No. 18-153

In the Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that the Federal Energy Regulatory Commission (FERC) adequately explained its decision to deny refunds resulting from misallocation of wholesale electricity capacity costs based on equitable factors supported in the record.

2. Whether the court of appeals erred in sustaining FERC's consideration of proceedings before the Arkansas Public Service Commission as one factor that contributed to a risk of under-recovery by the utility if refunds were ordered, where under-recovery was one of several equitable considerations supporting FERC's denial of refunds.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 883 F.3d 929. The orders of the Federal Energy Regulatory Commission (FERC or Commission) (Pet. App. 13-97) are reported at 156 F.E.R.C. ¶ 61,221 and 155 F.E.R.C. ¶ 61,120.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2018. A petition for rehearing was denied on May 3, 2018 (Pet. App. 234-235). The petition for a writ of certiorari was filed on August 1, 2018. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, provides FERC with jurisdiction over the rates, terms, and conditions of service for the transmission

and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. 824(a) and (b) (2012 & Supp. V 2017). The FPA requires FERC to ensure that rates are just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. 824d(a), (b), and (e). To facilitate that review, every FERC-regulated utility must file with FERC a schedule of its rates. 16 U.S.C. 824d(c); see 18 C.F.R. Pt. 35 (filing obligations).

Under Section 206 of the FPA, FERC, either on its own initiative or on a motion by a third party, must change a filed rate prospectively if it no longer meets the statutory standards. 16 U.S.C. 824e(a) and (b). A regulated utility may also petition under Section 824d for a change to the rate. 16 U.S.C. 824d(d) and (e).

FERC's authority to remedy an unlawful rate under FPA Section 206, 16 U.S.C. 824e, is mainly prospective. Upon making the necessary findings, FERC can determine a revised rate "to be thereafter observed and in force." 16 U.S.C. 824e(a). As revised by the Regulatory Fairness Act, Pub. L. No. 100-473, 102 Stat. 2299, in 1988, however, FPA Section 206(b) allows FERC to provide refunds for the 15-month period following a refund effective date established under that section upon the filing of a complaint with FERC. 16 U.S.C. 824e(b). FPA Section 206(c), which applies in cases "involving two or more electric utility companies of a registered holding company," permits FERC to authorize refunds only "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." 16 U.S.C. 824e(c). Even if FERC makes that finding, however, refunds are discretionary. See *ibid.* (refunds "may be ordered by the Commission").

2. This case concerns a dispute about cost allocation under a FERC-approved tariff for electric utilities owned by Entergy Corporation (Entergy), a public utility holding company. During the relevant period, Entergy sold electricity in four States (Arkansas, Louisiana, Mississippi, and Texas) through five subsidiaries, referred to as the "operating companies." Pet. App. 213-214; see *id.* at 212-233 (*Louisiana II*). In 1982, each operating company entered into the tariff, which was called the "System Agreement." *Id.* at 214. The System Agreement was terminated on August 31, 2016, although two of the operating companies withdrew from it earlier. See *Council of New Orleans* v. *FERC*, 692 F.3d 172, 174-177 (D.C. Cir. 2012) (discussing withdrawal of Arkansas and Mississippi subsidiaries in 2013 and 2015), cert. denied, 569 U.S. 972 (2013); *Entergy Arkansas, Inc.*, 153 F.E.R.C. ¶ 61,347 (2015) (approving settlement agreement to terminate System Agreement).

For decades, the Entergy operating companies ran their generation and transmission facilities as a single, integrated system. Pet. App. 102; see *id.* at 98-117 (*Louisiana III*). The System Agreement required each of the five utilities to operate its generation facilities for the benefit of the whole system, dispatching electricity system-wide in a way that minimized costs. See *Louisiana Pub. Serv. Comm'n* v. *FERC*, 522 F.3d 378, 383-385 (D.C. Cir. 2008) (per curiam).

The System Agreement consisted of several Service Schedules, which allocated costs among the operating companies. This case concerns the cost allocations for Service Schedule MSS-1 (Reserve Equalization) and MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies). See *Louisiana Pub. Serv. Comm'n* v. *Entergy Corp.*, 124 F.E.R.C.

¶ 61,275, at paras. 1, 4 (2008). In general, these schedules allocated costs among the operating companies according to their "Responsibility Ratio[s]"—an operating company's load placed on the system at the time of system peak demand, as a proportion of the total load responsibility for the combined operating ompanies. *Id.* at paras. 4-5.

In 1995, petitioner Louisiana Public Service Commission and the Council of the City of New Orleans filed a complaint with FERC, under FPA Section 206, 16 U.S.C. 824e, asserting that the formula for determining load responsibility in the System Agreement was unjust and unreasonable because it included interruptible load, in addition to firm load, in the calculation of peak load responsibility. Pet. App. 215; see *id.* at 116. "Firm load is electricity sold pursuant to a contract that entitles the customer to receive service from the seller on demand." *Id.* at 214-215. "Interruptible load, on the other hand, is electricity sold pursuant to a contract that entitles the seller to curtail service when it does not have enough capacity to produce electricity in excess of the quantity demanded by customers with contracts for firm service." *Id.* at 215. FERC dismissed the complaint, finding "no merit to the Louisiana Commission's claims." *Louisiana Pub. Serv. Comm'n* v. *Entergy Servs., Inc.*, 76 F.E.R.C. ¶ 61,168 (1996), reh'g denied, 80 F.E.R.C. ¶ 61,282 (1997). The D.C. Circuit vacated FERC's decision, concluding that the Commission had reversed, without sufficient reasoning, its prior determination that because a utility can control its capacity costs by stopping a customer that uses interruptible load from imposing any demand on its system during peak periods, interruptible load should not be considered when allocating capacity costs. See *Louisiana*

Pub. Serv. Comm'n v. *FERC*, 184 F.3d 892, 894-897 (D.C. Cir. 1999) (discussing *Kentucky Utilities Co.*, 15 F.E.R.C. ¶ 61,002 (1981)).

3. On remand, FERC set the matter for a hearing, determined that it was unjust and unreasonable for Entergy to include interruptible load in its calculation of peak load responsibility, and directed Entergy to phase it out prospectively over a 12-month period. *Louisiana Pub. Serv. Comm'n* v. *Entergy Corp.*, 106 F.E.R.C. ¶ 61,228 (2004), reh'g denied, 111 F.E.R.C. ¶ 61,080 (2005). But FERC held that it lacked authority to order refunds in cases in which refunds would be funded from a reallocation of costs among the operating companies. *Id.* at paras. 83-84; *Louisiana Pub. Serv. Comm'n* v. *Entergy Corp.*, 111 F.E.R.C. ¶ 61,080, at para. 21 (2005).

Petitioner again sought judicial review. In 2007, the D.C. Circuit again remanded to FERC, directing it to eliminate the phase-in of the remedy. Pet. App. 226-227. The court also determined that FERC had failed to adequately explain its decision to deny refunds for the 1995-1996 refund period. *Id.* at 227-232.

4. On remand from *Louisiana II*, FERC issued a series of five orders. See Pet. App. 104-106 (summarizing orders).

a. In the first two orders, FERC required Entergy to remove all interruptible load from the cost allocation at issue, effective April 1, 2004. See *Louisiana Pub. Serv. Comm'n* v. *Entergy Corp.*, 120 F.E.R.C. ¶ 61,241, at paras. 2, 7 (2007), reh'g denied, 124 F.E.R.C. ¶ 61,275 (2008). FERC also directed Entergy to make refunds among its operating companies reflecting the immediate removal of interruptible load from the cost-allocation calculation, for the 15-month refund period of May 1995 through August 1996. *Id.* at paras. 2, 8; see Pet. App. 203 n.46 (describing refund period).

The Arkansas Public Service Commission ("Arkansas Commission") and Entergy petitioned for judicial review of the two orders issued on remand from *Louisiana II*. See Pet. App. 190. The D.C. Circuit granted FERC's request for a voluntary remand to allow FERC to consider more fully the parties' arguments. *Ibid.*

b. FERC then directed further briefing on the issue of refunds. Pet. App. 190-191. In the third order in the series, FERC again determined that refunds "would be appropriate." *Id.* at 191. Having found the prior rate unlawful, FERC determined that the parties failed to present any reason to prevent it from "applying its general policy and ordering refunds in the face of rates found to be unjust and unreasonable." *Id.* at 209 n.63; see *id.* at 208 & n.63.

c. The Arkansas Commission, Mississippi Public Service Commission, and Entergy sought rehearing, which FERC granted in part on the issue of refunds. Pet. App. 173-174. In a fourth order, FERC concluded that, while it had the "authority to grant refunds in this case, the better course is to invoke our equitable discretion to deny them." *Id.* at 174. FERC stated that "[o]n the question of refunds, the Commission has two lines of precedent, each dealing with a different situation." *Id.* at 186. Under the first line of precedent, "[w]hen a case involves a company over collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers." *Ibid.* "By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds." *Id*. at 186-187; see *id.* at 187 n.41 (citing cases). "[U]pon reflection," FERC determined that "in this case, the Entergy system as a whole collected the proper level of revenue, but, as was later established, incorrectly allocated peak load responsibility among the various Entergy operating companies." *Id.* at 187. Thus, this case did not "present a straightforward instance of a utility over-collecting revenue[s]." *Ibid.* The Commission therefore decided to apply what it described as its "usual practice in such cases [not involving over-collection], invoking [its] equitable discretion to not order refunds." *Ibid.*

d. Petitioner sought rehearing, and FERC solicited additional briefing on the issue of refunds. *Louisiana Pub. Serv. Comm'n* v. *Entergy Corp.*, 137 F.E.R.C. ¶ 61,018 (2011) (ordering a paper hearing). In the fifth and final order in the series, FERC denied rehearing and continued to deny refunds. Pet. App. 118-119. FERC found it "appropriate under the circumstances presented in the instant proceeding to follow our general rule that new cost allocations or rate designs that do not reflect over-recoveries or other special circumstances will run prospectively * * * and that refunds will not lie." *Id*. at 152; see *id.* at 154-161. Considering the equities, FERC noted that while this case did not appear to involve a potential for under-recovery of costs by Entergy, the fact that Entergy could not revise past system operating decisions counseled against ordering refunds. *Id*. at 162.

5. Petitioner sought judicial review of the series of five orders that had been entered by FERC following *Louisiana II*. In *Louisiana III*, the court of appeals rejected petitioner's argument that there is an entitlement to or presumption in favor of refunds under the

FPA. Pet. App. 108-110. The court explained that "[t]o hold that refunds are mandatory every time there is an unjust or unreasonable rate would be contrary to Congress's use of the permissive 'may' in section 206(b)." *Id.* at 108-109 (citing *Towns of Concord* v. *FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992)).

The court of appeals agreed with petitioner, however, that FERC had failed to adequately explain its "departure" from what it had previously described as a "'general policy' of ordering refunds when consumers have paid unjust and unreasonable rates." Pet. App. 110 (citation omitted). In particular, while FERC argued that a different policy—which generally denies refunds in rate-design and cost-allocation cases—applied here, the court concluded that FERC had failed to demonstrate the existence of that policy. Although FERC had denied refunds in prior cost-allocation cases, the court stated that those cases "generally involved the possibility of under-recovery"—a factor that FERC had not relied upon in the orders under review. *Id.* at 111; see *id.* at 112-113. Moreover, the court observed, "the equitable factors relied on by the Commission in previous refund denials were largely absent here." *Id.* at 112; see *ibid.* (noting among the relevant factors "potential under-recovery by the utility; consumers' and utilities' inability to revisit past decisions; a 'detrimental effect upon an organized market'; different generations of consumers paying the surcharges and receiving the past benefits; and the 'complication and cost of rerunning markets'") (citation omitted). FERC had relied on Entergy's lack of over-recovery, but the court concluded that FERC "did not explain why a lack of over recovery should automatically negate refunds." *Id.* at 113. In addition, while FERC had also cited Entergy's inability to revisit past decisions, the court concluded that FERC "did not identify any particular [past] decisions made by Entergy in reliance on the inclusion of interruptible load in its cost allocation," nor explain why this case involved more than "a generic possibility of reliance" present in all refund cases. *Id.* at 116; see *id.* at 115-116. The court therefore remanded the case to FERC "to consider the relevant factors and weigh them against one another, striking 'a reasonable accommodation among them.'" *Id.* at 117 (quoting *Las Cruces TV Cable* v. *FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981)).

6. On remand from *Louisiana III*, FERC clarified its traditional approach to refunds. In addition, as directed by the court of appeals, FERC further considered the equitable factors relevant to the decision whether to order refunds in this case. FERC determined that the record supported its decision to deny refunds for the 15-month refund effective period. Pet. App. 69-97 (Order on Remand); *id.* at 13-68 (Order Denying Rehearing).

a. In the Order on Remand, FERC explained that the court of appeals' description of FERC's "'general policy' of ordering refunds" was "based on statements made by the Commission in this proceeding that do not accurately represent that policy as both the Commission and the courts have described it in the past." Pet. App. 80. After reviewing prior FERC orders and court decisions, the Commission stated that it had "never enunciated a single, general policy on refunds that applies to all instances where it has found rates to be unjust and unreasonable under the FPA." *Id.* at 82. Instead, FERC's "approach to refunds has * * * been shaped by the way certain equitable considerations are typically associated with certain specific fact patterns."

Ibid. In particular, FERC and court precedent demonstrated that references to a "general policy" to grant refunds have "been limited to cases involving utility over-collection." *Id.* at 85; see *id.* at 81 (noting that "only two Commission orders, both of which have been issued in this proceeding, refer to a general policy of ordering refunds when consumers have paid unjust and unreasonable rates").

By contrast, FERC stated, "'in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally'" has taken a "different approach" and "'declined to order refunds.'" Pet. App. 86 (citation omitted). "[T]he basic consideration in ruling on refunds," FERC further explained, "is one of fairness." *Id.* at 87. If a utility has over-collected, "fairness dictates that the excess revenues should be refunded to customers." *Ibid.* "On the other hand, in cases where a cost allocation or rate design has been found unjust and unreasonable, but where no over-collection of revenue has occurred, other factors come into play," including the possibility of under-recovery and the fact that utilities and customers "cannot alter their past purchase or sale decisions in light of [a] new rate." *Id.* at 87-88; see *id.* at 112 (acknowledging these and other equitable factors).

FERC observed that—as petitioner had previously noted—this case concerns cost allocation rather than over-recovery. Pet. App. 88-90. Thus, FERC's "'general policy' of awarding refunds in over-collection cases does not apply here," and it was required to examine whether the relevant equitable factors supported following its practice of not awarding refunds in cost-allocation cases. *Id.* at 90. FERC determined that the "two primary grounds the Commission has cited in denying refunds in cost allocation cases" supported denying refunds here. *Ibid.*

First, if refunds were granted, Entergy would face a possibility of under-collecting its revenues. Entergy's wholesale customers had changed and diminished as a percentage of its total customers over time, and FERC determined that "there is a significant possibility that Entergy could not recover the portion of necessary surcharges that would be attributed to wholesale customers during the refund period." Pet. App. 90-91. In addition, FERC noted "a possibility of under-recovery based on potential litigation." *Id.* at 91. When Entergy had sought approval to collect surcharges to pay for the refunds FERC had previously imposed in this case, the Arkansas Commission had denied that request, concluding that "federal preemption does not require the Arkansas Commission to pass-through those costs to Arkansas retail customers." *Id.* at 92; see *id.* at 91-92. While FERC noted that "[t]he ultimate outcome" of such litigation "remain[ed] uncertain," it concluded that the litigation presented "a second potential risk of under-recovery." *Id.* at 92. The risk of under-recovery provided an equitable reason for denying refunds, and also supported denying refunds under FPA Section 206(c), 16 U.S.C. 824e(c), which prohibits refunds in circumstances in which FERC cannot verify that the registered holding company will not experience any reduction in revenues. Pet. App. 92.

Second, citing allegations in petitioner's complaint, FERC determined that "the tariff provision challenged here created incentives for the Entergy Operating Companies" to avoid interruptible sales. Pet. App. 93.

That incentive "resulted in decisions that cannot now be undone" if refunds were ordered. *Ibid.*; see *id.* at 93-96.

FERC explained that it was "mindful" of the court of appeals' statement that it must "consider the fact that an unjust and unreasonable cost allocation caused consumers in Louisiana to pay too much and consumers in other states to pay too little." Pet. App. 96. While FERC considered this "an important consideration in determining whether refunds are warranted," it noted that if refunds were ordered, "other customers who were not responsible for the misallocation * * * would be required to make additional payments for past purchases they reasonably concluded were final and cannot revisit." *Ibid.* The Commission therefore balanced the equities as it "traditionally" had done, by denying refunds and correcting the rate prospectively. *Ibid.*

b. Petitioner sought rehearing, which the Commission denied. Pet. App. 13-68. As relevant here, FERC reaffirmed that its approach to refunds depends on whether over-collection has occurred, as well as equitable factors, and it examined in depth the legal precedents underlying its refund policy. *Id.* at 18-50. With respect to the equitable factors relevant to whether to order refunds, FERC rejected petitioner's argument that notice of the 1995 complaint eliminated "concerns that refunds would violate the rule against retroactive ratemaking and that the utility or customers may have relied on the prior rate." *Id.* at 50 (citation omitted). And it reiterated the other equitable factors on which it relied, including a possibility of under-recovery and the inability to revisit past operating decisions. *Id.* at 53-59.

7. The court of appeals denied petitioner's petition for review. Pet. App. 1-12 (*Louisiana IV*). The court stated that its decision in *Louisiana III* "determine[d]

[its] task here." *Id.* at 5. Having previously found that FERC failed to explain its departure from a general policy of ordering refunds for unjust and unreasonable rates, the court determined that FERC's most recent order "made its historic practice clear and justified its application of that practice" in this case. *Id.* at 6. Specifically, FERC had explained that "it has no generally applicable policy of granting refunds." *Ibid.* Rather, the court continued, although FERC generally awards refunds where overcharges have resulted in over-collection, its default position is to deny refunds where it has found a rate unjust and unreasonable "because of a flaw in rate design, such as cost allocation (at least so long as there is no violation of the filed rate doctrine)." *Ibid.* (citing FERC precedent). In such cases, the utility has not received a net over-recovery. The court recognized that FERC bases that default position on "its belief that two circumstances are usually present in such cases": first, that it would be difficult for the utility to fully recover its costs, and second, that customers that had made operational decisions in reliance on the existing rates could not undo transactions retroactively in light of the corrected rates. *Id.* at 7; see *id.* at 7-8.

The court of appeals noted that petitioner's briefs had failed to respond to the cited FERC decisions. Pet. App. 8. Nevertheless, the court addressed distinctions that petitioner had offered at and after oral argument, including arguments presented in its brief in the prior *Louisiana III* appeal. *Ibid.* The court concluded, however, that "even if th[o]se arguments had been renewed" in this appeal, the court "would find them unavailing." *Ibid.* In *Louisiana III*, FERC had disclaimed any reliance on potential under-recovery; on remand, however, FERC "ha[d]—reasonably—changed its position on the feasibility of recoupment by Entergy." *Id.* at 9.

The court of appeals further determined that FERC had "offered a convincing answer to [the court's] query about the absence of evidence of 'particular decisions' made in reliance on the old rate structure." Pet. App. 10. While the court was concerned in *Louisiana III* that some amount of reliance is likely in every case of potential refunds, FERC cited numerous cases, *id.* at 86 n.58, demonstrating that "its general tendency to deny refunds in cost allocation cases stems from the high correlation between such reliance and that type of case," *id.* at 10. Moreover, the court noted that petitioner "itself, in objecting to Entergy's prior cost allocation system, invoked the desirability of correcting customers' incentives for the purpose of changing their behavior." *Id.* at 11. Finally, the court agreed with FERC that, "under the facts of this case, * * * an additional equity militate[d] against refunds: the disjunction between the beneficiaries of the old regime" and the current customers "who would have to pay surcharges to ensure that each operating company fully recouped costs retroactively allocated to it." *Ibid.* Given the court's conclusion that FERC reasonably denied refunds, the court did not address the parties' debate over whether Section 206(c) of the FPA, 16 U.S.C. 824e(c), would prohibit the Commission from ordering refunds here.

8. The court of appeals denied petitioner's petition for panel rehearing. Pet. App. 234.

ARGUMENT

Petitioner contends (Pet. 31-41) that the court of appeals unreasonably deferred to FERC's account of its practice regarding refunds in cases involving cost allocation. Petitioner further argues (Pet. 26-31) that FERC's consideration of the risk of under-recovery effectively gave the Arkansas Commission a veto over refunds, in violation of the Supremacy Clause. Those contentions lack merit. The court of appeals correctly held that FERC had reasonably explained its practice and precedent, and that it considered the potential for under-recovery as one of several equitable factors that counseled against ordering refunds in this case. The decision below does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that FERC's denial of refunds in this case accords with its own precedent and that FERC adequately explained its conclusion that it would be inequitable to award refunds here. Because FERC did not abuse its discretion or act in an arbitrary and capricious manner, the court correctly denied the petition for review. See 5 U.S.C. 706(2)(A); *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (in reviewing FERC's rate-making decisions, courts "may not substitute [their] own judgment for that of the Commission"); *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("[W]e afford great deference to the Commission in its rate decisions.").

a. Petitioner contends (Pet. 31) that the court of appeals "accepted without scrutiny" FERC's account of its past practice in considering refunds in cost-allocation cases. And it further faults the court (*e.g.*, Pet. 34) for "acquiesc[ing] in FERC's turnabout" regarding its policy and the factors counseling against refunds here. See Pet. 38-41. But the history of this litigation—including three remands by the court of appeals, two of which focused on the issue of refunds—belies any suggestion that the court failed to thoroughly review FERC's reasoning. To the contrary, the court's most recent decision, in *Louisiana IV*, built on its prior decisions, correctly determining that FERC had addressed the specific issues the court had previously identified as problematic.

In its fourth order following *Louisiana II*, FERC determined that where, as here, a company has collected the correct level of revenues, but those revenues should have been allocated differently, "the Commission traditionally has declined to order refunds." Pet. App. 186-187. In the fifth order, FERC further explained that exercising its discretion to decline to order refunds was appropriate in this case because, while it did not appear to involve a risk of under-recovery, Entergy could not revise past operating decisions. *Id.* at 162. In *Louisiana III*, the court of appeals determined that FERC had failed to substantiate that it had a "policy" or "'line of precedent'" specific to cases in which the utility had not over-collected. *Id.* at 112 (brackets and citation omitted). In addition, the court stated that "equitable factors relied on by the Commission in previous refund denials were largely absent here," *ibid.*; see *id.* at 114, and it faulted FERC for failing to explain how it had balanced the equities in this case, *id.* at 114-117.

FERC accordingly addressed those issues in detail in its Order on Remand and Order Denying Rehearing. The Commission explained at length (Pet. App. 18-50, 80-90) that although it had made prior statements in these proceedings suggesting a single policy of ordering refunds when consumers have paid unjust and unreasonable rates, its precedents in fact revealed two distinct policies, supported by distinct rationales: one for cases in which a utility had over-collected, and one for cases in which it had not, but costs had been allocated improperly. FERC further explained that the "primary grounds the Commission has cited in denying refunds in cost allocation cases" were present here. *Id.* at 90. And FERC expressly balanced those factors against the countervailing equities. See *id.* at 96.

In reviewing the Order on Remand and Order Denying Rehearing, the court of appeals in *Louisiana IV* properly focused on FERC's responses to the court's critiques in *Louisiana III*. See Pet. App. 5 ("*Louisiana III*'s conclusion determines our task here."). The court found that, in contrast to FERC's previous failure to explain a departure from a general policy of ordering refunds, FERC "has made its historic practice clear and justified its application of that practice here." *Id.* at 6. "Above all," the court explained, "the Commission has clarified its previously muddled position" regarding its two distinct refund policies. *Ibid.* In particular, FERC had cited numerous decisions showing that its "default position" is to deny refunds "in the set of cases to which this belongs"—those "in which [FERC] has found a rate unjust and unreasonable because of a flaw in rate design, such as cost allocation," but "the utility has received no net over-recovery." *Ibid.* Moreover, the court explained that petitioner had failed to distinguish those precedents in its briefing. *Id.* at 8. And while, at argument, counsel had attempted to distinguish some of those cases because they did not involve holding companies, the court noted that "[c]ounsel failed to explain

* * * why that should affect the Commission's general principle as to refunds in rate design cases." *Ibid.*

The court of appeals also examined the reasons FERC had offered for its "default position" against refunds in cases without over-recovery. Pet. App. 7; see *id.* at 7-8. As FERC had explained, its position is based on "its belief that two circumstances are usually present" in cost-allocation cases: a risk of under-recovery, and the existence of operational decisions that cannot now be undone. *Ibid.*[1]

The court of appeals also examined FERC's finding that those same circumstances were present here. To be sure—and as the court expressly recognized, see Pet. App. 9-10—FERC's conclusion on this point was different than in *Louisiana III*, where it had "disclaimed any reliance on a risk of under-recovery." *Id.* at 9. Here, by contrast, FERC had "reversed its prior disclaimer and affirmatively explained why there is at least a risk of under-recovery" in this case, due in part to the prior decision of the Arkansas Commission. *Ibid.*; see *id.* at 9-10 & n.1. Although the court agreed that "the ultimate outcome" of litigation before the Arkansas

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[1] Events since the court of appeals' decision further support FERC's articulation of its policy. In June, the court affirmed FERC orders that denied refunds in a cost-allocation dispute based on the agency's "reasonable balancing of the [case-specific] equites" and on its general practice, recognized in *Louisiana IV*, of denying refunds in such cases. *Ameren Servs. Co.* v. *FERC*, No. 07-1141, 2018 WL 3525364, at *4 (D.C. Cir. June 28, 2018) (per curiam). In July, the court relied on *Louisiana IV* to uphold FERC's decision to *grant* refunds in *Verso Corp.* v. *FERC*, 898 F.3d 1, 12-13 (D.C. Cir. 2018), a cost-allocation case in which neither of the two circumstances generally supporting FERC's policy against refunds in such cases—the potential for under-recovery by the utility and decisions that could not be undone in light of corrected rates—was present.

Commission was "uncertain," it found that FERC had "identifie[d] definite evidence of at least a non-trivial risk of under-recovery—one factor that counsels against the issuance of refunds." *Id.* at 10.

In addition, FERC had "offered a convincing answer to [the court's] query about the absence of evidence" in *Louisiana III* "of 'particular decisions' made in reliance on the old rate structure." Pet. App. 10. The court understood that cost allocation is intended to influence customer behavior, and that FERC's tendency to deny refunds in cost-allocation cases "stems from the high correlation between such reliance and that type of case." *Ibid.* The court further noted that petitioner itself had invoked the relationship between cost allocation and customers' behavior in challenging the prior rates. *Id.* at 11. Finally, the court determined that FERC had reasonably relied on the mismatch 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." *Ibid.*; see *id.* at 11-12.

b. Petitioner does not suggest that the decision below conflicts with any decision of this Court or another court of appeals. See Pet. 31-41. Instead, petitioner's remaining arguments (*ibid.*) simply repeat its disagreements with FERC's analysis. None of those arguments has merit or warrants this Court's review.

Petitioner contends (Pet. 34-38) that the court of appeals gave insufficient consideration to FERC's prior decisions involving Entergy. See Pet. App. 35-37. But the court appropriately addressed and rejected the core of petitioner's argument: that all cases involving holding companies should be treated in the same way. See *id.* at 8. Petitioner further faults FERC (Pet. 33) for "glomm[ing] cost allocation and rate design together," when, on petitioner's view, they should be treated differently for purposes of refunds. But as discussed above, FERC adequately explained its decision not to order refunds in this case. Finally, petitioner contends (Pet. 41) that FERC improperly "adopted arguments from" Entergy's brief on remand "without receiving a response from" petitioner. See Pet. 21-22. But while Entergy submitted an initial brief along with its motion requesting additional briefing on remand, FERC made clear that it did not rely on that filing. Pet. App. 16. Instead, in rejecting petitioner's motion for rehearing on this ground, the Commission explained that "[t]he Order on Remand is based on the record as developed up to the time of the Remand Order," *i.e.*, *Louisiana III*. *Ibid.*

2. Petitioner further contends that FERC "offend-[ed] the Supremacy Clause" by concluding that litigation before the Arkansas Commission, in conjunction with other factors, created a risk of under-recovery if refunds were ordered. Pet. 26 (capitalization altered). As discussed above, in considering the equities, FERC explained that "[b]oth Commission and court precedent" stated that "a potential for, or possibility of, under-recovery" could counsel against refunds in cost-allocation cases. Pet. App. 90; see *id.* at 58. FERC found such a potential here for two reasons. First, in light of changes to Entergy's wholesale customer base, there was 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. During the refund period, 15% of Entergy Arkansas' peak load was comprised of wholesale customers; as of 2010, however, none of those

entities was a customer of Entergy Arkansas, and Entergy Arkansas had only one wholesale customer, which was not a customer during the refund period and which comprised only .002% of its load. *Id.* at 91. FERC thus determined that the "source of surcharges is unclear." *Ibid.* In addition, FERC found no basis to conclude that all surcharges attributable to wholesale load could be assessed to retail ratepayers. *Ibid.* And citing its prior precedent, FERC noted 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." *Id.* at 59 & n. 139.

Second—in the reasoning to which petitioner objects—FERC recognized "a possibility of under-recovery based on potential litigation, as demonstrated by proceedings before the Arkansas Commission." Pet. App. 91. FERC explained that when Entergy sought approval to collect surcharges to pay refunds previously ordered in these proceedings, the Arkansas Commission determined that "federal preemption does not require the Arkansas Commission to pass-through those costs to Arkansas retail customers." *Id.* at 92; see *id.* at 91-92. FERC noted that "[t]he ultimate outcome of this decision, of course, remains uncertain, but it represents a second potential risk of under-recovery." *Id.* at 92.

FERC's analysis reveals that it did not, as petitioner claims (Pet. 31), give the Arkansas Commission "veto" power over refunds. FERC emphasized that its precedents concerning refunds are premised on a possibility—not a certainty—of under-recovery. Pet. App. 58 & n.136 (citing cases); see also, *e.g.*, *Second Taxing Dist.* v. *FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (affirming denial of refunds where FERC found that "the Company might be subject to undercollections"). And it found that litigation before the Arkansas Commission was only the second, and less certain, factor demonstrating a risk of under-recovery, after substantial changes in the wholesale load that would be charged the costs of refunds. Pet. App. 57-59, 90-93.[2]

Moreover, the risk of under-recovery was *itself* only one of several bases for denying refunds. FERC also relied on "the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past actions in light of that new rate." Pet. App. 90; see *id.* at 93-96. In doing so, FERC quoted at length from petitioner's own complaint, which had explained how the prior cost allocation affected incentives and decisions. See *id.* at 93-94. And FERC relied on the inequity that would result from requiring current customers to pay for charges incurred by past ones. *Id.* at 59.

To be sure, FERC does not dispute that the Supremacy Clause would prevent state commissions from trapping FERC-ordered wholesale costs at the retail level. See Pet. App. 204 (FERC order citing *Mississippi Power & Light Co.* v. *Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986)); see also *id.* at 57-58 (rejecting suggestion that FERC had changed its position on this issue). But

[2] As an additional basis for finding a risk of under-recovery, FERC stated that surcharges to pay for refunds might be precluded by the D.C. Circuit's decision in *City of Anaheim* v. *FERC*, 558 F.3d 521 (2009). Pet. App. 91. While the court of appeals in this case did not address the validity of FERC's interpretation of that decision, *id.* at 9 n.1, it underscores that FERC did not rely solely, or even primarily, on the Arkansas Commission litigation.

FERC is not the final arbiter of a dispute over retail rate recovery. Based on the record here, FERC reasonably found that, because litigation regarding recovery of surcharges from Arkansas retail ratepayers appeared likely, and prior litigation resulted in the denial of recovery, there was a *potential* for under-collection. *Id.* at 9-10. Recognition of that "definite evidence of at least a non-trivial risk of under-recovery," *id.* at 10, did not offend the Supremacy Clause.[3]

[3] Petitioner relatedly contends (Pet. 30) that FERC's Order on Remand and the court of appeals' decision conflict with *Louisiana II*, in which the court held that FERC had not sufficiently explained its concern regarding whether the operating companies would be allowed by the state regulators to recover at retail the revenue needed to pay the refunds. See Pet. App. 228-231. But the issue in *Louisiana II* was simply whether FERC had *authority* under FPA Section 206(c) to order refunds. *Id.* at 227-231. Because FERC's orders in these proceedings up until that point contained "not even a hint of discretion being exercised," *id.* at 231, the court did not consider whether uncertainty arising from litigation could be one of several equitable factors militating against the discretionary award of refunds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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