developed for those regions as well. Most multi-State entities use some type of federal tariff mechanism to allocate the costs of facilities within FERC's jurisdiction, whether they are generation facilities, as in this case, or transmission facilities, as in the case of ISOs and RTOs. FERC's review of those tariffed allocations is designed to promote system-wide efficiency through regional planning, construction, and operation of the facilities. In the case of ISOs and RTOs, regional planning,

construction, and operation are especially critical to provide all transmission customers throughout the independent operator's region nondiscriminatory service at just and reasonable rates.

Under the Louisiana Supreme Court's decision, however, the individual operating companies of a traditional multi-State system, and the members of an ISO or RTO that own the transmission facilities that have been dedicated to independent operation, cannot be sure whether costs allocated by FERC will be trapped by a state commission, which would result in those costs being borne by shareholders or reallocated to customers in other States. Furthermore, because state regulatory commissions have particular concern for retail rates within their own jurisdictions, one State's disallowance of federally authorized cost recovery could lead other States to take similar action. FERC is constrained in addressing those problems because it lacks jurisdiction over retail rates for electric energy. See 16 U.S.C. 824(b)(1). The Louisiana Supreme Court's decision therefore is sufficiently important to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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