No. 18-153

In The
Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION,

Petitioner,

versus

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Neither the Federal Energy Regulatory Commission ("FERC") nor the Arkansas Public Service Commission ("APSC"), amicus curiae, disputes that retail ratemaking agencies are required as a matter of law to permit the collection of FERC-ordered surcharges in retail rates. Yet they cling to FERC's rationale, accepted without scrutiny by the court of appeals, that there is a "non-trivial risk of under-recovery" in litigation with the APSC because the "ultimate outcome . . . is uncertain." *LPSC IV*, 883 F.3d at 934, App. 10. FERC's holding reversed its own prior rulings on that point, but the court of appeals accepted it without analysis.

FERC seeks to redirect attention to the rationale in the *Order on Remand* that Entergy Arkansas would not be able to collect surcharges from its departed wholesale customers, a rationale that was refuted with unrebutted evidence and rejected in 2010. FERC retreated from that rationale in the *Order Denying Rehearing* and the court of appeals did not rely on it. Instead, the court deemed it reasonable for FERC to allow a state agency veto of FERC-ordered surcharges and refunds, based on a threat of disallowance.

FERC's discovery of a no-overcollection "policy" was a policy change that the court also accepted without question. Neither FERC nor the APSC disputes that FERC for decades has routinely granted refunds in holding company cost allocation cases. These cost allocation cases solely involve allocations among joint

sellers; they do not determine "rate designs" to customers.

FERC's change of policy rips much of the no-undue-discrimination content from the Regulatory Fairness Act ("RFA") and the Federal Power Act ("FPA"). The RFA was designed to promote prompt relief for consumers – to put them on an even playing field with utilities, which begin collecting new rates soon after filing them. The "evil of discrimination" was a prime motivator of the FPA. *See In re Otter Tail Power Co.*, 2 F.P.C. 134, 142 (1940). But a regulatory agency or party victimized by unduly discriminatory cost allocations faces a long and arduous process at FERC, usually lasting a number of years. Few parties would undertake this effort when FERC, as a matter of "policy," has removed the prospect of even 15 months of interim relief.

FERC effectively concedes that the court substituted its own "incentive" rationale for FERC's, pretending that the Entergy Companies were true customers. Also, the court embellished FERC's one-line rationale in the *Order Denying Rehearing* concerning customer turnover, without considering its implications. First, the rationale is at odds with refunds in *any* case because utility customers constantly turn over. Second, this too was a reversal of position by the agency, yet the court embraced it without analysis. Third, the court's decision means that an agency determined to deny refunds may delay a case repeatedly, so that the delay itself justifies the desired result. That

ruling conflicts with the RFA, which was designed to ameliorate the effect of delay.

The level of deference the court of appeals granted FERC's decision conflicts with *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154 (2012), where the Court suggested that no deference may be due when an agency changes a prior interpretation. Here, to get to the desired result, FERC changed its statement of policy, its ruling on the collectability of surcharges, its ruling on the effectiveness of notice, its holding on customer turnover, and its determination concerning whether *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009) barred retroactive surcharges. It asserted its past descriptions of policy were mistakes, failed to explain the other changes, and the court accepted, ignored, or brushed aside all of them.

1. **State agency veto.** The court of appeals approved as "reasonabl[e]" FERC's ruling that the APSC might successfully deny recovery of the surcharges needed to make refunds. *LPSC IV*, 883 F.3d at 933, App. 9. That was the *only* basis on which the court of appeals upheld the finding that Entergy might suffer an underrecovery. Nevertheless, FERC argues that this rationale "was only the second, and less certain factor demonstrating a risk of under-recovery. . . ." [FERC Br. 22]. The first, it contends, was the possibility that Entergy Arkansas could not collect from its departed wholesale customers. [*Id.*].

FERC's *Order on Remand* did rely on the departed wholesale customer theory, but FERC conceded that

this reliance was misplaced in the *Order Denying Rehearing*. *Order Denying Rehearing*, ¶ 59, App. 59. FERC withdrew its rationale and switched to another, finding: "While the examples used by the Louisiana Commission may be used in some cases with respect to retail load, that fact does not indicate that retail load in Arkansas needs to subsidize refunds being paid to Louisiana retail load." *Id.* FERC had to withdraw its rationale because it was contradicted by unrefuted evidence.

In 2010, in its brief opposing refunds, Entergy argued that there would be "practical obstacles" to recovering refunds, including an inability of Entergy Arkansas to collect from departed wholesale customers. FERC rejected the argument, holding that "[s]uch alleged practical problems would not overcome a Constitutional doctrine like the Supremacy Clause" and, in any event, were not the concern underlying Section 206(c). *2010 Order*, ¶ 26, App. 205. In its brief opposing refunds after the remand from *LPSC III*, Entergy renewed the argument and, without inviting a response, FERC seized on it. *Order on Remand*, ¶ 31, App. 90-91.

FERC did not acknowledge its change in position. More important, FERC ignored unrebutted evidence in the record, which showed that Entergy collects surcharges to make refunds from *current* customers, and makes the refunds to *current* customers. Indeed, in 2010 the LPSC showed, based on data obtained from Entergy, exactly how Entergy made the 2005 refunds and surcharges for the 2004-05 delay in implementing the remedy and the 2007 refunds for the 2004-05

phase-in of the remedy. In each case, Entergy assessed refunds and surcharges to then-*current* customers. [Brief and Evidentiary Submission . . . on Behalf of the Louisiana Public Service Commission, Aff. of Stephen J. Baron, ¶ 8, Jan. 19, 2010 (FERC Docket No. EL00-66) (available at FERC eLibrary)]. Moreover, Entergy had already flowed through a portion of the 2008 refund/surcharge for the 1995-96 refund period in assessments through retail fuel clauses to then-*current* customers. [*Id.*, ¶ 9].

In the same 2004-08 period, Entergy Arkansas lost 10 of 15 wholesale customers. [Request for Rehearing of the Louisiana Public Service Commission, Attach. 1, Aff. of Randy A. Futral, ¶ 16, May 31, 2016 (FERC Docket No. EL00-66) (available at FERC eLibrary)]. Entergy never sought to recover a surcharge from a departed wholesale customer. Moreover, FERC ordered numerous refunds and surcharges in Entergy Bandwidth cases, although Entergy Arkansas lost wholesale customers while the cases were pending, and Entergy never experienced any difficulty recovering the surcharges from then-*current* customers. In 2015, the APSC approved the pass-through to then-*current* customers of a surcharge to make refunds of unjust and unreasonable cost allocations from 2005. *Order No. 40*, *In re Application of Entergy Arkansas, Inc.*, Docket No. 13-028-U, 2015 Ark. PUC LEXIS 11 (APSC Jan. 9, 2015). Except for one tiny customer, all of Entergy Arkansas's wholesale load from 2005 had departed. Entergy did not fail to collect anything.

FERC's departed customer rationale was based on a fantasy, from Entergy's unilateral brief. No party has ever tried to support this fallacious theory with evidence. FERC later retreated from that rationale and the court of appeals did not mention it. The "under-recovery" factor is based strictly on the theory that the APSC could successfully violate the Supremacy Clause. That rationale requires review by this Court.

2. **Reversal of policy.** Neither FERC nor the APSC disputes that FERC has always made it a practice to grant refunds for unjust and unreasonable holding company cost allocations. Indeed, FERC appears to concede the point, suggesting that the agency did not have to treat this case like other holding company cost allocation cases. [FERC Br. 19]. The LPSC in the petition cited numerous holding company refund precedents that established its normal practice; neither party addresses them. Every holding company cost allocation involves "no overcollection" by the holding company because payments and receipts cancel out. Absent preemption, there would always be a potential for disallowance at the retail level. Instead of addressing the precedents, FERC resorts to repeating what the agency and the court *said* about the alleged no-overcollection policy. [FERC Br. 16-18].

As FERC says, the court asserted that FERC "'cited numerous decisions'" denying refunds "'in the set of cases to which this [case] belongs,'" involving "'a flaw in rate design, such as cost allocation.'" [FERC Br. 17]. These were the same rate design cases FERC cited in *LPSC III*, which the court held did not support a

no-refund policy. *LPSC III*, 772 F.3d at 1304, App. 112 (one holding company no overcollection decision "does not constitute a 'line[ ] of precedent.'"). In the *2011 Order*, FERC had "disavow[ed]" the distinction previously drawn between refunds in cost allocation and rate design cases and lumped them together because of no overcollection. *2011 Order*, ¶ 23, App. 186-87. That disavowal was overruled in *LPSC III*. 772 F.3d at 1304, App. 112-13. FERC lumped them again in the *Order on Remand*, based on the same cases, and the court blithely accepted FERC's no-overcollection rationale. *LPSC IV*, 883 F.3d at 932-933, App. 6-7. *Compare 2013 Order*, ¶ 54 footnote, App. 154-55, *with Order on Remand*, ¶ 25 & n.58, App. 86, cited by the court of appeals. 883 F.3d at 932, App. 6.

FERC notes that the court faulted the LPSC for failing to distinguish the cases in briefing *LPSC IV*, or explain the holding company distinction at oral argument. [FERC Br. 17-18]. But the court's comment is mystifying, because the LPSC initial brief and its reply brief did document FERC's practice of granting refunds in holding company cost allocation cases. [Final Br. for Petitioner at 15-18, 47-51; Final Reply Br. for Petitioner at 20-25 (Docket No. 16-1382) (D.C. Cir.)]. When the LPSC counsel was "[p]ressed" at oral argument on why holding company cost allocations are different from rate design cases, counsel tried to explain that holding company allocations do not affect the design of rates to customers; they allocate the costs of the seller. *LPSC IV*, 883 F.3d at 933, App. 8 (for quote).

That did not deter the court of appeals from adopting an irrelevant rationale.

The issue was whether FERC always had a no-refund policy for "no-overcollection" holding company cost allocation cases. It did not; that point apparently is no longer disputed. FERC changed the policy and the court did not require it to explain the change. Rate design precedents, applicable to tariffs between utilities and independent customers that often are designed to influence the customers' behavior, are not in the same "set of cases to which this case belongs. . . ." *Id.* at 932, App. 6.

When undue discrimination occurs, some consumers pay too much, others too little. To the LPSC's knowledge, there is no other type of transaction in which a seller could avoid paying a legally-authorized refund to a customer who was charged too much, on the ground that the seller also undercharged other customers and had "no over-collection." The change of policy undermines the RFA and FPA. Indeed, in a holding company case in which it granted refunds under the RFA, FERC said it was "hard-pressed to believe" that Congress could have intended that the cancel-out theory would be a basis to deny refunds. *Blue Ridge Power Agency v. Appalachian Power Co.*, 58 F.E.R.C. ¶ 61,193 at 61,603 (1992).

FERC's change of policy conflicts with core purposes of the RFA and FPA – to allow consumers prompt relief from undue discrimination. Unduly discriminatory rates offend *both* prohibitions of the FPA – they

are unjustly and unreasonably high for some customers and too low for others, and they unduly discriminate among customers and localities. 16 U.S.C. § 824d(a), (b); 16 U.S.C. § 824e(a). They involve "over-collections" by some companies and "over-payments" by others. There is *more* reason to provide refunds in these cases than in pure "over-collection" cases.

Additionally, this Court made clear in *Fed. Power Comm'n v. Tenn. Gas Transmission Co.*, 371 U.S. 145, 153 (1962), that the "policy of the Act" supports placing the risk of under-collections on the utility, not consumers. FERC here denied relief to consumers and absolved Entergy as a matter of policy from all risk of refunding unduly discriminatory rates. FERC adopted a policy that for the refund period permits "the very price discrimination that the Act by its terms seeks to prevent." *Maislin Indus., U.S. v. Primary Steel*, 497 U.S. 116, 130 (1990) (overruling Interstate Commerce Commission policy for conflict with antidiscrimination purpose of statute). FERC's ruling requires review.

3. **Other rationales.** FERC effectively concedes that the court substituted its own inference and rationale for that of FERC concerning impacts on customer behavior. FERC never found any impact on customers; customers pay under different rate designs. As FERC says, the agency inferred an impact because the tariff "'created incentives for the Entergy Operating Companies' to avoid interruptible sales." [FERC Br. 11]. FERC inferred that the Companies "chose to engage in firm sales that cannot now be undone instead of curtailable sales," which could only make them

better off. *Order on Remand*, ¶ 35, App. 95. There would be no need to revisit any past decision to add a customer that paid full freight.

Instead of analyzing that inference, the court substituted its own inference that the cost allocation could affect *customer* behavior. [FERC Br. 16, 19]. Apparently unknown to the court, its own rationale conflicted with unrebutted evidence. [Aff. of Stephen J. Baron, ¶ 9, Jan. 2010 (FERC Docket No. EL00-66) (available at FERC eLibrary) (ultimate customers do not pay under System Agreement rate schedules)]. This newly-imagined inference was and is an illusion.

FERC's separate reliance on customer turnover reversed its prior rejection of that argument in the *2010 Order*. *2010 Order*, ¶¶ 14, 32, App. 197, 210. FERC did not acknowledge the prior determination. Moreover, this appears to be the only reported case in which FERC relied on that basis to justify denying a refund for an unjust and unreasonable rate. FERC cited one case, *Am. Elec. Power Serv. Corp.*, 46 F.E.R.C. ¶ 61,382 (1989), where the agency emphasized that it "made no finding" that the prior cost allocation was unjust and unreasonable, so a refund order "is not legally required." *Id.* That statement confirms that FERC's policy normally did require refunds for unjust and unreasonable holding company cost allocations.

Here, the companies that were parties to the FERC cost allocation are all the same as in the refund period. Normally, FERC limits its consideration of equities to the parties subject to the FERC tariff. *Pub.*

Serv. Comm'n of Wisconsin v. Midcontinent Indep. System Operator ("*Wisconsin*"), 156 F.E.R.C. ¶ 61,205, ¶¶ 46-47 (2016), *aff'd sub nom. Verso Corp. v. FERC*, 898 F.3d 1, 13 (D.C. Cir. 2018). But here, FERC looked beyond the tariff it regulates, to ultimate customer turnover. If ultimate customer turnover were a factor that prevents refunds, however, there never would be refunds. Making customer turnover an equitable factor weighing against refunds legitimizes selective and unprincipled decisionmaking – FERC can generally ignore this factor, except when the agency needs it to support a refund denial.

Additionally, although some customers turn over, many do not. Large industrial and commercial customers are likely to remain after many years, along with most residential customers. Denying refunds solidifies the harm they suffered. It also ignores the long-term effects of economic harm to a locality. Permitting either is inconsistent with a core purpose of the FPA.

FERC in this case delayed and delayed, contrary to the purpose of the RFA. It issued arbitrary decisions, which were reversed by the court of appeals, causing further delays. It imposed more delays in a bizarre back-and-forth administrative process. Then, as part of conceding its error on the departed wholesale customer point, FERC introduced the customer turnover resulting from its own delays as a reason to deny refunds. Approving that rationale conflicts with the purpose of the RFA and undercuts judicial review.

Grasping for any theory that might support a refund denial, FERC reversed other prior determinations without acknowledging or explaining the changes. For instance, FERC changed its prior ruling that *City of Anaheim v. FERC*, 558 F.3d 521, 522, does not bar the surcharges needed to make refunds. *2011 Order*, ¶ 17, App. 183; *Order on Remand*, ¶ 31, App. 91. But four days before it issued the *Order Denying Rehearing* in this case, FERC in *Wisconsin* held that *City of Anaheim* does not prevent ordering surcharges to pay refunds in cost allocation cases. 156 F.E.R.C. ¶ 61,205, ¶¶ 48-49 (2016), *aff'd sub nom. Verso Corp. v. FERC*, 898 F.3d 1, 11-12 (D.C. Cir. 2018). In *Verso*, the court of appeals analyzed that holding and affirmed a grant of refunds. Here, it found that FERC "would have reached the same conclusion" absent reliance on *City of Anaheim*, did not comment on FERC's inconsistency, and did not review the holding. 883 F.3d at 934 n.1, App. 9.

Any reasonable review of FERC's actions would show that the agency was intent on defending a litigation position – a reason to grant the decisions no deference. *SmithKline*, 567 U.S. at 154. Indeed, FERC adopted arguments from a unilateral brief without obtaining a response. The court of appeals' complete deference to FERC's reversals does not satisfy the requirement of judicial review.

CONCLUSION

Faced with an intransigent agency, the court of appeals surrendered and found a way to affirm an irrational decision. This Court should grant review to determine whether FERC can allow one state to veto federally-authorized refunds to another state and change its policy without any explanation.

Respectfully submitted,

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