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

BRIEF OF PETITIONER

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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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The opinion of the Louisiana Supreme Court (Appendix to Petition for Certiorari ("Pet. App.") 1a-21a) is reported at 815 So. 2d 27 (La. 2002). The order of the Louisiana Supreme Court denying the petition for rehearing (Pet. App. 159a) is not reported. The opinion of the Nineteenth Judicial District Court for the Parish of East Baton Rouge (Pet. App. 22a-23a) is not reported. The order of the Louisiana Public Service Commission (Pet. 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. Pet. App. 1a. On May 24, 2002, the Court denied petitioner's timely petition for rehearing. Pet. 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 Pet. App. 165a-175a.

STATEMENT OF THE CASE

Petitioner Entergy Louisiana, Inc. ("ELI") is a local electric utility that is part of an integrated power system that serves portions of four states. ELI is challenging a judgment of the Louisiana Supreme Court that upheld an order of the Louisiana Public Service Commission ("LPSC") which barred ELI from recovering in its retail rates – and thus "trapped " – certain costs that ELI was required to incur under the FERC rate schedule that governs the wholesale allocations of power and its costs in the multistate Entergy system. The

Louisiana Supreme Court acknowledged FERC's exclusive jurisdiction to determine the lawfulness of the wholesale rate paid by ELI, but held that the LPSC had the authority to determine that it was "imprudent" for ELI to pay this rate because FERC had not yet determined that it was just and reasonable for ELI to incur these costs.

As explained in detail below, this holding is squarely foreclosed by *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*") and its numerous precursors. *MP&L* held – in the context of the very multistate electrical system at issue here – that state utility commissions are required to allow local utilities to pass through to retail ratepayers the wholesale rates incurred under FERC rate schedules, whether or not FERC has expressly ruled on the state's specific challenge to their reasonableness. It held that if a state commission believes that particular wholesale costs have been improperly imposed, its exclusive remedy is to file a complaint before FERC.

These principles have particular force here. The LPSC previously filed a complaint at FERC and challenged the requirement that ELI pay wholesale rates that included the particular costs that the LPSC disputes, but FERC found that it was "just, reasonable, and nondiscriminatory" for ELI to incur these costs. To justify its prudence disallowance, the LPSC deemed FERC's findings to cover only the costs incurred during the period that ended on August 5, 1997, and *not* the subsequent days and months. It then based the prudence disallowance on parochial local interests that are impermissible factors under the FERC Order. This was a paper thin attempt to evade FERC's jurisdiction on the issue and its prior rejection of the LPSC's challenge to the very costs at issue.

1. The Federal Power Act. The Federal Power Act gives the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction to regulate the "transmission" and the "sale of electric energy at wholesale in interstate commerce."

16 U.S.C. § 824. The Act provides that all rates and charges, and all rules and regulations affecting such charges, must be "just and reasonable" (*id.* § 824d(a)) and nondiscriminatory (*id.* § 824d(b)).

To enable FERC to enforce this prohibition, Section 205(c) of the Act generally requires public utilities to file with the Commission "schedules" or "tariffs" that show all their rates and charges for wholesale sales of electricity and the classifications, practices, and regulations affecting such charges, together with all contracts which in any manner affect or relate to such charges. *Id*. § 824d(c). The Act generally prohibits changes in any rates, classification, or services except following sixty days notice. *Id.* § 824d(d).

But the Act provides that FERC may, "for good cause shown," enter orders allowing changes to take effect on lesser notice (or without notice). *Id.* Pursuant to this latter authority, FERC has authorized utilities to file tariffs that do not provide a specific dollar charge for a unit of electricity, but that contain "automatic adjustment clauses" or other cost of service formulas that the utility applies to determine some or all components of the actual unit charge. FERC approves "formula" rates for transactions (*e.g.*, certain transactions among affiliated utilities) in which it finds that the costs of rate filings are great and the benefits are slight because the Act's other remedies are sufficient to allow FERC to assure that rates are just, reasonable and nondiscriminatory.[1] When formula rates are authorized, the filed rate is not a dollar charge per unit of output, but a formula that is applied by the utility, subject to audit and review by FERC in other proceedings.

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[1] *See Middle S. Servs., Inc. (Opinion No. 124)*, 16 FERC ¶ 61,101, at 61,219 (1981), *aff'd*, *Louisiana Pub. Serv. Comm'n* v. *FERC*, 688 F.2d 357 (5th Cir. 1982); *Middle S. Servs., Inc.*, 30 FERC ¶ 63,030, at 65,131-32, *aff'd*, 31 FERC ¶ 61,305, at 61,660 n.25 (1985); *Central Power & Light Co.*, 11 FERC ¶ 61,102, at 61,228 (1980).

In this regard, Section 206 of the Act gives FERC the authority to investigate, on its own motion, or on complaint from any interested party, whether any rate, or regulation affecting rates, is unjust, unreasonable, or discriminatory. 16 U.S.C. § 824e(a) & (b). Section 306 of the Act gives any State, municipality, state commission, or person the right to file a complaint under Section 206 of the Act. *Id.* §§ 824d, 824e, 825e.

2. The Multi-State Entergy System. Petitioner ELI is part of the same "integrated power pool" involved in *MP&L*, 487 U.S. at 357.[2] ELI is an electric public utility operating in Louisiana, and ELI is a wholly owned subsidiary of Entergy Corporation, which is a public utility holding company under the Public Utility Holding Company Act, 15 U.S.C. §§ 79 *et seq.* There are now four other operating companies in the Entergy System: Entergy Arkansas, Inc. (formerly AP&L), Entergy Mississippi, Inc. (formerly MP&L), Entergy New Orleans, Inc. (formerly NOPSI), and Entergy Gulf States (formerly Gulf States Utilities, which merged with Entergy in 1994).

"The five [Entergy] 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." Pet. App. 3a. Each Entergy operating company separately owns some generating facilities.[3] However, all the generators on

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

[3] The Entergy System Operating Committee determines when generating facilities or capacity are added to the system, what types of facilities are added, and which Entergy company constructs or otherwise obtains the new capacity. J.A. 14-15. The determinations are made to meet the demand of the Entergy system as a whole. *MP&L,* 487 U.S. at 357. To meet growing system demand, new generating facilities historically were added by individual operating companies on a rotating basis prior to the construction of a major nuclear unit (Grand Gulf) in the

the system are centrally dispatched as part of a single integrated power pool, and their output is used to meet the combined load of the entire system. *MP&L*, 487 U.S. at 357.

"The costs and benefits of the coordinated operation of this interstate system" have been "distributed among the operating companies pursuant to" a series of power pool agreements known as the System Agreements. Pet. App. 3a. The current System Agreement, as adopted in 1982 and subsequently amended, governs arrangements among the operating companies for the transmission, sale, and exchange of electricity.[4] The System Agreement is a rate schedule filed with and approved by FERC, and any changes to a Agreement must be approved by FERC. See *MP&L*, 487 U.S. at 357; *Louisiana Pub. Serv. Comm'n* v. *FERC*, 174 F.3d 218, 220-21 (D.C. Cir. 1999) ("*LPSC*").

The System Agreement is administered by the Entergy Operating Committee. The Operating Committee includes one representative designated by each Entergy operating company and one from Entergy Services, a wholly-owned subsidiary of Entergy that provides administrative services to the system. J.A. 12. The Operating Committee's centralized planning and administration of the system achieves "efficiency, reliability and other economies of scale" and "benefit[s] all the . . . companies by having lower costs and greater reliability." *Middle S. Servs., Inc.*, 30 FERC ¶ 63,030, at 65,142, *aff'd as modified*, 31 FERC ¶ 61,305 (1985).

1980s. Because the operating company could not finance this plant, Entergy formed a separate generating subsidiary to build Grand Gulf, but each Entergy operating company was allocated a fixed percentage of the output of Grand Gulf and required to purchase its share of the output at rates that recover 100% of the Grand Gulf costs as calculated by the System pursuant to a formula rate. *See MP&L,* 487 U.S. at 358, 360.

[4] The original system Agreement was filed with FERC in 1951. *See MP&L*, 487 U.S. at 357. A significantly revised System Agreement was filed and made effective in 1973. *See Middle S. Servs.*, 16 FERC ¶ 61,101, at 61,216.

3. Equalization Payments And MSS-1. One of the purposes of the System Agreement is rough equalization of generating costs among the Entergy operating companies. The Agreement "'provide[s] the contractual 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].'" Pet. App. 3a-4a. In particular, the System Agreement includes a series of Service Schedules that allocate the costs of generating power and other system resources among the five Entergy Operating Companies.

The service schedule at issue here is Service Schedule MSS-1, Reserve Equalization,[5] which allocates the costs of reserve generators on the System. Under MSS-1, each operating company bears financial responsibility for a share of the System's generating capability. That share is a function of the company's contribution to the System's peak load. Companies providing less generating capacity than their calculated share of the System's capability ("short" companies) are required to make monthly "equalization" payments to companies providing more than their share ("long" companies). Pet. App. 5a.

Under MSS-1, the System makes monthly determinations of whether and to what extent individual operating companies are short or long under criteria set forth in the tariff. The System then calculates and assesses the particular equalization payment that short companies must make to long companies – pursuant to the rate formula set forth in MSS-1. Through these payments, short Entergy companies compensate long companies for reserve capacity that the long

[5] "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. Pet. App. 4a n.3.

companies will "make . . . available to its sister companies" when needed. *LPSC*, 174 F.3d at 220.[6]

FERC has approved the formula rate established in MSS-1 and the other service schedules in a series of separate orders.[7] In these Orders, FERC rejected the LPSC's contention that approval of the formula tariff in MSS-1 should be conditioned on periodic filings by Entergy, and periodic review by FERC, of the specific costs and other inputs that the System plugs into the formula. FERC reasoned that the equalization payments allocate costs among affiliated companies that participate in a single integrated power pool, that the specific costs and other determinations that the System makes in administering these schedules are disclosed in retail and wholesale rate proceedings, and that inclusion of "any questionable costs" could be remedied in a complaint proceeding under Section 206 of the Federal Power Act.[8]

4. The Extended Reserve Shutdown Program. Under Section 10.02 of the System Agreement, the System

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[6] For example, in the 1996 test year, ELI was required to make MSS-1 equalization payments to two companies (Entergy Arkansas, Inc. ("EAI") and Entergy Mississippi, Inc. ("EMI")). For the period January through June, ELI was required to pay EAI $1.6616 per kilowatt ("kW") month (for the kWs that EAI contributes to ELI) and EMI $1.6616 per kW month (for the kWs that EMI contributes to ELI). For the period July through December, ELI was required to pay EAI $1.1943 per kW month and EMI $1.9074 per kW month. Total ELI MSS-1 payments in calendar year 1996 were $14,451,982.

[7] *Middle S. Servs.*, 30 FERC ¶ 63,030, at 65,131-32, 65,135-40 (1982 Service Schedules); *Middle S. Servs.*, 16 FERC ¶ 61,101, at 61,219 (1973 Service Schedule Amendment); *see Entergy Services, Inc. (Opinion No. 415)*, 80 FERC ¶ 61,197 (1997) (Pet. App. 85a-106a), *aff'd*, *LPSC*, 174 F.3d at 231.

[8] *Middle S. Servs.*, 30 FERC ¶ 63,030, at 65,131; *see also Middle S. Servs.*, 16 FERC ¶ 61,101, at 61,219 ("[t]he costs which are distributed to the operating companies under the formulae will be subject to audit by the Commission, as well as investigations which might be commenced under Section 206 of the Federal Power Act").

Operating Committee must designate a generating unit as "available" for use by the Entergy System for that unit to be counted in an operating company's generating capability for purposes of the calculation of MSS-1 payments or receipts. J.A. 16-17.

During the mid-1980s, the Entergy operating companies had excess generating capacity. Rather than keep excess generating facilities on line, the companies placed them in an Extended Reserve Shutdown ("ERS") program "to save money (for the customers, as well as for the companies themselves)." Pet. App. 6a. By keeping 23 units in ERS status, Entergy retained the capability to activate the units to meet any future increase in power demand or operational deficiencies, while simultaneously "reduc[ing] operating staff and maintenance costs and defer[ring] costs of repairing the units." *Id*.

When it instituted the ERS program, the Entergy Operating Committee decided that ERS units would continue to be included in calculating individual operating companies' capacity and payments under MSS-1. This policy meant that inclusion of units in the ERS program had no immediate effect on the level of equalization payments required by Entergy operating companies that were "short" or on the level of receipts of companies that were "long." However, Entergy Arkansas and Entergy New Orleans "placed a proportionately larger share of their capacity in ERS" than had ELI (a short company) and Entergy Mississippi (a long company). Pet. App. 92a n.14. In consequence, the inclusion of ERS units in MSS-1 capacity determinations meant that ELI was "more short" and required to make higher MSS-1 equalization payments than would have been made if none of the ERS units had been reflected in the MSS-1 computation. *Id.* at 9a, 6a. (It also meant that Entergy Mississippi was "less long" and received lower payments than if ERS units had been excluded.)

5. FERC's Opinion. Between 1986 and 1993, neither the LPSC nor any other party contended that Entergy's treatment of ERS units violated MSS-1. However, in 1993, FERC noted this issue during its proceedings on the merger of Entergy and Gulf States Utilities, and FERC initiated proceedings to determine whether Entergy had violated the Agreement by including the ERS units in the MSS-1 computations. The LPSC intervened, and filed a separate complaint alleging that Entergy had violated the System Agreement by treating the ERS units as "available" capacity and seeking retroactive refunds (plus accrued interest) for ELI's retail customers.

In Opinion No. 415, FERC concluded that the ERS units were not "available" as that term was then used in Section 10.02 of the System Agreement,[9] and that Entergy's tariff did not "expressly encompass the ERS program." Pet. App. 104a. It held that Entergy's inclusion of the ERS units in MSS-1 calculations thus violated the terms of the System Agreement. *Id.* at 99a-100a; see *id.* at 123a-125a.

At the same time, FERC found that the "equities" did not support LPSC's request for a refund. The primary basis for this decision was FERC's finding that the "end result" of the inclusion of ERS units were MSS-1 rates that were "just, reasonable, and non-discriminatory." Pet. App. 161a.

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[9] 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. [Pet. App. 112a.]

Foremost, FERC found that an operating company's recovery of the costs of its ERS units from its sister operating companies was just and reasonable. It concluded that the "ERS units were planned and constructed for the benefit of all the pre-merger Operating Companies," Pet. App. 102a, and that even during the time the units are in ERS status, they provide system-wide benefits. In particular, the fact that the units could be brought back to service allows the System to "postpone construction and acquisition of new [generating] facilities to meet [projected] load growth." *Id.* at 163a n.8. It also means that "'[o]perational deficits [can] be made up'" by returning units to service as well as by "'short-term purchases'" or other "'operational action[].'" *Id.* at 105a. The benefits to the System are further magnified when units are in fact later returned to service (which occurs whenever that is the method of meeting growth or operational deficiencies that has the lowest incremental cost). *Id.* The D.C. Circuit later held that FERC's findings of these benefits were abundantly supported by substantial evidence in the record and by legal precedent. See *LPSC*, 174 F.3d at 228-29 (Silberman, J).

FERC further found that the ERS program produced other immediate cost savings for the operating companies, their ratepayers, and the System as a whole because placing a unit in ERS eliminates the operational costs of keeping units on line and allows deferral of repairs and maintenance. FERC thus also rested its decision upholding the reasonableness of the inclusion of ERS units in the MSS-1 calculations on the ground that operating companies otherwise would have a "disincentive" to place units in ERS and to achieve these benefits for the System. Pet. App. 101a. In particular, it found that operating companies would be less likely to include units in ERS if the effect would be to increase their required equalization payments (in the case of short companies) or to decrease their equalization revenues (in case of long companies):

> 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.* [Pet. App. 102a-103a (emphasis supplied) (footnotes omitted).]

The D.C. Circuit held that this finding, too, was supported by substantial evidence and reasonable. See *LPSC*, 174 F.3d at 225-27.

FERC also relied on purely equitable factors. It noted that "Entergy as a whole received no net gain from the inclusion of ERS units in Schedule MSS-1," for the "overpayments were merely part of equalization payments among ratepayers which algebraically added up to zero as far as Entergy as a whole and its shareholders are concerned." Pet. App. 101a & n.37. While FERC acknowledged that net retail revenues could have been affected if Entergy had pursued a selective policy of "avoiding [retail] rate cases," it found that there was no evidence that Entergy companies had done so and that cost reductions from ERS had enabled Entergy "to avoid *rate increase* filings." *Id.* at 162a. The D.C. Circuit found that this reasoning "just passes muster." *LPSC*, 174 F.3d at 230.

Finally, FERC referred to the fact that no state commission had challenged the inclusion of ERS units during the seven years before FERC raised the issue. The D.C. Circuit stated that while this factor is "less weighty than the others – particularly the first two – and perhaps would be inadequate standing alone, we do not regard it as objectionable." *Id.*

FERC thus chose to remedy the past violation of the tariff by accepting Entergy's Offer of Settlement in which MSS-1 would be prospectively amended, effective August 5, 1997, so that it would expressly authorize the inclusion of the ERS units in MSS-1 calculations. Pet. App. 103a-105a. This amendment expressly 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.'" *Id.* at 104a (emphasis omitted). See also *id.* at 157a-158a. The amendment further provides:

> "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.* at 104a (emphasis omitted)].

FERC rejected the LPSC's claim that this language is "ambiguous and does not limit Entergy's judgment to make decisions on ERS units." Pet. App. 104a. It held that the proceeding arose "because of the failure of section 10.02 of the System Agreement to expressly encompass the ERS program. The proposed amendment does so." *Id.* It further held that the "'amendment sets out the parameters of the Operating Committee's discretion,'" and "'[t]he regulations of the Commission provide a remedy for any abuse of this discretion.'" *Id.* at 104a (quoting *Entergy Servs., Inc.*, 70 FERC ¶ 63,018 (1995)).

As noted, the LPSC appealed FERC's order to the Court of Appeals for the D.C. Circuit; and the LPSC challenged both FERC's denial of the refund and its prospective amendment to the tariff. The D.C. Circuit rejected both contentions. See *LPSC*, 174 F.3d at 231.

First, the Court held that there is nothing in the Federal Power Act that requires FERC to order a refund of "overpayments" when a utility is found to have passed through costs that are not authorized by the governing FERC tariff; to the contrary, it may refuse to grant refunds when the costs benefitted ratepayers and otherwise were legitimate costs that the utility was entitled to recover from its customers. The Court relied on prior court of appeals' decisions that had so held.[10] As noted, the Court upheld FERC's discretionary decision to deny a refund because it accepted FERC's two separate findings that inclusion of ERS units benefits sister operating companies, their ratepayers, and the Entergy System and because it concluded that the two other "equitable" factors on which FERC relied were not impermissible considerations.

Second, the LPSC had challenged the prospective amendment to the System Agreement solely on the ground that it was too vague and gave the System Operating Committee "unfettered discretion." *Id.* at 231. The Court acknowledged the basis for the LPSC's contentions that the amendment lists factors that could "cut for or against . . . inclusion" of ERS units "depending on the circumstances" and does not "say anything about the relative weights of the factors." *Id.* The Court thus stated that the "amendment is certainly closer to a standard than to a rule," but it held that this is a matter of "rate design" and deferred to FERC's judgment that granting this discretionary authority to the System Operating Committee is "just and reasonable." *Id.* It stated that "FERC understandably concluded that the amendment set out the parameters of the operating

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[10] *See LPSC*, 174 F.3d at 224 (citing *Koch Gateway Pipeline Co.* v. *FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998); *Town of Concord* v. *FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (citing cases)).

committee's discretion, and that discriminatory implementation of the amendment could be remedied in a proceeding under FPA § 206." *Id.*

6. Entergy's Determination Under Amended Section 10.02. The Entergy Operating Committee met on September 30, 1997, less than two months after FERC had determined that MSS-1 rates were just and reasonable and nondiscriminatory when the 23 ERS units were treated as available. The minutes of the meeting quote the provisions of the amended tariff in full and state that the Committee concluded that the "units currently in ERS status" are "available" within the meaning of amended Section 10.02. J.A. 33-34. The minutes recite that these determinations were based on the information contained in a presentation that discussed the System's 1998 Capacity Plan and its 1998 Load and Capacity Forecast for the next ten years. *Id.*

The validity of these determinations was verified by subsequent events. 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." Pet. App. 6a n.4.

7. The LPSC Order. On May 30, 1997, ELI made the annual filing of financial data (from a 1996 test year) that would be used to determine the retail rates that ELI would charge in Louisiana during the period from July 1, 1997 through June 30, 1998. In the resulting rate proceeding, the LPSC staff contended that the LPSC should exclude from ELI's retail revenues those costs of making equalization payments under MSS-1 that were attributable to the inclusion of ERS units in the rate calculation because these charges had been assessed in violation of the FERC tariff.

The LPSC concluded that it was obligated to permit recovery of the amounts incurred up to and including August 5, 1997, for it held that FERC Opinion No. 415 established that ELI's payments were just and reasonable and "mandatory" during this period. But it concluded that it "has the authority to review the prudence of ELI's actions *after* August 5, 1997," Pet. App. 70a, and that a finding of imprudence after that date "could [not] conflict" with FERC's determinations in Opinion No. 415 because the Order did not mandate the inclusion of ERS units in the calculations after August 5, 1997. *Id*. at 72a.

In addressing the period from August 6, 1997 through July 30, 1998, the LPSC repeatedly acknowledged that it could not adjudicate the question whether the Operating Company or ELI had "violated a FERC-filed tariff" in continuing to treat ERS units as available after the amended tariff took effect. Pet. App. 64a. It thus held that it "is preempted from determining whether the terms of a FERC tariff have been met, for the issue of violation of or compliance with a FERC tariff is peculiarly within FERC's purview. *Any allegation of a violation of a FERC-tariff should therefore be brought before the FERC*." *Id.* (emphasis supplied). See *id.* at 72a (the LPSC "is not assessing Entergy's compliance with the amended Section 10.02 of the System Agreement, for a determination of violation or compliance with a FERC tariff is peculiarly within FERC's purview").

The LPSC held that the question whether ELI was prudent in paying equalization assessments that reflected ERS units was a broad inquiry in which the LPSC could choose also to consider the criteria of the tariff in assessing the reasonableness of ELI's actions:

> In addition to the well-established standards for judging prudence such as reasonableness, economy, impact on retail rates, duty to minimize cost of service, duty to avoid risk, etc., this Commission can also take judicial notice of the FERC-set standard for treating ERS units as available. . . . Thus, the amended Section 10.02 may serve as an additional test for reasonableness and

> prudence in this Commission's review of ELI's MSS-1 expenses. [Pet. App. 65a-66a.]

Assessing all these factors, the LPSC found that ELI's decision to make its assessed MSS-1 equalization payments "was neither prudent nor reasonable." Pet. App. 73a. The LPSC pointed out that "ELI was made aware by the FERC order of the increased costs to ELI and its ratepayers" of continuing to treat ERS units as available. *Id.* The LPSC then acknowledged that FERC had held that "'Entergy's actions resulted *in system-wide benefits, in the form of enhanced system efficiencies and cost reductions* that ultimately benefited ratepayers.'" *Id.* But the LPSC stated that its concern was the effect of MSS-1 payments on ELI's retail rates and that the cited system-wide benefits were simply evidence of ELI's imprudence:

> [t]hese findings [of system-wide benefits] . . . apply *at the level of the parent company*, whereas this Commission is concerned solely with ELI in this proceeding. FERC's jurisdiction under 16 U.S.C.A. §824 over interstate wholesale rates makes system-wide concerns relevant to FERC, whereas *in regulating retail rates, system-wide benefits are not of prime importance to a state Commission*. [*Id.* (first emphasis in original; second emphasis supplied).]

The LPSC further concluded that where "system-wide benefits increase ELI's operation expenses, it is a reflection of the utility's failure to exercise its discretion to limit expenses, and of its acquiescence in the parent company's decision without regard to the impact of such increased expenses on ELI's ratepayers." *Id.* at 73a-74a. It also found that "system-wide benefits which increase ELI's operation expenses show that other sister companies are benefiting from MSS-1 treatment of ERS units at ELI's expense." *Id*. at 51a-52a.

Finally, the LPSC also found that the Operating Committee's decision to continue to treat ERS units as available was made without the benefit of more "detailed" and "accurate" information that "was not available to the Operating Committee at the time it made the decision under review." Pet. App. 74a. The LPSC did *not* find that the Operating Committee would have reached a different decision in any respect if it had considered additional information, much less that it would then have excluded all 23 ERS units from MSS-1 calculations. Although the LPSC acknowledged that the Operating Committee "made the decision," *id.*, the LPSC found that ELI was imprudent for failing to "follow the criteria set forth in the amended Section 10.02 in reaching a decision regarding the availability status of ERS units after August 5, 1997," *id.*, and that "[w]hen its obligation to make the higher MSS-1 payments ceased on August 5, 1997, ELI should have responded with a more thorough evaluation of that change in circumstances in an attempt to minimize its cost of service." *Id.* at 75a.

For all of these reasons, the LPSC concluded that ELI had acted imprudently. The critical premises of the LPSC's decision were its belief that no binding FERC order required ELI to comply with the System Operating Committee's application of MSS-1 and that ELI had a choice whether to comply with the Operating Committee's decision – *viz.*, that ELI's decision "was not mandated by FERC" and that "the utility had an opportunity to make a different decision and minimize its costs" and did not do so. Pet. App. 75a.

Relying on these premises, the LPSC held that the *Pike County* exception to the filed-rate doctrine applied here. Under that exception, a state may review the prudence of a utility's decision to purchase power at a FERC-approved rate if the utility has more than one source for obtaining wholesale power and has the right to refuse to purchase power under the terms of a FERC tariff. *MP&L,* 487 U.S. at 373-74; *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 972 (1986) (discussing *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 465 A.2d 735, 737-38

(Pa. Commw. Ct. 1983)). The LPSC decided that ELI had the right to refuse to make equalization payments that reflected ERS units because the LPSC believed that neither the System Agreement, MSS-1, nor any FERC order required ELI to incur the costs imposed by the System Operating Committee under MSS-1.

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. Pet. App. 83a. It further ordered ELI to credit the overpayments "back to the ratepayers." *Id.*

8. The Louisiana Courts' Decisions. 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. Pet. App. 22a. ELI appealed to the Louisiana Supreme Court.

In an opinion without citation to *MP&L*, the Louisiana Supreme Court (by a vote of 4-3) affirmed the district court's decision, and essentially adopted the analysis of the LPSC. It held that the LPSC had jurisdiction to review the prudence of ELI's decision to continue to treat ERS units as available under MSS-1 after August 5, 1997, and that ELI's decision had been imprudent and unreasonable. Like the LPSC, the Louisiana Supreme Court stated that FERC has exclusive jurisdiction to determine the lawfulness of the wholesale rates paid by ELI and to determine whether the 1982 System Agreement and Schedule MSS-1 had been violated. Pet. App. 14a. But the court nonetheless held that the LPSC had the authority to determine that it was imprudent for ELI to incur the costs prescribed in MSS-1 because "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." *Id.* at 19a.

Like the LPSC, the Louisiana court decided that no FERC order required ELI to treat ERS units as available after August 5, 1997, and that ELI had the "option[]" of "treating the units as unavailable." Pet. App. 20a. Thus, the court held that under the rule established in *Pike County*, the LPSC had jurisdiction to address the prudence of ELI's choice. *Id.* at 15a-17a.

Finally, the Louisiana court held that the LPSC's determination that ELI had been imprudent was not arbitrary or capricious. Pet. App. 19a-20a. In so holding, the court relied on the LPSC's findings (a) that ELI had a choice whether to continue to treat ERS units as available under MSS-1 and made the choice that increased costs for Louisiana ratepayers, and (b) that the System Operating Committee did not "'exert due diligence'" in deciding to continue to treat ERS units as available under MSS-1. *Id.* at 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." Pet. 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.*

SUMMARY OF ARGUMENT

The LPSC's Order epitomizes the retail ratemaking orders that the Federal Power Act was enacted to prevent. The

LPSC here barred ELI from recovering in its retail rates the costs of an interstate power system that were allocated to Louisiana under a FERC rate schedule; that concededly produced benefits for the entire multistate system; and that were expressly found by FERC to be "just, reasonable, and nondiscriminatory" prior to August 5, 1997. Yet the LPSC found that it was unreasonable for ELI to incur these costs after that date based on the LPSC's parochial local interest in reducing rates in Louisiana and preventing payments to out-of-state companies. The Louisiana Supreme Court has upheld this Order, because it concluded that states are free to disallow costs under FERC rate schedules unless and until FERC enters an order that finds them to be just and reasonable for the precise period in question and because it believed that the *Pike County* doctrine authorized the disallowance in question. These holdings are simply wrong.

The purpose of the Federal Power Act is to centralize all determinations of the reasonableness and "prudence" of bulk power supply arrangements in interstate systems in a neutral federal forum – FERC. This Court has developed the "'filed rate doctrine'" to "enforce" FERC's exclusive jurisdiction over these arrangements. *Nantahala*, 476 U.S. at 962-67. Under this doctrine, FERC alone may determine the reasonableness and prudence of an affiliated utility's compliance with a FERC tariff, and state commissions must treat the wholesale rates set under such tariffs as reasonable operating expenses and pass them through to retail customers unless and until FERC reviews the rates, finds them to be unjust and unreasonable, and prescribes different rates. *Id.*

In *Nantahala*, the Court held that state and local entities "setting retail prices must allow . . . costs incurred as a result of paying a FERC-determined wholesale price" to be recovered in retail rates. *Id.* at 965. *MP&L* reaffirmed that state and local regulators may not "enter an order 'trapping' the costs [that a utility] is mandated to pay" under a FERC tariff or "undertake a 'prudence' review for the purpose of deciding whether to enter such an order." 487 U.S. at 372.

MP&L also expressly rejected the Louisiana Supreme Court's holding that the pre-emptive effect of FERC jurisdiction "turn[s] on whether a particular matter was actually determined in the FERC proceedings." *Id.* at 374. "The 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.

The doctrine of *Pike County* is inapposite. It allows states to find that a utility was imprudent in obtaining a particular quantity of power at a FERC-approved price only when the utility "had the legal right to refuse to buy that power" and could have purchased it from another source at a lower price. *MP&L*, 487 U.S. at 374. The doctrine has no applicability where, as here, the claim is that a utility should have "minimize[d]" its costs under a FERC tariff to which it is legally bound. Pet. App. 75a. Further, ELI had no "choice" whether to include ERS units in the equalization payments it made. Under the FERC tariff, that determination was delegated to the System Operating Committee. ELI is bound by the Operating Committee's decisions and required to make whatever equalization payments flow from these decisions.

Finally, there is no substance to any claim that the Act gives state retail ratemaking bodies jurisdiction to adjudicate whether FERC tariffs have been "violated" and to order prudence disallowances as remedies for any "violations" that are found. These are matters exclusively for FERC. That is particularly so in the case of the tariff at issue here (MSS-1), for it delegates to the System Operating Committee the task of determining the generating facilities that are available under a discretionary standard. The Operating Committee's role under the tariff is a matter of its "rate design," and the determinations made by the Operation Company are part and parcel of the filed rate and bind state commissions unless and until they are disallowed by FERC in proceedings under Section 206 of the Act. See *Nantahala,* 476 U.S. at 966-67 & 970-71 (1986); *AT&T* v. *Central Office Tel. Co.*, 524 U.S. 214, 224 (1998).

ARGUMENT

I. THE FEDERAL POWER ACT GIVES FERC EXCLUSIVE JURISDICTION TO REGULATE COST ALLOCATIONS WITHIN INTERSTATE POWER POOLS AND PRE-EMPTS STATES FROM LITIGATING THE PRUDENCE OF SUCH ALLOCATIONS IN RETAIL RATEMAKING PROCEEDINGS.

Congress enacted the Federal Power Act because it recognized that bulk power arrangements among utilities are "particularly likely to affect more than one State," and that "uncontrolled [state] regulation" of utilities in multi-state systems can "patently interfere with broader national interests." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).[11] If state regulation had been permitted, the reasonableness of wholesale power

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[11] The Federal Power Act was enacted to fill the "gap" created by the 1927 holding in *Attleboro* that the negative impact of the Commerce Clause barred state regulation of wholesale sales of electricity. *New York* v. *FERC*, 535 U.S. 1, 5 (2002) (citing *Public Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927)). Congress could have filled the gap by authorizing state regulation, *see Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946). Instead, Congress codified *Attleboro*'s concerns that parochial state regulation would burden interstate commerce and gave FERC jurisdiction over all wholesale power transactions. Congress not only "authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro*, . . . it also extended federal coverage to some areas that previously had been state regulated." *New York* v. *FERC*, 535 U.S. at 6.

rates and the interstate allocations of power costs could have been litigated in each affected state. *Id*. at 377-78. Further, each state has incentives to protect its "respective local interests," *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 90 (1927), and to impose arrangements that "benefit[] its residents to the detriment of its neighbors." *Massachusetts, Dep't of Pub. Utils.* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.). Thus, the result would have been wasteful duplicative proceedings and the inappropriate shifting or trapping of costs with attendant burdens on interstate commerce.

The Federal Power Act prevents this interference with commerce by centralizing all decisions about wholesale power arrangements in a single neutral federal forum – FERC – and by establishing a uniform, orderly procedure in which all legitimate state interests in such arrangements can be raised and protected. The Act requires each utility to file with FERC a "rate schedule" or tariff that generally contains the utility's charges for wholesale sales of electricity and all arrangements affecting these wholesale rates. Section 205 requires FERC to assure that these rates are "just and reasonable," and nondiscriminatory, and Section 206 of the Act authorizes FERC to investigate rates and practices on its own motion or on complaint. 16 U.S.C. §§ 824d(a)-(b), 824e(a).

Because FERC's determinations directly affect retail rates – *i.e.*, wholesale rates become costs for purposes of setting retail rates – the Act protects local interests by giving states, municipalities, and other retail rate-making bodies the right to participate in FERC proceedings, to file complaints with FERC, and otherwise to urge FERC to prevent the imposition of excessive or unwarranted costs on retail ratepayers. *Id*. §§ 824d, 824e, 825e. See also *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414, 418 (1952) (the federal power agency must assure that wholesale power supply arrangements do not result in "excessive prices" to any class of power consumers).

This Court has consistently construed the Federal Power Act to give FERC "jurisdiction plenary" 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); *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951). Whatever the form of state action, it is pre-empted if its "effect" is to interfere with FERC's interstate "allocation of costs" among the companies of an integrated power system. *Maryland* v. *Louisiana*, 451 U.S. 725, 749-50 (1981) (pre-empting state tax law).[12]

Most pertinently, the Court developed the "filed-rate doctrine" to "enforce the exclusive jurisdiction vested by Congress in FERC." *Nantahala*, 476 U.S. at 966. Under this doctrine, interstate power rates that are "filed with FERC or fixed by FERC" must be treated as lawful in a state or federal proceeding unless and until they are changed by FERC, *id.* at 970, and no tribunal may enter an order that would have the effect of "authoriz[ing] commerce in the commodity on other terms." *Montana-Dakota Utils. Co.*, 341 U.S. at 251. This doctrine was first applied to federal court proceedings, *id.*, and was later extended to state court proceedings under state law and made a rule of federal pre-emption in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981).

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[12] Contrary to the decision of the LPSC, Pet. App. 56a-62a, there is no presumption against pre-emption in this context. As this Court explained in *New York* v. *FERC*, 535 U.S. at 18, in cases addressing "the proper scope of federal power" delegated to an agency by Congress, the Court "interpret[s] the statute to determine whether Congress has given FERC the power to act as it has, and [does] so without any presumption one way or the other."

Thereafter, state supreme courts almost uniformly held that the filed rate doctrine requires that costs incurred under FERC rate schedules be treated as reasonable operating expenses and passed through to retail ratepayers in state retail ratemaking proceedings. See *Nantahala*, 476 U.S. at 967-70. These holdings were followed by this Court first in *Nantahala* and then in *MP&L*.

Nantahala held that state retail rate regulators may not disregard FERC's allocation of low-cost power among operating companies in an affiliated, multi-state system in setting retail rates. The allocation at issue was the result of a FERC proceeding that determined the reasonableness of the arrangements, a proceeding in which the state was fully involved. The allocation was also 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 because "FERC required Nantahala's wholesale rate to be filed in accordance with that allocation." 476 U.S. at 967. But the state attempted to use its retail ratemaking authority to nullify FERC's allocation decision by setting retail rates as if a radically different interstate allocation had been ordered, and this Court reversed. 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) (citation omitted).]

Thus, the Court held, rate schedules "filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Id.* at 962.

MP&L applied these principles to interstate power and cost allocations within the Entergy System (then called the Middle South System). The Mississippi Supreme Court had held that its state commission could not pass through to consumers the costs of the Grand Gulf I nuclear plant that were allocated to MP&L by the FERC rate schedules unless the state commission first determined that these costs were "prudent." In particular, the Mississippi court held that the state utility commission was required to examine the prudence of the management decisions that led Middle South Utilities to construct Grand Gulf 1. The 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 it therefore ordered the state commission to conduct a prudence "review" to determine whether the system "acted reasonably when [it] 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." *Pittman*, 506 So. 2d at 986.

MP&L, however, held that the state court's judgment was pre-empted by federal law. It reaffirmed this Court's earlier decision in *Nantahala*, explaining that the Federal Power Act and the Supremacy Clause "preclude [such a] review of MP&L's managerial prudence." 487 U.S. at 369. The Court further 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 explicit that FERC had exclusive jurisdiction to determine the prudence of decisions of MP&L and other system operating companies related to wholesale power arrangements. 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. 487 U.S. at 375. The Court expressly rejected the argument that state commissions have the authority to bar recovery of FERC-mandated wholesale costs on grounds that could have been raised before FERC. *Id.* The Court held: "The 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*.

II. THE LPSC'S ORDER VIOLATES *NANTAHALA*, *MP&L*, AND THEIR PRECURSORS.

Under these principles, the Louisiana Supreme Court was wrong in holding that the LPSC had jurisdiction to decide that "ELI's failure to take steps to minimize its MSS-1 payments after the [August 5, 1997] effective date of the amendment to

Section 10.02 of the System Agreement" was imprudent. Pet. App. 19a. Schedule MSS-1 is a tariff "fixed by" and "filed with" FERC that sets forth the standards and formulas that the System Operating Committee applies in allocating the costs of generating power among members of an integrated, interstate power pool. The System Agreement mandates that each Entergy Operating Company pay the equalization charges that the System assesses under the tariffs, subject to review only in a complaint or other proceeding before FERC under Section 206 of the Act. Under *Nantahala* and *MP&L*, the LPSC must accept ELI's costs under MSS-1 for purposes of setting ELI's retail rates unless and until FERC says otherwise.

Instead, the LPSC disallowed a portion of the ELI equalization payments and refused to pass them through to Louisiana ratepayers. The LPSC thus did precisely what *Nantahala* and *MP&L* prohibit: it "trapped" costs that were required to be incurred under a FERC rate schedule.

The primary ground for the Louisiana Supreme Court's judgment is its view that the Federal Power Act pre-empts states from litigating only those matters that have actually been determined by FERC and that FERC Order No. 415 did not foreclose the LPSC from finding the ERS-related portion of ELI's equalization payments to be imprudent on the grounds that the LPSC advanced. The Louisiana Supreme Court also relies on the *Pike County* doctrine. Finally, the LPSC's counsel has made the *post hoc* claim (rejected by the LPSC's Order) that the LPSC has "concurrent jurisdiction" to find violations of FERC tariffs and to fashion appropriate remedies. None of these claims has merit.

The overriding fact is that FERC has exclusive jurisdiction over the transactions among affiliated utilities operating an interstate power pool and over all the complex interrelated questions that these arrangements present. "[W]hether one characterizes the questions as related to prudence, interpretation [of the basic service agreements], or cost allocation, they are clearly matters most appropriately resolved by [FERC] as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules." *MP&L*, 487 U.S. at 378 (Scalia, J., concurring in the judgment) (first alteration in original) (quoting *AEP Generating Co.*, 36 FERC ¶ 61,226, at 61,550 (1986)).

A. Pre-emption Is Not Limited To Matters "Actually Determined" In Prior FERC Orders, But Extends To Any Claim That Could Have Been Raised At FERC.

The major premise of the Louisiana Supreme Court's holding is that FERC Order No. 415 "did not consider whether the Operating Committee's decision to use the ERS units in its calculation after August 5, 1997 is in compliance with the System Agreement" and that the LPSC therefore had the authority to "assess the prudence of ELI's decision [sic] to continue to accord MSS-1 treatment to ERS units." Pet. App. 15a. This is incorrect. The Federal Power Act's pre-emption of state regulation in no way depends on whether the particular matter has been addressed in prior FERC Orders.

This Court expressly so held in *MP&L*. It rejected the Mississippi court's holding that "the preemptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." 487 U.S. at 374 (citing *Pittman*, 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). It held that "States may not regulate in *areas* where FERC has properly exercised its jurisdiction," *id*. (emphasis supplied), and that "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts" or in State commissions. *Id*. at 375. "The only appropriate forum for such a challenge is before the

Commission or a court reviewing the Commission's order." *Id*.

Similarly here, FERC has properly exercised its jurisdiction over the allocation of costs of ERS and other generating units. Indeed, FERC Order No. 415 held that the recovery of these costs from Louisiana ratepayers was just and reasonable during the past periods when the charges were not authorized by the governing tariff, and FERC attempted to "prevent future disputes" by amending MSS-1 so that it expressly authorized these charges after August 5, 1997. See Pet. App. 103a-104a. If the LPSC believed that Operating Committee's decision to include ERS units in MSS-1 payments after August 5, 1997 violated this tariff and that ELI should not then have made payments that reflect ERS units, the LPSC's exclusive remedy was to file a complaint before FERC. The LPSC's refusal to do so cannot 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." *MP&L*, 487 U.S. at 376.

B. The LPSC's Order Conflicts With FERC's Policies And Its Explicit Findings In FERC Order No. 415.

Further, the LPSC's Order vividly underscores the threat to FERC's regulation if state commissions are permitted to exercise jurisdiction over the reasonableness of interstate power supply arrangements whenever FERC purportedly has not "actually" addressed the particular subject matter at issue. Here, FERC had found that it was just, reasonable, and nondiscriminatory for the 23 ERS units to be included in calculations of equalization payments during the period that ended on August 5, 1997. The LPSC reached the opposite conclusion for the immediately ensuing period of August 6, 1997 to June 30, 1998. It did not do so because the LPSC found any material intervening changes in conditions. Rather, the LPSC relied on local interests that are impermissible considerations under FERC policies and treated the "system-wide benefits" on which FERC relied as not merely irrelevant, but as evidence of imprudence. Pet. App. 73a-74a.

In particular, FERC Order No. 415 held that inclusion of the 23 ERS units in the equalization rates ELI paid was just, reasonable, and nondiscriminatory because of the substantial benefits that ERS units produced for the entire Entergy system, including Louisiana and its ratepayers. See *supra* at 10-12. It explained that the units were built to meet the needs of the system as a whole and that when they are in extended reserve status, the units function as reserves that eliminate the need for the system to invest in additional generation capacity. Pet. App. 102a, 163a n.8. It noted that the ERS units further provide even greater benefits if they are later reactivated – as they have been – to meet load growth and operational deficiencies. *Id*. at 105a. FERC further explained that a rule that excluded ERS units from equalization payment calculations would inhibit conduct that produces other immediate savings and efficiencies for the system and ratepayers. *Id*. at 102a-103a. These are the reasons that FERC refused to order refunds for the prior technical violation of the tariff and that it amended the tariff to expressly authorize the inclusion of ERS units in MSS-1 calculations after August 5, 1997.

To be sure, FERC did not expressly address the reasonableness of the continued inclusion of the 23 ERS units after that date. However, the LPSC did not find that there was any material change in conditions in the days and months following August 5, 1997. Indeed, while it criticized the System Operating Committee for failing to rely on more "accurate" and "detailed" information that became available only after the September 1997 meeting in which the availability determination was made, the LPSC does not find that consideration of this other information would have altered the Operating Committee's ultimate conclusion that all ERS units should be considered "available" under MSS-1 calculations, much less that it would resulted in the exclusion of all 23 ERS units. See Pet. App. 74a. Any such finding would have been impossible, moreover, in view of the conceded fact that all but one of units were returned to service, or scheduled to return to service, within the next two years. *Id.* at 6a n.4.

To the contrary, the LPSC Order affirmatively *acknowledged* the continued validity of FERC's findings that ERS units benefit the system in the form of "'enhanced system efficiencies and cost reductions that ultimately benefited ratepayers.'" Pet. App. 51a (emphasis omitted). The LPSC expressly based its disallowance of all costs resulting from the inclusion of any ERS units on the ground that its "primary concern" was not the existence of the conceded "system-wide benefits," but the local and parochial concerns of reducing retail rates in Louisiana and in preventing Louisiana customers from paying for generating capacity owned by sister utilities. *Id*. at 73a ("this Commission is concerned solely with ELI in this proceeding"); *id*. at 74a ("[t]he impact of MSS-1 expenses on retail rates guides this Commission's review of ELI's actions"); *id*. at 73a ("system-wide concerns [are] relevant to FERC, whereas in regulating retail rates, system-wide benefits are not of prime importance to this Commission"); *id.* at 51a-52a ("other sister companies are benefiting from the MSS-1 treatment of ERS units at ELI's expense"). Perversely, the LPSC treated the existence of system-wide benefits as evidence of ELI's imprudence. See *id*. at 73a ("where those system-wide benefits increase ELI's operational expense, it is a reflection of the utility's failure to exercise its discretion to limit expenses").

Although it nominally covers a different period, the LPSC's Order quite plainly conflicts with FERC Order No. 415. Here, as in *MP&L*, the LPSC violated FERC's policies by making prudence decisions "'in light of local conditions' alone" and by seeking to subvert arrangements that benefit the Entergy System as a whole. See *MP&L*, 487 U.S. at 376. As in *MP&L*, the LPSC's actions underscore the threat to interstate commerce that local regulation creates and the need for the "bright line" rule that categorically bars states from regulating the prudence of a utility's actions under a FERC tariff.

C. *Pike County* Is Inapposite.

Contrary to the Louisiana Supreme Court's holding, the *Pike County* exception to the filed rate doctrine is inapplicable here. Pet. App. 15a-17a (citing *Pike County*, 465 A.2d at 738. While this Court has not approved the *Pike County* doctrine, the Court has held that it can allow state commissions to find that a utility was imprudent in obtaining a particular quantity of power at a FERC-regulated rate only if the utility clearly had "the legal right to refuse to buy that power" and could have obtained the same quantity at a lower price from another source. *MP&L*, 487 U.S. at 374; *Nantahala*, 476 U.S. at 972-73. In this circumstance, a state commission's review of the prudence of the utility's choice between two options does not inherently implicate any FERC tariff or FERC's regulation of cost allocations within an interstate power system.

Here, by contrast, ELI's wholesale power arrangements are governed in their entirety by a FERC-approved tariff. And the claim of imprudence is solely that ELI should have acted to minimize its expenses under a FERC tariff that mandates equalization payments to allocate costs within an interstate power pool. *Pike County* has no possible valid application in this circumstance, for any prudence review necessarily requires states to determine matters within FERC's exclusive jurisdiction.

Further, even if *Pike County* applied to claims that a utility should have minimized its costs under a single FERC tariff, the doctrine cannot apply unless the utility had some choice or some control over the levels of its assessments. Here, ELI had no choice whether to incur the ERS costs imposed under MSS-1. MSS-1 delegates to the System Operating Committee the decision whether ERS units are "available" for purposes of calculating operating companies' equalization rates under MSS-1 (Service Agreement Section 10.02 (J.A. 30-31)), and the decision of the Operating Committee (and the equalization charges that are assessed by the System) bind each Entergy Operating Company unless and until FERC rules otherwise. As *MP&L* and *Nantahala* make clear, and lower courts have held, *Pike County* has no application in these circumstances.[13]

In support of its reading of *Pike County*, the Louisiana Supreme Court also relied on *New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 911 F.2d 993 (5th Cir. 1990) ("*NOPSI*"), *cert. dismissed*, 502 U.S. 937 (1991). There, the Fifth Circuit upheld a retail ratemaking order that disallowed – and trapped – the same costs that were at issue in *MP&L.* This Court granted certiorari to review the decision, but the case was settled and dismissed before the Court could decide it. But even by its own terms, *NOPSI* provides no support for the LPSC's Order. The Fifth Circuit recognized that state commissions may not trap costs incurred under FERC schedules based on claims of imprudence that could be raised before FERC, see *id.* at 1001; and it upheld the prudence disallowance at issue only because it concluded

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[13] *Accord, 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, 415 (8th Cir. 1985); *South Dakota Pub. Utils. Comm'n* v. *FERC*, 690 F.2d 674, 676 (8th Cir. 1982) (per curiam); *Anaheim, Cal.* v. *FERC*, 669 F.2d 799, 809-10 (D.C. Cir. 1981).

(erroneously) that FERC's jurisdiction does not extend to certain decisions made during construction of a plant. *Id.* at 1002. For present purposes, the decisive fact is that it is undisputed that FERC has jurisdiction over the prudence of the inclusion of ERS units in MSS-1 calculations. So *NOPSI* provides no support for any claim that the the LPSC's Order is within the scope of *Pike County* or is sustainable under any theory. In all events, *Nantahala* and *MP&L* foreclose any such claim.

D. The *Post Hoc* Claim That State Commissions Have Concurrent Jurisdiction To Adjudicate Whether Entergy Has Violated The System Agreement Is Erroneous And Irrelevant.

Both the LPSC's Order and the Louisiana Supreme Court's Opinion concluded that "FERC has exclusive jurisdiction over the issue of whether the System Agreement has been violated." Pet. App. 64a, 72a, 14a-15a. Each, of course, nonetheless asserted that it could address the prudence of ELI's continued compliance with MSS-1. *Id.* at 65a, 14a-15a, 19a. As the dissenting Justice explained below, this latter claim amounts to an illicit attempt by the LPSC to do indirectly what it cannot do directly; and it is erroneous for all of the reasons stated above. *Id.* at 21a. Perhaps in recognition of this reality, the LPSC's Opposition to the Petition for Certiorari sought to defend the judgment below on a different *post hoc* ground. It asserted that the LPSC and FERC have concurrent jurisdiction over the question whether Entergy has "violated" its tariff and that when the LPSC finds such a violation, it can impose a remedy that excludes from ELI's retail rates any expenses resulting from the purported tariff violation.

This argument is meritless. First, it ignores the Court's repeated holdings that the Federal Power Act adopts a "bright line" division between federal and state jurisdiction. See *supra* at 22-24. The question whether a FERC tariff has been violated is obviously on the federal side of the "bright line."

Further, while a state commission has jurisdiction over the Entergy Operating Company that provides retail electric services, it has no jurisdiction over Entergy and the System Operating Committee that administers the FERC tariff, which is an obvious precondition to adjudicating claims that they violated a FERC tariff.[14]

Second, LPSC's *post hoc* claim is irrelevant as well as erroneous. Even if the Act gave state commissions jurisdiction to adjudicate whether wholesale tariffs had been violated in retail rate proceedings, it would afford no basis for upholding the judgment of the Louisiana Supreme Court. As courts of appeals have uniformly held, when a FERC tariff is violated, the question of the remedial consequences of the violation are committed to FERC's discretion. See *Town of Concord* v. *FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (citing cases). In particular, FERC has the discretion to refuse to grant a refund (that would be flowed through to retail ratepayers) on the ground that the charges represent legitimate costs that are appropriately charged to customers in that state and that the rates were just, reasonable, and nondiscriminatory, notwithstanding any technical violation of the tariff. *Id.* Indeed, in FERC Order No. 415, it made precisely this choice in the earlier proceedings where MSS-1 was at issue. See *supra* at 9-10. Thus, even if the Act granted state commissions concurrent jurisdiction to

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[14] The LPSC's reliance on *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961), is misplaced. First, that case involves a breach of contract dispute between two parties engaged in a transaction that was governed by a tariff in whole or in part. It does not involve a state regulator arrogating to itself the right to decide whether a FERC tariff has been violated in determining retail rates for state consumers. Second, in that case, the Court held only that the existence of a federal preemption defense did not mean that a well-pleaded state law breach of contract claim cannot be brought in state court. The Court said nothing about the pre-emption claim on its merits. *See id.* at 664 ("[w]e are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy").

adjudicate violations of tariffs, a state commission could not invade FERC's concededly exclusive jurisdiction to determine if rates are just, reasonable, and nondiscriminatory, and it is this determination that ultimately governs the question whether the rates must be passed through to retail ratepayers.

Finally, there is a fundamental fallacy to all the claims in the case that depend, directly or indirectly, on contentions that the System Operating Committee "violated" the amended MSS-1 in determining to continue to classify the ERS units as available after August 5, 1997. The claims rest on formalistic distinctions that have no substance, that ignore the determinations that FERC made when it approved the original and amended versions of MSS-1, and that ignore the scope of the filed rate doctrine.

FERC could have exercised its authority under section 205(d) of the Act to require the Operating Committee to *file* lists of the ERS units that were classified as available. Had FERC done so, the list of ERS units that are "available" would have been part of the filed tariff and there could have been no claim that their inclusion in MSS-1 calculations violated the tariff. In 1982, the LPSC made an analogous proposal when it asked FERC to condition its approval of MSS-1's cost of service formulas and automatic adjustment clauses on Entergy's periodic filing of the costs that it plugged into the tariff's formula. FERC rejected this proposal on the ground that the filing requirement would serve no beneficial purpose. It reasoned that the schedules governed transactions among affiliates to a power pool, that the cost inputs into the formula would be disclosed in retail and wholesale regulatory proceedings, and that in the event there were questionable cost inputs into the formulas, interested parties would know of them and could institute complaint proceedings under Section 206 of the Act. See *supra* at 7 & n.8.

Similarly, in amended Schedule MSS-1, FERC delegated to the Operating Committee the authority to designate ERS units as available, with no filing requirement. The amendment lists various factors that the System Operating Committee is to consider in making availability determinations; it does not "indicate in which direction the various factors point, and does not say anything about the relative weight of the factors." *LPSC*, 174 F.3d at 231. The D.C. Circuit stated that the amended MSS-1 is "certainly closer to a standard than to a rule." It deferred to FERC's judgment that it is "just and reasonable" to delegate this authority to the Operating Committee on the grounds that this is a matter of "rate design," that the amendment "set out the parameters of the operating committee's discretion," and that any abuse of discretion or "discriminatory implementation of the amendment could be remedied in a proceeding under FPA § 206." *Id*.

Under these conditions, the availability and other determinations that the System makes in its administration of the agreement are part and parcel of the "filed rate" and bind operating companies and state regulatory bodies alike, unless and until they are disapproved by FERC in Section 206 proceedings. As this Court has held, the filed rate doctrine applies not merely to rates *per se,* but also to contracts and practices that allocate costs and that are part of the bundle of rights and liabilities that are received in exchange for payment of the rate. *Nantahala,* 476 U.S. at 966-67 & 970-71; *Central Office Tel. Co.,* 524 U.S. at 224-26.

But the short answer to the *post hoc* claim is that "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *MP&L*, 487 U.S. at 377 (Scalia, J.) (concurring in the judgment). Accord *id.* at 374 (Opinion of the Court). No further analysis is required to conclude that, in setting retail rates for Louisiana customers of ELI, the LPSC and the Louisiana state courts lack jurisdiction to address violations of a FERC tariff, whether

FERC has ruled or not. *Id.* at 375. State regulators setting retail rates do not have concurrent jurisdiction with FERC to address violations of FERC tariffs. The Federal Power Act and this Court's decisions forbid it.

CONCLUSION

The decision of the Louisiana Supreme Court should be reversed.

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