No. 02-299

IN THE
Supreme Court of the United States

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

On Writ of Certiorari to the Supreme Court of Louisiana

REPLY BRIEF OF PETITIONER

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INTRODUCTION AND SUMMARY OF ARGUMENT

In its Respondent's brief, the LPSC simply refuses to acknowledge the factors that establish the unlawfulness of its Order. Rather than exercise its statutory right to file a complaint before FERC, the LPSC here used its retail ratemaking authority to regulate an "area[] where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting such wholesale rates are reasonable." *Mississippi Power* v. *Miss. ex rel Moore,* 487 U.S. 354, 374 (1988) ("*MP&L*"). The LPSC did so by denying recovery in retail rates of wholesale generating costs that the FERC-approved tariff required ELI to incur and that FERC indisputably could find – and had previously found – to be just and reasonable.

In Opinion No. 415, FERC properly exercised jurisdiction over the question whether the Entergy System Operating Committee and the Entergy System (collectively "Entergy") may include ERS units in calculations of the equalization payments that ELI and its sister operating companies make to fairly allocate certain costs in this multistate system. Although FERC found that inclusion of ERS units had not been authorized by the System Agreement prior to August 5, 1997, FERC declined to order a retroactive refund because it concluded that the 23 ERS units at issue benefited Louisiana and the entire system and that the "end result" was a "just, reasonable, and not unduly discriminatory" charge. Pet. App. 161a. FERC also sought to "eliminate future disputes" by approving Entergy's proposed tariff amendment that gave it discretion to include ERS units in these calculations when it intended to return them to active service. *Id.* at 103a-104a.

After August 5, 1997, Entergy exercised this discretion by doing nothing more than continuing to calculate equalization payments by including the same 23 ERS units that FERC had already found to result in just and reasonable rates. Contrary to the LPSC's misstatements, Entergy has maintained throughout this litigation that it fully satisfied the substantive and procedural requirements of the amended tariff and that FERC or any other neutral tribunal would so find, particularly in light of the undisputed fact that all but one of the units were quickly returned to active service. Pet. App. 6a n.4. In all events, the LPSC's allegation is only that Entergy failed to follow certain "processes" in making a substantively valid decision; and if a violation were found on such a theory, it could not be remedied by a retroactive refund. But the decisive factor is that under the terms of the FERC-approved tariff, ELI was required to make whatever equalization payments Entergy assessed – unless FERC held otherwise.

This Court's decisions thus mandated that the LPSC pass through these costs and that it pursue its objections through a FERC complaint. *MP&L*, 487 U.S. at 372; *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 970 (1985). Instead, the LPSC denied recovery of – and unlawfully "trapped" – these costs. As the LPSC's Brief does not dispute, the LPSC further rested its disallowance on parochial grounds that are flatly inconsistent with FERC's explicit findings of system-wide benefits. Cf. Pet Br. 30-31; U.S. Br. 9-10, 29 (filed Mar. 2003); *MP&L*, 487 U.S. at 376.

In its Brief, the LPSC ignores all these facts, and disavows its and the Louisiana Supreme Court's prior statements that the Federal Power Act ("FPA" or "Act") gives FERC exclusive jurisdiction to determine if this FERC tariff has been violated. The LPSC now defends its judgment by contending that the Act gives state commissions "concurrent" jurisdiction to enforce FERC tariffs. It contends that it may disallow ELI's costs on the basis of its finding that Entergy (over whom the LPSC has no jurisdiction) violated the FERC tariff in determining the amount of ELI's equalization payments – unless and until FERC expressly rules that the charges are lawful for the precise period in question.

This rule would create all the evils that the FPA was designed to prevent, and it is foreclosed by the Act's text, structure, and history. The LPSC tries to justify its Order by relying on cases that are irrelevant or that squarely bar the LPSC's claim. In each, state law governed the resolution of specific aspects of disputes between parties to bilateral power supply contracts only because FERC had disclaimed (or was found not to have) exclusive jurisdiction over the issues.

Here, by contrast, FERC has exercised exclusive jurisdiction over all questions that affect allocations of power costs within multistate systems – whether they are characterized as matters of "prudence, interpretation . . . , or cost allocation." *MP&L*, 487 U.S. at 378-79 (Scalia, J., concurring) (quotations omitted). As the LPSC concedes, there is no issue governed by state law. The LPSC thus had no jurisdiction to resolve the federal issues under the FPA's "bright line" that divides federal and state authority.

I. THE LPSC TRAPPED COSTS THAT ELI WAS REQUIRED TO INCUR UNDER THE TARIFF.

Contrary to the LPSC's claims (Resp. Br. 43), the principles that control this case are not "new." Foremost, they are simply applications of *MP&L*, *Nantahala*, and the filed rate doctrine.

Instead of approving amended MSS-1, FERC could have required Entergy periodically to make filings that set forth the precise monthly equalization payments that were to be made among its operating companies or that listed all the ERS units and other units that were treated as "available." Had FERC done so, there is no question but that the filed rate doctrine would bar the instant disallowance. But the rate schedule that FERC approved has the same preemptive effect. Under it, Entergy is delegated discretion to make availability determinations based on consideration of certain factors, and it calculates the resulting equalization payments, with recourse only to FERC if any party disagrees with any aspect of these determinations. Pet. App. 103a-105a; J.A. 17, 14.

Under the terms of the tariff, Entergy thus makes a centralized assessment of the equalization payments that ELI and each other operating company must make, and these assessments bind each company just as surely as if the System Agreement imposed a definite numerical charge. As the United States explained, "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." U.S. Brief 15 (filed Dec. 2002). This payment regime means that ELI did not have any "choice" over whether to incur the charges that Entergy assessed. Thus, even if there were a basis for a finding that Entergy violated the terms of the tariff and imposed "an illegal charge" on ELI, the "filed rate doctrine" requires "state officials to accept" that charge in setting retail rates unless and until they are disallowed by FERC. *Id.* at 15 n.2 (quotations omitted).

That is the clear meaning of *MP&L* and *Nantahala.* They hold that the only situation in which a state commission can disallow a cost incurred under a FERC-approved tariff is where, as in *Pike County*, the utility was not required to incur the charge because the tariff granted the utility "the legal right to refuse to buy [] power" and to obtain the same "quantity" at a lower price from another source. *MP&L*, 487 U.S. at 374; *Nantahala*, 476 U.S. at 972-73 (citing *Pike County Light & Power Co.* v. *Pa. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983)). Because there is no such choice here, the LPSC's Order is invalid.

The LPSC's sole response to this argument is to misstate it. The LPSC asserts (Resp. Br. 38, 43-44) that the claim that ELI had no choice rested on the ground that a parent corporation can control its wholly-owned subsidiaries, and the LPSC claims that ELI is urging a "new rule of presumptive preemption" of holding companies' billing decisions. But

Pike County involved a sale from a parent to a wholly-owned subsidiary, and a "choice" existed there because the FERC-approved tariff gave the utility the right to cancel its contract to purchase power from its parent and to obtain power from other sources. 465 A.2d at 274-77. Thus, preemption here does not result from a parent's billings or its control over subsidiaries. It results from FERC's decision to approve a rate schedule that centralizes the administration of the System Agreement at Entergy and denies any choice to individual operating companies on the level of their equalization payments. The FERC-approved tariff thus eliminates the ability of each of five different retail ratemaking authorities to bar recovery of its utility's payments by interpreting the tariff and "finding" that Entergy violated its "objective terms." Compare Resp. Br. 38, with EEI Br. 11-12.

In this regard, contrary to the LPSC's contention (Resp. Br. 35), *MP&L* quite clearly establishes that a state commission cannot here disallow costs incurred by a retail subsidiary on the ground that its parent "breached the terms of a contract filed with . . . FERC" in assessing them. *MP&L* arose from FERC rate schedules that required MP&L to purchase 33% of the output of the Grand Gulf nuclear plant under a formula rate that was designed to recover 100% of its costs and that was administered by Entergy (then called Middle South Utilities).[1] Pursuant to this rate schedule, Entergy began billing MP&L "about $27 million" a month in Grand Gulf costs, and the Mississippi commission approved retail rates that passed through all these costs. 487 U.S. at 365-66.

The Mississippi Supreme Court reversed that order on the ground that these billings could not be reflected in retail rates unless the state commission first found them to be prudent. It directed "a complete review of the transactions between MP&L, [MSE] and MSU, and their effect on Grand Gulf

[1] *Middle S. Energy*, 26 FERC ¶ 63,044, 65,120 (1984) (approving Grand Gulf formula rate), *aff'd*, 31 FERC ¶ 61,305, 61,657 (1985).

expense" and a determination whether the "price" charged for the power was "prudent." *Id.* at 367, 376 (quotations omitted). Among the things that the Mississippi commission could have addressed on remand was whether Entergy had violated the formula rate tariff and "overcharged" MP&L.

However, this Court reversed on the ground that the FPA categorically preempts a state from disallowing any of the $27 million in monthly Grand Gulf billings to MP&L on any ground and that a state's exclusive remedy for any claimed overcharge is a complaint before FERC. *Id.* at 375. Justice Scalia's separate opinion noted that FERC's exclusive jurisdiction extends to all questions affecting such charges within an integrated multistate system whether "'characterize[d]" as "prudence, interpretation [of the basic service agreements], or cost allocation.'" *Id*. at 378 (Scalia, J., concurring) (quotations omitted).

II. THE LPSC'S ORDER WOULD BE PREEMPTED EVEN IF THE FILED RATE DOCTRINE WERE INAPPLICABLE.

Further, the LPSC's Order would be preempted even if the filed rate doctrine were inapplicable. As the LPSC now admits, its Order can be upheld only if state utility commissions have jurisdiction to adjudicate whether Entergy violated the FERC tariff and to remedy that violation by nullifying the assessments for the only purpose for which they ultimately matter: the recovery of the costs from retail customers. But the questions of the proper interpretation of this tariff, whether it has been violated, and the remedy for any violation are matters that are within FERC's exclusive jurisdiction and are inextricably interrelated with the establishment of just and reasonable wholesale rates and cost allocations in multistate systems.

Ironically, the LPSC concedes (Resp. Br. 20) that FERC has exclusive jurisdiction to enforce just and reasonable wholesale electric rates and arrangements affecting those rates, which are requirements of § 205(a) of the Act. 16 U.S.C. § 824d(a). However, it contends that FERC does not have exclusive jurisdiction to enforce § 205(c)'s requirement that utilities file schedules showing all charges and all classifications and practices affecting charges. *Id*. § 824d(c).

Rather, the LPSC's contention is that states and FERC have "concurrent" jurisdiction to enforce § 205(c). It claims that state commissions may – unless FERC has issued a declaratory ruling on the precise subject for the precise time in question – interpret a FERC tariff, determine that a utility's charges violate it, and refuse to pass through the resulting "overcharge" in retail rates. The LPSC maintains (Resp. Br. 44) that this concurrent jurisdiction over tariffs is confirmed by legislative history that the Act (and the Public Utility Holding Company Act) was intended to "assist" states and extend federal regulation only to matters that cannot be effectively controlled by them. It also contends that FERC and court decisions have so held. The LPSC is wrong on all counts.

A. The LPSC's Claim Is Foreclosed By The Act's Terms, Structure And History.

Sections 205(a) and 205(c) are interrelated provisions of a statute that codified earlier constitutional holdings that barred any form of state regulation of wholesale sales of electricity. Pet. Br. 22-23. Under the Act, a state commission can no more refuse to pass through a wholesale charge on the ground that it was imposed in violation of the state's interpretation of a FERC tariff than the state could do so on the ground that the rate violated the state's interpretation of the FPA requirement that rates be just, reasonable, and nondiscriminatory.

Both are matters that are on the federal side of the "bright line" between the wholesale electric services regulated by FERC and the retail electric services regulated by states. *FPC* v. *S. Cal. Edison Co.*, 376 U.S. 205, 214-15 (1964). In this regard, this Court has repeatedly rejected claims that the legislative history of the 1935 Acts permits any role for states in assessing the propriety of wholesale transactions. *Id*. at 216; *New York* v. *FERC*, 535 U.S. 1, 6, 20-24 (2002).

The LPSC has no textual basis for its claim. Rather, the LPSC's claim rests on an attempt to draw "inferences" from limitations that Congress imposed on FERC's remedial powers that have nothing to do with enforcement of the FPA's tariff requirements.

In particular, the LPSC relies on the ground that, as originally enacted, the FPA denied FERC the power to order reparations or other forms of refunds when charges had been imposed *in conformity* with a tariff that had been properly filed and allowed to take effect without being suspended. If FERC later decided that the tariffed rates, terms, and conditions were unjust and unreasonable, its sole remedy was to order prospective changes to the tariff. See 16 U.S.C. § 824d(e); Resp. Br. 6 (citing legislative history); *Mont.-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co*, 341 U.S. 246, 256 (1951). Congress later granted FERC discretion to order refunds covering prescribed periods when it finds filed rates unlawful in complaint cases. But the LPSC asserts (Resp. Br. 27) that "FERC was given no other refund authority . . . for violations of a filed rate" and that Congress must have intended that courts and state commissions would enforce the tariff filing requirement.

This is wrong. FERC could not award reparations when tariffed rates are found unlawful because the Act's terms, structure, and history denied FERC this authority. By contrast, there never has been any limitation on the authority of FERC to order refunds or other appropriate remedies for *violations* of tariff filing requirements.[2] To the contrary,

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[2] Of course, even if there were relevant limitations on FERC's remedial authority, that would not establish that states have this authority. In this regard, the *reductio ad absurdum* of the LPSC's argument is that because Congress denied reparations authority to FERC, it must have intended that

FERC had this authority by virtue of its express jurisdiction to adjudicate complaints, 16 U.S.C. § 825e, and to take all actions "necessary and appropriate to carry out the provisions of the Act." *Id.* § 825h. Contrary to the LPSC's suggestion (Resp. Br. 28), FERC's remedial authority has been broadly construed during its history (*e.g.*, *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153, 157-60 (D.C. Cir. 1967)), and courts of appeals have long uniformly recognized FERC's authority to grant (or deny) refunds for tariff violations.[3]

The LPSC's claims are wrong for the additional reason that a rule that allowed states to adjudicate and remedy tariff violations is inconsistent with FERC's concededly exclusive jurisdiction to set just and reasonable rates. First, it is inevitable that states will interpret tariffs in ways that FERC would not and that state commissions would find tariff violations where FERC would not. That risk is great because tariffs in the federal power industry increasingly do not set dollar rates for units of output, but are complex formulas which are centrally administered by entities that assess charges on utilities in multiple states and that present a range of interpretative issues. See EEI Br. 19-23.

Further, ever if a charge were properly found to violate a tariff, that does not establish that there has been an "overcharge" for which a disallowance is appropriate – as FERC Opinion No. 415 illustrates. Unlike the Interstate Commerce Act ("ICA") and the Federal Communications Act ("FCA"), the FPA merely requires the filing of schedules

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other tribunals have this authority. This Court rejected that claim in *Montana-Dakota Utilities*, 341 U.S. at 254. Similarly, this Court has held that even when courts have jurisdiction over matters affecting rates, they cannot order remedies that are unavailable to FERC. *See Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1983).

[3] *See Borough of Ellwood City* v. *FERC*, 583 F.2d 642, 646-49 (3d Cir. 1978); *Belco Petroleum Corp.* v. *FERC* 589 F.2d 680, 686 (D.C. Cir. 1978); *Minn. Power & Light Co.* v. *FERC*, 852 F.2d 1070, 1073 (8th Cir. 1988); *Town of Concord* v. *FERC,* 955 F.2d 67, 72-73 (D.C. Cir. 1992).

containing rates and the practices and contracts that affect or relate to rates. The FPA does not also prohibit utilities from providing service at rates or terms that are not "specified" in the tariff (compare FCA, 47 U.S.C. § 203(c), and ICA, 49 U.S.C. § 10761(a) (1990)), and it therefore does not mandate refunds of past amounts that were unauthorized by tariffs (or collections of undercharges).[4] Accordingly, even when FERC concludes that particular charges were not authorized by the filed tariff, it can find that the charges were "just, reasonable, and nondiscriminatory" and that a refund is improper.[5] Instead, FERC can choose to remedy the violation of § 205(c) by imposing a fine or by ordering prospective changes in the tariff or some other appropriate measure.

For this reason, allowing state commissions to "enforce" tariff requirements is inconsistent with FERC's concededly exclusive jurisdiction to establish just and reasonable charges. The facts here vividly illustrate the point. FERC Opinion No. 415 found the inclusion of the 23 ERS units in ELI's equalization payments to be just and reasonable up to August 5, 1997 because, among other things, the units benefited Louisiana and the entire system. Yet the LPSC Order found the charges were unreasonable after August 6, 1997 and denied recovery of them based solely on parochial interests of Louisiana and without regard to the effect on the companies that serve other states and FERC's determination that these allocations serve the broad public interest. Pet. Br. 30-31, U.S. Br. 9-10, 12, 21-23 (filed Mar. 2003). This is precisely what the FPA was enacted to prevent. See Pet. Br. 22-23.

Finally, the LPSC's proposed rule would also lead to duplicative proceedings and litigation that ultimately would serve no purpose at all. First, the LPSC would obviously

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[4] *Compare Maislin Indus., U.S.* v. *Primary Steel*, 497 U.S. 116, 130-33 (1990); *id.* at 136-37 (Scalia, J., concurring), *with Town of Concord*, 955 F.2d at 73-74.

[5] *See Town of Concord*, 955 F.2d at 72-75; *Minn. Power & Light Co.*, 852 F.2d at 1073; *Borough of Ellwood City*, 583 F.2d at 646-49.

allow the proper "interpretation" of Entergy's tariff and the appropriate remedy for a violation to be litigated in each of five affected retail ratemaking bodies. Further, under the LPSC's scheme of concurrent FERC and state jurisdiction, the LPSC admits (Resp. Br. 42) that a utility can respond to an unfavorable state order by relitigating the issue at FERC. Any decision that FERC made in review of the state order not only would be controlling, but also would allow the utility to seek retroactive relief for any illegal trapping of costs. EEI Br. 12.[6] Plainly, the more efficient, practical remedy is for FERC to have exclusive jurisdiction such that states must litigate their claims before FERC in the first instance. That is another reason the FPA drew its "bright line."

B. The FERC And Judicial Decisions On Which The LPSC Relies Are Inapposite.

The LPSC also relies (Resp. Br. 28-33) on various decisions in which courts resolved disputes by interpreting provisions of contracts filed with FERC (or tariffs filed with the FCC and ICC) or in which FERC deferred issues to court proceedings under state law. The LPSC contends that these cases establish that FERC does not have exclusive jurisdiction over tariff enforcement, that courts can enforce FERC-filed contract unless FERC asserts primary jurisdiction, and that state utility commissions can necessarily do the same.

However, to the extent these decisions are relevant, they merely reflect the reality that the FPA does not require or permit FERC to exercise exclusive jurisdiction to resolve as a matter of federal law *all* issues that arise between electric utilities and wholesale customers. While all contracts that relate to rates are filed as part of FERC schedules, there are provisions of these contracts that are *not* "rates" or "rules or

[6] Because all issues will ultimately be resolved at FERC, it is ironic that the LPSC defends its proposal by contending (Resp. Br. 45-46) that it lacks the resources to litigate at FERC and that FERC has not always been responsive to the LPSC's claims.

regulations affecting or pertaining to rates" that are subject to § 205(a)'s requirement that they be "just and reasonable" and that can be governed by state law. There also are procedural and remedial rights that exist under state law that do not implicate any substantial interest protected by § 205(a).

FERC – and courts – thus distinguish between (1) issues that are within FERC's "exclusive jurisdiction" and that other tribunals can never decide, (2) issues that are within FERC's primary jurisdiction which FERC resolves only if asked to do so, and (3) issues that are governed by state law. The FPA and Natural Gas Act ("NGA") cases that the LPSC discusses are merely applications of these principles to factual situations that are very different than those presented here.

The decisive fact here is that FERC properly exercises exclusive jurisdiction over wholesale rates and contracts allocating generating costs in integrated multistate systems. Because FERC has this jurisdiction, "the States cannot have [it]." *MP&L*, 487 U.S. at 377 (Scalia, J., concurring).

FERC Decisions. The cited FERC decisions are very clear on these points. First, when there are disputes over the amounts due under tariffs or their reasonableness, FERC asserts "exclusive jurisdiction."[7] For example, in *Northern States Power Co.* v. *Southern Minnesota Municipal Power Agency*, 55 FERC ¶ 61,101 (1991), FERC was "asked to determine the amount of compensation due [the utility]," and "[r]esolution of this dispute involve[d] determining the respective obligations of the parties under rate schedules on file with the Commission." *Id.* at 61,343. Further, there, as here, the claim was made that if the tariff did not authorize particular charges, it was unjust and unreasonable and should be reformed. *Id*. at 61,344. Citing *MP&L* and *Nantahala*, FERC rejected the argument that state courts had concurrent jurisdiction and held that FERC's jurisdiction is exclusive:

[7] *See S. Co. Servs.*, 37 FERC ¶ 61,256, 61,652 (1986); *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009, 61,021 (1995).

> [The] allegations bring the heart of the dispute between the parties within the Commission's jurisdiction under the FPA to set rates and to ensure utility practices that are just and reasonable and not unduly discriminatory. That jurisdiction is exclusive. [*Id.*]

Second, FERC asserts "primary jurisdiction" over claims that are not within its exclusive jurisdiction and that "otherwise would be subject to state court jurisdiction," *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009, 61,021 (1995), but that have been brought before FERC and are found to satisfy a three part test. See *Ark. La. Gas Co.* v. *Hall*, 7 FERC ¶ 61,175 (1979) ("*Arkla*"). Such claims are within FERC's primary jurisdiction if it possesses relevant expertise, if uniform interpretation is necessary, or if the issues are important to FERC's regulations. *Id.* at 61,322.

Third, there are issues over which FERC declines to assert primary jurisdiction and defers to state law. These are illustrated by the case that LPSC miscites (Resp. Br. 33) for the proposition that FERC defers to state court or state commission interpretations of FERC tariffs. There, FERC declined jurisdiction and deferred to state law because "[t]here [wa]s no dispute here about the amount owed . . . for services rendered under rate schedules on file with the Commission pursuant to the Federal Power Act;" rather, the only issue was whether there was a right to offset amounts owed for power sales that FERC did *not* regulate. *Pub. Serv. Co.* v. *N.H. Elec. Coop.*, 55 FERC ¶ 61,028, 61,078 (1991). The other cited decisions where FERC deferred to state law presented equally inconsequential issues under the FPA.[8]

[8] In *Arkla*, 7 FERC at 61,332, FERC declined jurisdiction because the main issue was the application of a most favored nations clause to small gas producers that FERC had ceased regulating (and FERC assumed that the filed rate doctrine would bar recovery for periods when sales were regulated). *See also Portland Gen. Elec. Co.*, 72 FERC at 61,021 (whether a utility's "acquiescence in the appointment of an official to liquidate salvageable asserts from [a plant] constitutes an event of default

Court Decisions. The LPSC also relies on two sets of cases in which courts adjudicated claims between utilities and customers. The first are FCA and ICA decisions that are simply irrelevant. The second are FPA and NGA decisions that represent applications of the distinctions reflected in the foregoing FERC decisions to quite different issues than are presented here. None of the decisions supports the LPSC's claim that state tribunals can apply federal law to resolve issues that are within FERC's exclusive jurisdiction.

FCA And ICA Decisions. The LPSC primarily relies (Resp. Br. 25, 29) on decisions that do not arise under the FPA. Rather, these are cases that arose under the quite different provisions of the ICA or the FCA and that have no relevance here.[9]

Foremost, the FCA and ICA decisions have no possible implications for the ultimate questions in this case: whether or when state utility commissions may, in the exercise of retail ratemaking authority, interpret wholesale tariffs that are regulated by FERC and enforce purported "violations" of the tariffs by preventing the pass-through of FERC-regulated costs to retail customers. This is because unlike the FPA,

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under the contract"); *PPL Mont. LLC*, 96 FERC ¶ 61,313, 62,208 (2001) (whether retail utility violated contract by scheduling more power than necessary to supply its retail customers); *Schuylkill Energy Res., Inc.* v. *Pa. Power & Light Co.*, 8 FERC ¶ 61,056, 61,278 (1997) (whether utility was contractually required to provide transmission service to a power producer selling output to third parties), *clarified by* 82 FERC ¶ 61,027 (1998).

[9] *See Great N. Ry.* v. *Merchants' Elev. Co.*, 259 U.S. 285, 288-89 (1922) (ICA); *S. Pac. Transp. Co.* v. *San Antonio*, 748 F.2d 266, 272 (5th Cir. 1984) (ICA); *Union Pac. R.R.* v. *Structural Steel & Forge Co.*, 344 P.2d 157, 160 (Utah 1959) (ICA); *Pa. R.R.* v. *Nasshorn*, 116 N.Y.S.2d 365, 365 (N.Y. App. Div. 1952) (per curiam) (ICA); *Pa. R.R.* v. *Chromcraft Corp.*, 424 S.W.2d 104, 106 (Mo. Ct. App. 1967) (ICA); *United States* v. *Garner*, 134 F. Supp. 16, 18 (E.D.N.C. 1955) (ICC); *Consol. Terminal Sys., Inc.* v. *ITT World Communications, Inc.,* 535 F. Supp. 225, 233 (S.D.N.Y. 1982) (FCA); *Nat'l Communications Ass'n* v. *AT&T Co.*, 46 F.3d 220, 223 (2d Cir. 1995) (FCA).

there is no wholesale-retail split under the FCA and the ICA. The FCA and the ICA provide federal jurisdiction over all interstate services (both wholesale and retail) and state jurisdiction over all intrastate services (both wholesale and retail). See 49 U.S.C. § 10501; 47 U.S.C. §§ 151, 152.

Second, as noted *supra* at 10, the tariff provisions of the ICA and FCA are fundamentally different than those of the FPA. Unlike the FPA, the ICA and FCA prohibit deviations from filed tariffs. Judicial proceedings under those statutes could not interfere with the FCC's or the ICC's discretion to decline to order refunds on the ground that the untariffed charges are just and reasonable because those agencies have no such discretion. Further, unlike the FCA and the ICA, the FPA authorizes tariffs that do not set numerical prices, but that flow through costs determined under formulas that utilities apply and implement. 16 U.S.C. § 824d(d).

Third, unlike the FPA, the FCA and the ICA expressly confer upon courts jurisdiction to adjudicate private actions for violations of the FCA's and the ICA's tariff requirements. Each contains an election-of-remedy provision in which a claimant can either file a complaint before the agency or bring suit in federal district court. See 47 U.S.C. § 207 (FCA); 49 U.S.C. § 9 (1970) (ICA). Courts have thus held that the FCA and the ICA must grant courts jurisdiction to enforce tariffs in some circumstances because, otherwise, the filed rate doctrine "would render meaningless" the election-of-remedy provisions that the FCA and the ICC have. *Brown* v. *MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002); see *S. Pac. Transp. Co.* v. *San Antonio*, 748 F.2d 266, 271 n.11 (5th Cir. 1984).

FPA And NGA Decisions. While the LPSC also cites a few FPA and NGA decisions, none supports its contention that state courts and commissions have authority to resolve disputed federal issues affecting the level of charges over which FERC has exclusive jurisdiction. In this regard, the primary decision on which LPSC relies is *Pan American*

Petroleum Corp. v. *Superior Court*, 366 U.S. 656 (1961). But the Court's holding in that case was merely that, under the well-pleaded complaint rule, state courts have *jurisdiction* over the parties' dispute if the case is pled as a state contract claim. The Court held that the question whether the FPA preempted the plaintiffs' specific claim or proposed remedy for a contractual violation is a separate question that is to be raised as a defense, and the Court there did not reach any preemption question. *Id*. at 664.

Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571, 580-81 (1983), held that where a court acquires jurisdiction over the parties to a dispute, it cannot award a remedy that invades FERC's jurisdiction and that rests on the premise that FERC would have approved a different rate if it had been presented with those facts. Thus, even if the LPSC had jurisdiction over Entergy – as it does not – the LPSC could not disallow ELI's MSS-1 expenses by speculating that FERC would (1) find that Entergy's assessment of these charges violates the tariff and (2) remedy the violation by ordering a refund to ELI.

The LPSC also cites lower court decisions that concluded, in a range of different factual settings, that certain state remedies would not invade FERC's exclusive jurisdiction to assure the reasonableness of wholesale rates and the practices affecting them. *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561, 567 (8th Cir. 1962), held that the Act did not preempt enforcement of a state law contract to recover the overcharges that resulted from a Kansas law that had mandated rates ($0.11) in excess of prior contract rates ($0.07) and that was invalidated by this Court for that reason and held to be void *ab initio*. The Eighth Circuit held that courts could enforce the contract to refund the overcharges because it was not founded on any "liability created" by the NGA and because there had been no finding by the FPC that the contract was "unlawful." *Id.* Accord *Cleveland Elec. Ilum. Co.* v. *City of Cleveland*, 363 N.E.2d 759, 767 (Ohio Ct. App. 1976). Whether or not these decisions are correct on their facts, they provide no support for the LPSC's claim that it may disallow costs based on a finding that Entergy violated the FPA's tariff requirements, for that claim rests on a "liability created by the Act."

Finally, in *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir.), *amended by* 831 F.2d 557 (5th Cir. 1987), GSU claimed that Southern had acted in bad faith in refusing to renegotiate a contract in which it was entitled to sell specific quantities of power to GSU at prescribed rates. The Fifth Circuit held that the filed rate doctrine preempted any claim that good faith negotiation would have resulted in a lower rate, but that GSU was not preempted from claiming that a renegotiated contract would have "reduced the amount" of power GSU was required to purchase at the filed rate. *Id*. at 1471. That latter holding is inconsistent with *MP&L* (487 U.S. at 374) and *Nantahala* (476 U.S. at 374), which hold that the filed rate doctrine applies to both "price" and "quantity" terms of FERC tariffs.

But even if the Fifth Circuit's decision were correct, it provides no support for the LPSC's claim. Contrary to its assertion (Resp. Br. 29), no claim could be made that Entergy sold ELI "an excessive *quantity* of capacity at the filed rate." Availability determinations under MSS-1 do not affect the *amount* of generating capacity to which ELI has access; they determine the *price* that ELI pays for capacity to which ELI already has access as a member of the Entergy System.[10]

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[10] The Entergy System Agreement is not a bilateral contract for the purchase and sale of quantities of power at prescribed rates. It is a multilateral contract that gives each operating company the benefits of the System's generating and transmission facilities, which are centrally planned and centrally dispatched. The Agreement contains schedules (like MSS-1) that allocate or reallocate certain of the costs through equalization payments. MSS-1 thus determines the *price* that ELI pays for benefits it receives and not the *amount* of generating capacity to which it has access. Further, under MSS-1, availability determinations affect the per megawatt *rate* of payments that short companies make to long companies. In particular, availability determinations establish whether and to what extent

But all this is beside the point. As *MP&L* and Opinion No. 415 establish, FERC has properly exercised exclusive jurisdiction over allocations of generating costs within the Entergy System. Thus, the LPSC concedes that federal law governs the question whether Entergy's equalization assessments "overcharge[d]" ELI, and there is no state law issue. In this circumstance, all the FPA and NGA decisions that the LPSC cites would hold that state tribunals have no jurisdiction over the issues, and that the federal law issues must be decided by FERC.

In addition, even if these decisions established general jurisdiction in *courts* to interpret and enforce tariffs, the decisions provide no support for the LPSC's claim that it can adjudicate Entergy's compliance with the tariff in a state retail ratemaking proceeding. In all these cases, courts were able to adjudicate rights because there was a dispute between two parties to a contract and because state contract law provided the court with jurisdiction over the subject matter and the parties. State retail ratemaking bodies have no comparable jurisdiction. There is no dispute between Entergy and ELI. The LPSC has jurisdiction only over ELI and its retail rates; it has no jurisdiction over the System Operating Committee or other entities that act for the Entergy System.

III. THE LPSC'S REMAINING ARGUMENTS ARE IRRELEVANT AND ERRONEOUS.

Finally, the LPSC makes a series of arguments that are irrelevant and erroneous. First, the LPSC notes (Resp. Br. 2-5) that it (like other ratemaking bodies) has authority under state law to review affiliate transactions in setting rates, and it cites a number of cases where the LPSC did so. As this Court

individual companies are short or long. In turn, the rate per megawatt is based on the actual costs that each long company incurs in providing its own gas and oil-fired units, and these costs are different for each Entergy operating company. *See* Pet. Br. 7 n.6. The average rate per megawatt that short companies pay will thus vary depending on whether ERS units are or are not included in calculations.

has held, the equalization payments and other transactions among affiliates that occur under the Entergy System Agreement are within the exclusive jurisdiction of FERC, and states are preempted from reviewing them. *MP&L*, 487 U.S. at 376.

Second, the LPSC's Brief (pp. 10-13) alleges that the purpose and effect of Entergy's inclusion of ERS units was somehow to discriminatorily shift costs in ways that would maximize corporate profits and injure ratepayers. These are the same claims that were rejected in Opinion No. 415 and in *LPSC* v. *FERC*, 174 F.3d 218 (D.C. Cir. 1999), and they have no factual support. See Pet. Br. 9-14. This underscores that the LPSC's Staff here relitigated in a friendly forum (the LPSC) issues that it had lost in a neutral forum (FERC).

Finally, the LPSC repeatedly asserts (Resp. Br. 1, 33, 41, 42) that there here can be "no dispute" that Entergy violated the "objective terms" of the amended tariff and that the only issue is whether state utility commissions must pass through "overcharges" resulting from an established tariff violation.[11] That is nonsense. Entergy plainly satisfied the substantive requirement of the tariff that it had the "intent to return the units to service;" that is starkly confirmed by the fact that all but one of the 23 units was returned to active service or scheduled to be so returned within two years. Pet. App. 6a n.4. The LPSC's claim (Resp. Br. 1) is that, despite these

[11] The LPSC asserts (Resp. Br. 1) that the merits of the tariff violation "could not be raised in this Court because ELI litigated the contract issue before the LPSC, lost the issue, and did not appeal it." That claim is both erroneous and irrelevant. It is erroneous because Entergy expressly challenged any finding of a tariff violation in its state court appeals (*see*, *e.g.*, Pet. of ELI for Appeal and Judicial Review at 8, No. 458,129 (La. 19th Jud. Dist. Ct. Feb. 17, 1999); ELI Original Br. at 2-6, *ELI* v. *LPSC*, 815 So. 2d 27 (La. 2002); ELI Post-Argument Br. at 3, *id.*), and the Louisiana Supreme Court addressed this claim and rejected it on the merits. Pet. App. 19a-20a. The claim is irrelevant because the issue is whether these are matters within FERC's exclusive jurisdiction, which ELI concededly raised below.

facts, Entergy's decision was procedurally defective because Entergy purportedly failed to adhere to the "specifi[ed] process" in reaching its substantively valid decision.

But that claim, too, is baseless. Entergy's minutes recite each of the factors that the tariff required Entergy to "consider" and its conclusion, which is all the tariff requires. J.A. 33-34 Further, the materials attached to the minutes contained information relevant to each factor and supported Entergy's finding that each unit would be returned to service at some point within the next ten years. See *id.* at 35, lines 13 & 17 (projecting "operational deficits" that far exceeded the total capacity of the 23 ERS units). The LPSC objects (Resp. Br. 15) that the information on which Entergy relied was somehow insufficient and that Entergy did not specify the precise time that each unit would be returned to active service. But that fact is affected by varying costs of "short-term [energy] purchases" and other factors that cannot be readily forecast (J.A. 35, Notes: line 17). And nothing in the tariff precluded Entergy from proceeding in the way that it did, and resting its decision on what it believed was certain to occur within ten years. In short, FERC, as a neutral tribunal, could plainly find that the tariff was not violated and that, in all events, no refund is appropriate.

CONCLUSION

The decision of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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April 21, 2003

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