No. 18-153

IN THE

Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE ARKANSAS PUBLIC SERVICE COMMISSION IN SUPPORT OF RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Amicus Arkansas Public Service Commission is not required to provide a corporate disclosure statement because it is a governmental entity organized under the laws of the State of Arkansas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

CONSTITUTION

STATUTES

ADMINISTRATIVE ORDERS

INTEREST OF THE AMICUS CURIAE[1]

In proceedings before the Federal Energy Regulatory Commission ("FERC"), amicus the Arkansas Public Service Commission ("APSC" or "Arkansas Commission") represents the interests of Arkansas retail customers served by Entergy Arkansas, Inc. In the instant proceeding, the Arkansas Commission actively participated as a party to protect those interests.

Separately, the APSC issued an order, *In re Application for Entergy Ark., Inc*., 2011 WL 3675199 (Ark. P.S.C. June 2, 2011)("APSC Order"), in which it denied Entergy Arkansas' proposal to collect surcharges from its retail customers in Arkansas to pay for refunds that FERC had initially ordered in this matter. *See, e.g.,* App. at 91-92 (summarizing APSC's action). The APSC's denial was based on its determination that the proposed surcharges would violate the filed rate doctrine and the rule against retroactive ratemaking under Arkansas law, and that denial of the surcharges would not be federally preempted.

The APSC offers the viewpoint, not presented by any other party, as to why this Court need not address whether the APSC Order purportedly violates the Supremacy Clause (Pet. at i) in light of FERC's denial of refunds, which mooted the APSC Order. In addition,

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[1] Counsel of record for all parties received timely notice via email of APSC's intent to file this brief, and all have consented in writing via email to its filing. Pursuant to S. Ct. Rule 37.6, APSC states that no counsel for a party authored this brief in whole, or in part, and that no counsel, party, or person, other than APSC, made a monetary contribution intended to fund the preparation or submission of this brief.

the APSC Order was neither the controlling nor the principal reason for denial of refunds, but merely one of several equitable considerations supporting FERC's decision that were properly found on review to show that FERC had engaged in reasoned decisionmaking supported by substantial evidence.

SUMMARY OF ARGUMENT

Petitioner Louisiana Public Service Commission ("LPSC") has not demonstrated any basis for review by this Court. LPSC implies that the APSC Order is the primary reason for denying refunds, but the record shows otherwise. The APSC Order is but one of two under-recovery risks that FERC found, and under-recovery risk is but one of several equitable considerations that FERC evaluates in deciding whether to order refunds in cost allocation cases.

LPSC's contention that the APSC Order denying a request to recover surcharges from retail customers violates the Supremacy Clause does not present a case or controversy given that FERC's disallowance of the refunds obviated the need to impose surcharges on Arkansas retail customers to pay for the refunds. For that reason, no judicial review of the APSC Order has been sought. Consequently, LPSC is effectively asking this Court to review directly a state regulatory commission ruling for the purpose of issuing an advisory opinion that the ruling, if it addressed an actual case or controversy, would be preempted by federal law. That is not a valid ground on which to grant the writ.

REASONS FOR DENYING THE WRIT

1. LPSC asserts FERC "found that Entergy would not be made whole" due to the APSC Order, and that the D.C. Circuit "accepted without scrutiny FERC's rationale." Pet. at 28. LPSC contends that this acceptance "undercuts the Supremacy Clause and the Congressional plan for utility regulation." *Id.* (citation omitted). This argument misstates the reasoning below and its potential impact.

To be sure, both the D.C. Circuit and FERC recognized that the APSC Order carried "at least a non-trivial risk of under-recovery," but acknowledged that the Order could be reversed on judicial review. App. at 10; *see id.* at 92 ("The ultimate outcome of this decision, of course, remains uncertain, but it represents a second potential risk of under-recovery"). In determining whether to order refunds where it has found a utility's cost allocation, but not its rates, to be unreasonable, FERC weighs several factors. The potential that refunds would result in rate under-recovery is but one of them. For this evaluation, under-recovery does not require a showing that it will occur; rather, it is enough that it might. *See* App. at 58 ("[FERC] precedent on under-recovery refers to a possibility, not a certainty, of under-recovery as a basis for denying refunds.")(footnote omitted); *see also id.* at 90 ("Both Commission and court precedent refer to a potential for, or possibility of, under-recovery as a reason for denying refunds.")(footnote omitted).

Further, FERC's reference to the APSC Order as "a second potential risk of under-recovery" underscores that FERC did not rely solely on the Order in assessing this risk. Rather, FERC also looked "to whether Entergy would be able retroactively to recover the cost of any refunds from departing load." App. at 58. On this point, FERC found "a significant possibility that Entergy could not recover the portion of necessary surcharges that would be attributed to wholesale customers during the refund period." *Id.* at 90-91.[2] Entergy's wholesale load had declined from 15% of peak load during the putative refund period to 0.002% today, and the current wholesale customer "was not a wholesale customer during the refund period." *Id*. at 91 (footnote omitted). These circumstances fully support FERC's view that "the source of surcharges is unclear," and to the extent surcharges could not be assessed against the departed load, "refunds would lead to under-recovery." *Id.*

The other side of this coin, and another factor considered by FERC in deciding whether to require refunds in cost allocation cases, concerns the equity of requiring current customers to pay surcharges to support refunds for past periods during which current customers received little, if any, benefit. As the D.C. Circuit explained, this factor constitutes "an additional equity militating against refunds: the disjunction between the beneficiaries of the old regime and those who would have to pay surcharges to ensure that each operating company fully recouped costs retroactively allocated to it." App. at 11. LPSC argues this factor should be given little weight because "the process at FERC is extremely slow" and the requested refunds would only partially fill that gap. Pet. at 29-30. This argument was refuted by the court: "But that would make it no more equitable to now force consumers who neither were at fault nor received any

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[2] FERC's jurisdiction over electric sales extends only to "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1).

benefit to 'pay back' consumers who were disadvantaged by the prior rate regime." App. at 12.

In sum, the risk attendant to the APSC Order was not the primary, much less the controlling, consideration in FERC's decision not to require refunds here. Rather, it was but one of two under-recovery risks, the other being the strong factual evidence that the required surcharges would not be paid by those wholesale customers who benefitted from the prior cost allocation, but by current retail customers who had not.

2. LPSC raises the specter that FERC's and the D.C. Circuit's acceptance of the APSC Order as an under-recovery risk "undercuts the Supremacy Clause and the Congressional plan for utility regulation." Pet. at 28 (citation omitted). But this apparition is illusory from both a factual and a legal perspective. On the facts, LPSC states that "state agencies may not 'trap' costs by refusing to recognize the legitimacy of costs incurred pursuant to FERC rulings." *Id.* Be that as it may, here there are *no* costs incurred pursuant to FERC rulings that the APSC Order trapped.

A timeline of the instant regulatory actions will explain why no costs were trapped by the APSC Order. The first pertinent FERC order (App. 189) issued on August 13, 2010, and required Entergy to pay refunds within 30 days and file a refund report within 60 days of the date of that Order. *Id.* at 211. In conjunction with its response to FERC's Order, Entergy Arkansas, Inc. filed on November 12, 2010, an application with the APSC seeking a proposed rate rider to its retail electric tariff that would flow-through to its retail customers in Arkansas the surcharge needed to pay the FERC-ordered refunds. In the meantime, both Entergy and the Arkansas Commission had sought rehearing of FERC's August 13, 2010 order. *See* App. at 175-84 (summarizing the rehearing requests).

The next event was issuance of the APSC Order on June 2, 2011, which denied Entergy's requested rate rider as it would violate Arkansas state law and denial would not be federally preempted. Only a week later, on June 9, 2011, FERC issued an order granting in part Entergy and APSC's rehearing requests, ruling that while FERC does "have authority to grant refunds in this case, the better course is to invoke our equitable discretion to deny them." App. at 174; *see generally id.* 173-88 (entire order). FERC's order denying refunds negated the need for Entergy Arkansas to seek a surcharge from its Arkansas retail customers, thus rendering the APSC Order moot. In other words, FERC's order denying refunds meant there were no longer any refund costs (*i.e.*, surcharges) to be flowed through to Entergy Arkansas' retail customers, and thus nothing that could be trapped by the APSC Order.

FERC reaffirmed its decision to deny refunds based on its equitable discretion despite LPSC's request for rehearing, *see* App. 118-72 (order denying rehearing), and a court opinion remanding the matter to FERC "to consider the relevant factors and weigh them against one another, striking 'a reasonable accommodation among them.'" *Id*. at 117 (citations omitted). FERC's subsequent Order on Remand (*id.* at 69-97) and Order Denying Rehearing (*id.* at 13-68), both of which were upheld by the D.C. Circuit (*id.* at 1-12), further explain FERC's reasoning for denying refunds on equitable grounds. Thus, the APSC Order remains moot because with no refunds being ordered by FERC, there remains no basis for Entergy Arkansas to seek surcharge recovery from its retail customers. It follows that no costs are trapped by the APSC Order.

This reality also shows why LPSC's specter of the APSC Order undercutting the Supremacy Clause and contravening the congressional plan for utility regulation is illusory. LPSC points to this Court's cases dealing with federal preemption in the context of state/FERC interaction[3] for the propositions "that FERC-ordered allocations preempt inconsistent state ratemaking; [and] state agencies may not 'trap' costs by refusing to recognize the legitimacy of costs incurred pursuant to FERC rulings." Pet. at 28. Whatever the import of those propositions in other cases, they are inapposite here.

With regard to the first proposition, neither the APSC Order nor the APSC in FERC refund proceedings at issue questioned the FERC-ordered cost allocation that Entergy Arkansas proposed to recover through the retail rate surcharge. Indeed, Entergy Arkansas proposed to recover through retail rate surcharges whatever refund amount FERC ultimately established. The APSC Order did not question the reasonableness of the dollar amount of the refunds sought to be recovered, but the more basic question of whether surcharges of any amount "would violate the filed rate doctrine and rule against retroactive ratemaking under Arkansas law and that federal preemption does not require the Arkansas Commission to pass-through those costs to Arkansas retail customers." App. at 92.

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[3] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Miss. Power & Light Co. v. Miss. ex rel. Moore,* 487 U.S. 354 (1988); and *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003).

Consequently, the instant case does not involve dueling cost allocations, one from FERC and one from the APSC, that were at the heart of the dispute in *Nantahala* and *Miss. Power*. *See Entergy La.*, 539 U.S. at 47 ("In *Nantahala* and *MP&L*, the Court applied the filed rate doctrine to hold that FERC-mandated cost allocations could not be second-guessed by state regulators.").

With regard to the second proposition, no costs are trapped here, unlike the situations in *Nantahala*, *Miss. Power*, and *Entergy La.* In those cases, the state agencies implemented different retail rates, all upheld by the states' supreme courts, from the retail rates that would have resulted from applying FERC's cost allocations. *See, e.g., Nantahala*, 476 U.S. at 970 ("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.") (internal citation omitted). Here, Entergy Arkansas was not prevented by the APSC Order from recovering costs; rather, FERC's June 9 order (App. 173) denying refunds meant there were no refund costs (surcharges) to be recovered from retail rates.

3. LPSC claims that reliance on the APSC Order to deny refunds undercuts "the Congressional plan for utility regulation," which, LPSC argues, requires that "state agencies must go to FERC to secure just and reasonable rates." Pet. at 29. This claim ignores that the Arkansas Commission participated at every stage of the underlying proceeding, arguing that no refunds should be allowed. *See, e.g.,* App. at 73 (noting APSC appealed FERC's initial ruling that required refunds).

Both before and after the APSC Order issued, the Arkansas Commission actively advocated at FERC for no refunds. APSC's active participation is not only consistent with LPSC's view of how the Congressional plan for utility regulation should work, but also led to adoption of FERC's no refund decision. *See, e.g.*, App. at 187 (agreeing "upon reflection" with APSC's and Entergy's position).

CONCLUSION

The Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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