No. _____

In The
Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION,

Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given this Court's holdings that the Federal Power Act ("FPA") preempts inconsistent state ratemaking and requires state agencies to treat cost allocations made by the Federal Energy Regulatory Commission ("FERC") as reasonable, may FERC deny a refund authorized by FPA Section 206(b) based on the threat of a state regulatory commission to violate the Supremacy Clause by denying recovery of the surcharge needed to make the refund?

2. When FERC grants a refund for an unjust and unreasonable holding company cost allocation, pursuant to its policy to grant refunds for unjust and unreasonable rates, and numerous holding company refund decisions support the policy, may a court of appeals accept without scrutiny FERC's subsequent reversal of its refund decision based on its assertion that its previously-cited policy never existed and its reversal of key prior findings without explanation?

LIST OF PARTIES TO THE PROCEEDING

The Petitioner, and petitioner below, is the Louisiana Public Service Commission. Respondent, and respondent below, is the Federal Energy Regulatory Commission. Intervenors below were the Arkansas Public Service Commission and Entergy Services, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Louisiana Public Service Commission is a political subdivision of the State of Louisiana. No corporate disclosure is required.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

The Louisiana Public Service Commission ("Louisiana Commission") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit ("court of appeals" or "court").

OPINIONS BELOW

The opinion of the court of appeals is reported at 883 F.3d 929 (D.C. Cir. 2018). App. 1. The decision of the Federal Energy Regulatory Commission is reported at 155 F.E.R.C. ¶ 61,120 (2016), App. 69, and its decision on rehearing is reported at 156 F.E.R.C. ¶ 61,221 (2016), App. 13.

Other relevant court and agency opinions below include: 1) *Louisiana Public Service Commission v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014), App. 98; 2) *Louisiana Public Service Commission v. FERC*, 482 F.3d 510 (D.C. Cir. 2007), App. 212; 3) *Order Denying Rehearing*, 142 F.E.R.C. ¶ 61,211 (2013), App. 118; 4) *Order Granting Rehearing in Part & Denying Rehearing in Part*, 135 F.E.R.C. ¶ 61,218 (2011), App. 173; and 5) *Amended Order on Remand*, 132 F.E.R.C. ¶ 61,133 (2010), App. 189.

JURISDICTION

The court of appeals rendered its decision on March 6, 2018. App. 1. A petition for rehearing was denied on May 3, 2018. App. 234. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The U.S. Constitution's Supremacy Clause, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e, provide, in relevant part:

> FPA Section 205
>
> (a) Just and reasonable rates. All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all

rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful. No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

* * *

16 U.S.C. § 824d.

FPA Section 206

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues. Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification,

rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest. Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. . . . At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed

and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company". Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not

> experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

16 U.S.C. § 824e.

The Administrative Procedure Act establishes the "scope of review" of agency action, and provides, in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> * * *
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

Rule 206 of the FERC's Rules of Practice and Procedure, 18 C.F.R. § 385.206, provides, in relevant part:

> (a) General rule. Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.
>
> (b) Contents. A complaint must:
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> * * *
>
> (10) Include a form of notice of the complaint suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d) of this part. The form of notice shall be on electronic media as specified by the Secretary.

* * *

> (d) Notice. Public notice of the complaint will be issued by the Commission.

18 C.F.R. § 385.206.

STATEMENT OF THE CASE

1. ***Introduction***. This Court has held three times that holding company cost allocations adopted by the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act ("FPA") preempt inconsistent state ratemaking, preventing retail regulators from disallowing the costs in setting retail rates. *Nantahala Power & Light Co. v. Thornburg* (*Nantahala*), 476 U.S. 953 (1986); *Miss. Power & Light Co. v. Miss. ex rel. Moore* (*Mississippi Power & Light*), 487 U.S. 354 (1988); *Entergy La., Inc. v. La. Pub. Serv. Comm'n* (*Entergy Louisiana*), 539 U.S. 39 (2003). Two of the three cases involved the cost allocations among operating company subsidiaries of Entergy Corp. ("Entergy"), which are also at issue here. Pursuant to the Court's requirement, the Louisiana Commission went to FERC to secure relief from an unjust and unreasonable Entergy cost allocation.

FERC after years granted relief, but denied statutorily-authorized refunds because the Arkansas Public Service Commission ("Arkansas Commission") said it would defy federal preemption and deny recovery of the surcharge needed to make the refund. FERC also ruled that it never had a policy to provide refunds for

unjust and unreasonable rates in holding company cost allocation cases, even though it previously said in the same proceeding that it did have that policy and its decisions over four decades have granted refunds in accordance with that policy. The court of appeals upheld FERC's ruling that the Arkansas Commission might be able to violate the Supremacy Clause as "reasonabl[e]" and accepted FERC's denial of its own policy without scrutinizing the change. App. 9. The decision provides complete deference to FERC's decision to grant a state veto over the exercise of FERC's exclusive power to grant refunds and its inconsistent reasoning.

This Court's rulings established that the Louisiana Commission could not itself disallow the unreasonable cost allocation – it had to go to FERC. It did so and, after a long delay, obtained relief. But FERC denied a refund for the statutorily-authorized period, holding that the Arkansas Commission was likely to disallow the surcharge FERC would require to make the refund. That decision turns preemption upside down and rewards defiance of the Court's rulings. The Court should not let stand a determination that FERC's ruling was "reasonabl[e]."

2. ***Overview***. Pursuant to Section 206 of the FPA, FERC is granted discretionary power to provide refunds for a specified "refund-effective" period if it finds pursuant to a complaint that rates are unjust and unreasonable. 16 U.S.C. § 824e(b). FERC, over decades, has repeatedly granted refunds for holding company cost allocations it found to be unjust and unreasonable, in both FPA Section 205 and FPA Section 206 cases.

FERC granted one of those refunds in the decision underlying *Mississippi Power & Light*, when Entergy was named Middle South Utilities, Inc. *Middle S. Energy, Inc.,* 31 F.E.R.C. ¶ 61,305 (1985).

In 1995, the Louisiana Commission filed a complaint against Entergy, arguing that it was unjust, unreasonable and unduly discriminatory to allocate the fixed costs of Entergy generating units based on electric loads that could be interrupted during times of peak usage. Section 306 and Section 206 of the FPA permit state agencies to file complaints at FERC. 16 U.S.C. § 825e; 16 U.S.C. § 824e. FERC dismissed the complaint, but the court of appeals overruled the decision as arbitrary and capricious, and remanded. *La. Pub. Serv. Comm'n v. FERC* (*LPSC I*), 184 F.3d 892 (D.C. Cir. 1999).

Five years later, FERC found that the cost allocation among the Entergy companies was unjust and unreasonable. It denied refunds, however, holding that some Entergy companies might not be able to collect the surcharges necessary to make the refunds in retail rates. *La. Pub. Serv. Comm'n v. Entergy Servs. Inc.*, 106 F.E.R.C. ¶ 61,228 (2004), *reh'g denied*, 111 F.E.R.C. ¶ 61,080 (2005). The court of appeals overruled that decision, holding that FERC had not explained why its refund allocation would not preempt inconsistent state ratemaking decisions and why the notice of the complaint would not satisfy any retroactive ratemaking concerns. *La. Pub. Serv. Comm'n v. FERC* (*LPSC II*), 482 F.3d 510, 520 (D.C. Cir. 2007), App. 230-31.

On remand, FERC at first granted refunds. FERC held that it had a policy to grant refunds for unjust and unreasonable rates and would have to justify deviating from that policy. It also held that the Supremacy Clause would require retail regulators to permit recovery of the surcharges needed to make refunds. *Amended Order on Remand* (*2010 Order*), 132 F.E.R.C. ¶ 61,133, ¶¶ 23-30 (2010), App. 203-07. But FERC changed its decision on rehearing, applying an exception to the general policy that it had previously made for "rate design" cases, even though the Entergy cost allocation does not determine the design of rates charged to Entergy customers. The court of appeals again overruled the decision, holding that FERC had not justified its departure from the general policy to grant refunds. *La. Pub. Serv. Comm'n v. FERC* (*LPSC III*), 772 F.3d 1297, 1303-05 (D.C. Cir. 2014), App. 110-14.

In this, the final round of decisions, FERC doubled down. It again denied refunds, finding that Entergy might not collect the surcharges needed to make refunds because the Arkansas Commission said it would deny recovery to Entergy Arkansas, Inc., one of Entergy's subsidiaries. FERC relied on "potential litigation," the outcome of which would be "uncertain." *Order on Remand*, 155 F.E.R.C. ¶ 61,120, ¶ 32 (2016), App. 91-92. FERC also denied that it ever had a policy to grant refunds for unjust and unreasonable holding company cost allocations, asserting that its own prior descriptions of the policy were erroneous. *Id.* ¶ 18, App. 80-82. Relying on "rate design" precedents, FERC

ruled that the general policy did not apply to cost allocations, which FERC equated to rate design. *Id.* ¶¶ 20-25, App. 82-86. On rehearing, FERC brushed off numerous holding company cost allocation cases where it granted refunds, mischaracterizing them or attempting distinctions. *Order Denying Rehearing*, 156 F.E.R.C. ¶ 61,221, ¶¶ 36 & nn.60-62 (2016), App. 35-37.

On judicial review, the court of appeals threw up its hands and surrendered. *La. Pub. Serv. Comm'n v. FERC* (*LPSC IV*), 883 F.3d 929 (D.C. Cir. 2018), App. 1. The court approved FERC's contention that it should deny refunds because the Arkansas Commission might deny pass-through of the associated surcharges. *Id*. at 934, App. 9-10. The court ruled that the outcome would be "uncertain" and did not even mention this Court's preemption holdings, nor its own ruling in *LPSC II*. *Id.* Additionally, although in its previous ruling the court rejected FERC's contention that its policy required denying refunds in holding company cost allocation cases, the court accepted without any scrutiny FERC's contention that the rate design policy also applies to cost allocation. *LPSC III*, 772 F.3d at 1304, App. 112 (stating that "one decision does not constitute a 'line[] of precedent'"); *LPSC IV*, 883 F.3d 929, 932, App. 6 (FERC "clarified" its "previously muddled" position, explaining its policy required denying refunds in cases where rates are changed "because of a flaw in rate design, such as cost allocation."). The court deemed that so-called "clarif[ication]" sufficient.

3. ***FERC's ratemaking and refund authority***. The FPA grants FERC exclusive jurisdiction over

wholesale sales of electricity, defined as a "sale of electric energy to any person for resale." 16 U.S.C. § 824(b), (d). Section 205 requires that all rates subject to the jurisdiction of FERC shall be "just and reasonable" and forbids maintaining "any unreasonable difference in rates . . . either as between localities or as between classes of service." 16 U.S.C. § 824d(a), (b). For rate changes filed by utilities, the FPA provides FERC with authority to investigate while the rates are being assessed, hold hearings, and grant refunds for aspects of the rate found unreasonable or unduly discriminatory. 16 U.S.C. § 824d(e).

Section 206 allows FERC to conduct rate investigations, initiated on its own or pursuant to a complaint, and disallow rates as unjust and unreasonable or unduly discriminatory. The statute directs FERC to establish new just and reasonable rates. 16 U.S.C. § 824e(a). Until 1988, FERC could only change the rates prospectively. In that year, however, Congress passed the Regulatory Fairness Act ("RFA"), which permits FERC to establish a refund-effective date upon initiation of an investigation and grant refunds for up to 15 months after the filing of the complaint for unjust and unreasonable rates. 16 U.S.C. § 824d(b). In "registered" holding company cases, Section 206(b) and (c) of the FPA permit FERC to grant refunds on finding that the holding company would not suffer a reduction in revenues "which results from an inability of an electric utility company of the holding company" to recover the surcharge necessary to make the refund. 16 U.S.C. § 824e(c).

4. ***FERC ratemaking for holding companies***. FERC exercises jurisdictions over sales from some companies at wholesale to independent parties, such as other utilities, municipalities, or electric cooperatives that resell at retail to ultimate customers. FERC also has always exercised jurisdiction over cost allocations within holding company systems. In the case of Entergy, for instance, the entire electric system was planned and constructed as a single system. The Entergy System dispatched "all energy in the entire system" from a "single dispatch center . . . ," directly to ultimate customers or to independent wholesale customers. *Miss. Power & Light*, 487 U.S. at 357. The Entergy System Agreement, filed as a FERC tariff, "provided the basis for planning and operating the companies' generating units on a single-system basis and for equalizing cost imbalances among the four companies." *Id.* The System Agreement was terminated in 2016; Entergy now allocates costs under other tariffs filed with FERC.

For Entergy's sales to ultimate customers, the rates charged to ultimate customers and design of those rates are determined by retail agencies, not FERC. The System Agreement allocated System production and transmission costs to the companies in different retail jurisdictions; those costs were then added to costs incurred for distributing electricity and serving customers, and translated into rates by retail agencies. Sales from Entergy companies to independent wholesale customers were established by FERC, but in separate tariffs with their own rate designs. The

System Agreement cost allocations were entirely separate from the rate designs faced by customers. The Entergy holding company itself made no electric sales and was not subject to FERC rate regulation; the cost allocations were treated as wholesale transactions among the Entergy companies.

FERC has traditionally regulated cost allocation agreements among affiliated entities. *See, e.g.*, *Miss. Power & Light*, 487 U.S. at 361. As the court of appeals stated in *Mississippi Indus. v. FERC*, 808 F.2d 1525, 1549 (D.C. Cir. 1987) ("Moreover, when, as here, affiliated operating companies in an integrated regional system enter into agreements for wholesale power sales in interstate commerce which allocate costs, FERC jurisdiction has additional merits.").

5. ***Development of FERC refund policy***. For decades after the passage of the FPA, FERC – then the Federal Power Commission – required refunds of unjust and unreasonable rates, even if that imposed undercollections on a utility. FERC did so even if it retroactively corrected flaws in a rate design without prior notice that the rate design might change. This Court commented on FERC's practice in a natural gas case, *Fed. Power Comm'n v. Tenn. Gas Transmission Co.*, 371 U.S. 145 (1962), where the Court upheld an interim rate reduction issued before rate design details were determined. The Court said:

> The company . . . may suffer further loss when the Commission upon a finding of excessiveness makes adjustments in the rate detail of

> the company's filing. In this latter respect a rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter. Such situations are entirely consistent with the policy of the Act and, we are told, occur with frequency.

In the 1970s, FERC created an exception to its refund policy. When it ordered a change in the design of rates affecting independent parties, it would waive retroactive application relating to the change. FERC ruled that the utility might not be able to collect the rates retroactively increased due to the rate design change. It also found that customers whose behavior was influenced by the previous rate design could not react retroactively to the new rate design. *See Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982); *Second Taxing Dist. of Norwalk v. FERC*, 683 F.2d 477 (D.C. Cir. 1982).

A rate design sometimes is driven by cost allocations, but often departs from cost causation in order to influence customer behavior. In both *Batavia* and *Norwalk*, for instance, the disapproved rate designs involved "ratchets," which bill customers all year based on a single peak of electric demand. *Batavia*, 672 F.3d

at 83; *Norwalk*, 683 F.3d at 489-90. One purpose is to curb usage at the peak and promote usage at other times, not necessarily to allocate costs properly. *Batavia,* 672 F.3d at 83. Customers arguably would have responded to the ratchet, but could not change their behavior retroactively.

FERC did *not* apply this rate design policy to holding company cost allocations. In the same time period as *Batavia* and *Norwalk* were decided, for instance, FERC disapproved cost allocations proposed by Entergy's predecessor-in-name, Middle South Utilities, Inc., and other holding companies. In *Middle South Services, Inc.*, 16 F.E.R.C. ¶ 61,101 (1981), FERC found that the company proposed unjust and unreasonable System Agreement cost allocations. FERC ordered tariff revisions and held that: "the operating subsidiaries of Middle South Utilities, Inc., shall refund to their customers any amounts collected in excess of those amounts which would have been payable under the rates and charges approved in accordance with Ordering Paragraph (D), above." *Id.* at 61,223.

In the FERC decision underlying this Court's preemption ruling in *Mississippi Power & Light*, FERC allocated the costs of the Grand Gulf nuclear unit and altered cost allocations that Entergy had proposed in the 1982 System Agreement. *Middle S. Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 (1985). FERC ordered Entergy to make changes to the System Agreement and "refund, with interest, any amounts collected in excess of those allowed pursuant to this opinion." *Id.* at 61,667. Similarly, in the FERC cost allocation ruling underlying

this Court's well-known *Nantahala* decision, FERC ordered refunds. *Nantahala Power & Light Co.*, 19 F.E.R.C. ¶ 61,152 (1982). Nantahala and an affiliate were owned by Alcoa Aluminum Co. FERC adjusted Nantahala's rates to wholesale customers, holding that Alcoa had allocated too much cheap energy to the other subsidiary and too little to Nantahala. *Id.* at 61,279. FERC ordered Nantahala to make refunds to customers. *Id.* at 61,287.

FERC refunded unjust and unreasonable cost allocations in other holding company cases. *Am. Elec. Power Serv. Co.*, 8 F.E.R.C. ¶ 61,068, Ordering Para. D (1979), *on reh'g*, 8 F.E.R.C. ¶ 61,302 (1979) (requiring interest on the refunds); *Cent. & S. W. Servs., Inc.*, 48 F.E.R.C. ¶ 61,197, at 61,741 (1989).

FERC's practice of refunding unjust and unreasonable holding company cost allocations continued into the period when this case was pending on the remand from *LPSC II*. Four times FERC ordered refunds for unjust and unreasonable System Agreement cost allocations. Three of the cases involved complaints filed by the Louisiana Commission to change the cost allocations in the System Agreement "bandwidth" tariff, designed to "roughly equalize" production costs among the Entergy Companies. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 124 F.E.R.C. ¶ 61,010, ¶ 28 (2008); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 F.E.R.C. ¶ 61,253, ¶ 41 (2010); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 F.E.R.C. ¶ 61,100, ¶ 27 (2012). One case involved bandwidth tariff changes proposed by Entergy, which FERC disapproved in part and required refunds.

Entergy Servs., Inc., 143 F.E.R.C. ¶ 61,120, Ordering Para. C (2013) (on rehearing). No state agency has tried to disallow any surcharge required to make those refunds.

6. ***Prior refunds in this litigation***. There have been four refunds required by FERC in this litigation. After FERC granted the LPSC complaint in 2004, Entergy obtained permission to delay changing the rates until after a rehearing order. When FERC denied rehearing, Entergy made refunds and no state agency questioned the associated surcharges. *Order Conditionally Accepting Compliance Filing, etc.*, 112 F.E.R.C. ¶ 61,192 (2005). Entergy computed the refund based on a phase-in of the rate change, which the court of appeals overruled in *LPSC II*, along with overruling the denial of refunds. *LPSC II*, 482 F.3d at 518, App. 226-27. On remand, FERC granted two refunds – for the phase-in and for the refund-effective period. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 120 F.E.R.C. ¶ 61,241, ¶¶ 7, 8 (2007). Although four companies were required to make payments to Entergy Louisiana, Inc., no state agency questioned the phase-in surcharges.

Entergy and the Arkansas Commission sought rehearing of the Section 206(b) refund for the refund-effective period, which FERC denied. Entergy and the Arkansas Commission sought judicial review and FERC requested a voluntary remand, which was granted. In the meantime, Entergy Arkansas, Inc. requested recovery of the Section 206(b) refund at the Arkansas Commission. The Arkansas Commission denied recovery, citing the state's filed-rate doctrine, and

litigation ensued in federal court. But FERC retracted the refund decision in 2011 and the case became moot. When FERC reversed its ruling, refunds and surcharges were again assessed among the companies to return the previously-refunded funds. With the exception of the single surcharge disallowed by the Arkansas Commission, which it was simultaneously opposing at FERC, no state agency questioned any of the refunds or surcharges.

On the voluntary remand, FERC initially held: 1) refunds and surcharges would not violate the filed-rate doctrine and federal preemption would require pass-through of FERC-ordered cost allocations at the retail level; 2) Section 206(c) was not applicable in any event because Entergy was no longer a registered holding company; 3) FERC had a policy to refund unjust and unreasonable rates and would have to justify deviating from that policy. *See, e.g.*, *2010 Order*, 132 F.E.R.C. ¶ 61,133, ¶¶ 23-30, 31 n.63, App. 203-08. On rehearing, however, FERC ruled that it would exercise "discretion" to deny refunds, relying on an alleged separate policy to deny refunds in cost allocation cases. *Order Granting Rehearing in Part & Denying Rehearing in Part* (*2011 Order*), 135 F.E.R.C. ¶ 61,218, ¶ 23 (2011), App. 186-87. FERC "disavow[ed] the distinction [it] attempted to draw . . . between the treatment of refunds in rate design and cost allocation cases." *Id.* ¶ 23, App. 187. Although Entergy in a brief relied heavily on the Arkansas Commission's disallowance to show a risk of under-collection, FERC still ruled that "the danger of under-recovery of costs in this case is not

present." *Order Denying Rehearing* (*2013 Order*), 142 F.E.R.C. ¶ 61,211 ¶ 63, App. 162; Brief Opposing Refunds of Entergy Services, Inc. at 18-19, FERC Docket No. EL00-66 (Nov. 7, 2011).

In *LPSC III*, the court of appeals ruled that FERC did not adequately explain its departure from its "'general policy' of ordering refunds when consumers have paid unjust or unreasonable rates." 772 F.3d at 1303, App. 110. FERC cited one similar holding company cost allocation case in which it denied refunds, but the court found that "one decision does not constitute a 'line[] of precedent' . . . much less offer a comprehensive theory." *Id.* at 1304, App. 112. The court noted that FERC conceded that the danger of under-recovery "'is not present.'" *Id.*, App. 113. The court rejected FERC's assertion that the cost allocation might have affected decisions of the Entergy companies, finding that consideration "generic" and applicable in any case, including cases granting refunds. *Id.* at 1306, App. 116.

On remand, Entergy submitted a motion requesting still another round of briefing. Mot. to Establish Briefing Schedule on Remand, Mar. 16, 2015 (FERC Docket No. EL00-66) (available at FERC E-Library). Entergy submitted an extensive Initial Brief with the motion and asked FERC to establish a briefing schedule. Initial Br. of Entergy Services Inc. on Remand, Mar. 16, 2015 (FERC Docket No. EL00-66) (available at FERC E-Library). The LPSC filed an opposition to the motion, but said if FERC considered Entergy's brief it should allow other parties to respond. Opp'n of the Louisiana Public Service Commission, etc., Mar.

26, 2015 (FERC Docket No. EL00-66) (available at FERC E-Library).

Entergy's brief asked FERC to revisit prior decisions. It requested FERC: 1) to clarify its refund policy as one pertaining only to over-recovery, 2) hold that there was a possibility of under-recovery, again based on the Arkansas Commission's disallowance, and 3) draw an inference, without evidence, that the prior cost allocation affected decisions of the Entergy companies. Initial Br. of Entergy Services Inc. on Remand at 8, 10, 16-17, Mar. 16, 2015 (FERC Docket No. EL00-66) (available at FERC E-Library).

FERC did not rule on Entergy's motion. It did not invite a reply from the LPSC, and neither the LPSC nor any other party submitted a brief. Yet when FERC issued its *Order on Remand*, it adopted the arguments in Entergy's brief.

First, FERC asserted it needed to explain why the court's "description of Commission policy under the FPA is inaccurate and then to explain the Commission's long-established approach." *Order on Remand*, 155 F.E.R.C. ¶ 61,120, ¶ 17, App. 80. The key factor always present when refunds are granted, FERC asserted, was an "over-collection of revenue by the utility." *Id.* ¶ 20, App. 83. Next, FERC ruled there was a possibility of under-recovery. True to Entergy's brief, FERC relied on "potential litigation" in Arkansas. *Id.* ¶¶ 31-32, App. 90-92. FERC also adopted Entergy's "artificial disincentive" argument, agreeing to draw an inference, without evidence, that the cost allocation

influenced behavior of the Entergy companies. *Id.* ¶ 35, App. 94-96. FERC said the Companies may have "engage[d] in firm sales that cannot now be undone" rather than interruptible sales. *Id.*, App. 95. On rehearing, FERC attempted to distinguish the many holding company cost allocation cases over four decades, in which FERC granted refunds. *2013 Order*, 142 F.E.R.C. ¶ 61,211 (2013), App. 24-46.

In *LPSC IV*, the court of appeals accepted FERC's reversals, without apparent scrutiny. It held that FERC's reliance on the possibility that the Arkansas Commission would violate the Supremacy Clause and deny refunds presented a "reasonabl[e]" change of position "on the feasibility of recoupment by Entergy." *LPSC IV*, 883 F.3d at 933, App. 9. The court found that the prior Arkansas litigation presented "definite evidence of at least a non-trivial risk of under-recovery." *Id.* at 934, App. 10. The Court did not mention this Court's preemption decisions.

The court uncritically accepted FERC's contention that it never had a policy to award refunds for unjust and unreasonable holding company cost allocations. The court said that the "Commission has clarified its previously muddled position." *Id.* at 932, App. 6. It said FERC "makes clear" that its policy is "the opposite" when rates are found unjust and unreasonable "because of a flaw in rate design, such as cost allocation." *Id.* The court relied on the same cases it found inadequate in *LPSC III*, which were rate design cases or cases in which "cost allocations" directly determined

the design of rates to independent parties, not cost allocations among affiliates in a holding company. *Id.*

The court of appeals also approved FERC's theory that it could infer that Entergy's previous allocation detrimentally affected the Entergy companies, but it transformed the theory into something new. According to the court's description, the Entergy company sellers were "customers" who respond to price signals in the "rate design," allowing the court itself to "infer" on effect on the companies' "purchase decisions." *Id.* at 934, App. 10. But "customers" do not pay Entergy pursuant to the System Agreement tariffs and never see its so-called "price signals." They pay rates established by retail agencies.

REASONS FOR GRANTING THE PETITION

The acceptance of a state agency veto over FERC's exercise of jurisdiction pursuant to the FPA to grant refunds for unjust and unreasonable rates undermines the federal plan to ensure that consumers are protected from unreasonable rates and undue discrimination. This Court has ruled three times – two involving Entergy – that state agencies may not disallow cost allocations approved by FERC. The FPA allows FERC to adjust rates and provide refunds and, according to the Court's decisions, state agencies must go to FERC to obtain relief pursuant to the statute. That is what the Louisiana Commission did here, only to be denied a refund based on the threat of an agency in a different

state to violate the Supremacy Clause. The court of appeals' approval of that rationale as "reasonabl[e]," when it would be illegal, requires review by this Court.

This Court has made clear that courts on judicial review should ensure that when an agency changes its policy or deviates from prior holdings, it must acknowledge the change and show that there are good reasons for it. *Fed. Commc'ns Comm'n v. Fox Television Stations*, *Inc.*, 556 U.S. 502, 515 (2009). An agency must provide a more detailed explanation when a new policy "rests upon factual findings that contradict those which underlay its prior policy." *Id.* Here, FERC in 2010 and 2011 declared it had a policy, applicable to this cost allocation case, to grant refunds for unjust and unreasonable rates. But then it reversed position, contending that the policy always provided for denying refunds in cost allocation cases, as well as rate design cases. In *LPSC IV* the court of appeals unquestioningly accepted that rationale, even though it is demonstrably untrue. The court of appeals accepted without analysis FERC's change of position on the collectability of refunds and supplied a new rationale for FERC on "customer" incentives. It also accepted FERC's reversal of findings without scrutiny. This level of review does not suffice, particularly in a case involving important considerations of federalism.

The Louisiana Commission followed the directives of this Court by going to FERC for relief from an unjust cost allocation, rather than trying to disallow it at retail. But FERC denied a statutorily-authorized refund on the ground that the Arkansas Commission might

disallow the necessary surcharge at retail, defying the Court's rulings. The court of appeals approved that rationale as "reasonabl[e]" and failed to apply even minimal scrutiny to multiple reversals of policy and findings. *LPSC IV*, 883 F.3d at 933, App. 9. The Court should review the upending of federal preemption and approval of agency recalcitrance.

I. FERC'S RECOGNITION OF A STATE AGENCY VETO OF REFUNDS AUTHORIZED BY THE FEDERAL POWER ACT OFFENDS THE SUPREMACY CLAUSE AND IMPROPERLY CRIMPS FERC'S EXCLUSIVE JURISDICTION.

FERC held categorically in 2010 and 2011, responding to the voluntary remand after *LPSC II*, that state agencies could not disallow refunds ordered by FERC pursuant to Section 206(b) of the FPA. FERC in this phase said it had not departed from that finding, but nevertheless held that the Arkansas Commission might try again to disallow the refunds and might succeed. The court of appeals, which in *LPSC II* rejected the same rationale, accepted it without question in *LPSC IV*. Approving this rationale conflicts with this Court's preemption decisions and upends the federal plan for wholesale regulation.

The RFA, incorporated into the FPA, provides FERC with authority to refund unjust and unreasonable rates for up to 15 months after the filing of a complaint. 16 U.S.C. § 824e(b). The RFA was intended to

prevent harm to consumers from FERC delays in resolving complaint cases, which contrasted with the right of utilities under Section 205 to begin charging new rates after a short delay, subject to potential future disallowances. Congress incorporated a "registered" holding company exception in Section 206(c), which prevented refunds if holding company subsidiaries had an "inability" to collect the surcharges associated with refunds. 16 U.S.C. § 824e(c). In the absence of an "inability" to collect, the prohibition does not apply. *Id.*

In *LPSC II*, the court of appeals held that FERC's reliance on Section 206(c) to deny refunds was irrational. It found that Congress was concerned with the filed-rate doctrine in enacting Section 206(c), and FERC had not explained why the notice of the complaint – published pursuant to a FERC regulation in the Federal Register – would not satisfy filed-rate concerns. 18 C.F.R. § 385.206(b)(10); *LPSC II*, 482 F.3d at 520, App. 230-31. It also held that FERC had not explained "why, under the Supremacy Clause, a rate increase ordered by the Commission may be recovered through retail rates but a refund ordered by the Commission may not be." *Id.* at 520, App. 231.

On remand, FERC held that Section 206(b) authorized it to establish a refund-effective date, which placed all parties on notice that the rates might change. *2010 Order*, 132 F.E.R.C. ¶ 61,133, ¶ 23, App. 203. It also held that state agencies would have to pass through FERC-ordered refunds, *citing Nantahala* and *Mississippi Power & Light*. *Id.* ¶ 24, App. 204. On

rehearing, it reaffirmed those rulings. It also held that Entergy is no longer a "registered" holding company given the repeal of the Public Utility Holding Company Act in 2005 and could not claim the protection of Section 206(c). *2011 Order*, 135 F.E.R.C. ¶ 61,218, ¶ 12 & n.24, App. 180-81. But FERC said it would exercise equitable power to deny refunds based on "rate design" precedents. *Id.*, ¶¶ 22, 24, App. 185-87. That decision was overruled in *LPSC III*.

Here, FERC switched position on the collectability of refund-associated surcharges at retail. It said it "ha[d] not departed from" its prior finding, but in the same breath found that Entergy would not be made whole. *Order Denying Rehearing*, 156 F.E.R.C. ¶ 61,221, ¶ 64, App. 58. The court of appeals accepted without scrutiny FERC's rationale that the Arkansas Commission, one of five affected agencies, might try successfully to deny recovery of the surcharges needed to make the rates just and reasonable in the refund period. This acceptance of "definite evidence of at least a non-trivial risk of under-recovery" undercuts the Supremacy Clause and the Congressional plan for utility regulation. *LPSC IV*, 883 F.3d at 934, App. 10.

This Court has held repeatedly that FERC-ordered allocations preempt inconsistent state ratemaking; state agencies may not "trap" costs by refusing to recognize the legitimacy of costs incurred pursuant to FERC rulings. In *Nantahala*, the Court overruled a state agency's adjustment of Alcoa's allocation of cheap power between Nantahala and another Alcoa subsidiary because it was different from FERC's. It said:

> Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.

476 U.S. at 966.

In *Mississippi Power & Light*, the Court ruled that the Mississippi Public Service Commission could not investigate the prudence of FERC-allocated costs of the Grand Gulf nuclear unit. The Court followed *Nantahala*, holding that "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." 487 U.S. at 374. In *Entergy Louisiana*, the Court held that the Louisiana Commission had to respect System Agreement cost allocations, even when made by Entergy's management pursuant to authority delegated by FERC in the tariff. The Court found that federal preemption still applied: "We see no reason to create an exception to the filed rate doctrine for tariffs of this type that would substantially limit FERC's flexibility in approving cost allocation arrangements." 539 U.S. at 50.

The message of these decisions is inescapable: state agencies must go to FERC to secure just and reasonable wholesale rates and protection from unduly discriminatory cost allocations. But the process at

FERC is extremely slow – FERC delayed five years after *LPSC I* before granting relief. *La. Pub. Serv. Comm'n v. Entergy Servs. Inc.*, 106 F.E.R.C. ¶ 61,228 (2004). The RFA was designed to fill at least 15 months of the gap due to FERC's delays, allowing refunds for unjust, unreasonable, or unduly discriminatory rates. Granting refunds fulfills the purpose of the statute.

The Louisiana Commission followed the Court's rulings and sought redress at FERC for an unjust and unreasonable cost allocation. After years, it succeeded and obtained prospective relief. But FERC denied refunds, holding that an agency in a different jurisdiction might try to disallow the surcharge needed to pay the refunds, which the law says it could not do. The court of appeals' approval of this rationale as "reasonabl[e]" is incomprehensible, especially since it conflicts directly with this Court's rulings and the holding in *LPSC II*.

The same threat of disallowance was present in *LPSC II*. 482 F.3d at 519, App. 227-28 (FERC said it "could not be certain the Operating Companies owing refunds would be allowed by their state regulators to recover at retail the revenue needed to pay the refunds."). *LPSC II* rejected that claim of uncertainty, holding that FERC would have to explain why the public notice of the complaint and federal preemption would not eliminate that possibility as a matter of law. *Id.* at 520, App. 230-31. But here, the court blandly accepted the same bare claim of uncertainty as a "reasonabl[e]" ground to prevent refunds. That

determination conflicts with the law and upends federal preemption.

The court of appeals' approval of a state agency veto over refunds authorized by the FPA disrupts the federal plan of electric regulation. The Court should grant the writ to review it.

II. THE COURT OF APPEALS FAILED IN ITS TASK OF JUDICIAL REVIEW BY ACCORDING COMPLETE DEFERENCE TO FERC'S REVERSALS OF POSITION.

In *LPSC IV*, the court of appeals bowed before an intransigent agency, bent on denying refunds for Entergy's unduly discriminatory rates. Of particular importance here, the court of appeals accepted without scrutiny FERC's contention that its previously described policy for holding company cost allocations never existed. Also, rather than examining FERC's assertion that the prior allocation might have affected decisions of the sellers, the Entergy Companies, the court translated that concern into something else – a supposed effect on ultimate customers, even though they do not face Entergy's cost-allocation "rate design." FERC made other aberrational rulings that the court of appeals approved or ignored. Rather than scrutinizing FERC's turnabouts, the court gave them near-absolute deference.

The members of this Court have not always agreed on the appropriate standard of review when an agency changes its policy or its findings. But four members of

the Court made clear in 2005 that a reviewing court should ensure *at least* that the agency "display awareness that it is changing position[s]" and provide a "more detailed justification" when its factual findings contradict prior findings. *Fed. Commc'ns Comm'n v. Fox Television Stations*, *Inc.*, 556 U.S. 502, 515 (2009). A fifth member determined that an agency may be arbitrary if it "ignores or countermands its earlier factual findings without reasoned explanation." 556 U.S. at 537 (Kennedy, J., concurring in part). Four justices ruled that when the agency reverses course, the arbitrary and capricious standard may require a more thorough explanation of the *reasons* for the change. 556 U.S. at 549-50 (Breyer, J., dissenting). In *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), the Court determined that no deference may be due when "the agency's interpretation conflicts with a prior interpretation."

In the rulings leading up to *LPSC III*, FERC ruled that it had a policy, applicable to the Entergy cost allocation, of granting refunds for unjust and unreasonable rates. *2010 Order*, 132 F.E.R.C. ¶ 61,133, ¶ 31, App. 207-08 ("There is no question that the Commission has a policy of granting full refunds to correct unjust and unreasonable rates" and no reason to deviate from the policy.). In *LPSC III*, FERC conceded the existence of its policy but suggested it had not been applied in cases of "no over-recovery" by a holding company. The court held, however, that FERC had not adequately explained why its "'general policy' of ordering refunds when consumers have paid unjust and unreasonable

rates" did not apply to Entergy. *LPSC III*, 772 F.3d at 1303, App. 110. It also found that "[t]he Commission did not explain why a lack of over-recovery should automatically negate refunds." *Id.* at 1304, App. 113.

On remand, FERC glommed cost allocation and rate design together, finding that its "policy" actually required denying refunds in both types of cases. That would be true if the cost allocation were always synonymous with rate design, but it is not always synonymous. In the case of Entergy, the companies jointly comprise a single seller and the rates to true customers are established under separate retail and wholesale tariffs. As FERC found before *LPSC I*, "'Here . . . the rate at issue allocates the costs of an integrated system among its constituent parts. While ostensibly purchasers, the Entergy operating companies in reality comprise the seller, the Entergy System.'" *See LPSC I*, 184 F.3d at 897.

During the period at issue, Entergy planned its generation as a single System. Entergy Services, Inc. dispatched the entire System from a single, centralized dispatch center. *Miss. Power & Light*, 487 U.S. at 356 (All energy "in the entire system . . . distributed by a single dispatch center."). None of the Companies made decisions to purchase electricity; acting as one, they *sold* electricity. The Companies could not control consumption because Entergy's electricity was consumed by *retail* and *wholesale requirements* customers. As a joint seller, they could not react to price signals in retail rate designs. As the presiding judge in the rough equalization case ruled, "[t]he Operating Companies

are operated and centrally dispatched as one company, and thus could not have any individual company incentive . . . to minimize production costs." *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 106 F.E.R.C. ¶ 63,012, ¶ 44 (2004). The cost allocation here was in no sense a "rate design."

The court of appeals accepted, without any apparent question, FERC's explanation that Entergy's cost allocation was controlled by the "rate design" exception to the general policy to grant refunds. The court found that FERC "clarified its previously muddled position" and, despite prior pronouncements, explained "it has no generally applicable policy of granting refunds." *LPSC IV*, 883 F.3d at 932, App. 6. It accepted that "the set of cases to which this [case] belongs" involved "a flaw in rate design, such as cost allocation." *Id.* The court said "a series of Commission decisions" – the *same decisions* FERC cited in *LPSC III*, established that new policy. *Id.* But the court did not examine this revision of FERC's stance.

The court of appeals' acquiesce in FERC's turnabout might not be so concerning if FERC were not requiring refunds right and left in other Entergy System Agreement cases while the remand was pending. The Louisiana Commission cited numerous Entergy cost allocation cases where FERC granted refunds. FERC in the *2013 Order* said that happened because the Commission "initially doubted its authority to deny refunds based on equitable considerations in matters involving holding company systems." *2013 Order*, 142 F.E.R.C. ¶ 61,211, ¶ 75, App. 170. It also said "our

policy in this area was still under consideration and evolving" when it granted all those refunds. *Id.* That does not square with the FERC's new assertion after *LPSC III* that there was always a policy to deny refunds.

In the *Order Denying Rehearing*, FERC switched tactics and brushed those refund cases off as cases requiring compliance with the Entergy Bandwidth Tariff, which is part of the System Agreement. *Order Denying Rehearing*, 156 F.E.R.C. ¶ 61,221, ¶ 36, App. 35-37. But there were three Section 206 complaint cases in which the LPSC succeeded in obtaining *changes* to unjust and unreasonable provisions in the Bandwidth Tariff. FERC granted refunds in all three cases. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 F.E.R.C. ¶ 61,100, ¶ 27 (2012); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 F.E.R.C. ¶ 61,253, ¶ 41 (2010); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 124 F.E.R.C. ¶ 61,010, ¶ 28 (2008). The inaccuracy of FERC's attempted distinction did not trouble the court of appeals. In another case, Entergy sought a change in the Bandwidth Tariff. FERC disallowed the proposal in part as unjust and unreasonable and required years of refunds. *Entergy Servs., Inc.*, 143 F.E.R.C. ¶ 61,120, Ordering Para. C (2013) (on rehearing).

These cases are indistinguishable in principle from this case. The holding company had "no over-recovery" in each; the tariff was changed in each; FERC granted refunds in each. One case is just like this case. In this case, the Louisiana Commission succeeded in obtaining the removal of interruptible load from the

Service Schedule MSS-1 reserve capacity allocator in the System Agreement; in the other, the Louisiana Commission succeeded in obtaining the removal of interruptible load from the allocator for "fixed" capacity costs in the Bandwidth Tariff. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 F.E.R.C. ¶ 61,100, ¶ 27 (2012). FERC said in the *Order Denying Rehearing* that the two cases were distinguished in "note 73 below." *Order Denying Rehearing*, 156 F.E.R.C. ¶ 61,221, ¶ 36 n.64, App. 36. Footnote 73 was a bare citation of a case involving a different holding company, in which FERC *granted* refunds. Nor was the reference to "note 73" a typo; no footnote in the entire Order distinguished the cases. The inconsistency was *never* explained, but that did not bother the court of appeals.

FERC has granted System Agreement refunds for unjust and unreasonable rates in cases involving Entergy's predecessor-in-name since the 1980s. *Middle S. Servs., Inc.*, 16 F.E.R.C. ¶ 61,101 (1981); *Middle S. Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 (1985). Its normal practice in other holding company cost allocation cases was to grant refunds for unjust and unreasonable rates. *Am. Elec. Power Serv. Corp.*, 8 F.E.R.C. ¶ 61,068 (1979); *Am. Elec. Power Serv. Corp.*, 8 F.E.R.C. ¶ 61,302 (1979); *Cent. & S. W. Servs., Inc.*, 48 F.E.R.C. ¶ 61,197 (1989). In briefing its case for the court of appeals in *LPSC III*, FERC found only one holding company case where refunds for unjust and unreasonable rates were not granted. *LPSC III*, 772 F.3d at 1304, App. 112 ("[O]ne decision does not constitute a 'line[] of precedent.'"). FERC found no more for *LPSC IV.* It cited two other

"cost allocation" cases, but in both, the cost allocation *did determine* the rate design charged by Regional Transmission Organizations to *independent* customers or parties. *Black Oak Energy, LLC*, 136 F.E.R.C. ¶ 61,040 (2011); *Occidental Chem. Corp.*, 110 F.E.R.C. ¶ 61,378 (2005). That is nothing like the Entergy cost allocation, which does not affect the design of rates to customers.

Also, many refunds were passing back and forth in this decade in other Entergy cases in which there was "no over-recovery" by the holding company. Many of these cases involved accounting errors corrected by FERC years after annual bandwidth filings. FERC ordered so many adjustments requiring refunds that Entergy obtained leave to file "comprehensive" refund reports covering multiple issues and dockets, including complaint dockets. *E.g., Entergy Servs., Inc.*, 142 F.E.R.C. ¶ 61,011, ¶ 20 (2013). Additional refunds were granted because FERC improperly delayed the Bandwidth Remedy. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 F.E.R.C. ¶ 61,047 (2011). Most recently, FERC in 2018 granted refunds for test year 2005 after adjusting Entergy's filing for that period. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 163 F.E.R.C. ¶ 61,116 (2018). And as the court of appeals noted in *LPSC III*, "[u]nrebutted expert evidence of record . . . indicated that refunds between operating companies in the context of billing errors were routine and not disruptive." *LPSC III*, 772 F.3d at 1306, App. 116-17.

All of the Entergy holding company cases involved "no over-recovery" by the holding company. Also, if a state agency had a novel "filed rate doctrine" that required disallowance of refunds for the past, regardless of federal law, the policy would have to apply to all of these refunds and surcharges. Yet except for the single case involving the Arkansas Commission's decision to disallow the refund that it was simultaneously opposing at FERC, there was no evidence that a state agency ever disallowed a surcharge needed to make a refund in the past 40 years.

None of this was deemed worthy of mention by the court of appeals. It simply accepted FERC's so-called "clarif[ication]," which actually was a policy reversal. *LPSC IV*, 883 F.3d at 932, App. 6. It said FERC's reliance on the Arkansas Commission's threat to violate the Supremacy Clause was "reasonabl[e]," including FERC's determination that "the ultimate outcome . . . is uncertain. . . ." *LPSC IV*, 883 F.3d at 933-34, App. 9-10. The court recognized that FERC "has now reversed" its prior ruling that the Supremacy Clause would require the agency to allow recovery, but made no analysis of how that could be correct. *Id.* The court did not even acknowledge its own prior, contrary holding in *LPSC II*.

The court also supplied reasoning for FERC that the agency never adopted. FERC had suggested, based on Entergy's unilateral brief, that the unjust and unreasonable cost allocation to interruptible load might have affected the conduct of the Entergy companies, driving them to add firm rather than interruptible load

in decisions that could not be undone. *Order on Remand*, 155 F.E.R.C. ¶ 61,120, ¶ 35, App. 94-96. There was no evidence to support that conclusion, although it would easily be the subject of proof. Moreover, adding firm customers rather than interruptible customers would have made the companies *better off*, because "firm" rates contain a full allocation of capacity costs and interruptible rates do not. *See LPSC I*, 184 F.3d at 895-96. Further, FERC's theory rested on the assumption that the joint sellers would impose a "disincentive" on themselves. *Order on Remand*, 155 F.E.R.C. ¶ 61,120, ¶ 35, App. 95.

The court of appeals chose not to address FERC's irrational reliance on possible Entergy decisions to add firm customers. Instead, it substituted its own rationale, transforming the Entergy companies into "customers." The court said that "the object of sound cost allocation is to influence customer behavior" and "we may fairly infer that their purchase decisions reflected that principle." *LPSC IV*, 883 F.3d at 934, App. 10. FERC never suggested that the Entergy cost allocation could possibly affect customers, who are all served under separate tariffs with their own rate designs.

In the *Order Denying Rehearing*, FERC tossed out other aberrational rulings that the court of appeals deemed unworthy of scrutiny. For instance, it ruled that the public notice published in the Federal Register – the same public notice provided for all utility rate change filings and all complaint cases – is not adequate notice for ultimate customers. *Order Denying Rehearing*, 156 F.E.R.C. ¶ 61,221, ¶ 58, App. 51. Based

on that, FERC reversed its prior finding that Section 206(c) would not bar refunds. *Id.* ¶¶ 64-65, App. 57-58. But in *LPSC II*, the court had ruled that "all parties were on notice" as of the filing of the complaint that the cost allocation might be found unjust and unreasonable. *LPSC II*, 482 F.3d at 520, App. 230. The court did not discuss the notice finding or the conflict with *LPSC II*. It simply said its decision did not determine the applicability of Section 206(c). *LPSC IV*, 883 F.3d at 935, App. 12.

In the *Order on Remand*, FERC gullibly accepted Entergy's argument – from the unilateral brief – that Entergy Arkansas would have to look for past wholesale requirements customers to collect the surcharges needed to make refunds. *Order on Remand*, 155 F.E.R.C. ¶ 61,120, ¶ 31, App. 90-91. That rationale was preposterous – it has never happened in Entergy's history, which the Louisiana Commission demonstrated on rehearing. FERC-ordered refunds and surcharges always are reflected in current rates to current customers. FERC's rehearing order grudgingly accepted that point, but added a sentence: "Indeed, the Commission has previously found that a requirement that current load would have to pay for charges incurred by past customers, or a prior generation of customers, is an equitable consideration that supports denial of refunds in such cases." *Order Denying Rehearing*, 156 F.E.R.C. ¶ 61,221, ¶ 67, App. 59.

To the extent this single sentence was designed to provide a rationale for this case, it constitutes another unexplained reversal of position. FERC in the *2010*

Order deemed the passage of time irrelevant, which makes sense because all refunds involve past periods. *2010 Order*, 132 F.E.R.C. ¶ 61,133, ¶ 32 ("Under the facts of this case, we do not consider the length of time to be a relevant factor, and we decline to consider this a relevant factor in determining whether refunds are equitable."). The court of appeals elevated FERC's sentence to a rationale and, despite the unexplained reversal, accepted it without scrutiny. *LPSC IV*, 883 F.3d at 934-35, App. 11.

The court of appeals did not acknowledge FERC's unusual procedure, in which it adopted arguments from a brief on one side without receiving a response from the other. The LPSC asked for "full consideration" of its arguments on rehearing, to which FERC responded: "[T]he full consideration we give to the Louisiana Commission's arguments . . . is the same consideration that we give to all rehearing requests." *Order Denying Rehearing*, 156 F.E.R.C. ¶ 61,221, ¶ 7, App. 17. FERC then demonstrated what that meant.

The court of appeals' ready acceptance of FERC's flurry of unexplained reversals and its transformation of federal preemption into state veto authority does not satisfy the review standards announced by this Court. If anything, FERC's reversals deserved heightened scrutiny, but they could not have survived normal appellate review. This Court should review the court of appeals' decision to defer completely to FERC.

CONCLUSION

The ruling of the court of appeals approves FERC's repudiation of the preemption doctrine and accords complete deference to unexplained agency reversals. The Court should grant the petition to review these errors.

Respectfully submitted,

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