No. 02-

IN THE
Supreme Court of the United States

ENTERGY LOUISIANA, INC.,
Petitioner,
v.
LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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August 22, 2002

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QUESTION PRESENTED

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?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the five Commissioners of the Louisiana Power Service Commision – Hon. C. Dale Sittig, the Hon. Jack "Jay" A. Blossman, Jr., the Hon. Irma Muse Dixon, the Hon. James M. Field, and the Hon. Don Owen – are Respondents in this proceeding and were Defendants below solely in their official capacities as members of the Commission.

Pursuant to Sup. Ct. R. 29.6, Petitioner Entergy Louisiana, Inc. is a wholly-owned subsidiary of Entergy Corporation. Entergy Corporation has no parent company. Old Mutual, the parent company of Barrow, Hanley, Mewhinney & Strauss, owns 11% of the stock of Entergy Corporation. Old Mutual is publicly traded on the London and Johannesburg stock exchanges.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Entergy Louisiana, Inc. ("ELI") respectfully submits this petition for writ of certiorari to the Louisiana Supreme Court.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court (Appendix ("App.") 1a-21a) is reported at 815 So. 2d 27 (La. 2002). The order of the Louisiana Supreme Court denying the petition for rehearing (App. 159a) is not reported. The opinion of the Nineteenth Judicial District Court for the Parish of East Baton Rouge (App. 22a-23a) is not reported. The order of the Louisiana Public Service Commission (App. 24a-84a), Order No. U-20925-G, is not reported, but is available at 1998 WL 1285300.

JURISDICTION

The opinion and judgment of the Louisiana Supreme Court were entered on April 3, 2002. App. 1a. On May 24, 2002, the Court denied petitioner's timely petition for rehearing. App. 159a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Federal Constitution and the Federal Power Act, 16 U.S.C. §§ 791a-828c, are reprinted at App. 165a-175a.

STATEMENT OF THE CASE

In this case, a divided Louisiana Supreme Court affirmed a decision by the Louisiana Public Service Commission ("LPSC") barring a local electric utility (ELI) from recovering in retail rates – and thus "trapping" – costs that ELI was required to incur under a Federal Energy Regulatory Commission ("FERC") rate schedule. By unlawfully determining the "prudence" of ELI's compliance with a FERC-approved rate schedule, the state court and the LPSC are exercising jurisdiction that Congress assigned exclusively to FERC. The LPSC took these actions after FERC denied the complaint it previously had filed challenging the very allocation of costs in issue and after the D.C. Circuit affirmed that FERC decision.

The Louisiana Supreme Court decision is thus squarely contrary to *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*") and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986) ("*Nantahala*"). It is similarly contrary to the decisions of numerous state supreme courts and to decisions of the federal courts of appeals for the District of Columbia, First, Fourth, and Eighth Circuits. The only decision that provides any support for the Louisiana Supreme Court's judgment is an earlier decision of the Fifth Circuit that this Court granted certiorari to review, but that was dismissed when the parties settled the case. *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. dismissed*, 502 U.S. 937 (1991) ("*NOPSI*"). Both the decision below and the *NOPSI* decision are in clear and irreconcilable conflict with this Court's decisions. Yet those decisions have twice been misunderstood and misapplied. This Court's review is warranted to resolve the conflict.

Such review is important because the decision below not only undermines the integrity of the System Agreement governing an electric system providing service in Arkansas, Louisiana, Mississippi, and Texas, but also undermines the Congressional scheme for regulation of interstate power. The Federal Power Act directs FERC to "promote and encourage" "voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy" in the interest of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy." 16 U.S.C. § 824a(a). Congress gave FERC this jurisdiction precisely to prevent parochial local interests from impeding the achievement of benefits available through the coordinated operations of multi-state electric systems. This Congressional scheme will be substantially undermined if states may review for themselves the prudence of costs and benefits allocated by FERC pursuant to multi-state agreements and bar recovery of FERC-allocated costs. The need for review here is heightened by the strategy employed by the LPSC, and evidenced in this case, of using its own proceedings to subvert FERC's jurisdiction in order to serve its own interests. In view of the ruling below and *NOPSI*, a decision from this Court on this issue is the only certain means of preventing Louisiana and other state utility commissions from creating the disruptions of interstate commerce that the Federal Power Act was enacted to prevent.

1. The Multi-state Entergy System and FERC Rate Schedules. This case arises in the same "integrated power pool" involved in *MP&L*, 487 U.S. at 357, and *NOPSI*.[1] Petitioner ELI is an electric public utility that operates in Louisiana. It is a subsidiary of, and wholly owned by, a public utility holding company, Entergy Corporation. Entergy also owns four other utility operating companies, Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. "The five operating companies plan, construct, and operate their collective electric generating and transmission facilities as a single, integrated system serving parts of Louisiana, Arkansas, Mississippi, and Texas." App. 3a.

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[1] Entergy Corporation was formerly Middle South Utilities, Inc. App. 4a n.3.

The current Entergy System Agreement, adopted in 1982 and subsequently amended, governs arrangements among the operating companies for the transmission, sale, and exchange of energy. Its purpose is:

> "to provide the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the [operating companies] [and to] provide[] a basis 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 [operating companies]." [App. 3a-4a.]

The System Agreement is administered by a system-wide operating committee, the Entergy Operating Committee. The System Agreement is a rate schedule filed with and approved by FERC; any changes to the Agreement must be approved by FERC. See *Louisiana Pub. Serv. Comm'n.* v. *FERC*, 174 F.3d 218 (D.C. Cir. 1999) ("*LPSC*").

The System Agreement includes rate schedules that allocate resources and associated costs among the five operating companies and that are known as Service Schedules. These schedules are "formula" rate schedules in that they do not specify particular rates or cost allocations. Rather, they set forth formulas that prescribe how the allocations are to be calculated or determined and that delegate the application of certain aspects of the formula to the Entergy Operating Committee, subject to review by FERC in the event of claims that the formula had been misapplied. Once a Service Schedule is approved by FERC, it becomes part of the System Agreement.

One such service schedule – Schedule MSS-1, Reserve Equalization – is the subject of this case.[2] MSS-1 establishes a mechanism for equalizing generating reserves among the operating companies. Under MSS-1, each operating company bears responsibility for a share of the total Entergy system capability; that share is a function of the company's contribution to the System's peak load. Companies providing less than their calculated share of the System's capability make payments to companies providing more than their share. "Each of the operating companies makes or receives payments based on whether its capacity exceeds, equals, or is less than the system capability for which it is responsible." App. 5a. See also *LPSC*, 174 F.3d at 220 (characterizing MSS-1 as "the inter-company formula tariff that [FERC] administers to equalize costs among [the five Entergy operating companies]").

A generating unit must be "available" for use by the System, as defined in Section 10.02 of the System Agreement, in order to be counted as part of an operating company's capability in the calculation of MSS-1 payments.

During the mid-1980's, the Entergy operating companies had excess generating capacity. They implemented the Extended Reserve Shutdown ("ERS") Program, "to save money (for the customers, as well as for the companies themselves) by placing the excess generating units in an inactive, *i.e.*, extended reserve status." App. 6a. The System kept 24 units in ERS status in order to retain the capability to meet any future increase in power demand, yet "were able to reduce operating staff and maintenance costs and defer costs of repairing the units." *Id*.

The Entergy Operating Committee decided that units in ERS status should be considered "available" for purposes of

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[2] "MSS" refers to the former name of the System's service company, Middle South Services, Inc. The number "1" indicates only that this is one of several Service Schedules. App. 4a n.3.

calculating individual operating companies' capacity under MSS-1. As a result, ELI made higher MSS-1 payments than it would have made if none of the ERS units had been included in the MSS-1 computation.

2. The FERC ERS Proceedings. In 1993, FERC reviewed the System Agreement and initiated proceedings to determine, inter alia, whether Entergy had violated the Agreement by including the ERS units in the MSS-1 computations. The LPSC intervened in that FERC proceeding, filing a separate complaint alleging that Entergy had violated the System Agreement by treating the ERS units as "available" capacity and seeking retroactive refunds for ELI's LPSC-jurisdictional customers, plus accrued interest.

A FERC Administrative Law Judge ("ALJ") concluded that, although the end result was just, reasonable, and not unduly discriminatory, the ERS units were not "available" for purposes of MSS-1 calculations within the meaning of Section 10.02 of the System Agreement, as then defined,[3] and therefore concluded that Entergy had violated the System Agreement. He rejected, however, the LPSC's request for refunds based on several considerations, including the substantial savings for ratepayers generated by the ERS program and his conclusion that the end result was just, reasonable, and nondiscriminatory. He also determined that the System Agreement should be amended going forward to

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[3] Prior to August 5, 1997, section 10.02 of the System Agreement provided in pertinent part:

> "A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling. A unit is considered unavailable if in the judgment of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage." [App. 112a.]

allow ERS program units to be deemed "available" in the future. App. 124a-125a, 139a-140a, 151a-152a.

FERC affirmed that decision, including the ALJ's rejection of the LPSC's request for a refund of alleged overpayments. In so doing, FERC explained that Entergy's ERS program had provided significant benefits and overall cost-savings for the system and that it was "just" and "reasonable" for Entergy to include ERS units in the MSS-1 calculation:

> By including ERS units in the Schedule MSS-1 computation, Entergy continued the previously-approved equalization approach that was established for excess capacity on the Entergy System. Moreover, if Entergy had not undertaken to reduce costs for its system by implementing the ERS program, these units would have been eligible for inclusion in Schedule MSS-1. *We do not believe that the Operating Companies should lose the right to have their costs equalized when they take advantage of the ERS program which, we note, provides very significant benefits for the Entergy system.*
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> . . . .
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> . . . By exercising our discretion not to order refunds, we are simply acting consistent with the equities in this case. Indeed, the record evidence demonstrates that, although Entergy acted in a manner inconsistent with Schedule MSS-1, *the end result was just, reasonable, and not unduly discriminatory*. App. 102a-103a (emphases supplied) (footnotes omitted).]

FERC therefore approved a proposed amendment to the System Agreement, effective August 5, 1997, which authorized the Entergy Operating Committee to consider ERS units "available" in MSS-1 calculations if the "'intent of [the Operating Committee is to] return[] the unit to service at a future date in order to meet Entergy System requirements.'" App. 104a (emphasis omitted). FERC further required that the:

> "Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service." [*Id.* (emphasis omitted)].

In making this decision, FERC rejected both the argument of the LPSC that refunds should be allowed for past periods and the argument of the LPSC that the ERS units should be excluded from MSS-1 payment calculations in the future. FERC also denied the LPSC's request for rehearing. App. 160a-164a.

The LPSC pursued its arguments on appeal, but its contentions were rejected by the Court of Appeals for the D.C. Circuit. See *LPSC*, 174 F.3d at 231. In addition to holding that FERC's denial of refunds was lawful, the court of appeals rejected the LPSC's challenge to the amendment to Section 10.02, authorizing inclusion of ERS units in MSS-1 calculations if the Operating Committee intends to return the units to service in the future. The court of appeals held that the amendment was just and reasonable and, if necessary, that "discriminatory implementation of the amendment could be remedied in a proceeding under [Federal Power Act] § 206, 16 U.S.C. § 824e." *Id.*

Following FERC's amendment of the System Agreement, the Operating Committee determined that the ERS units should be considered "available" within the meaning of the amended definition. Based on the presentation of the Director of Resource Planning for Entergy, the Committee concluded that the ERS units were "available" within the meaning of that amendment. Neither the LPSC nor any other party challenged this determination before FERC. Therefore, after August 5, 1997, the ERS units were included in the MSS-1 calculations pursuant to the amended MSS-1 that had been approved by FERC. The reasonableness of this determination was verified by subsequent events for it is undisputed that, consistent with the Operating Committee's assessment, "[b]y 1999, all of the ERS units, with the exception of one, had either been returned to active service, or w[ere] scheduled for return to service." App. 6a n.4.

3. The LPSC Proceedings. During all relevant times, ELI annually filed with the LPSC financial data for the previous year relating to its cost of providing service. The LPSC uses these data to adjust ELI's retail rates. ELI's 1997 filing was based upon data from 1996 and included its MSS-1 payments made during 1996. All of the generating units in ERS status were treated as "available."

The LPSC ordered ELI to remove from its calculations "all MSS-1 overpayments incurred on or after August 6, 1997" that resulted from the inclusion of the ERS units in the MSS-1 calculation. App. 83a. It further ordered ELI to credit the overpayments "back to the ratepayers." *Id.*

The LPSC concluded that Entergy's treatment of ERS units benefited Entergy Arkansas (formerly Arkansas Power & Light Company) and Entergy New Orleans (formerly New Orleans Public Service, Inc.) and penalized ELI and Entergy Mississippi (formerly Mississippi Power & Light Company). The LPSC recognized that under the filed-rate doctrine, state regulators may not challenge FERC-approved wholesale rates and "trap" wholesale costs incurred by a utility. Nonetheless, the LPSC held that the *Pike County* exception applied in this case. Under that exception, a state may review the prudence of a utility's decision to purchase power at a FERC-approved rate if and only if the utility has the right to refuse to purchase that power. *MP&L,* 487 U.S. at 373-74; *Nanatahala,* 476 U.S. at 972 (discussing *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 465 A.2d 735, 737-38 (Pa. 1983)). The LPSC stated that:

> though FERC has exclusive jurisdiction over the issue of whether the System Agreement has been violated, there currently exists no FERC order that has found that the Operating Committee's decision is in compliance with the System Agreement. In the absence of such FERC determination, the Commission can scrutinize the prudence of the Operating Committee's decision without violating the Supremacy Clause insofar as that decision affects retail rates. [App. 65a.]

The LPSC then determined that ELI did not consider the effect of the System's treatment of ERS units on its retail rates in Louisiana after August 5, 1997, and that the company failed to minimize its operating costs by continuing such treatment. App. 73a-74a. Moreover, the LPSC stated that ELI's duty to avoid imprudent costs includes the duty to follow the criteria set in the System Agreement to determine the available status of ERS units after August 5, 1997. It found that the Operating Committee's decision was made without complete or accurate information regarding the costs of returning ERS units to service and without ascertaining "'current and future resource needs, the projected length of time the unit would be in ERS status, [the] projected cost of maintaining such unit, and the projected cost of returning the unit to service'" under the amended System Agreement. *Id.* at 74a. Thus, the LPSC concluded that ELI knew or should have known that the MSS-1 payments made after August 5, 1997 were unreasonable at the time the payments were made and that it was imprudent for ELI to pay them even though the System had determined that they were due. The decision prevented ELI from recovering these costs from retail customers and thus trapped these costs.

ELI's arguments that the LPSC's review of the MSS-1 Service Schedule is preempted were rejected. The LPSC agreed that it lacked authority to review the reasonableness of ELI's 1996 MSS-1 payments, which are the MSS-1 payments that were included in the test year data that were under consideration in the case below. App. 64a. The LPSC further agreed that it lacked authority to order refunds of those payments in light of FERC's express refusal to order such refunds. *Id*. But the LPSC reasoned that FERC had not considered whether the Operating Committee's decision to use the ERS units in its calculations after August 5, 1997 complied with the amended System Agreement. Rather than challenge the Operating Committee's decision at FERC, as it had done previously, the LPSC concluded that it had "the authority to assess the prudence of ELI's decision to continue to accord MSS-1 treatment to ERS units subsequent to the FERC Order No. 415 dated August 5, 1997." App. 69a-72a (emphasis omitted).

4. The Louisiana Supreme Court's Decision. ELI filed a petition for judicial review of the LPSC order on February 17, 1999. The district court, however, affirmed the order, stating that the ruling was "well within [the LPSC's] constitutional and statutory authority," and was neither arbitrary nor capricious. App. 22a. ELI appealed to the Louisiana Supreme Court.

In an opinion without citation to *MP&L*, the Louisiana Supreme Court affirmed the district court's decision. It recited the LPSC's two reasons for rejecting preemption: (1) that FERC had not expressly ruled that the Entergy Operating Committee's decision to include ERS units after August 5, 1997 complied with the System Agreement; and (2) that under *Pike County,* the LPSC had jurisdiction to review the prudence of the decision to continue to include ERS units in MSS-1 Service Schedule of the System Agreement after August 5, 1997, even though the LPSC concededly lacked jurisdiction to review the allocation of interstate wholesale costs under that same Agreement. App. 14a-15a. The Louisiana Supreme Court essentially adopted this reasoning.

First, relying on *Pike County* and *NOPSI,* the state court held that the LPSC was "not attempting to regulate interstate wholesale rates" and had not "challenged the validity of the

FERC's declination to order refunds of amounts paid in violation of the System Agreement prior to the amendment." App. 19a. Instead, the court held, "the LPSC has merely examined the prudence of ELI's failure to make steps to minimize its MSS-1 payments after the effective date of the amendment to Section 10.02 of the System Agreement." *Id.*

Second, the Louisiana Court agreed with the LPSC that "the FERC's determination encompassed treatment of the ERS units *prior to* the effective date of the amendment" and that "FERC never ruled on the issue of whether ELI's decision to continue to include the ERS units is a prudent one [or] whether ELI must continue to make overpayments to the other Entergy operating companies." App. 19a.

For both of these reasons, the Louisiana Supreme Court affirmed the LPSC's decision that its review of the decision to include the ERS units in MSS-1, a FERC rate schedule, was not preempted. App. 20a.

Justices Kimball, Lobrano, and Traylor dissented. Justice Kimball's dissent pointed out that the majority had acknowledged that (i) the System Agreement is a FERC rate schedule, (ii) that FERC amended the System Agreement to state that ERS units may be included in calculations for MSS-1 payments if a specified condition is met, and (iii) that "FERC has exclusive jurisdiction over the issue of whether ELI has violated the System Agreement." App. 21a. She stated that the LPSC found ELI's decision to continue to include ERS units after August 5, 1997 imprudent, "because the LPSC found that ELI did not meet the conditions imposed in the amended System Agreement." *Id.* Thus, Justice Kimball concluded, "the LPSC is simply trying to do indirectly what it may not do directly, namely, determine that ELI violated a FERC tariff." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents a recurring question under the Federal Power Act that has been decided in sharp conflict with this Court's prior decisions and those of all other courts, with the exception of the United States Court of Appeals for the Fifth Circuit. The Louisiana Supreme Court established a broad exception to FERC's exclusive jurisdiction over wholesale rates of electricity under the Federal Power Act. It held that until FERC holds otherwise, states have jurisdiction to determine whether a FERC rate schedule has been violated, and more specifically, to determine whether a utility that is part of an integrated, multi-state power system is imprudent for failing to "minimize" the costs incurred under a rate schedule approved by FERC. App. 20a.

Under this holding, each state served by a multi-state utility system may do what this Court held to be preempted in *MP&L* and *Nantahala* – effectively re-litigate FERC-approved rates and cost allocations and "trap" FERC-mandated costs – subject only to state court review. Other states in the Entergy system and in other multi-state power systems may be forced to follow suit to protect the interests of their consumers. The result will be a patchwork of parochial rulings that is the antithesis of what Congress intended in enacting the Federal Power Act. This decision is worthy of the Court's review because it conflicts with decisions of this Court, is the subject of a conflict in the lower courts, and is critically important to the administration of the federal statute governing regulation of the electric power industry.

I. THE DECISION BELOW CONFLICTS WITH *MP&L*, *NANTAHALA*, AND OTHER DECISIONS OF THIS COURT, THE LOWER COURTS, AND FERC.

Bulk power arrangements among utilities are "particularly likely to affect more than one State, " and "uncontrolled [state] regulation" of utilities in multi-state systems can "patently interfere with broader national interests." *Arkansas Elec. Co-op. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). In the Federal Power Act, accordingly, Congress established FERC as a single, neutral forum to assure that wholesale rates and contracts affecting such rates are "just, reasonable, and nondiscriminatory," and to balance the interests of shareholders and ratepayers in setting wholesale rates and allocating the prudent wholesale costs among utilities serving different states.[4] See 16 U.S.C. §§ 824d, 824e; *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). State regulation – which would impair interstate commerce by allowing the litigation and re-litigation of the reasonableness of wholesale power rates and interstate cost allocations in multiple state forums – is forbidden. *Arkansas Elec. Co-op. Corp.*, 461 U.S. at 377. The Act protects local interests by giving states and municipalities rights to participate in FERC proceedings and to file complaints with FERC. 16 U.S.C. §§ 824d, 824e, 825e.

"It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over that subject." *MP&L*, 487 U.S. at 377 (Scalia, J., concurring). This Court has construed the Federal Power Act to give FERC "plenary jurisdiction" to make all determinations required to regulate wholesale rates and to allocate costs among affiliated utilities, regardless of the "impact" on state regulation. See *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). See also *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951). "FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates. . . . States may not bar regulated utilities from passing through to retail consumers FERC-

[4] *See* 16 U.S.C. § 824 (providing FERC with exclusive jurisdiction to regulate the "transmission" and the "sale of electric energy at wholesale in interstate commerce"); *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) (FERC has plenary jurisdiction to regulate all aspects of wholesale transactions, regardless of the impact on state regulation).

mandated wholesale rates." *MP&L*, 487 U.S. at 371-72 (citation omitted). The filed-rate doctrine and other preemption principles "enforce the exclusive jurisdiction vested by Congress in FERC." *Nantahala*, 476 U.S. at 966. However the state characterizes its action, it is preempted if its "effect" is to interfere with FERC's interstate "allocation of costs." *Maryland* v. *Louisiana*, 451 U.S. 725, 749-50 (1981).

In this case, in violation of these principles, the Louisiana Supreme Court held that the LPSC had jurisdiction to decide that "ELI's failure to make steps to minimize its MSS-1 payments after the effective date of the amendment to Section 10.02 of the System Agreement" was imprudent. App. 19a. The state court rested its holding on two purported exceptions to FERC's exclusive jurisdiction. First, the state court held that the *Pike County* exception, which allows states to determine the prudence of certain decisions by utilities to make purchases at FERC-filed rates, applied. *Id*. at 15a-17a. Second, the Louisiana court held that the LPSC had jurisdiction, because "FERC never ruled on the issue of whether ELI's decision [sic] to continue to include the ERS units is a prudent one." *Id*. at 19a.[5] In *MP&L* and *Nantahala*, however, this Court affirmed the filed-rate doctrine in this very context. It expressly rejected the application of the *Pike County* exception to rate schedules governing the allocation of costs within integrated, multi-state systems, and it held that States are prohibited from regulating in areas governed by FERC even if FERC has not yet acted.

In *MP&L*, the Court reviewed a judgment of the Mississippi Supreme Court that required the state utility commission to examine the prudence of the management decisions that led Middle South Utilities (now Entergy) to construct a nuclear power plant called Grand Gulf 1. The

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[5] The decision was not, of course, ELI's, but that of the System Operating Committee that administers the System Agreement.

Mississippi court stated that it had become "obvious" by the early 1980's, that "both the cost and demand projections related to Grand Gulf were terribly incorrect," and thus ordered a prudence "review" to determine whether the system "acted reasonably when they constructed Grand Gulf 1, in light of the change in demand for electric power . . . and the sudden escalation of costs." *State ex rel. Pittman* v. *Mississippi Pub. Serv. Comm'n*, 506 So. 2d 978, 986, 987 (Miss. 1987) (en banc); *MP&L*, 487 U.S. at 368. This review would have decided the extent to which MP&L had been imprudent with respect to Grand Gulf expenditures and thus the extent to which Grand Gulf costs should be "trapped" and borne by the utility's shareholders, rather than "passed on to MP&L's retail customers." *MP&L*, 487 U.S. at 372 n.12. The state court also held that "'[a]s to those matters not resolved by the FERC, state regulation is *not preempted provided that* State regulation would not contradict or undermine FERC determinations and federal interests, or impose inconsistent obligations on the utility companies involved.'" 506 So. 2d at 986.

MP&L, however, held that the state court's judgment was preempted by federal law. It reaffirmed this Court's earlier decision in *Nantahala* and held that the Federal Power Act and the Supremacy Clause "preclude [such a] review of MP&L's managerial prudence." 487 U.S. at 369. It held that a state retail ratemaking body "may not enter an order 'trapping' the costs MP&L [and other system operating companies are] mandated to pay under the FERC order allocating Grand Gulf power or undertake a 'prudence' review for the purpose of deciding whether to enter such an order." *Id.* at 372 & n.12. "States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair." *Id.* at 371. See also *Nantahala*, 476 U.S. at 970.

In *MP&L*, this Court made it explicit that FERC had exclusive jurisdiction to determine the prudence of decisions of MP&L and other system operating companies. All such "prudence" claims, the Court said, were matters "FERC easily could have considered in determining whether to permit [the system] to recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies and in allocating Grand Gulf Power" among those companies. *MP&L*, 487 U.S. at 375. The Court explicitly rejected the argument that state commissions have authority to bar recovery of FERC-mandated wholesale costs on grounds that could have been raised before FERC. *Id.* At bottom, "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id*.

Equally to the point, the *MP&L* Court specifically recited the *Pike County* exception and rejected its application to the case before it. As the Court observed, that exception applies only if a utility unreasonably purchases high-cost power at FERC-approved rates when the utility "had the legal right to refuse to buy that power." *Id*. at 374. Just as here, in *MP&L*, the utilities had no choice but to accept the allocation of costs and power in the FERC-approved rate schedule: "[I]f the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for." *Id.* All nine members of the Court recognized that although FERC determines only the seller's prudence in an ordinary bilateral transaction, FERC necessarily determines the prudence of buyer and seller when, as here, the power supply arrangements are those of an integrated power pool. *Id*. at 357, 363, 374-75; *id.* at 378 (Scalia, J., concurring); *id.* at 386 (Brennan, J., dissenting). See also *AEP Generating Co.*, 36 FERC ¶ 61,226 (1986); *AEP Generating Co. & Ky. Power Co.*, 38 FERC ¶ 61,243 (1987).

Similarly, in *Nantahala*, this Court held that state retail rate orders may not disregard FERC's allocation of low-cost power among operating companies in an affiliated, multi-state system in setting retail rates. This allocation was part and parcel of FERC's exclusive authority to determine wholesale rates, because it "determine[d] the amount of low-cost power that [Nantahala] may obtain, and FERC required Nantahala's wholesale rate to be filed in accordance with that allocation." 476 U.S. at 967. Thus, the Court explained:

> The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. *Such a "trapping" of costs is prohibited.* Here, [the wholesaler as seller] cannot fully recover its costs of purchasing at the FERC-approved rate if [the state commission's] order is allowed to stand. [*Id*. at 970 (emphasis supplied).]

In *Nantahala*, too, the Court expressly found the *Pike County* exception inapplicable. "Without deciding this issue," the Court assumed "that a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price." *Id*. at 972 (emphasis ommitted). Nantahala, however, "could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation," *id*. at 972-73; accordingly, *Pike County* did not apply.

MP&L and *Nantahala* govern this case. This authority precludes the argument that the LPSC or the state court can decide that ELI imprudently failed to minimize its MSS-1 payments. Under the System Agreement, the Entergy Operating Committee determined whether ERS units should be included in MSS-1 payment calculations. The System Agreement – which is a binding FERC rate schedule – governs ELI's costs. If the LPSC wishes to challenge that determination, it must do so before FERC, which has exclusive jurisdiction to decide whether its rate schedule, the System Agreement, was violated or imprudent. Indeed, the FERC proceedings addressing the inclusion of ERS units in MSS-1 payment calculations prior to August 5, 1997, demonstrate that FERC has jurisdiction over this question and that the state action here is preempted. As *MP&L* and *Nantahala* hold, the *Pike County* exception has no application in these circumstances.

The Louisiana Supreme Court also erred in concluding that the LPSC had jurisdiction to assess the prudence of the Operating Committee's decision to include ERS units in MSS-1 payment calculations, because "FERC never ruled on the issue of whether ELI's decision [sic] to continue to include the ERS units is a prudent one." App. 19a. In essence, the court is saying that the LPSC can evade FERC's exclusive jurisdiction simply by deciding not to file a complaint with FERC challenging the Operating Committee's determination under Section 10.02 of the System Agreement. In *MP&L*, this Court considered and rejected the Mississippi court's holding that "the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." 487 U.S. at 374 (citing 506 So. 2d at 986). The Court explained that it has "long rejected this sort of case-by-case analysis of the impact of state regulation upon the national interest in power regulation cases." *Id.* (internal quotation marks omitted) (quoting *Nantahala*, 476 U.S. at 966). Thus, "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts.

The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id*. at 375.

Ultimately, in *MP&L*, the Court concluded that the issue of prudence was not discussed in FERC proceedings or on review of FERC orders "because no party raised the issue, not because it was a matter beyond the scope of FERC's jurisdiction." *Id*. at 375. Similarly here, the LPSC's failure to challenge the Operating Committee's decision to include ERS units in MSS-1 payments after August 5, 1997 does not deprive FERC of exclusive jurisdiction. The LPSC simply "cannot evaluate . . . the prudence of [the] decision to [include ERS costs in MSS-1 payment calculations] without traversing matters squarely within FERC's jurisdiction." *Id*. at 376.

The decision below conflicts not only with this Court's precedent, but also with the decisions of numerous state supreme courts. In addition to the numerous such decisions that hold that the filed-rate doctrine requires that FERC-regulated expenses be treated as reasonable operating expenses in setting retail rates,[6] at least five state supreme courts that have held that FERC's jurisdiction preempts states from rejecting FERC-mandated costs on prudence grounds. See, *e.g.*, *General Motors Corp.* v. *Illinois Commerce Comm'n*, 574 N.E.2d 650, 655-58 (Ill. 1991) (filed rate doctrine applies to costs associated with procurement of gas and state commission has no authority to conduct prudence review of such costs); *Maine Yankee Atomic Power Co.* v. *Maine Pub. Utils. Comm'n*, 581 A.2d 799, 803-04 (Me. 1990) (FERC has exclusive jurisdiction to determine utility's plant decommissioning expense and state commission could not

[6] *See Narragansett Elec. Co.* v. *Burke*, 381 A.2d 1358, 1362 (R.I. 1977); *Hopewell Cogeneration Ltd. P'ship* v. *State Corp. Comm'n*, 453 S.E.2d 277, 282 (Va. 1995); *Hamm* v. *Public Serv. Comm'n*, 425 S.E.2d 28, 30 (S.C. 1992); *Appeal of Northern Utils., Inc.*, 617 A.2d 1184, 1186 (N.H. 1992).

assess the prudence of that expense); *Eastern Edison Co.* v. *Department of Pub. Utils.*, 446 N.E.2d 684, 688 (Mass. 1983) (FERC has exclusive jurisdiction to determine whether utility system was imprudent in failing to take greater steps to minimize risks in construction of plant); *Northern States Power Co.* v. *Minnesota Pub. Utils. Comm'n*, 344 N.W.2d 374, 381-82 & n.17 (Minn. 1984) (FERC has exclusive jurisdiction to assess the prudence of system's decision to cancel a nuclear plant and obtain coal-fired power instead); *Northern States Power Co.* v. *Hagan*, 314 N.W.2d 32, 38 (N.D. 1981) ("it would undermine the supremacy clause and the preemption doctrine for the [state] to indirectly assert jurisdiction over the wholesale rates by investigating the reasonableness of underlying costs in a proceeding involving retail rates").

The courts of appeals for the Fourth, First, Ninth, Eighth, and District of Columbia Circuits, too, have each upheld FERC's exclusive jurisdiction to make prudence decisions that affect FERC rate schedules governing integrated, multi-state power systems. See *Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987) (holding that the essence of the *Pike County* exception is choice and therefore that the prudence inquiry that the state commission sought to undertake was an impermissible duplication of the inquiry into the justness and reasonableness of the allocation agreement that was subject to the exclusive jurisdiction of FERC). See also *Public Serv. Co.* v. *Patch*, 167 F.3d 15, 27 (1st Cir. 1998); *Transmission Agency* v. *Sierra Pac. Power Co.*, 295 F.3d 918, 930 (9th Cir. 2002); *Middle S. Energy, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985); *South Dakota Pub. Utils. Comm'n* v. *FERC*, 690 F.2d 674 (8th Cir. 1982) (per curiam); *Anaheim, Cal.* v. *FERC*, 669 F.2d 799 (D.C. Cir. 1981).[7]

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[7] The only circumstances in which either FERC or the lower courts have permitted states to bar recovery of costs under FERC rate schedules

The only decision that provided any support for the LPSC's action here is the decision of the Fifth Circuit in *NOPSI*. In that case, the court of appeals recognized that a New Orleans City Council order "prevented NOPSI from recovering, in its retail rate, wholesale costs FERC ordered it to incur as a result of its participation in [Grand Gulf 1]." 911 F.2d at 995. The Fifth Circuit also recognized (as the Louisiana Supreme Court did not) that states could not regulate matters that are within FERC's jurisdiction. *Id.* at 1001. However, the Fifth Circuit held that New Orleans had jurisdiction to determine that NOPSI's failure to minimize its allocation of Grand Gulf 1 power was imprudent. *Id.* at 1002. The court concluded that *MP&L* and *Nantahala* established only that "FERC had jurisdiction to determine whether [NOPSI and other system operating companies] acted prudently in deciding to participate in the Grand Gulf venture" initially, and that these cases had not decided "whether FERC has jurisdiction to determine whether NOPSI acted prudently once the Grand Gulf project was underway." *Id.* at 1001. Thus, the court held that states, and not FERC, have exclusive jurisdiction to determine the "prudence" of a utility's failure to "minimize its losses" by "diversify[ing] its supply portfolio." *Id*. at 1001, 1002.

The decision below and *NOPSI* directly contravene this Court's decisions. The fact that the Louisiana Supreme Court and the Fifth Circuit so misread *MP&L*, *Nantahala*, and decades of preemption law – and held that state law review is the only limitation on state subversion of FERC regulation –

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is where FERC regulation has *not* allocated costs to a particular utility, and where the utility has a *choice* to obtain the power from one of many sources. *Pike County Light & Power Co.* v. *Pennsylvania. Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. 1983). *See also Kentucky W. Va. Gas Co.* v. *Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 608-09 (3d Cir. 1988); *Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 703 (N.H. 1985).

makes resolution of this conflict and review of this decision a matter of compelling importance.

II. RESOLUTION OF THIS CONFLICT IS A MATTER OF GREAT NATIONAL IMPORTANCE.

Resolution of the conflict described above is a matter of great national importance. In 1935, Congress enacted the Federal Power Act directing FERC to "promote and encourage" "voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy" in the interest of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy." 16 U.S.C. § 824a(a). See also Public Utility Holding Company Act, 15 U.S.C. § 79a(a) (finding that sales and exchanges of power within power pools "are not susceptible of effective control by any State"). In the years that followed, utility companies developed power pools and integrated power networks transcending state boundaries. In recent years, the electric utility industry has become much more highly interconnected and is now a national business.

This trend serves Congress' purpose in enacting the Federal Power Act. As one commenter summarized:

> It is universally accepted that interconnection and coordination of the facilities of separate electric companies is in the public interest. Among the most obvious benefits of such coordination are (1) the exploitation of economies of scale in building generating and transmission facilities; (2) the avoidance of unnecessary duplication of facilities; (3) the ability to place generating facilities at the most advantageous sites, regardless of ownership; (4) increased reliability because of the availability of emergency support from interconnected systems; and (5) operating economies which can be achieved by dispatching the lowest cost generation, regardless of ownership, to serve demands on the interconnected and coordinated systems. [K.

> Duffy, *Will the Supreme Court Lose Patience With Prudence?* 9 Energy L.J. 83, 98-99 (1988).]

See also Regional Transmission Organization, 65 Fed. Reg. 809 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35) (FERC Order No. 2000) (addressing the economic and service benefits of consolidation of small independent electricity transmission systems into large Regional Transmission Organizations). As a result, "[t]he necessity for federal leadership in securing planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest possible costs" is as pressing now as it was in 1935. S. Rep. No. 74-621, at 17 (1935).

This case is like *MP&L* and *Nantahala* in that here, as in those cases, the lower court embraced a sweeping exception to well-settled principles that would subvert the orderly scheme that Congress has created and impede fulfillment of Congress' stated purpose. Under this exception, each FERC cost allocation could be re-litigated in each state served by a multi-state power system, and states could interpose "local" parochial interests to preclude the integrated, multi-state planning that the Federal Power Act seeks to encourage. See Duffy, *supra* at 99 ("[a] pooling arrangement simply will not work if each participant continually seeks to maximize its own benefits or minimize its own costs at the expense of the other participants").

A state can always claim that a utility should have minimized its losses by purchasing lower-cost power or refusing to accept its allocated share of the costs of the multi-state system. "Only FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the [Federal Power Act] . . . . Lodging exclusive authority in FERC to consider the merits of the [allocation] thus forecloses the potential for differing state pronouncements regarding an agreement involving utilities regulated by various states." *Appalachian Power Co.*, 812 F.2d at 905. See also *Arkansas Elec. Co-op. Corp.*, 461 U.S.

at 377; *Southern Cal. Edison Co.*, 376 U.S. at 215-16; *Public Utils. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927) (expressing concern about parochial state regulation that burdens interstate commerce by requiring exclusive federal regulation of all wholesale power transactions), *overruled on other grounds by Arkansas Elec. Co-op Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *Massachusetts, Dep't of Pub. Utils.* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) (each state would seek to "benefit[] its residents to the detriment of its neighbors"). When the interests of several states are at odds because of their participation in a multi-state power system and where a decision of one state in favor of its citizens is likely to have an adverse effect on the citizens of other participating states, FERC's jurisdiction is most necessary. That critically important necessity is ignored and thus threatened by the state court decision in this case.

Indeed, related events in Louisiana underscore the threat to the regime of the Federal Power Act, for the LPSC's assertion of authority over FERC-jurisdictional issues in this case was not a one time event, but part of an emerging pattern that appears to represent an overall strategic plan. In another matter, the same special counsel to the LPSC in the case below and in the ERS proceedings at FERC advised the LPSC that when "the Louisiana Commission has a problem with what FERC wants to do" and when it faces "a matter of rather large consequence to the LPSC," the LPSC should not merely participate in proceedings before FERC, but should act in its own right. LPSC Sept. 19, 2001 Business and Executive Session Tr. at 78. Special counsel advised that "if somebody wanted to try to stop the LPSC, . . . it would happen on Louisiana turf." *Id.* at 83.

The LPSC is thus now using its asserted jurisdiction over ELI's prudence to re-determine matters that are within FERC's jurisdiction. Specifically, the LPSC filed a complaint at FERC that contended that the Entergy system has failed to achieve the "rough" production cost equalization required by FERC and that modifications to the System Agreement are required to make it just, reasonable, and nondiscriminatory within the meaning of the Federal Power Act,[8] and FERC is now conducting a massive proceeding in which it is addressing these issues and related issues raised by other state utility commissions that regulate different Entergy operating companies.[9] But rather than await and accept the outcome of this FERC proceeding, the LPSC has instituted a separate proceeding in which it is investigating, inter alia, whether "the production costs of the Entergy operating companies [are] equalized, or roughly equalized" and if not, whether "[ELI] acted imprudently in failing to seek changes in the [system] agreement that would bring about the appropriate cost equalization" and in which it would order rate reductions and refunds to the extent that such "imprudence" is found.[10] This proceeding requires the Entergy System to litigate the same matters before the LPSC that are pending before FERC.

The LPSC's other actions dramatically underscore the great national importance of resolving the issues presented in this Petition. Unless the Louisiana Supreme Court's holding is reviewed and reversed, the range of circumstances in which the LPSC and other state commissions can assert parochial interests to disrupt the interstate allocations of bulk power supply is virtually unlimited. The federal scheme for regulation of the electric power industry is profoundly endangered by the holdings in this case and in *NOPSI*.

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[8] *Louisiana Pub. Serv. Comm'n & the Council of the City of New Orleans* v. *Entergy Corp.*, 98 FERC ¶ 61,135, at 61,390 (2002).

[9] 98 FERC at 61,392-93

[10] *Investigation Of Retail Issues Related Entergy System Agreement Billings,* No. U-25888, slip op. at 1 (La. Pub. Serv. Comm'n Jan. 4, 2002).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 22, 2002

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